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ISDS Trends in the Nordic Countries

Expedited Arbitration Clause – Use Responsibly

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Expedited arbitration is a tempting option for parties drafting commercial agreements. This is understandable: who would not want their dispute resolved quickly and on the cheap? However, experience shows that expedited arbitration clauses are sometimes used also in agreements that likely induce disputes involving significant monetary value, complex legal issues, or extensive evidence. These characteristics cause challenges in the expedited environment. The new combined arbitration clauses are worth trying.

Use of the Expedited Arbitration Clause

By provisions regarding expedited arbitration, arbitration institutes offer an even more efficient and low-cost arbitration compared to standard arbitration. It appears that the users have found the expedited proceedings attractive. According to the statistics of the ICC, 146 arbitrations had been or were being conducted under the ICC Expedited Procedure Provisions as of the end of 2019. According to the 2020 statistics of the Finland Arbitration Institute, 21 per cent of the requests for arbitration were issued under the Rules for Expedited Arbitration. Between 2016 and 2019, the portion of expedited arbitrations varied from 3 to 10 per cent. In Sweden, the SCC has provided Rules for Expedited Arbitration since 1995. Since then, the rules have been amended several times, and the recent rules came into force in 2017. In the past years, the expedited proceedings have represented 25 to 30 per cent of the total number of cases administrated by the SCC. In 2019, 52 out of the total number of 175 cases were handled under the SCC Rules for Expedited Arbitration.

However, the parties entering into an agreement and drafting an arbitration clause should always carefully consider whether expedited arbitration is suitable in the possible dispute arising out of their agreement. In case the parties

have agreed on expedited arbitration and a complex dispute arises, the parties might not eventually be willing to follow the default rules on expedited arbitration. On the contrary, they frequently request procedural steps, for instance oral hearing, that belong to standard arbitration procedures but not to expedited arbitration. These additional steps cause more work and increase time and costs of arbitration. In the worst case scenario, the benefits of an expedited arbitration procedure are practically lost. Parties' conduct can lead to an extreme situation in which a standard procedure is pushed through in relatively quick procedure but with an increased risk of mistakes and a considerable pressure.

Challenges

By way of an example, the ICC Expedited Procedure Provisions provide for a proceeding with a final award rendered within six months from the case management conference. The procedure is simplified, and the arbitral tribunal has discretion to adopt such procedural measures as it considers appropriate. The arbitral tribunal may, after consultation with the parties, inter alia, decide the dispute solely on the basis of the documents (i.e. without a hearing and examination of witnesses or experts). The arbitral tribunal may also disallow requests for document production or limit the number, length, and scope of written submissions and written witness evidence. The procedure is applicable, in principle, in cases in which the value of dispute does not exceed USD 3 million.

Under the Rules for Expedited Arbitration of the Finland Chamber of Commerce, the dispute are decided by a sole arbitrator. The parties may agree that the dispute will be decided solely based on documentary evidence. A hearing is held only if requested by a party and if deemed necessary by the sole arbitrator. In addition to the Statement of Claim and the Statement of Defence, the parties may each file only one written submission unless the sole arbitrator decides otherwise in special circumstances. The submissions must be brief, and the time limits within which the submissions must be filed may not exceed 14 days. The time limit for the final award is three months from the date on which the sole arbitrator received the case file. The final award must be made in writing, but it does not contain the reasons therefor, unless a party has requested a reasoned award. The costs of expedited arbitration are lower compared to standard arbitration.

The SCC Rules for Expedited Arbitration are very similar to those adopted by the FAI. The expedited cases are decided by a sole arbitrator within three months from the referral of the case from the SCC to the sole arbitrator. Moreover, there are certain limits to the parties' submissions. As a general rule, the parties may make only one supplementary submission in addition to the request for arbitration and the answer, the submissions should be brief, and the submissions must be filed within 15 working days. A hearing must be held only at the request of a party and if the sole arbitrator considers the reasons for such a request compelling.

"In the worst case scenario, the benefits of an expedited arbitration procedure are practically lost."

In practice, it is more of a rule than an exception that the parties to an expedited arbitration request for another submission round, oral hearing, and/or a reasoned award. No stone is left unturned in the search for justice. When parties request for additional procedural steps, arbitrators must keep in mind that they are serving the parties, who must have reasonable opportunity to present their case. Rejecting the parties' joint procedural requests is practically impossible.

When the procedural steps mentioned above are applied, they may lead to the need for extending the default time limits, including the time limit for the arbitral award. This conclusion is supported by experience but also by the statistics. One fourth of the awards in ICC expedited arbitrations could not be rendered within the stipulated six-month time limit.

Next Generation: Combined Arbitration Clauses

Expedited arbitration is a practical dispute resolution mechanism when applied in the right cases. But it is not always easy to foresee what are the right and what are completely wrong cases for expedited arbitration. A so-called combined arbitration clause may be the solution to this problem. The idea is that arbitration will be expedited, unless the institute decides that the concrete dispute calls for an ordinary arbitration.

For instance, the FAI has offered a model combined arbitration clause from the beginning of 2020. It reads as follows:

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or validity thereof, shall be finally settled by arbitration in accordance with the Rules for Expedited Arbitration of the Finland Chamber of Commerce. However, at the request of a party, the Arbitration Institute of the Finland Chamber of Commerce may determine that the Arbitration Rules of the Finland Chamber of Commerce shall apply instead of the Rules for Expedited Arbitration, if the Arbitration Institute considers this to be appropriate taking into account the amount in dispute, the complexity of the case, and other relevant circumstances."

A similar model arbitration clause is offered by the SCC.

A combined arbitration clause leaves room for necessary flexibility after a dispute has arisen.

Climate Change Litigation – Are Companies and States Getting Sued?

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In brief, the answer is yes; around the world, companies and states alike are seeing themselves sued on grounds pertaining to failure to live up to the targets which have been set for emission reduction in e.g. the Paris Agreement. What is more, the claimants – private individuals and NGO's alike – sometimes end up winning.

States have seen themselves sued on these grounds a number of times in the past. In this respect, the most notable court case is the Urgenda case, in which the Dutch Supreme Court stated on 20 December 2019 that the Dutch government has a human rights-based obligation to reduce emissions by at least 25% by 2020 (compared to the 1990 levels) in order to prevent global warming from exceeding 2°C.

Since then, many other cases have followed. Until recently, the successful cases imposed obligations on states. Now, however, an NGO has for the first time won a significant climate change litigation against a major company. In a landmark judgment handed down by the Hague District Court on 26 May 2021, the court ordered Royal Dutch Shell to reduce the CO2 emissions of the Shell group by net 45% in 2030, compared to 2019 levels, through the Shell group's corporate policy. It remains to be seen how the case will ultimately play out, taking potential appeals into account.

While the Dutch laws around class actions have been identified as one of the primary reasons for why many of the successful climate change litigations have taken place in the Netherlands, it would be a mistake to conclude that businesses in other countries would be immune to climate change litigation. In fact, many similar cases have either succeeded in, or are currently pending before, several other courts around Europe. In Estonia, an NGO is seeking to nullify a permit issued to a state-owned energy group for the construction of a new oil plant. In the US, an oil company's board members are being unseated by a dissident shareholder group concerned about the company in question not doing enough to combat climate change. In a case currently pending before the European Court of Human Rights, Portuguese youth have filed a complaint against 33 countries, most of them EU member states. The Federal Constitutional Court in Germany recently ordered the legislature to set clear provisions for reduction targets from 2031 onwards by the end of 2022. These are but a few examples.

The case law in this field is rapidly growing and one can already begin to see some common denominators as well as separators between the cases with respect to e.g. standing, causality and admissibility. Still, many different approaches to combat climate change through litigation are currently being tested, and there is no one set formula for this.

Will we see climate change litigation in the Nordics? Absolutely. In what shape? That remains to be seen.

More information

Stay tuned for a more comprehensive overview of past and present climate change litigation trends in an upcoming episode of the Legal Trends by Hannes podcast. The podcast can be found on all of the usual platforms such as Spotify, Google and Apple Podcasts.

Documenting the Effects of Disruptions Should Not Be Overlooked in Construction Projects

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Construction disputes often revolve around the question of which party is responsible for delays or increased costs during the project. To be in a position to effectively argue its case in litigation/arbitration (and, ideally, to avoid such proceedings), a contractor or other supplier needs to be able to establish:

- that it has made timely notifications of any disruptions, hindrances, or variations;
- the disruptions or similar events that it is not liable for; and
- the effects that the disruptions have had on the works.

Project personnel should be aware of the importance of making timely notifications when potential problems arise. This is usually the case, but not always. Problems in construction tend to materialise gradually, and initially, project personnel often have the (usually correct) assumption that things will work out, and they are either focused on solving the actual technical problems for the client, or not eager to sour the mood with formal complaints. However, in the cases where the snowball keeps going, by the time an eventual dispute seems more realistic, a problematic gap in early documents may have developed.

Proving the existence of disruptions or hindrances is also easier when documentation is gathered with this in mind as events develop. However, this is usually not the main problem, as events affecting the progress of the works tend to be tangible enough that some proof can be found later if needed. The bigger issue, often overlooked, is how to prove the actual effect the disruptions have had. In this regard, timely efforts to document the effects can be significant later.

It is often the case that disruptions accumulate gradually. Notice might initially be served, but if the matter is left to be resolved later and the details are not worked out at the outset, it can prove difficult to assess and show later what effect, for instance, the client's delay in making a decision on how to proceed with a variation had on the progress of the works, given everything that has happened in between. Claims for lost productivity are also quite dependent on the availability of adequate records to facilitate expert reports.

It can sometimes happen that various hindrances do not seem significant enough to warrant detailed attention during the works, but later in the project the contractor runs into problems of its own, at which point any earlier events potentially explaining part of the delay could suddenly be of increased importance. However, there can be both practical difficulties and credibility issues in relying on earlier events if not much attention has been paid to them at the time and if available documentation is lacking.

What is the correct approach, then? Extensive record keeping in case of hypothetical future disputes may not be the most cost-efficient policy to adopt in every project. However, here are some good practices to follow:

- Once disruptions and hindrances occur, their effects should be recorded on a daily basis. If this is done day to day, you will immediately become aware of what kind of information of the effects you might lack, and acquiring that information at the time of the occurrence will be significantly easier than perhaps a few years later during an arbitration.
- It is advisable to keep a diary on disturbances, where negative implications on the project are recorded on a daily basis. The diary should ideally be kept in all projects and from the very outset, regardless of whether any disturbances are encountered. The cost and time spent on a diary on disturbances are generally minimal if done on a daily basis, but the evidentiary value of the diary in case of a dispute may prove significant.
- Up-to-date records of progress and regularly updated programmes (schedules) are key documents if delay analyses and critical path assessments need to be done later. From a contractor's perspective, the client shall be informed on a regular basis of any changes made to the schedules of the project.
- The cost structure of the project should be itemised in a way that makes it possible to separately analyse and track the productivity and extra costs related to particular parts of the works. Involving the company's financial department at an early stage has proven effective for keeping track of, and separating costs relating to, disturbances and disruptions.
- In cases where the disturbances are caused by e.g. technical or geological issues, it is advisable to engage independent experts already during construction. Experts generally have better possibilities to investigate and identify issues when the works are still being performed instead of detecting the issues only after the works have been finalised. Engaging experts already during construction may also facilitate discussions with the client to find an amicable solution to the issues at hand.

The Dos and Don'ts of Expert Determination

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Although the general economy has had its fair share of booms and busts during the COVID-19 pandemic, the M&A market in Finland, Sweden, and also globally has been on a bull run for the past year. Deals have been negotiated and closed under exceptional circumstances. Various purchase price mechanisms continue to be popular solutions to navigating exceptional circumstances and allocating the risk between the seller and the buyer in these uncertain times. Most prominent among such mechanisms are earn-out and closing adjustment mechanisms.

Such mechanisms work well when the parties are in agreement about the target company's financial information. However, because accounting and financial statements are by no means an exact science, these mechanisms are also particularly prone to disputes. Typically, the parties agree in the SPA that any such disputes are to be finally resolved by an independent auditor or other (non-lawyer) expert in so-called expert determination.

Expert determination proceedings are, in many ways, different from "ordinary" disputes adjudicated or mediated before courts or arbitral tribunals. That being said, a dispute is a dispute, and many traditional rules of thumb also apply in expert determinations. We have compiled a list of dos and don'ts below to aid you in navigating these unique situations.

Do read the SPA carefully

The SPA typically includes strict procedural steps to be followed in determining purchase price adjustments, including deadlines for submitting calculations and form requirements for objections to calculations. Failure to meet such requirements can, depending on the contents of the SPA, lead to a forfeiture of rights, or at the very least, to unnecessary arguments about the subject. The procedural steps should be followed carefully, and experienced counsel can help you navigate the pitfalls (see next 'do').

Do hire good counsel (and hope your counterparty does too)

On the Finnish and Swedish markets, expert determination proceedings are relatively rare, so it is important to retain counsel with previous experience of such proceedings. However, even more importantly, your counsel should have a practical mindset. Expert determination proceedings are, by their nature, less governed by procedural rules and require a larger degree of co-operation between the parties. When both parties are represented by experienced and practically-minded counsel, the dispute can typically be resolved faster, more efficiently, and with less disruption to business. The fact that expert determination proceedings require co-operation between the parties is a double-edged sword; a party that aims to sabotage a proceeding has ample opportunity to invoke procedural arguments, thereby delaying the final resolution of the issues in dispute. Ultimately, however, if that party is at fault, such procedural manoeuvres just end up costing more money. Either way, this is yet another argument for hiring experienced counsel that can navigate these thorny procedural matters.

Do remember that the parties can also agree otherwise

Though the SPA should generally be followed, it can also be easily derogated from by mutual agreement of the parties. For example, in our experience, the typical 30-day limit for the duration of the proceedings is simply not sufficient for any but the simplest of disputes, and the deadline is typically extended by mutual agreement to ensure that the parties have access to the necessary underlying information and/or persons. The parties may also, explicitly or by conduct, agree to extend or skip certain procedural deadlines, bypass the expert determination phase and go directly to arbitration, or settle parts of their dispute while directing the rest to expert determination. Furthermore, in our experience, it is common that the parties and the expert agree on a set of guidelines or rules and a timetable at the outset of the proceedings. Such party agreement can provide a useful tool for the expert when managing the proceedings by, for example, narrowing down the scope of the expert's assignment and clarifying that the expert may only rely on arguments and documents presented by the parties.

Do try to agree on the expert

Due to the relatively small number of expert determinations, there are not too many persons with experience of acting as an expert in these types of proceedings. Due to conflicts of interest, many of the chosen candidates may also have to decline a potential

appointment. It is generally in both parties' interests to try to agree on a candidate from those available and willing to accept the task. Mutual acceptance of the expert generally facilitates agreement on the process and speeds up the resolution of the dispute.

Don't treat it like arbitration

Expert determination and arbitration are seemingly alike in that the dispute is referred to an independent external adjudicator. However, the two are in fact very far apart. Perhaps the greatest difference is that arbitrators are almost without exception lawyers, whereas independent experts are not. In our experience, the different backgrounds lead to very different styles of thinking, which is often reflected in the ultimate decision. For example, to a lawyer, it is almost instinctive to decide a matter based solely on the parties' agreement, arguments, and evidence, whereas a non-lawyer may feel compelled to search for the "right answer" even outside this frame of material. This also means that counsel should not always advocate their case precisely like in arbitration. Whereas "mind your audience" is always an important guideline for advocacy, this is even more critical to remember when your audience has a completely different education and background.

Don't hide material or information

Purchase price disputes typically involve significant information asymmetry in that the purchasing party has access to all of the financial data of the target company after the sale, whereas the seller may have access to the same information but prior to the sale and limited or no information thereafter. For this reason, SPAs often impose disclosure and document production obligations on both parties. The disclosing party may be tempted to conceal information unfavourable to its case, but this should always be avoided; information has a habit of rising to the surface, and in the worst case, concealing documents or providing false information may constitute a criminal offence.

Don't forget the other agreements

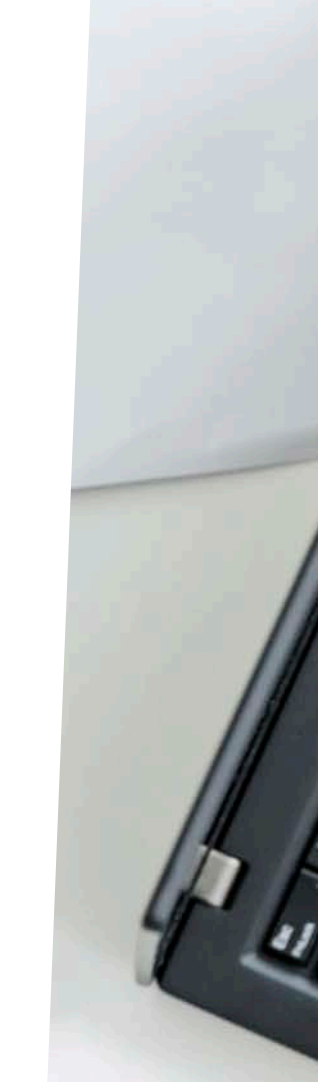
Purchase price disputes can arise in private equity investments where the founder-seller(s) retain(s) a minority stake or continue(s) to work for the company. Such arrangements typically involve a shareholders' agreement, shareholders' loans, and/or director/employee agreements. Alternatively, a larger M&A deal may involve different co-operation agreements during the integration phase. In pursuing their purchase price disputes, parties and counsel should be mindful of their rights and obligations under such other agreements. They may include, for instance, more extensive disclosure obligations which can be used in the dispute or different confidentiality obligations which may be inadvertently breached during the proceedings.

Don't expect too much

It is an unfortunate misconception that expert determination is fast and cheap, leads to higher-quality decisions, and is less disruptive to business. Sadly, none of these things necessarily holds true. There are no free lunches; when two disagreeing parties hire experts to represent them and a third party to resolve the dispute, it tends to be expensive, sometimes slow, and disruptive to business. However, with a practical mindset by both parties and with a focus on the core of the dispute, expert determination can also meet the high expectations.

Conclusions

While expert determination is often inserted into SPAs in the hope of finding a quick and expert-driven solution to a "numbers question", if the parties cannot agree on the numbers, expert determination often turns into a dispute requiring the intervention of lawyers. In such situations, the short deadlines provided on paper rarely work in practice, and legal and/or contractual argumentation will be required in addition to discussion about the numbers. At best, expert determination can bring the parties the necessary information to arrive at an agreed settlement in a more structured framework, but at worst, expert determination is only an unclear step in a protracted post-M&A dispute that will ultimately end up being determined in arbitration. The latter outcome can often be avoided by retaining experienced counsel and experts and by taking a proactive approach to the resolution of the dispute.



"Expert determination proceedings are, by their nature, less governed by procedural rules and require a larger degree of co-operation between the parties."

Corporations and Criminal Liability – Guilty Despite Reasonable Doubt?

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Everyone who has ever watched a US sitcom knows that in order to convict a natural person for criminal liability, the prosecutor must prove — without a reasonable doubt — that the accused natural person has committed the criminalised actions for which they stand accused. Up until recently, it has been clear that unless the threshold of "without a reasonable doubt" is met, no criminal liability would attach to any natural or legal person. But is this still the case, or is there reason to believe that something fundamental may change in the years ahead?

Today, legal persons may be imposed significant fines of up to SEK 500 million in Sweden or EUR 850 000 in Finland. The legislation supporting the criminal liability of legal persons has been going through major developments over the last 30 odd years leading up to today. In a climate supportive of corporations taking responsibility for their actions, and the consequences of their actions, the notion that a company should also be held responsible for *criminal* actions performed in the course of its business is not difficult to understand.

If anything, the political and legal trends seem to lean towards more enforcement measures against corporate activity that is seemingly immoral and breaks our common sets of rules (regardless of whether criminal or not). In other words, the pressure is on, and as a result, "compliance" is so important in any company's day-to-day business that it no longer is the buzz word it used to be — it is just business.

So, for the politicians and lawmakers who actually want to prevent illegal behaviour, it is obviously not ideal that a corporation in whose business crimes have been committed may go on unpunished, save for the few individuals who personally take the hit. It is hard to disagree with these fundamental issues. But so far, criminal sanctions have still been reserved for situations where the stringent requirements of reasonable doubt and burden of proof have been met, and a criminal sanction has therefore always been looked at slightly differently than, say, administrative sanctions (which themselves, depending on the underlying legislation, can also be very severe). A crime is always a

"A recent judgment from the Finnish Supreme Court may serve as a reminder that not even criminal law is entirely black or white."

crime, is it not? *Nullum poena sine lege, nullum crimen sine lege*, and all such Latin phrases learnt in law school, was for a reason. Criminal law is simply its own animal.

By way of background, Swedish legislation (Swedish Criminal Code Ch. 36 § 7) provides that a company may be imposed a company fine where a criminal act was committed in the practice of the company's business and (i) the company has neglected to "*... perform what can be reasonably required to prevent the criminal act*" or (ii) the crime was committed by a leading person within the company with the authority to represent the company or make decisions on the company's behalf.

In Finland, the situation is very similar, although the Finnish Criminal Code also specifically states that criminal liability can also attach to the company even if it cannot be determined which individual person committed the crime, meaning criminal liability may attach even if a natural person cannot be convicted for the alleged crime. The situation, in practice, is the same in Sweden in this respect, meaning you may be dealing with an *anonymous perpetrator*.

But still, unless it can be proven that a specific person, or an *anonymous perpetrator*, as the case may be, has really committed a crime (with all that this entails in terms of burden of proof and "without a reasonable doubt"), then the company will walk. And in cases where the authorities did not catch the perpetrator, the company usually did — until now.

A recent judgment from the Finnish Supreme Court (KKO 2021:6) may serve as a reminder that not even criminal law is entirely black or white. Or at least that what is black to some may appear white to others. In the judgment, a gaming association was criminally sanctioned for money laundry by negligence even though the sole individual that had actually been charged for the crime was found not guilty already at an early stage of the proceedings. The Supreme Court, however, became convinced that a crime had been committed in the activities of the legal entity.

In the reasoning of the Supreme Court, there is nothing to indicate that the Supreme Court would have misunderstood or interpreted the fundamental legislation any differently than what could be expected; the legal entity does not itself commit a crime but is attached a criminal liability due to someone having committed a crime in the business of the legal entity. In the case, at hand the Supreme Court reasoned that it had been shown that an *anonymous perpetrator* had committed a crime in the course of business, and thus, given also the other circumstances of the case, sentenced the legal entity to a corporate fine.

The decision has gained some publicity and views from commentators. Many seem excited at the prospect that the actual application of the *anonymous perpetrator* concept (which has been something of a dead letter of the law) now opens new possibilities; now, finally, companies may more easily be criminally sanctioned for their criminal conduct! The prudent litigator remains cautious, however, and even somewhat concerned.

One could argue that the Supreme Court did not sufficiently analyse all aspects of the *anonymous perpetrator's* actions, such as their negligence (which is, admittedly, difficult to show for a person whose identity is unknown). We are not, however, writing this to scrutinise the case in detail or to comment on the case any more than this. But sometimes society's good intention and will to see progress can over-shadow what are legitimate concerns.

Our concern is this: under no circumstances should the burden of proof required to criminally sanction a corporation be more easily met than for an individual. One could easily picture where this could lead — suddenly investigating and prosecuting individuals would no longer be interesting. What prosecutor would bother investigating (and proving) the poor CFO's actions and intents (the actual suspected crime), if the company can just as easily — or even more easily — be held solely liable with a hefty corporate fine, setting an important precedent for others?

The burden of proof for corporations and individuals cannot differ to the detriment of the former, at least not for the same crime and absolutely not unless the law explicitly provides for it. And there we are again, back at the Latin phrases: *nullum crimen sine lege, nulla poena sine lege*.

Let's progress in the realm of corporate criminal liability, while still remembering the fundamentals and avoiding a slippery slope. Sometimes, there is beauty in being old-school.

ISDS Trends in the Nordic Countries

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Investor-state dispute settlement ("ISDS") has traditionally touched the Nordic countries when Nordic investors have sought to enforce their rights elsewhere in the world, or for procedural reasons when Stockholm has been the seat of arbitration for ISDS disputes often arbitrated under the Arbitration Rules of the Stockholm Chamber of Commerce ("SCC").

In the last decade, Nordic investors have also initiated proceedings against Western European states under the Energy Charter Treaty ("ECT"). The latest development in this type of a case came on 5 March 2021 when Germany communicated its decision to settle the disputes stemming from Germany's phase-out of nuclear energy. Among the settled disputes is the closely monitored Vattenfall v. Germany (II) case initiated by Vattenfall, a Swedish state-owned energy company, which reportedly will receive over EUR1.4 billion in compensations.

Last year, certain Nordic countries also became subject to investor-state disputes as respondents, as investment treaty claims were launched against Sweden, Norway, and Denmark, a first for each respectively.

Additionally, there are topical ISDS developments taking place at the EU level, namely the status of the Multilateral Investment Court and the status of intra-EU investment disputes following the ruling of the European Court of Justice ("ECJ") in Achmea (C-284/16). These changes naturally also influence ISDS in the Nordic countries.

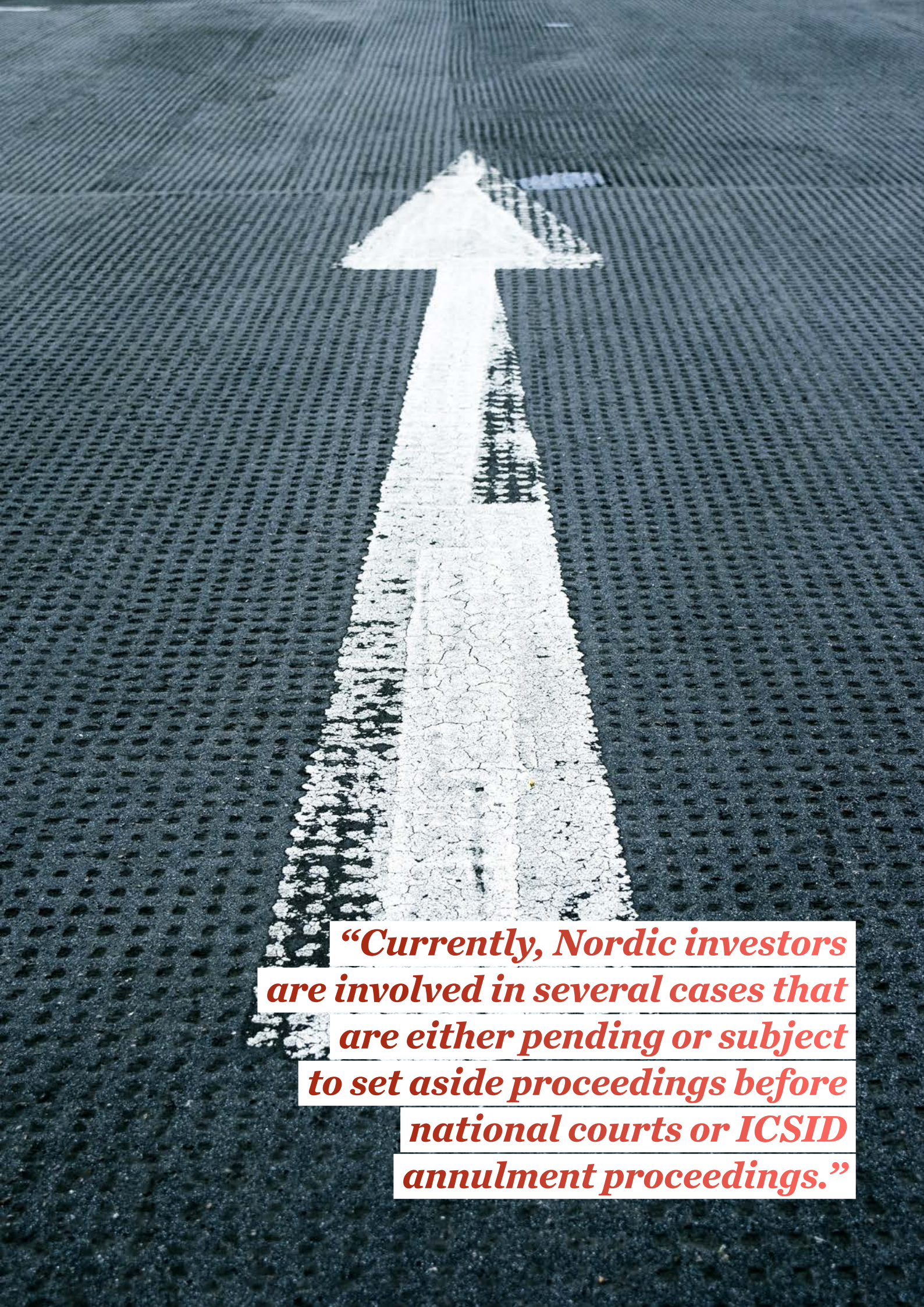
Cases Involving Nordic Investors

Currently, Nordic investors are involved in several cases that are either pending or subject to set aside proceedings before national courts or ICSID annulment proceedings. Danish investors are, for example, pursuing four separate cases under the ECT concerning legal reforms affecting the renewable energy sector. The sectoral representation is unsurprising, considering that a number of Nordic companies are advanced in the development of clean energy. Swedish investors also have several pending cases against various states. However, these cases are not focused on a particular economic sector, unlike those initiated by Danish investors.

Norwegian investors are currently not involved in any publicly known ISDS proceedings. There are currently no reported ISDS cases involving Finnish nationals as claimants either. Despite Finland not currently being involved in any ISDS cases, the subject has received more attention in Finland recently, as Uniper, a German energy company whose majority owner is Fortum (a Finnish state-owned energy company), has threatened to launch an ISDS claim under the ECT against the Netherlands for its plan to phase out coal power.

Investment Treaty Claims Against Nordic Countries

In 2020, separate ISDS cases were launched against Sweden, Norway, and Denmark, and in 2021, also Huawei initiated an ISDS case against Sweden. No continental Nordic country



"Currently, Nordic investors are involved in several cases that are either pending or subject to set aside proceedings before national courts or ICSID annulment proceedings."

had been the target of such investment claims before that. Iceland, however, was a respondent in an investor dispute that was settled in 1985. The following disputes initiated in 2020 and 2021 are still in their early stages:

Aura Energy v. Sweden

Aura Energy, an Australian mining firm, has initiated proceedings against Sweden. The dispute relates to Sweden's ban on uranium mining. The investor has alleged that Sweden has breached its ECT obligations, basing its claims on the expropriation clause and the FET standard contained in the ECT. The dispute is at the prenotification stage.

Huawei v. Sweden

Huawei, a Chinese telecom firm, has initiated proceedings against Sweden. The dispute relates to Sweden banning Huawei from taking part in its 5G network operations. The investor has alleged that Sweden has breached its obligations under the China-Sweden BIT.

Peteris Pildegovis and SIA North Star v. Kingdom of Norway (ICSID Case No. ARB/20/11)

The dispute relates to fishing rights. The investor has alleged that Norway has breached its obligations under the Norway-Latvia BIT, namely the expropriation clause, the FET standard, and the MFN standard.

Donatas Aleksandravicius v. Kingdom of Denmark (ICSID Case No. ARB/20/30)

The dispute relates to a construction project. The investor has alleged that Denmark has breached its obligations under the Lithuania-Denmark BIT.

Although there are currently no reported cases against Finland, considering the trends in the Nordic countries, it is likely only a matter of time before Finland becomes involved in such a case as well.

EU and ISDS

In 2018, the ECJ issued its ruling in Achmea, holding that Articles 267 and 344 TFEU must be interpreted as precluding an arbitration agreement in an intra-EU bilateral investment agreement. While many EU member states went on to terminate their intra-EU BITs as a result of the judgment, Finland and Sweden did not. There are also a number of set aside cases pending before Swedish courts as a result of the Achmea judgment, and two of these disputes have been referred to the ECJ for a preliminary ruling, namely the case between the Republic of Poland and PL Holdings (C-109/20) and the case between Italy and Athena Investments et al.

Since Achmea, ECT tribunals have consistently found that they have jurisdiction in intra-EU investment disputes, as they have found that the findings made in Achmea do not apply to disputes based on a multilateral treaty such as the ECT. However, in February 2021, the Svea Court of Appeal agreed to ask the European Court of Justice whether the Achmea ruling also applies to ECT disputes. Furthermore, in March 2021, Advocate General Szpunar gave a non-binding opinion in case Republique de Moldavie v. Komstroy (C-741/19) dealing with the question of whether or not ad hoc tribunals have jurisdiction under the ECT, stating that the findings made in Achmea should indeed be applicable to ECT disputes as well.

In case C-109/20, the court has been asked to determine whether the Achmea ruling also prevents intra-EU investment arbitrations that are allegedly not based on a bilateral investment treaty, but rather on an alleged, separate arbitration agreement.

These ongoing cases before the ECJ will likely clarify the status of arbitration in relation to intra-EU investment treaty claims.

The EU is also working on changing the settlement of investment disputes through political means, and not just through ECJ rulings. In the working group of the United Nations Commission on International Trade Law (UNCITRAL WG III), the EU has actively advocated for a permanent Multilateral Investment Court, which would have permanent judges — a system that would differ greatly from the current system, in which the parties to a dispute may select the arbitrators to hear the case. In essence, the system proposed by the EU would have a court of first instance and an appeal mechanism. The Investment Court would have a pool of permanent judges, and judges hearing a given case would be selected randomly from this pool.

The EU has already included provisions on this type of an ISDS system on its more recent investment treaties. However, no such court has yet been founded. Although the ECJ confirmed in 2019 that such a system would be compatible with EU law, it may well prove to be difficult to attract other countries to become members of the court. It is also uncertain whether the EU's solution would fix certain issues linked to ISDS proceedings.

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