The International Arbitration Review

Sixth Edition

Editor
James H Carter

Law Business Research

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For further information please email
Nick.Barette@lbresearch.com

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Editor
James H Carter

Law Business Research Ltd

PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGER
Nick Barette

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EDITOR'S PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another. The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more hours of reading from lawyers than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. However, there is a niche to be filled for analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world is consumed with debate over whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

James H Carter
Wilmer Cutler Pickering Hale and Dorr LLP
New York
June 2015

Chapter 39

SWEDEN

Peter Skoglund and Sverker Bonde[1]

I INTRODUCTION

i Structure of the law

In Sweden, any matter that may be resolved amicably by the parties through out-of-court settlement is considered arbitrable. In resolving such disputes under the Swedish Arbitration Act, the arbitral panel is explicitly authorised to apply competition law rules.[2]

Obviously, arbitration can only happen if there is an agreement between the parties to this effect. An arbitration agreement may be concluded both before and after a dispute has arisen. An arbitration agreement that is concluded before a dispute has arisen must be sufficiently specific, must relate to an identifiable relationship between the contracting parties and cannot simply refer to any and all future disputes or controversies. The Arbitration Institute of the Stockholm Chamber of Commerce (the SCC Institute), offers several template, or model, clauses providing for arbitration according to a number of tailored alternatives, such as for full-scale proceedings under the SCC Institute's Arbitration Rules, fast-track proceedings under its Rules for Expedited Arbitration or various combination clauses that will provide a measure of flexibility.

Prayers for relief can include monetary claims, claims for specific performance, injunctive claims and declaratory claims. Under the SCC Institute's Emergency Rules, the SCC Institute can appoint an emergency arbitrator to hear requests for interim or preliminary reliefs. An arbitral panel may not combine an order for specific performance or an injunction with a penalty. An award is, however, fully enforceable and the enforcement agency may issue penalty orders. An order issued by an emergency arbitrator cannot be enforced and compliance will therefore be something of a gentlemen's

1 Peter Skoglund and Sverker Bonde are partners at Advokatfirman Delphi.

2 See the *Eco Swiss/Benetton* case (C-126/9).

agreement. Further, notwithstanding an arbitration agreement, parties will be free to seek interlocutory orders in court.

Arbitration in Sweden will either be administered according to law (*ad hoc* arbitration) – the 1999 Swedish Arbitration Act – or administered under the rules of an arbitration institute. With respect to institutional rules the parties are free not only to agree on domestic rules, such as those of the SCC Institute, but to apply any other institutional rules, such as the International Chamber of Commerce Rules or the American Arbitration Association Rules. Any arbitration administered according to institutional rules will, when conducted in Sweden, be supplemented by the Swedish Arbitration Act as the *lex arbitri*.

Although Sweden is not a Model Law country, the Swedish Arbitration Act closely resembles the UNCITRAL Model Law and there are few differences. The Swedish Arbitration Act is less comprehensive than the Model Law but, in practice, on such issues where the Arbitration Act is silent, it will be supplemented by the Model Law.[3]

A domestic arbitration is organised and conducted applying the following sources of authority (in decreasing order of importance): the parties' arbitration agreement, applicable institutional rules, the Swedish Arbitration Act, the UNCITRAL Model Law and the Swedish Code on Judicial Procedure.[4]

By comparison with an *ad hoc* arbitration, an SCC-administered arbitration will have several advantages, although it entails a small fee payable to the SCC Institute, such as a higher degree of predictability with respect to the costs of arbitration (since fees to the arbitrators are set according to a pre-fixed table),[5] supervision and control of case administration, not least with respect to time limits, and transparent and efficient rules and practices for vetting and deciding issues concerning arbitrators' independence and impartiality.[6]

In an SCC-administered arbitration, the SCC Institute acts as an appointing authority and, unless the parties have agreed differently, the SCC Institute will appoint

3 Regarding the differences between the Swedish Arbitration Act and the Model Law, see L Heuman, *Arbitration Law of Sweden: Practice and Procedure* (2003), pp. 671–674.

4 The Code of Judicial Procedure governs procedure before the general courts.

5 Arbitrators' fees are fixed on the basis of the amount in dispute, meaning the total value of all claims, counterclaims and set-offs. On its webpage, the SCC Institute provides a 'How much is it?' calculator for the parties themselves to be able to calculate the arbitration costs and although the result of the calculation may not always be the definitive truth, it almost invariably serves as a good approximation of the actual costs.

6 Among other things, the SCC Institute provides each arbitrator with a standardised confirmation of acceptance form by which the arbitrators are asked to disclose any and all circumstances that may give rise to doubts as to the their independence and impartiality. A copy of the form is then provided to the parties. Further, the SCC Rules establishes a specific procedure for dealing with challenges to arbitrators. In its February 2013 Newsletter, the SCC Institute published a report (authored by Felipe Mutis Tellez) on its practices on challenges to arbitrators – 'Arbitrators' Independence and Impartiality: A Review of SCC Board Decisions on Challenges to Arbitrators (2010–2012)'.

the 'third arbitrator' (each party appoints one arbitrator), who will act as chairperson. The SCC Institute will also decide on the fees to the arbitrators and the SCC Institute will administer any requests for the extension of the time limit for the rendering of an award. Importantly, if there is a challenge to the arbitration agreement, the SCC Institute will take a *prima facie* decision on such a challenge (the SCC Institute's scrutiny is simplified in that the SCC Institute will only dismiss a case where its lack of jurisdiction is 'manifest', but the SCC Institute's scrutiny will still serve as something of a jurisdictional threshold).[7]

Party autonomy is a salient feature of all dispute resolution in Sweden, either before a court of law or before a Swedish arbitration panel. In arbitration, but not in litigation before the courts, parties have a great deal of discretion as to what procedures they wish to apply. Both in arbitration and in litigation before the courts, the parties have an almost absolute discretion as to what facts they wish to base their case on and what evidence, written as well as oral, they wish to rely on. In fact, judges and arbitrators are disallowed from basing their rulings on other facts than those the parties have chosen to rely on. However, arbitrators and, to a much lesser extent, judges, may sometimes be inquisitive and attempt to solicit facts from parties or witnesses. The only exception to the principle that it is solely for the parties to decide on what evidence to bring is with respect to expert witnesses. Accordingly, after consultation with the parties, both in litigation and arbitration, the court or the arbitral panel may decide to appoint one or more expert witnesses.

The courts and arbitrators are free to apply different legal rules and theories from those invoked by the parties as long as those rules or theories are applied only to such facts as have been presented by the parties. In other words, the principle of jura novit curia will apply. Under *jura novit curia* the judge or the arbitrator is presumed to be fully knowledgeable about the law and it is for the judge or arbitrator to apply such legal rules or theories as he or she deems relevant.

Unless differently instructed by the parties, the arbitrators will decide the case strictly according to law, and the principle of *ex aequo et bono* or other principles based on equitability will not apply.

Sweden is a civil law jurisdiction although case law, both with respect to procedural issues and to substantive issues, plays an important role, both before the courts and in arbitration.

ii Distinction between international and domestic arbitration law

Section 46 of the Swedish Arbitration Act stipulates that the Arbitration Act shall apply also in international arbitral disputes, provided that proceedings take place in Sweden. *Lex arbitri* is thus determined on the basis of the place, or seat, of the arbitration. Not only is it the case that Swedish law is deemed to be the *lex arbitri*, despite the principle

7 In its March 2013 Newsletter, the SCC Institute published a report (authored by Felipe Mutis Telles) on its *prima facie* decisions on jurisdictions in the years 2010 through 2012 – 'Prima facie Decisions on Jurisdiction of the Arbitration Institute of the Stockholm Chamber of Commerce: Towards Consolidation of a 'Pro-Arbitration' Approach'.

of party autonomy, as explained in the preparatory works of the Arbitration Act, the parties cannot derogate from Swedish law as *lex arbitri*.[8] In other words, Sweden as the place of arbitration is exclusively decisive. However, an important modification is suggested in the legal history, namely that the parties are free to replace such rules under the Arbitration Act that are not mandatory with other rules. Such other rules that the parties agree to contract in could of course be taken from foreign arbitration laws. Also, the parties are free, both in international and in domestic arbitration, to agree on the application of institutional rules (whether the SCC Rules or any other rules).

With respect to such issues that are not resolved, either by applicable institutional rules or in the Swedish Arbitration Act, and that are also not settled in case law or in applicable theses or other legal literature, in international arbitration it may be appropriate to apply foreign practices. However, before applying foreign procedural rules the arbitral panel should discuss the matter with the parties.

Notwithstanding Section 46 of the Swedish Arbitration Act, the international aspect of a dispute may warrant that, either on a case-by-case basis or within a certain field or with respect to a certain issue or matter,[9] Swedish rules are modified to take account of this aspect.

As noted above, in order to be arbitrable in Sweden, the disputed matter must be amenable to out-of-court settlement. However, it is clear both from the *travaux préparatoires*[10] and from case law[11] that an international dispute may be settled by arbitration in Sweden even if a corresponding domestic dispute could not have been resolved in the same manner.

What has now been said about the same rules applying, in principle, to international arbitration and domestic arbitration does not, however, mean that the distinction is without importance. In practice, although this is not a function of formal differences, an international arbitration may well play out differently in several respects from a domestic arbitration. For instance, the principle of *jura novit curia* may not be fully applied in an international arbitration or at least applied differently than in domestic arbitration. Another example of such differences that may exist between an international arbitration and a domestic arbitration is that in domestic arbitration the arbitral panel may sometimes be influenced by the Swedish Code on Judicial Procedure. This would only rarely, or never, happen in an international arbitration. However, procedural differences between an international arbitration and domestic arbitration are often explained by the fact that non-Swedish arbitrators, who will almost inevitably make up the majority of the arbitral panel in an international arbitration, come from different legal cultures and are accustomed to other rules and practices that may be different from domestic ones. Thus, it is more a question of traits of character than a formal or legal distinction.

8 SOU 1994:81, p. 304, the Government Bill 1998/99:35, p. 244.

9 One such field of the law which has been identified is with respect to discovery (see Heuman, 'Discovery in civil litigation and arbitration', *Juridisk Tidskrift 1989–90*, p. 4, see also the Supreme Court case NJA 2012 p. 289.

10 The Government Bill 1998/99:35, p. 50.

11 The Supreme Court case No. T 4982-11, NJA 2012 p. 790.

A not-infrequent situation in international arbitration organised under Swedish law as the *lex arbitri* is where foreign law shall govern the substantive issues and thus apply to the merits of the case. In cases where different national laws are to apply country X's laws on the merits and Swedish law on procedural issues, it may sometimes be disputed whether an issue is substantive or procedural. One such example is the question of interest, which in Sweden is deemed to be substantive, but which in other countries is considered to be procedural. As a general rule, when Swedish law is the *lex arbitri*, Swedish law will apply to the classification issue.

Sweden is a New York Convention state and although enforcement of foreign arbitration awards requires the assistance of the Swedish courts, the procedure is fast and efficient.

iii Structure of the courts

In Sweden, there are essentially three kinds of courts; general courts, which deal with both civil and criminal law cases; general administrative courts; and specialised courts, for instance, for labour, environmental and immigration law matters.

The general courts form a three-tiered system; district courts, appellate courts and the Supreme Court. Leave to review (*certiorari*) is required for all appeals, including from the district courts to the appellate courts.

As a general principle, with only a few exceptions, court proceedings are open to the general public and the parties' submissions are, generally, accessible by the general public. Exceptions would apply, for instance, to trade-secret information, however, this is always subject to a case-by-case assessment by the court.

The Swedish court system is 'arbitration friendly' in the sense that the courts may provide assistance in matters such as the hearing of arbitration witnesses (under oath) and by providing means of discovery,[12] however, always provided that the arbitral panel has first approved a party requesting such assistance from the courts. The general courts may also hear requests for interlocutory and interim measures, although the merits of the case are subject to arbitration. The appellate courts and, in rare cases, the Supreme Court will also hear challenges to an arbitral award.

iv Local institutions

Among arbitration institutes most Swedish institutional arbitrations are administered under the rules of the SCC Institute. The SCC Institute was established almost a century ago in 1917. It is a separate entity within the Stockholm Chamber of Commerce. In addition to its ordinary rules, which, at least hitherto, have been the most frequently used rules, the SCC Institute has also adopted rules on expedited arbitration, on emergency arbitration to decide interlocutory and preliminary matters, for insurance disputes, and on mediation.

The SCC Rules include, for instance, provisions on the commencement of proceedings, the composition of the arbitral panel, proceedings before the panel (such

12 An arbitral panel can encourage parties to disclose documents, but the panel can never order disclosure.

as rules on evidence, hearings and witnesses), awards (such as the limit for rendering an award) and costs of the arbitration.

v Trends and statistics

In 2014 the SCC Institute saw yet another strong year with a total caseload of 183 cases. 51 per cent of the new cases were international, while 49 per cent were domestic, emphasising the international nature of the cases handled by the SCC. Of the new cases, 62 per cent were registered under the SCC Rules and 27 per cent were cases under the SCC Rules for Expedited Arbitration. The remaining cases were related to mediation, administrative services for *ad hoc* arbitration and UNCITRAL cases. Parties came from 36 different countries. Russians continued to be the most frequent non-Swedish parties at the SCC, followed by parties from the UK, Germany, China and France.

The Committee (whose report is described in Section II, *infra*) made, as a part of their investigation, a survey of all challenges to arbitral awards from 1 January 2004 until 31 May 2014. In total 191 arbitral awards had been challenged during the period. Of these, 170 had been decided by the courts. The average turnover time in 2013 was approximately seven months until a judgment was rendered. In total, 10 arbitral awards were entirely or partially set aside by the Court of Appeal or the Supreme Court. The result quite clearly shows that the Swedish court system supports arbitration and does not set aside awards unless there is actual reason to do so.

The result also indicates that setting-aside proceedings are initiated from time to time for other reasons than an assessment that it is likely that the challenge will succeed, but instead perhaps to delay enforcement or to seek to obtain a favourable settlement. This is further reinforced by the fact that in several cases in the past few years, the Svea Court of Appeal has ordered counsel of the claimant in the challenge proceedings to be jointly responsible with the claimant for the costs of the challenge proceedings. It appears that the Court has set the bar relatively high when assessing whether counsel has acted with due care when the likelihood of the case's success is low.

II THE YEAR IN REVIEW

A committee chaired by the former Supreme Court Chairman, and well-known arbitrator, Johan Munck was appointed by the Swedish government and tasked with investigating potential improvements to the Swedish Arbitration Act. The Committee has now presented its report and presented a number of improvements and adaptations of the Swedish Arbitration which could be summarised as follows.

i Dual proceedings and challenges to awards

The Committee proposes that it shall no longer be possible to, at any time during the arbitral proceedings, initiate proceedings in the district court and challenge the arbitral tribunal's jurisdiction and seek a negative declaratory award to that effect. Currently, this is a possibility regardless of whether the arbitral tribunal has ruled on its own jurisdiction. The current model leads to a risk of costly and time-consuming dual proceedings if the arbitral proceedings continue and the award is rendered and then challenged before the court proceedings first initiated have been resolved. The Committee therefore proposed

that once arbitral proceedings have been convened, declaratory claims concerning the arbitral tribunal's jurisdiction may not be raised other than by a consumer. The arbitral tribunal's decisions concerning their jurisdiction taken during proceedings may instead be appealed to the Svea Court of Appeal within 30 days of receiving notice of the decision. The proposal is in line with the solution used in the Model Law.

A number of measures to further clarify and improve the challenge procedures are proposed. The Committee proposed that all challenge proceedings should be handled by one specific court of appeal (the Svea Court of Appeal), which is the court currently handling the by far the largest number of challenges. The Committee further proposes that applications for setting aside awards should be handled under the same rules that the court of appeal apply to appeals for grave procedural errors in the district court. The proceedings under such rules would be primarily in writing and less complicated than the rules currently applied, a hearing should, however, always be held if requested by any party. Finally, and perhaps the most significant change proposed in this respect: English can be used as the language of setting-aside proceedings if the involved parties agree to it. This includes that written submissions may be made in English, witness examinations may be made in English and written evidence be presented in English. The award and decisions made by the court should however be rendered in Swedish but the court should provide a courtesy translation if so requested.

The Committee further proposed certain amendments to the rules on when awards may be set aside.

In recent years the few cases where an award has been successfully set aside have in mostly been due to the arbitral tribunal exceeding their mandate (by basing the award on an argument not made by the parties). The Committee proposes that the relevant rule is clarified so that the test of whether the mandate has been exceeded shall be whether the circumstance(s) on which the arbitral award relied were introduced into the proceedings in such a way that the opposite party must have understood that it could constitute grounds for the award.

It is further possible to have an award set aside if, without fault of the party, an irregularity occurred in the course of the proceedings that probably influenced the outcome of the case. In practice the irregularity must be serious if the award is to be set aside, the Committee proposes that this is expressly included in the relevant provision of the Arbitration Act.

ii Terminology

To update the terminology in the Swedish Arbitration Act in line with the commonly used terminology, 'place' is replaced with 'seat' when describing where the legal seat of the arbitration is. It is necessary, but also sufficient, that the link between the arbitral proceedings and Sweden consists in the seat of arbitration being a location in Sweden for the Arbitration Act to be applicable to the proceedings. Thus, as before, the seat of the arbitration does not prescribe where actual hearings and so on should take place.

A provision concerning governing law is introduced. The current Arbitration Act does not contain any provision on how the arbitrators are to decide which substantive law to apply. The Committee proposes that an explicit rule is included codifying what has previously applied; namely that the arbitrators shall follow the parties' agreement

and in the absence thereof, taking account of the legal rules to which the dispute is most closely connected. The arbitral tribunal may only decide *ex aequo et bono* if the parties have expressly authorised it to do so.

iii Multiparty proceedings

The Committee proposes that a provision is included in the Arbitration Act making it possible to consolidate arbitral proceedings if both parties consent, the same arbitrators are appointed in all of the arbitral proceedings to be consolidated and that the arbitrators deem it advantageous for the arbitral proceedings in question. In addition to this the Committee proposes that the district court (or an arbitration institution if the parties have so agreed) should be empowered to appoint all arbitrators in multiparty proceedings if the parties opposite to the claimant cannot agree on the arbitrator.

iv Arbitrators' powers to order interim measures

The Committee also proposes that the arbitrators shall, if the arbitration agreement grants them that authority, be authorised to render decisions on security (interim) measures during the proceedings in the form of enforceable special awards.

III OUTLOOK AND CONCLUSIONS

Both the report from the Committee described in Section II, *supra* and a recent set of guidelines issued by the Svea Court of Appeal (see below) emphasise the arbitration-friendliness of the Swedish court systems and the support of the government in promoting arbitration as a preferred dispute resolution method.

The Svea Court of Appeal is the appeals court that handles most challenges of arbitral awards in Sweden, and if the Committee proposal is realised – all such cases. In particular, challenges to international arbitral awards are handled almost exclusively by this court. The internal guidelines issued by the Court after consultation with experienced arbitration practitioners are aimed at ensuring that cases are handled in an 'efficient and result-oriented' manner so 'final decision[s] can be rendered as soon as possible'.

The guidelines are divided into two parts. The first part of the guidelines considers some practical issues, while the second includes a step-by-step guide for an ordinary case. Of particular note is that the guidelines indicate that the Court will take a firmer grip on the timetable for each case.

Cases will be assigned to a reporting judge (who will be a judge of appeal) and a specific legal clerk, who will be responsible for the case until the final award. The judge will consult with the parties to decide a timetable for the case with the aim that this should be agreed no later than when the statement of defence has been submitted by the respondent.

The timetable will set the dates for a preliminary and final hearing, as well as a preliminary date for when the award will be rendered. Extensions will be granted very restrictively once the timetable has been agreed. In ordinary court cases in Sweden, the dates for the final hearing are often decided at a considerably later stage. Given the difficulty in finding hearing dates that suit all involved persons, this more 'arbitration-like'

approach from the Court with regard to scheduling should mean that unnecessary delays are avoided.

The guidelines emphasise the arbitration-friendly approach of the Swedish judicial system and provide guidance on how the court will handle challenge proceedings, which will be particularly useful for international parties.

Appendix 1

ABOUT THE AUTHORS

PETER SKOGLUND

Advokatfirman Delphi

Mr Skoglund has been a partner with Delphi since 1988. Mr Skoglund has almost 30 years' experience in commercial dispute resolution, both in litigation and arbitration, and he has served both as counsel and as an arbitrator. Mr Skoglund predominantly represents banks and finance companies and manufacturers of branded consumer goods. Mr Skoglund has tried six cases before the Swedish Supreme Court.

SVERKER BONDE

Advokatfirman Delphi

Mr Bonde has been a partner with Delphi since 2010. Mr Bonde heads the dispute resolution practice group in Delphi's Stockholm office. Sverker Bonde has more than 10 years of experience as counsel for Swedish and international clients in domestic and international commercial arbitrations and before Swedish courts. The often complex disputes have included, for instance, disputes related to M&A, contract manufacturing, general contracts disputes, directors, advisers' liability and product liability. Sverker Bonde also advises clients on general commercial contracts.

ADVOKATFIRMAN DELPHI

Regeringsgatan 30-32
PO Box 1432
111 84 Stockholm
Sweden
Tel: +46 8 677 54 00
Fax: +46 8 20 18 84
peter.skoglund@delphi.se
sverker.bonde@delphi.se
www.delphi.se