SWEDEN

Pontus Ewerlöf

Maqs Law Firm

COUNTRY REPORT (SWEDEN)

To: Pascal Hollander, IBA Sub-Committee on Recognition and Enforcement of Awards

From: Pontus Ewerlöf

Date: 31 March 2015

Regarding: IBA Public Policy Project

---

1 INTRODUCTION

(1) This report examines how the concept of public policy is defined and applied by Swedish courts in the context of recognition and enforcement of arbitral awards, as well as, setting aside such awards. It should be noted that Swedish case law is very scarce when it comes to rulings on public policy in general and in the context of arbitral awards in particular. Hence this report will not focus solely on cases concerning arbitral awards but also on other cases that illuminates how Swedish Courts handle matters of public policy. The report is also complemented with commentaries from the *travaux préparatoire* and legal literature.

2 THE LEGAL FRAMEWORK OF PUBLIC POLICY IN THE CONTEXT OF ARBITRAL AWARDS IN SWEDEN

(2) The relevant provisions with respect to public policy issues under the Swedish Arbitration Act ("**SAA**") are primarily the provisions in

i. Section 33, item 2, (invalidity)

> "*An arbitral award is invalid: […] if the arbitral award, or the manner in which the award arose, is manifestly incompatible with the fundamental principles of Swedish law*"
>
> and

ii. Section 55, item 2, (recognition and enforcement)

> "*[Recognition and enforcement of a foreign arbitral award shall also be refused where the court finds:] […] that it would be manifestly incompatible with the fundamental principles of Swedish law to recognize and enforce the arbitral award*".

(3) The provisions represent an incorporation of the corresponding provisions in the New York Convention. However, since the New York Convention is not incorporated by reference but transformed into Swedish law through specific statutory provisions, the implementation of Article II and V of the New York Convention in the SAA demonstrates slight variations from the wording of the New York Convention.[1] These variations notwithstanding, the Swedish Supreme Court has always stressed the importance of respecting the objective and purpose of the New York Convention and the SAA and its predecessor.[2]

(4) The wording of the aforementioned provisions gives no direct guidance as to what constitutes public policy or what might be a violation thereof. The provisions merely recognize the concept of public policy as such and stipulate that, if an award is contrary to public policy, it may be declared invalid, set aside or declared unenforceable under Swedish law. In this respect, it should be noted that Swedish law recognizes the distinction between procedural public policy and substantive public policy *per se*. However, in practice this distinction is of less importance since the relevant provisions under the SAA do not distinguish between these categories.

---

[1] Hobér, *International Commercial Arbitration in Sweden*, 2011, p. 358-359.

[2] See for instance *Societé Planavergne SA v. KB i Stockholm AB* (NJA 2003 p. 379), where the Supreme Court concluded that the Swedish provisions on enforcement of foreign arbitral awards should be interpreted in light of "the general efforts to facilitate enforcement which [is] the main objective of the [New York] Convention", and the case *Götaverken Arendal AB v. General National Maritime Transport Company* (NJA 1979 p. 527), where the Supreme Court, in applying the old arbitration act of 1929, referred to "the overall objective of the New York Convention to facilitate enforcement".

(5) For substantive examples of what the Swedish legislator considers to be contrary to public policy one has to consult the *travaux préparatoire* to the SAA, to which are attached great importance in the interpretation of Swedish law. The *travaux préparatoire* state that "*the content of public policy does not lend itself to be defined in an absolute manner*" and that "*it should only apply in particularly offensive cases*".[3]

(6) Although an issue is arbitrable as such, there are certain matters that the courts will not accept or deal with. Primarily these are claims based on, e.g., gambling or criminal acts, such as an order to pay an agreed upon bribe (so-called *pactum turpe*-cases).[4] An award is also contrary to public policy if the arbitrator has been threatened, bribed or exposed to similar influence given that it can be assumed that it has an impact on the outcome of the dispute[5]. A few illustrations of what could potentially constitute a violation of public policy can also be found in legal literature. For instance, a foreign award, that orders obligations on a third party (i.e. which has not been a party to the arbitral proceedings), or that have been awarded only for appearances, may violate Swedish public policy.[6]

(7) The aforementioned examples illustrate clear and flagrant cases that obviously are contrary to public policy. The conclusion to be drawn from this is that public policy represents a very high threshold under Swedish law. This means that the scope of its applicability is very narrow. However, the legislator has intentionally left it open for the courts to apply the rules of public policy on a case by case basis.

3 OVERVIEW OF SWEDISH CASE LAW

(8) Since the task is to examine how Swedish courts define public policy, this report will first and foremost focus on cases concerning arbitral awards. However, as was mentioned in the introduction, the number of cases where the violation of public policy has been dealt with is very limited. In fact, no arbitral award has ever been declared invalid due to a violation of public policy under the SAA. And, only once have an award been subject to refusal of enforcement, namely in the case of *Robert Grizila v. Johnny Letth (bankruptcy estate)*[7].

[3] See Govt. Bill 1998/99:35, p. 49 and pp. 142 and 234.

[4] Ewerlöf, *Application of the New York Convention by Swedish Courts*, in Franke et al. (eds.), *International Arbitration in Sweden; A Practitioner's Guide*, 2013, p. 293. – Cf, however, two Supreme Court cases, which included elements of tax evasion (e.g. NJA 1992 s. 299 and NJA 2002 s. 322), where the Supreme Court concluded that these cases should be tried on its merits; hence the Supreme Court did not find that the circumstances was in violation of public policy.

[5] Govt. Bill 1998/99:35, p. 150.

[6] Lindskog, *Skiljeförfarande - En kommentar*, 2012, p. 1180.

[7] The Supreme Court's decision (NJA 2002 C 45).

(9) In addition, there are two cases where the Supreme Court has tried the public policy defence in the context of the enforcement of arbitral awards, *viz*., *Kvarnabo Timber v. Cordes GmbH & Co* [8], and *SwemBalt AB v. Republic of Latvia*[9].

(10) It should be noted that the concept of public policy is applied in the same manner in recourse proceedings (invalidation and setting aside) as in proceedings for the recognition and enforcement of an award (enforcement proceedings). Hence, the recourse cases are relevant for the understanding of the concept of public policy also in enforcement proceedings. Violation of public policy has been invoked as a ground for the invalidation or setting aside an arbitral award in various recourse cases, e.g. *Czech Republic v. CME Czech Republic B.V.*[10]*, Dirland Télécom S.A. v. Viking Telecom AB*[11], *Republic of Latvia v. JSC Latvijas Gaze*[12], *Sea Carriers Inc. and Frontline Ltd v. Blad Foundation*[13], and *Richard Larsson v. Rynninge IK*[14]. None of these challenges have been successful.

(11) The question of public policy has also been tried by the Supreme Court in several ordinary litigation cases, e.g. *Brattebergs Sågverk AB (bankruptcy estate) v. Mullsjö Maskinförsäljning AB*[15]*, Europe Industri Consultation ApS v. Kjell Lindström i Norrtälje AB*[16], *P-J. K. v. J.S.*[17], which may be of interest in the interpretation of the concept of public policy.

3.1 Recognition and enforcement cases

A. Robert Grizila v. Johnny Letth

(12) In April 2001, Johnny Letth was sentenced to prison in Sweden for bank fraud and forgery. Concurrently, goods were impounded by the police and subsequently levied to satisfy claims by Johnny Letth's creditors. Johnny Letth objected to the levy, claiming that the goods had been pledged, by way of a title-transfer security transaction under German law, to his brother Robert Grizila. However, the district court, in upholding and with reference to the decision of the Enforcement Authority, found it more than likely that the goods in question had been acquired with money he had gained through criminal activities. In September 2001, Johnny Letth was declared bankrupt.

[8] The Supreme Court's decision (NJA 1986 C 26).

[9] The Supreme Court's decision (NJA 2002 C 62)

[10] The Svea Court of Appeal's judgment (RH 2003:55)

[11] The Court of Appeal for Western Sweden's decision on 29 December 2003 (T 4366-02).

[12] The Svea Court of Appeal's judgment on 4 May 2005 (T 6730-03).

[13] The Svea Court of Appeal's judgment on 16 September 2002 (T 6588-01-79).

[14] The Svea Court of Appeal's judgment on 28 August 2009 (T 1648-08).

[15] The Supreme Court's decision on 27 May 1992 (NJA 1992 p. 299)

[16] The Supreme Court's decision on 27 February 1997 (NJA 1997 p. 93).

[17] The Supreme Court's decision on 7 June 2002 (NJA 2002 p. 322).

(13) In the spring of 2002, Johnny Letth's brother Robert Grizila submitted an arbitral award to the Svea Court of Appeal and applied for its recognition and enforcement. Allegedly, the two brothers had entered into a commission agency contract in Slovenia in August 2000, pursuant to which Johnny Letth was to procure a car, two mobile phones, a digital camera and a floor-heating device on behalf of Robert Grizila. In August 2001, an award covering the car, mobile phones and the digital camera was rendered in Ljubljana, Slovenia, and the respondent Johnny Letth was found liable for rent for the lease of certain premises and damages for breach of contract.

(14) The Svea Court of Appeal refused to recognize and enforce the award on grounds of public policy and concluded that it could be questioned whether the award reflected a true legal relationship between the parties. Reference was made, *inter alia*, to the fact that the parties were brothers, that the property in question was subject to another legal proceeding (i.e., the claims of Johnny Letth's creditors in his bankruptcy), in which it had been alleged that a security transfer had taken place, whereas the arbitral award was based on a commission agency agreement without reference to any alleged security transfer, and that two somewhat differing awards had been submitted by the applicant in the enforcement proceedings. Rather, the Svea Court of Appeal appears to have denied recognition and enforcement of the award as it had reason to believe that the award constituted a fictitious document created to deceive the bankruptcy estate of Johnny Letth. Upon appeal, the Supreme Court upheld the decision of the Svea Court of Appeal.

B. Kvarnabo Timber v. Cordes GmbH & Co

(15) The Supreme Court found that the appointment of an arbitrator on behalf of the respondent in the arbitration, i.e. Kvarnabo, by the German Verein Deutscher Holzeinfuhrhäuser eV was not manifestly incompatible with the fundamental principles of Swedish law in a situation where Kvarnabo had been repeatedly requested, but failed, to appoint an arbitrator.

(16) Through an agreement dated 13 December 1982 Cordes procured from Kvarnabo 4,000 cubical meters of timber for the price of 820 SEK per cubical meter. According to the agreement, the "Deutschwaggon 66" standard terms were applicable between the parties. According to the standard terms, eventual disputes were to be resolved through arbitral proceedings, in which the parties were to collectively elect an arbitrator. If they could not mutually agree upon an arbitrator, each of them was to appoint its own arbitrator. If either party should omit to appoint an arbitrator, upon request by the other party, an arbitrator should be appointed by the association of German Timber Importers, Verein Deutscher Holzeinfuhrhäuser e.V. (VDH), Hamburg.

(17) During the time the agreement was in effect Kvarnabo only managed to deliver a small part of the agreed quantity. Cordes therefore commenced arbitral proceedings in accordance with the arbitration clause in Deutschwaggon 66 and elected an arbitrator. Upon the request from Cordes, VDH elected an additional arbitrator on behalf of

Kvarnabo. On 19 December 1983 an arbitral award was rendered in Bremen. The award obliged Kvarnabo to pay the amount of 575,000 SEK to Cordes.

(18) Subsequently, Cordes submitted the award to the Svea Court of Appeal and applied for its enforcement. Kvarnabo objected thereto and argued that it would be manifestly incompatible with the fundamental principles of Swedish law to recognize and enforce the award since one of the arbitrators had been appointed by VDH on Kvarnabo's behalf. The Svea Court of Appeal granted the enforcement and concluded that the fact that Kvarnabo had not taken notice of the standard terms did not mean that the provisions in the terms did not bind Kvarnabo. The Svea Court of Appeal emphasized the fact that Kvarnabo had omitted to appoint an arbitrator, although Cordes repeatedly had requested Kvarnabo to do so. Hence, the fact that VDH appointed an arbitrator on Kvarnabo's behalf could not be seen as tortious and therefore it would not violate public policy to recognize and enforce the award. The Supreme Court upheld the decision of the Svea Court of Appeal.

C. The Republic of Latvia v. SwemBalt AB

(19) The Republic of Latvia argued that the arbitral award, rendered in Denmark, violated the principle of *lis pendens* since the dispute was already pending before another arbitral tribunal. The tribunal sitting in Denmark had, however, concluded that there was no *lis pendens.* The Svea Court of Appeal found that a violation of the principle of *lis pendens* does not qualify as a public policy circumstance. The decision of the Svea Court of Appeal was affirmed by the Supreme Court without further reasons.

(20) The dispute in the arbitral proceedings concerned the Swedish company, SwemBalt's claim for compensation for the loss of one of its wessels, SJFW/SwedeBalt. The wessel was registered in Sweden but leased to the company's subsidiary in Latvia, Swede Balt SIA. The wessel was positioned in the port of Riga, Latvia, in April 1993, allegedly with the permission from the Latvian authorities. During the spring of 1994, SwedeBalt established a long-term contract with the Kurzeme Region of Riga regarding the lease of a certain berth as well as an area of land. Only a few days after the contract had been established a representative from the Port of Riga removed the wessel, despite the fact that no representatives of the owner were present. The wessel was towed to another berth two nautical miles away. Numerous objections were raised both by the owner and other parties. A few weeks later the Mayor of Riga informed the owner that the lease had become invalid due to a new law which had retroactive effect. In 1994 and 1995, the parties tried to resolve the situation, at some point during the discussions the Swedish embassy in Riga was also involved. The situation did, however, remain unresolved and on 3 May 1996, Latvian authorities decided that the wessel should be sold at a public auction since it was considered a danger to maritime traffic given its new location. Despite renewed objections from various parties the wessel was sold at auction in July 1996 bringing in approximately 150,000 USD.

(21) On 11 September 1996, SwemBalt commenced arbitral proceedings based on the leasing agreement. The Republic of Latvia objected to the jurisdiction and the arbitral proceedings were never pursued. However, the dispute was subject to negotiations between SwemBalt and the Latvian Foreign Office. The negotiations did not resolve the dispute.

(22) On 24 March 1999, SwemBalt once again commenced arbitral proceedings against the Republic of Latvia, this time under the UNCITRAL Arbitration Rules, referring to a BIT between the Government of the Kingdom of Sweden and the Government of the Republic of Latvia. On 23 October 2000, the arbitral tribunal rendered its award, which granted SwemBalt's claim and consequently the Republic of Latvia was ordered to pay a certain amount. Shortly thereafter the Republic challenged the award at the Maritime- and Commercial Court in Copenhagen, Denmark. Meanwhile, SwemBalt filed a request to the Svea Court of Appeal for the recognition and enforcement of the award. The Republic of Latvia opposed enforcement arguing, *inter alia*, that the arbitral tribunal lacked jurisdiction due to *lis pendens*. The Republic of Latvia referred to the request for arbitration of 1996 claiming that since the former arbitral proceedings had not yet resulted in an award, SwemBalt had no legal basis for commencing the arbitral proceedings in 1999. The Republic of Latvia further argued that, because of the *lis pendens* it would be manifestly incompatible with the fundamental principles of Swedish law to enforce the award.

(23) On the matter of public policy the Svea Court of Appeal concluded:

> "According to Section 55, item 2, of the SAA, an award shall not be recognized and enforced in Sweden if the Court finds that it would be manifestly incompatible with the fundamental principles of Swedish law to recognize and enforce the award. The provision refers to situations where the most basic legal principals have been disregarded, and should be given a narrow application (Cars, *Lagen om skiljeförfarande,* p. 211, Heuman, *Skiljemannarätt,* p. 749). In addition to this, one should notice that an arbitral award that has been rendered in contradiction with the principle of *lis pendens* cannot be attacked under the rule of *ordre public* in Section 33, item 2, of the SAA, but is to be viewed to constitute an optional bar to trial, which may be challenged under Section 34 of the SAA" (This view was also re-confirmed by the Svea Court of Appeal in the case of *Czech Republic v. CME Czech Republic B.V.*[18]).

(24) The Supreme Court upheld the decision of the Svea Court of Appeal.

[18] The Svea Court of Appeal's judgment (RH 2003:55)

3.2 Recourse cases

(25) An arbitral award may be declared invalid pursuant to Section 33, item 2, of the SAA, if the award or the manner in which the award arose would be in violation of public policy. Since the application of the concept of public policy would be the same in recourse cases as in recognition and enforcement cases, recourse case law is also relevant for the general interpretation of the concept of public policy. Below, some of these cases are elaborated on.

D. Czech Republic v. CME Czech Republic B.V.

(26) In recourse proceedings, following an arbitral award in a BIT-dispute between CME and the Czech Republic, a number of different grounds for the invalidity or the setting aside of the award were invoked. Some of these grounds allegedly also constituted a violation of public policy, e.g. the exclusion of an arbitrator from the deliberations, *lis pendens* and *res judicata*. In addition, the Czech Republic argued that all the grounds, i.e. jurisdiction, exceeding of mandate, irregularities, etc., in cumulative should constitute a violation of public policy.

(27) In short, the Svea Court of Appeal found that, under Swedish law, the issues of *lis pendens* and *res judicata* constitute bars to an examination on the merits, on the objection of the other party only. Since the issues of *lis pendens* and *res judicata* thus are of dispositive nature, a violation thereof cannot constitute a violation of public policy. Hence, the award cannot be invalid pursuant to Section 33, item 2, of the SAA.

(28) With respect to the other grounds, the Svea Court of Appeal found that the Czech Republic had no merits to its claim that there had been a violation of public policy. It should be noted that, even though the Court's reasons in this latter respect was scarce, each of the grounds, respectively, had been thoroughly adjudicated and rejected in other sections of the judgment.

E. Dirland Télécom S.A. v. Viking Telecom AB

(29) In the *travaux préparatoire* to the SAA it is further stated that arbitral awards which violate EU-law or competition law are contradictory to public policy.[19] The question of whether an arbitral award that encourages non-compliance with mandatory European telecommunications law constituted violation of Swedish public policy was dealt with in the case *Dirland Télécom S.A. v. Viking telecom*.

(30) The dispute emanated from an agreement concerning the sale of call routers. Viking Telecom AB ("**Viking**") is a Swedish company that develops and markets telecommunication equipment, including call routers. Dirland Télécom S.A. ("**Dirland**") is a French company that carries out wholesale of mobile phones and different telecommunication services. In June 1999 the two companies entered into an

[19] Cf *Eco-Swiss China Time Ltd. v. Benetton International NV* (ECJ, C-126/97).

agreement under which Viking sold to Dirland 150,000 call routers intended for the French market. After Viking had delivered 32,500 routers a dispute arose between the parties.

(31) On June 2000, Viking Telecom requested arbitration against Dirland with the Arbitration Council of the Western Sweden Chamber of Industry since Dirland had cancelled the agreement on grounds that the delivered routers were faulty, which Viking contested.

(32) An award was rendered on 10 October 2001, in which the sole arbitrator concluded, *inter alia*, that the contract merely entitled Dirland to demand delivery of faultless products and not the right to cancel the agreement. Hence the arbitrator found that the cancelation constituted a breach of contract and consequently ordered Dirland to pay damages to Viking.

(33) Dirland challenged the award before the Court of Appeal of Western Sweden, claiming that the award should be declared invalid under section 33 of the SAA as being manifestly incompatible with the fundamental principles of Swedish law (public policy).

(34) Dirland emphasized that since the routers supplied by Viking did not meet mandatory requirements under French law, which in turn was based on mandatory EU-law, the effect of the award was that Dirland was ordered to accept a remedy from Viking which in practice contravened mandatory EU-law.

(35) The Court of Appeal concluded that if an arbitrator decides a dispute without taking into account mandatory provisions protecting the rights of a third party or a public interest this might be contrary to ordre public. But, the Court also added that in Sweden the concept of ordre public is construed narrowly. The Court also made references to the European Court of Justice case, Eco Swiss v. Benetton20, and concluded that principles of ordre public can be applied when an award is contrary to mandatory EU-law. But, since the mandatory EU-law in question did not have so-called direct horizontal effect between individuals it could not put obligations on private legal subjects.

(36) Interestingly enough, simultaneously to the Swedish court case, parallel proceedings took place in France. In July 2003, the Tribunal de Grande Instance de Chaumont ordered Viking to pay both fines and damages to Dirland on the basis that Viking had intentionally delivered call routers that did not comply with EU-standards. In contrast to the Swedish court the French proceedings confirmed the mandatory nature of the relevant EU-law. This fact has been commented in legal literature, where it has been held that the Swedish decision is contrary to the essence of the Eco Swiss-case.21 Since the Swedish court's decision is rather controversial in the light of the Eco Swiss-

[20] Ibid.

[21] Diederik de Groot, *Stockholm Arbitration Report*, 2004:2, p. 245 et seq.

case and the Supreme Court did not review the case, one should be careful when drawing any conclusions from the case.[22]

F. Republic of Latvia v. JSC Latvijas Gaze

(37) In recourse against an arbitral award, the Republic of Latvia argued that the award was invalid on the bases that (i) the compensation in dispute constituted illegal state aid, and (ii) the award set aside a decision from the Latvian Energy Authorities.

(38) The Svea Court of Appeal clarified that even if the compensation in dispute constituted illegal state aid (which was alleged, but rejected by the court), the award might not be in breach of Swedish public policy in any event. Moreover, the Court emphasized that even if the Latvian Energy Authorities' mandate would have been set aside (which was rejected by the court), the award would still not have constituted a breach of Swedish public policy.

(39) The case highlights Swedish court's strict interpretation of the concept of public policy.

G. Sea Carriers Inc. and Frontline Ltd v. Blad Foundation

(40) The claimant sought to have an award declared invalid under Section 33, item 2, of the SAA because the arbitral tribunal had decided an issue which was later found to constitute tax fraud. With reference to an earlier Supreme Court case[23], the Svea Court of Appeal rejected the action since it was not *obvious* that the agreement upon which the claimant based its claim was an element in a third party tax evasion.

H. Richard Larsson v. Rynninge IK

(41) The claimant argued among other things that the arbitral award was invalid because of its punitive character. The claimant argued that the award had resulted in him having to reimburse compensation received from the Swedish Social Insurance Authorities. The Svea Court of Appeal did not declare the award invalid.

3.3 Ordinary litigation cases

I. Brattebergs Sågverk AB (bankruptcy estate) v. Mullsjö Maskinförsäljning AB

(42) The case concerned an agreement with an alleged element of tax evasion. The Supreme Court found that, while a court may refuse to deal with claims that are not accepted by the legal system and thus invalid according to civil law, such refusal required that the content of the agreement be inappropriate or unfair and that this should be *obvious* either from the grounds for the claim or from the assessment of the

[22] Cf *Latvian Republic v. JSC Latvijas Gaze*, Svea Court of Appeal's decision on 4 May 2005 (T 6730-03) (challenge of an arbitral award), where the court stated that a violation of EU competition law can only lead to an annulment in "obvious cases".

[23] The *Bratteberg*-case (NJA 1992 p. 299), referred to in section 3.3 (H) below.

case. Moreover, for a court to refuse to assess a claim, it also has to be clear that the agreement in question was invalid and lacked legal effect due to its involving a breach of law and morality. The Supreme Court did not find that the element of tax evasion was obvious from the claim.

J. Europe Industri Consultation ApS v. Kjell Lindström i Norrtälje AB

(43) Europe Industri Consultation (EIC) claimed compensation for works conducted by a subcontractor engaged by EIC on behalf of the defendant. The defendant requested that EIC's claims should be dismissed since the subcontractor turned out to have a ban on carrying on a business (*Sw. näringsförbud*) during the relevant period of time, and thus that the agreement was invalid. The Supreme Court did not dismiss the claim and found that:

> ”In contrast to several other national legislations, Swedish law does not have any general provisions on the invalidity of legal acts that are illegal or in violation of good manners and morals. Invalidity may instead be based on general legal principles. Whether or not an agreement is invalid due to its illegality, despite that such illegality is not provided for under the law, depends on whether the legal regulation which has been violated is based on such reasons which render the invalidity sanction essential. This should be determined on a case-by-case basis, subsequent to an analysis of the object of the legal regulation, the necessity of an invalidity sanction and the consequences such sanction may encompass, e.g. on an opposing party in good faith.”

K. P-J. K. v. J.S.

(44) The case concerned the question of *pactum turpe*. A construction contract regarding the construction of a small house included an agreement that part of the payment should be made without the lawful tax thereon. Subsequently, a dispute arose regarding this part of the payment. The Supreme Court (majority decision) found that there was no bar for the court to deal with the dispute, and stated that

> “Swedish law takes up a relatively liberal attitude in relation to agreements which violates the law and good manners and morals. As the Supreme Court has found in the 1997-case [the EIC-case referred to under section 3.3. (I) above]; If the main performance has been executed, certain winding up issues may be dealt with by the court, notwithstanding that the compliance with the agreement cannot lawfully be enforced.”[24]

[24] One of the justices of the Supreme Court dissented and found that it was obvious that the claim was based on an illegal agreement (supporting tax evasion) and thus that the purpose of the agreement was undue, as well as, that the agreement was invalid and in violation of good manners and morals. Hence, the court should not deal with the case, but dismiss it.

4 CONCLUSION

(45) None of the aforementioned cases provides a straight forward model of how Swedish courts determine whether a particular case or the circumstances surrounding it are contrary to public policy. There are however a few remarks to be made.

(46) When examining the case of Johnny Letth more closely it is difficult pin point on what specific ground(s) the Supreme Court came to the conclusion that the public policy defense was applicable. The case contained several quite spectacular circumstances which both separately and combined could have lead the Supreme Court to its conclusion. The Svea Court of Appeal indicated that its decision was, at least partly, based on the fact that the arbitral award did not reflect a true legal relationship. It is, however, quite common that the parties to a dispute agree to consider certain circumstances or facts non-contentious, this does not in any way require for the circumstances to be true. Although it is possible to make out that the court had reason to believe that the award was fabricated this was not expressly stated. In legal literature it has been held that this might be one of the reasons as to why the enforcement was refused, as well as, the fact that the purpose of the award seemed to have been to deceive the bankruptcy estate.[25]

(47) Despite the fact that there are several possible conclusions as to why the enforcement of the award was rejected, the case does not give a clear rule of what could constitute a requirement for the public policy provisions to be applicable. It rather seems that the courts have made an assessment of all the circumstances in the case and found them cumulatively reaching up to the public policy threshold. It may be questioned whether such an assessment is in conformity with the *travaux préparatoire* of the SAA, which states that the public policy defense should only be applied in the most offensive cases where it hardly can be seen as questionable whether a case is contrary to public policy.[26] If this observation is correct the case of Johnny Letth might indicate that the public policy defense for its applicability does not require a single clear breach but rather that the courts can base its decision on a combination of circumstances.

(48) In summary, it may be concluded

i. that public policy represents a very high threshold under Swedish law, and thus that the scope of its applicability as a defence in enforcement proceedings is very narrow,

ii. that public policy is to be decided on a case-by-case basis,

iii. that *pactum turpe* cases may constitute a violation of public policy, but only in *obvious* and particularly offensive cases,

[25] Heuman & Millqvist, *Journal of International Arbitration*, pp. 497-506.

[26] Govt. Bill 1998/99:35, p. 140.

iv. that an arbitral award that has been rendered in contradiction with the principle of *lis pendens* or *res judicata* cannot be attacked on the basis of public policy.

5 TABLE OF CASES

Identification of the decision	Summary of the public policy Argument	Substantive	Procedural	Enforcement denied	Enforcement accepted
The Supreme Court, 23 October 2002 **(NJA 2002 C 45)**	**The award constituted a fictitious document created to deceive a bankruptcy estate.**	**X**		**X**	
The Supreme Court, 1 January 1986 **(NJA 1986 C 26)**	**It would manifestly incompatible with the fundamental principles of Swedish law to recognize and enforce the award since one of the arbitrators had been appointed on one of the parties behalf by the opposing party.**		**X**		**X**
The Supreme Court, 1 January 2002 **(NJA 2002 C 62)**	**Due to *lis pendens* it would be manifestly incompatible with the fundamental principles of Swedish law to enforce the award.**		**X**		**X**