

## **Court Rules on Waiver of Right to Arbitrate**

Contributed by [Advokatfirman Vinge](#)

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A city court and a court of appeal have rejected a motion to dismiss without further hearing a counterclaim submitted in court proceedings, even though the parties had agreed that any dispute should be resolved by arbitration. The counterclaim was allowed on the grounds that a party to an arbitration agreement which has initiated court proceedings may not rely on the arbitration agreement to bar the other party from submitting a counterclaim on the same subject matter in the court proceedings.

### **Facts**

Foodeo submitted a request for arbitration against Karmöy. Karmöy then submitted a counterclaim. The arbitral tribunal directed the parties to pay deposits on account of the tribunal's fees. Karmöy paid its part of the deposits but Foodeo refused to pay. Karmöy then refused to pay Foodeo's part of the deposits. The tribunal thus dismissed the case without prejudice pursuant to Section 38 of the Arbitration Act.

Subsequently, Karmöy sued Foodeo in the Kristianstad City Court, submitting the same claim as in the arbitration. Since Foodeo had failed to provide its part of the requested deposits, the arbitration agreement no longer barred the court from proceeding with Karmöy's claim pursuant to Section 5 of the act.

Foodeo counterclaimed (the same claim as in the arbitration). Karmöy argued that Foodeo's counterclaim should be dismissed without any further hearing on the grounds that the parties had agreed to arbitrate.

### **Decision**

On June 19 2003 the city court found that it was competent to try Foodeo's counterclaim.<sup>(1)</sup> The court held that Karmöy had lost its right to rely on the arbitration agreement as a bar to court proceedings when it refused to pay the deposits for both parties in the arbitration. The court also stated that Karmöy had the right to initiate new arbitration proceedings after the

dismissal of the previous arbitration, but had chosen not to do so.

Karmöy appealed to the Skåne and Blekinge Court of Appeal. It argued that a party which obstructs an arbitration by not paying its part of the requested deposits should not be able to have a counterclaim tried in court proceedings. On the contrary, such party should be considered bound by the arbitration agreement, irrespective of the other party's right to initiate court proceedings, pursuant to Section 5 of the act. Karmöy further argued that it had not waived its right to arbitrate all disputes between the parties by initiating court proceedings.

On December 17 2004 the court of appeal stated that, under Swedish case law, a party which initiates court proceedings is considered to have waived its right to rely on the arbitration agreement as regards the subject matter of its claim.<sup>(2)</sup> A plaintiff that initiated court proceedings cannot rely on the arbitration agreement as a bar to court proceedings regarding all claims, grounds and objections that will be considered as *res judicata*, irrespective of whether they are relied on in the case at hand. Since a judgment regarding Karmöy's claim would have *res judicata* effect on Foodeo's counterclaim or on issues relevant to the counterclaim, the court allowed Foodeo's counterclaim.

## Comment

The outcome of the case seemingly favours parties trying to obstruct arbitration proceedings by not paying the deposits. However, the principle behind the decision has a narrow application, since the decision was based on the fact that Foodeo's counterclaim was closely linked to Karmöy's claim. Where a judgment does not have *res judicata* effect on the counterclaim or any issue relevant to the counterclaim, the counterclaim will probably not be allowed. In contrast, not allowing counterclaims connected to the plaintiff's claim would cause procedural difficulties in the relationship between court proceedings and arbitration proceedings.

The act expressly allows counterclaims to be submitted in the arbitration - provided that the claim falls within the scope of the arbitration agreement - even if the counterclaim is not closely linked to the other party's claim.<sup>(3)</sup> Moreover, the arbitrators may direct separate deposits for individual claims.<sup>(4)</sup> Where the requested deposit is not provided for an individual claim, the arbitrators may terminate the arbitration proceedings in part (ie, in respect of the individual claim in question) without further hearing. In the case at hand, the arbitral tribunal did not direct separate deposits for Foodeo's claim and Karmöy's counterclaim, probably because of the close connection between the two claims.

*For further information on this topic please contact [Paulo Fohlin](mailto:Paulo.Fohlin@vinge.se) or [Johan Myrén](mailto:Johan.Myren@vinge.se) at Advokatfirman Vinge by telephone (+46 31 722 35 00) or by fax (+46 31 722 37 00) or by email ([paulo.fohlin@vinge.se](mailto:paulo.fohlin@vinge.se) or [johan.myren@vinge.se](mailto:johan.myren@vinge.se)).*

## Endnotes


(1) Case T1828-02.


- (2) Case Ö1856-03.
- (3) See Section 23 of the act.
- (4) See Section 38 of the act.

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