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Environment Law 2008

A practical insight to cross-border Environment Law

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Chapter 54

Sweden

Thomas Sjöberg

Ingela Malmborg

Advokatfirman Vinge

1 Environmental Policy and its Enforcement

1.1 What is the basis of environmental policy in Sweden and which agencies/bodies administer and enforce environmental law?

The basis of environmental policy in Sweden is a desire to promote sustainable development and the will to come to terms with existing environmental problems such as e.g. eutrophication, air pollution and contaminated areas. The environmental policy is put into practice through the enforcement of environmental law that also manifests a desire to preserve the environment and natural resources, to protect the environment by precautionary measures, and the will to restore damaged areas.

The quality of the environment (e.g. pure water and air, biological diversity and a sustainable use of natural resources) is the core of environmental law. Activities that have or can have an impact on the core values shall be regulated by law. The policy is to preserve and improve environmental quality by regulating such activities, and to place a major part of the controlling procedures on the operators through the demand on the Operator's Control and the General Rules of Consideration (GRC). The Operator's Control is supplemented by the monitoring work of the supervisory authorities. Two GRCs, the Precautionary Principle and the Polluter Pays Principle, are of great importance when enforcing new or amended legislation in order to preserve and improve environmental quality.

Briefly, the agencies and bodies that are involved in the process of enforcement and administration are: the Government; the Ministry of Environment; national environmental authorities, e.g. the Swedish Environmental Protection Agency (EPA) and the Chemical Inspectorate; regional authorities such as the County Administrative Boards; and local municipal authorities. The judicial system in this area includes the Environmental Courts, the Supreme Environmental Court and the Supreme Court. Criminal enforcement is handled by the police organisation, the public prosecutor and the general courts. The Environmental Courts and the County Administrative Boards are the essential licensing authorities. However, some national environmental authorities, e.g. the Chemical Inspectorate, can issue licences within their control area. Cases can be appealed to, for example, the Supreme Environmental Court or to the Supreme Court depending on which level the first examination of an application or a matter was made. County Administrative Boards and municipal authorities are the essential supervisory authorities. National environmental authorities, e.g. the EPA, have both an enforcing and a guiding role.

1.2 What approach do such agencies/bodies take to the enforcement of environmental law?

The legislation is to a large extent based on the responsibility of operators to comply with applicable environmental legislation through demands on an operator's control, which for example comprises the responsibility of applying for an environmental permit if needed. The extent to which operators comply with the demands on their control is currently monitored by the supervisory authorities, which have the power to impose far-reaching measures in cases of non-compliance, e.g. revocation or reconsideration of a permit. Shortfalls in the system are more often due to limited supervisory resources than to failings in the legislation itself.

1.3 To what extent are public authorities required to provide environment-related information to interested persons (including members of the public)?

People have a wide-ranging right to access public documents, through the so-called principle of public access to official records (Sw. Offentlighetsprincipen). This principle applies to documents received or established by public authorities, unless there is an explicit exception in law according to which a document for a certain reason shall be kept secret. The main rule is thus that such documents are available to the public. A person who requests access to a certain document may not be required to disclose its name or the purpose for which access to a certain document is requested.

2 Environmental Permits

2.1 When is an environmental permit required, and may environmental permits be transferred from one person to another?

Permits are, in short, required for different environmentally hazardous activities, activities that involve the use of natural resources, and activities that have or can have an impact on the environment and on human health. Permits are for example required for facilities that contribute to emissions into the air, land and water or that in other ways can be considered as disturbing to their surroundings. Other examples are constructions in water and quarries. Certain procedures such as the import and distribution of certain chemicals and transport of waste also require a permit. Most activities that require a permit are set out in the Environmental Code and its adjoining ordinances, but not all. Some activities, including inter alia nuclear operations and construction of common roads, require a permit in accordance with specific legislation and

additional requirements.

In the event that an activity is not listed as one requiring a permit, the supervisory authority can in individual cases order an operator to apply for one. An operator can also voluntarily apply for a permit. Furthermore, extended activities or material alterations within permitted operations may require a new permit or a notification to be filed to the relevant authority. When granted a permit, the operator is, in principle, protected from being given further onerous conditions for a period of time, if the future claim involves an issue already regulated in the permit.

An operating permit for a hazardous activity under the Environmental Code is issued for the operations as such. If the assets used for the permitted operation are transferred inter alia to another entity, the purchasing entity will be the new permit holder; i.e. the permit stays with the activities. The new operator is however obliged to notify the supervisory authority about the alteration in operation management. Other environmental permits, e.g. regarding the handling of inflammable goods, cannot be transferred to a new operator, and others can require approval from the relevant authority in order to be transferred.

2.2 What rights are there to appeal against the decision of an environmental regulator not to grant an environmental permit or in respect of the conditions contained in an environmental permit?

As the principal rule, a decision regarding an environmental permit can be appealed against, irrespective of the fact that a permit may not have been granted or contains onerous conditions.

2.3 Is it necessary to conduct environmental audits or environmental impact assessments for particularly polluting industries or other installations/projects?

Anyone, whether a corporation or private individual, wishing to pursue an activity or take a measure for which a permit or decision is required pursuant to environmental legislation, shall consult both with relevant authorities and with private individuals in the vicinity who are likely to be affected by the intended activity at an early stage, before submitting an application for a permit and preparing the environmental impact assessment.

Applications for an environmental permit normally require an environmental impact assessment (Sw. miljökonsekvensbeskrivning) to be made. The scope of the environmental impact assessment varies depending on the impact that the planned activity has on the environment. If it is deemed to have a significant impact, a more thorough assessment is required along with extended consultations.

2.4 What enforcement powers do environmental regulators have in connection with the violation of permits?

A supervisory authority may issue injunctions and prohibitions which are necessary to ensure compliance with the provisions of a permit or environmental legislation in general. It may also request that the authority issuing the relevant permits reconsider its decision. When reconsidering a permit, the issuing authority may not impose conditions that are so onerous that the operation can no longer be continued or is significantly hampered. However, in severe cases the supervisory authority may request that the permit be revoked.

An operator who does not comply with the conditions set out in a permit risks being faced with a company fine. The company fines range between SEK 5,000 - 10,000,000. Furthermore, an individual responsible for the operation may be subject to criminal charges.

3 Waste

3.1 How is waste defined and do certain categories of waste involve additional duties or controls?

The Environmental Code specifies "waste" as any object, matter or substance belonging to a waste category, which the holder disposes of or intends or is required to dispose of. The different waste categories are defined in appendix 1 to the waste ordinance. Some categories of waste, such as hazardous and organic waste, are governed by certain regulations imposing additional obligations and controls, e.g. regarding transport, storing and recycling. Furthermore, as regards specific product categories (tyres, waste paper for recycling, packaging, cars and electrical and electronic goods), the "producer" has more extensive responsibilities, regarding inter alia the collection, removal, and/or recycling of the waste resulting from such products.

3.2 To what extent is a producer of waste allowed to store and/or dispose of it on the site where it was produced?

Storage of waste originating from an operator's production and stored within the operating site can be subject to permit conditions or other precautionary measures. The storage alone can, depending on the waste, require a permit. Site-specific storage conditions and other precautionary measures are common regarding the storage and handling of hazardous waste on industrial sites. So-called intermediate storage of waste and/or hazardous waste normally requires a permit or a notification.

3.3 Do producers of waste retain any residual liability in respect of the waste where they have transferred it to another person for disposal/treatment off-site (e.g. if the transferee/ultimate disposer goes bankrupt/disappears)?

The wording of the law is very vague in this context. Furthermore there is, as far as we know, no applicable case law regarding this issue. In the absence of applicable case law and clear regulations, in principle, no such remaining residual liability can be said to exist.

3.4 To what extent do waste producers have obligations regarding the take-back and recovery of their waste?

Companies that produce, import or sell specific product categories such as e.g. waste paper for recycling, packaging, tyres, cars and electrical and electronic goods ("Producers"), are obliged to secure that such products, when transformed into waste, are collected, recycled, reused or disposed of in a manner that is acceptable from an environmentally and a health protective point of view. Product categories connected to a producer's responsibility are regulated under specific ordinances. Legal compliance is normally fulfilled via collective compliance schemes for collection and recycling, to which the Producer is an affiliate.

4 Liabilities

4.1 What types of liabilities can arise where there is a breach of environmental laws and/or permits, and what defences are typically available?

In addition to consequences set out in the answer to question 2.4 above, an operator who does not comply with the environmental

laws risks being faced with an environmental sanction charge which range between SEK 1,000 - 1,000,000. Unlike other sanctions, strict liability applies in respect of the environmental sanction charge, i.e. irrespective of intent or negligence.

4.2 Can an operator be liable for environmental damage notwithstanding that the polluting activity is operated within permit limits?

Yes, an operator can be so liable. However, third party damage, caused without intent or negligence, is not compensated for where the disturbing event that caused the damage is acceptable, taking into account local conditions or the extent to which such disturbing events normally occur under similar conditions. As regards liability for remediation of contamination, the extent of such liability shall be reasonable. When the extent of the liability is determined, account shall be taken of the particular circumstances, such as whether the operation was subject to the conditions of and within the limits of the relevant permit.

4.3 Can directors and officers of corporations attract personal liabilities for environmental wrongdoing, and to what extent may they get insurance or rely on other indemnity protection in respect of such liabilities?

A supervisory authority is obliged to report violations of the Environmental Code and adjoining ordinances to the police or to a prosecution officer, if there is suspicion of a crime. Liability for criminal acts rests in principal on individuals only. As regards company liability, see question 2.4 above. If a criminal act is executed during a business activity, the question arises as to who will be held liable. The liability will, in general, be placed on the management (the CEO or a member/members of the Board). Responsibility and liability can be delegated to subordinate members of the staff.

Regarding liability for damages, personal liability for a director or an officer only arises if exceptional circumstances are apparent. If environmental wrongdoing results in costs or losses to a corporation, its CEO and/or board members may be liable, primarily, towards the corporation, provided that the damage has been caused by intentional or negligent acts or omissions.

Voluntary liability insurance can include compensation for environmental damage to a third party. Insurance or an indemnity would not, however, limit the authorities' ability to take action.

4.4 What are the different implications from an environmental liability perspective of a share sale on the one hand and an asset purchase on the other?

When a Swedish limited liability company is purchased, its liabilities (historical and environmental as well as any others) are purchased with the company but are in principle kept within the acquired corporate entity. There have been legal cases in which the corporate veil has been pierced, but only in very specific circumstances.

If a business operation is acquired through an asset purchase, a prudent purchaser should assume that the acquiring entity (which could be an off the shelf limited liability company) assumes responsibility for historical (environmental) liabilities attributable to the acquired operation. In a case, a few years ago, a purchaser was ordered to investigate contamination caused by a substance the handling of which was stopped before the acquisition of the operation.

Furthermore, a purchaser of real property in Sweden is subject to a secondary responsibility (if the polluter is not found or unable to pay for remediation) for remediation of contamination of which he knew or which he should have discovered at the time of the acquisition. This responsibility is applicable to purchases of real property made as from 1 January 1999. Thus, in a transfer of assets and liabilities including real properties, the purchaser is at risk of being subject to such secondary responsibility.

4.5 To what extent may lenders be liable for environmental wrongdoing and/or remediation costs?

As long as the activity of the lender is restricted to lending money, the lender would in principle not be liable for environmental wrongdoing by the borrower, or for the borrower's remediation costs. If the lender is involved in the management of the borrower's operation or holds ownership in the borrower, the situation may be different.

5 Contaminated Land

5.1 What is the approach to liability for contamination (including historic contamination) of soil or groundwater?

Intentional or negligent (i) emission of a substance to land, water and air that typically or in an individual case entail or may entail a contamination which is detriment to human health, animals or plants or (ii) storage or disposal of waste or other substances which may entail a contamination which is detrimental to human health, animals or plants or may entail other environmental nuisance is considered a criminal act in accordance with the Environmental Code, for which the polluter can be prosecuted and, if convicted, held liable.

Further, any operator that has caused or contributed to contamination of soil, water, constructions or facilities is liable to investigate and remediate the contaminated area, provided that: the operator's actual operation has continued after 30 June 1969; the effect of the operation was still apparent when the Environmental Code entered into force (i.e. 1 January 1999); and there is a need to remediate the contaminated area. When considering the extent of this liability, account shall be taken of, inter alia, the time that has elapsed from when the contamination was caused and the responsibilities of the operator at that time.

As stated under question 4.4 above, the owner of real property could have a secondary liability to remediate a contaminated area if the real property was purchased as from 1 January 1999. Liability for remediating contaminated areas is not limited in time.

In addition to the environmental liability described above, Sweden has implemented the EC Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage. The amended legislation applies to serious environmental damage (Sw. allvarlig miljöskada) caused after 1 August 2007. Serious environmental damage is defined in accordance with the Directive. An operator has an obligation to take preventive actions or bear the costs for preventive actions if the operation has created an imminent threat of serious environmental damage. Further, the operator is obliged to carry out remedial measures or bear the costs for remedial measures if the operation has created a serious environmental damage. The remedial measures include actions to rehabilitate or replace damage natural resources or to provide an equivalent alternative to those resources.

5.2 How is liability allocated where more than one person is responsible for the contamination?

Vis-à-vis the authorities, the responsible operators are jointly and

severally liable for the investigation and remediation of a contamination. However, an operator who is able to show that its contribution to the contamination in question is insignificant to the extent that it does not by itself justify remediation is only liable to the extent that corresponds to its contribution to the contamination. Likewise, owners who are secondary responsible are jointly and severally liable.

5.3 If a programme of environmental remediation is 'agreed' with an environmental regulator can the regulator come back and require additional works or can a third party challenge the agreement?

The liability to remediate contamination is not limited in time. The legal effect of an "agreement" with the authorities is unclear but may be dependent on the form of the agreement. The authorities tend to formulate their approvals in a way that will not prevent them from further future action, should new circumstances arise. If the "agreement" is in the form of a decision, it could be appealed against by a third party, if the third party is considered to be affected by the decision. If the "agreement" is in the form of a decision and it explicitly states what the remediating party is obliged to do, it can be argued that the authorities may not request additional remediation measures. A ruling in 2003 from a first instance court supports this view.

5.4 Does a person have a private right of action to seek contribution from a previous owner or occupier of contaminated land when that owner caused, in whole or in part, contamination; and to what extent is it possible for a polluter to transfer the risk of contaminated land liability to a purchaser?

The owner of land which is contaminated may have a private right of action against the seller under the terms of the sale and purchase agreement for the property in question, or possibly also under the rules regarding transfer of real property in the Real Estate Act (Sw. jordabalken). If an operation has caused environmental damage to its surroundings, someone who has suffered damage thereby may have a private right of action against the party liable for the damage. In the event of joint and several liability for environmental damage, the party from whom damages have been claimed has a right of recourse against other responsible parties.

The risk of contaminated areas and the cost for investigations and remediation measures of such areas can in commercial situations be transferred from a selling entity to a purchasing ditto through a civil agreement. Such an agreement is however only valid between the parties. It has no validity towards the authorities. The authorities can impose an injunction on any one of the parties regarding e.g. remediation measures, provided that both parties could have contributed to the contamination.

5.5 Does the government have authority to obtain from a polluter monetary damages for aesthetic harms to public assets, e.g., rivers?

In cases where protected wild animals have been illegally killed or where ancient heritage sites and remains have been destroyed, those responsible have been held liable to pay monetary damages to the government. These cases are special and it is not clear to what extent they are the result of underlying principles that can be applied to other situations.

As regards monetary damages to rehabilitate or replace damage natural resources or to provide an equivalent alternative to those resources, see the answer to question 5.1 above.

6 Powers of Regulators

6.1 What powers do environmental regulators have to require production of documents, take samples, conduct site inspections, interview employees, etc.?

Authorities have a wide range of powers, including the right of access to properties, buildings, etc. for the purpose of carrying out investigations and taking other measures. The authorities may order an operator subject to environmental legislation to submit information and documents and to carry out such investigations into the operator's activities and their effects as are necessary for the purposes of supervision. As regards contaminated areas, the supervisory authority may order those responsible for the contamination to conduct an investigation or request that the costs of such an investigation, if conducted by someone else, are paid for.

7 Reporting / Disclosure Obligations

7.1 If pollution is found on a site, or discovered to be migrating off-site, must it be disclosed to an environmental regulator or potentially affected third parties?

The owner or user of a property has a criminally sanctioned obligation to immediately notify the supervisory authority if any contamination is discovered on the property which may cause damage or be detrimental to human health or the environment. In addition, an operator must notify the supervisory authority if an imminent threat of serious environmental damage caused by the operations or other measures taken is discovered. Such information is accessible to the public.

7.2 When and under what circumstances does a person have an affirmative obligation to investigate land for contamination?

An affirmative obligation to investigate land for contamination exists when a person has received a non-appealable decision to investigate.

7.3 To what extent is it necessary to disclose environmental problems, e.g. by a seller to a prospective purchaser in the context of merger and/or takeover transactions?

The obligation of the seller to disclose environmental problems is dependent on many factors, such as the nature of the "problem", the form of transfer (e.g. transfer of real property or shares), the contractual negotiations and the wording of the acquisition agreement.

8 General

8.1 Is it possible to use an environmental indemnity to limit exposure for actual or potential environment-related liabilities, and does making a payment to another person under an indemnity in respect of a matter (e.g. remediation) discharge the indemnifier's potential liability for that matter?

Yes, such an indemnity is possible. However, the indemnity would only apply as between the indemnifying party and the indemnified party and will not be binding as regards the authorities. See also question 5.4 above.

8.2 Is it possible to shelter environmental liabilities off balance sheet, and can a company be dissolved in order to escape environmental liabilities?

According to a recommendation from the Swedish Financial Accounting Standards Council (Sw. Redovisningsrådet), balance sheet reservations shall be made, as a general rule, in respect of liabilities that are known to arise in the future. Environmental liabilities may be mentioned in the annual accounts (instead of making reservations in the balance sheet) if it is possible, but not likely, that such liabilities will arise.

Remedial measures on a contaminated area cannot be injuncted on a non-existing operator or a non-existing real property owner. This also applies to compensation to third parties regarding personal injury, material damage and financial loss caused by an activity on a site and its surroundings, if it cannot be determined who is to be held liable for the damage. Compensation for the latter can be paid via the common environmental damage insurance (Sw. Miljöskadeförsäkring) if there should be no operator liable. Payment for remedial measures can be paid in the same way via the common clean up insurance (Sw. Saneringsförsäkring).

8.3 Can a person who holds shares in a company be held liable for breaches of environmental law and/or pollution caused by the company, and can a parent company be sued in its national court for pollution caused by a foreign subsidiary/affiliate?

A person who holds shares in a limited company (Sw. Aktiebolag) cannot be held liable for breaches of environmental law etc. caused by the company merely because of the fact that he holds shares in it.

There are no specific rules (at present) regarding liability for pollution by affiliates. Such liability would primarily be determined by the parent's overall liability for its subsidiary, depending on what kind of entity the subsidiary is.

If the affiliate is a Swedish limited company, the parent company cannot, in principle, be held liable for its liabilities. There have been cases in which, under very specific circumstances, a parent company has been held responsible for its affiliates' liabilities.

8.4 Are there any laws to protect "whistle-blowers" who report environmental violations/matters?

There is no specific protection for "whistle-blowers" in environmental matters. However, the Act on the Protection of Trade Secrets (Sw. lagen (1990:409) om skydd för företagshemligheter) contains protection for "whistle-blowers" when exposing serious unsatisfactory activities of a company.

8.5 Are group or "class" actions available for pursuing environmental claims, and are penal or exemplary damages available?

Group actions relating inter alia to environmental damage claims have been introduced in Sweden. The Swedish legal system does not in principle acknowledge any compensation for penal or exemplary damages.

9 Emissions Trading and Climate Change

9.1 What emissions trading schemes are in operation in Sweden and how is the emissions trading market developing there?

Emissions trading in accordance with the European Union Scheme for trading with greenhouse gas (GHG) started on 1 January 2005. The development of the trading market in Sweden is in general considered to be similar to the development in other Member States.

As from the trading period 2008-20012, the project based mechanisms joint implementation (JI) and the clean development mechanism (CDM) from the Kyoto protocol will be valid in Sweden. However, Swedish companies will only be able to include emission reductions in projects in other countries corresponding to twenty percent of the total national allocation of emission rights.

10 Asbestos

10.1 Is Sweden likely to follow the experience of the US in terms of asbestos litigation?

This seems very unlikely. The employer's liability regarding asbestos diseases is primary regulated by mandatory health insurance. In exceptional cases, the employer can be held liable for asbestos diseases. In general, Swedish courts will not accept non-contractual damages at such a level as is accepted in US.

10.2 What are the duties of owners/occupiers of premises in relation to asbestos on site?

The use of asbestos is prohibited in Sweden. As regards existing asbestos, its handling is subject to a number of provisions. For example, the removal of asbestos shall be performed by licensed personnel and an owner of a real property shall have the necessary knowledge when rebuilding a facility as regards the occurrence of asbestos. Furthermore, if asbestos is disposed of, it is considered to be hazardous waste and, thus, subject to strict provisions regarding its handling and transportation, etc.

11 Environmental Insurance Liabilities

11.1 What types of environmental insurance are available in the market, and how big a role does environmental risks insurance play in Sweden?

General and Product Liability insurance provides cover for legal liability to pay damages for a sudden and unforeseen environmental damage to third parties' property or to persons. The coverage is provided on an occurrence basis. Most industrial corporations are also extending Property Damage insurance to cover clean up for sudden and unforeseen leakages of oil and other liquids. None of these insurance policies cover historical liabilities, i.e. pollution that occurred before the insurance was acquired.

There are stand-alone environmental liability insurance products available which cover gradually incurred environmental damage. In the light of the implementation of the EC Directive on environmental liability with regard to the prevention and remedying of environmental damage a wider range of companies tend to consider these types of stand-alone policies.

Special Environmental insurance solutions providing coverage for historical environmental risks are available, but are more frequently addressed when transferring a company, business or real property.

Anybody, whether a corporation or private individual pursuing environmentally hazardous activities for which a permit must be obtained or a notification filed to the relevant authorities, shall pay a pre-determined fee in order to finance common environmental damage insurance (Sw. miljöskadeförsäkring) and common environmental clean up insurance (Sw. saneringsförsäkring). These

insurances shall be used to pay damages and cover remediation costs, should there be inter alia no operator liable. An operator may, however, not receive compensation from these insurances.

General and Product Liability insurance and Property Damage insurance afford certain coverage for environmental risks on a general basis. Environmental risk insurance, as a stand-alone insurance policy providing cover for a business' ongoing operations, plays a rather limited role in Sweden. Special environmental insurance solutions providing coverage for historical environmental risks are quite expensive and normally used to ring-fence certain specific environmental risks.

11.2 What is the environmental insurance claims experience in Sweden?

Claims against the common environmental damage insurance and environmental clean up insurance along with the environmental liability insurance have been uncommon, if at all, over the years, as regards the environmental liability insurance. Normal liability insurance has, however, been taken into account both when large and relatively small accidents have occurred.

12 Updates

12.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in Environment Law in Sweden.

The Swedish environmental law is to a great extent developed by adoption of EC Directives. Recently, EC Directives regarding e.g. chemicals (REACH) and environmental liability have been implemented in national environmental legislation.

As regards trends in the monitoring of the Swedish environmental law, the environmental authorities in Sweden are conducting a nationwide inventory of suspected contaminated areas using the "MIFO methodology" (MIFO means methodology for inventory of contaminated areas). The aim is to identify, investigate and where needed see to it that contaminated areas are remediated. Governmental funds are in principle only available where the local authorities have established that no other party is liable for the contamination. This in turn is a motivation for the authorities to pursue actions against e.g. operators and real estate owners.

Thomas Sjöberg

Advokatfirman Vinge KB
Smålandsgatan 20, Box 1703
SE-111 87 Stockholm
Sweden

Tel: +46 8 614 3183
Fax: +46 8 614 3190
Email: thomas.sjoberg@vinge.se
URL: www.vinge.se

Thomas Sjöberg has been a partner at Vinge since 1989. He graduated with a Masters Degree in Law (juris kandidatexamen) from the University of Uppsala in 1981 and started his career by working at Swedish Courts from 1981 to 1983. In 1986 he was admitted to the Swedish Bar Association. Thomas Sjöberg's main areas of work comprise Environmental Law, Real Estate Law, Mergers and Acquisitions and Insolvency and Restructuring.

Ingela Malmborg

Advokatfirman Vinge KB
Östergatan 30, Box 4255
SE-203 13 Malmö
Sweden

Tel: +46 8 664 5539
Fax: +46 8 664 5501
Email: ingela.malmborg@vinge.se
URL: www.vinge.se

Ingela Malmborg has been a partner at Vinge since 2002. She graduated with a Masters Degree in Law (juris kandidatexamen) from the University of Lund in 1985 and started her career by working at Swedish Courts from 1985 to 1990. From 1990 to 1992 she worked at the law firm Fylgia. In 1993 she was admitted to the Swedish Bar Association. Ingela Malmborg's main areas of work comprise Environmental Law, Real Estate and Employment Law.

VINGE

Vinge is one of the largest firms in Scandinavia, offering a full range of commercial legal services. Vinge's offices are located in Stockholm, Gothenburg, Malmoe and Helsingborg, as well as in London, Brussels, Hong Kong and Shanghai.

At Vinge some ten lawyers are part of the Environmental Department, which handles inter alia environmental issues in conjunction with corporate and property transactions, permit applications and advice and assistance in connection with remediation issues and environmental disputes.