Revised rules for arbitration proceedings

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Commercial disputes are often resolved through arbitration proceedings rather than in court. People tend to say that the advantages of resolving a dispute by arbitration compared with court proceedings are that it is faster and more flexible, and also that arbitration proceedings are confidential.

In addition to the rules set out in the Swedish Arbitration Act (Sw. *Lag om skiljeförfarande*), rules from an arbitration institute are often used. In the case of Sweden, these are usually the rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the SCC). The SCC has established a number of different sets of rules for arbitration proceedings, the most important being the Arbitration Rules and the Expedited Arbitration Rules. The latter allow for more cost-efficient and faster resolution of disputes that are less complex.

The SCC's Board recently decided to revise both the Arbitration Rules and the Expedited Arbitration Rules. The revised versions will enter into force on 1 January 2017. These new rules will be applied to all arbitration proceedings initiated after that date, irrespective of when the contract containing the arbitration agreement was signed.

The new versions do not fundamentally change the rules, but are also not insignificant. The main changes are described below:

Improved management of complex disputes involving multiple parties and/or multiple contracts

The rules are being supplemented with provisions concerning how proceedings involving multiple parties and disputes involving multiple contracts are to be managed. Disputes that involve various different contracts between the same parties are common, and these different contracts frequently each contain an arbitration agreement. A new rule is now being introduced which gives the parties the right to make claims arising out of more than one contract in a consolidated arbitration, provided that the arbitration agreements are compatible with each other and the claims brought forward arise out of the same business transaction or series of transactions. The parties are to be given opportunity to comment on the proposal for a consolidated arbitration. The appropriateness of a consolidated arbitration will be assessed before a decision is taken by the SCC's Board. Note that the Board's decision is preliminary and that it is the arbitral tribunal in the case in question that has final discretion. Previously these situations were managed in roughly this way in practice, but it is now being incorporated into the rules – which provides greater certainty for such management, even if a party were to obstruct it.

It is not uncommon for disputes to also involve multiple parties on each side. Where group companies are involved on either side it can often be in the parties' interest to find a practical and effective solution, but if this is not in the interests of one of the parties then this party can effectively block such consolidated proceedings (joinder). The rules are now being supplemented with provisions concerning how and when additional parties may be joined to the arbitration. This can be done both by a party requesting that an additional party is to be joined to the opposing side in proceedings that are under way, or by two parallel sets of proceedings that are under way being consolidated. Once again, it is the Board that makes a preliminary decision once the parties have been given an opportunity to comment. In these cases, too, the Board must consider whether the arbitration agreements are compatible, whether the claims arise out of the same business

transaction or series of transactions and whether it is appropriate. If the SCC's Board takes the decision to consolidate certain cases, however, it is thereafter the respective arbitral tribunal that makes the final decision.

Incentives for faster proceedings

As mentioned, fast dispute resolution is a cornerstone of arbitration. Both the Arbitration Rules and the Expedited Arbitration Rules have therefore been updated with this in mind. One adjustment is that it is now incumbent upon, not only the SCC, but also the parties and the arbitral tribunal, to act in an efficient and expeditious manner when dealing with the case. To emphasise how important it is that the parties and the tribunal are committed to this, provisions have been introduced that allow these factors to affect the level of the arbitral tribunal's fees and allow the arbitral tribunal to consider these factors when determining how legal costs are apportioned.

Summary procedure option for issues of fact or law

Provisions that allow the arbitral tribunal to decide issues of fact or law using a summary procedure. This provision can be applied by the arbitral tribunal at the request of a party if (i) an allegation (of fact or law) that is material to the outcome of the case is clearly unfounded ("manifestly unsustainable"), or (ii) even if the facts alleged by the other party are assumed to be true, this could not result in the party succeeding in its claim, or (iii) if the arbitral tribunal otherwise considers it appropriate. The provision is intended to give the arbitral tribunal a tool for determining issues for which the resolution either seems given or will govern the final judgement, and where the issue is suitable for a decision using a summary procedure. Even in such a summary procedure the other party must be assured access to justice and be given an opportunity to present its arguments. One guesses that the provision will not be applied all that often, but that in situations where it is needed, it could be of great significance. Moreover, one can envisage that it will also frighten off parties from making unjustified allegations.

Allowing the tribunal to order security for legal costs

The Swedish starting point is that the losing party in arbitration must compensate the other party for its legal costs (cost of legal representation and other relevant expenses) and shall also be primarily responsible for the arbitral tribunal's fees and expenses as well as the fees to the SCC. It is already the case that, prior to the start of arbitration, the parties must provide security for the arbitral tribunal's fees and expenses and for the SCC's fees, but not for the other party's legal costs. Provisions are now being introduced into the rules that allow the arbitral tribunal to make decisions stating that the claimant (or counterclaimant) must provide security for the respondent's legal costs. For the arbitral tribunal to be able (but not obliged) to do this, it must be an exceptional situation. When assessing such a request from the respondent side, the arbitral tribunal must consider, among other things, the claimant's prospects of success in the dispute, the claimant's capacity to pay the respondent's legal costs if it loses and other relevant circumstances. If the arbitral tribunal decides that security is to be provided and such security is not provided, the arbitral tribunal may dismiss the claim or stay the case until such security is provided. We would guess that this possibility may give rise to a great many "disputes within disputes" and attempts to use procedural means in order to create an obstruction to the other side. There is no clear legal basis for an arbitral tribunal to have this right in Sweden and we therefore also guess that arbitral tribunals in disputes that are decided in Sweden will be cautious about applying the provision. Rules of this type are not particularly unusual in other countries around the world, so the provision may become more significant if the dispute is decided in another country, and applying the law of that country.

Administrative secretary

Provisions are now being introduced into the rules concerning the arbitral tribunal's use of a so-called administrative secretary. For a long time, arbitral tribunals have often – after obtaining approval from the parties – used an administrative secretary to support the tribunal in administrative matters. Often the administrative secretary is a fairly young lawyer. The provision makes it clear that this is an administrative function and that the person in question must not act as a "fourth arbitrator". A requirement is also being introduced that the administrative secretary – like the arbitral tribunal – must confirm that he or she is impartial and independent. If, in the course of the proceedings, a party assesses that the administrative secretary is not impartial and independent, a provision is being introduced that allows the party to request the removal of the administrative secretary from his or her position. The SCC's Board will examine such a request. If the administrative secretary is removed, the arbitration continues as before, but the arbitral tribunal may appoint a new secretary following approval by the parties.

Supplementary rules for arbitration proceedings under investment treaties

So-called investment disputes and how they are dealt with has been a big topic in the media in recent times. Criticism has been directed both at the protection afforded by investment treaties to foreign investors for their investments, and at the fact that the dispute resolution mechanism applied is "secret arbitration proceedings"

rather than public court proceedings. The transparency of such proceedings has increased in recent years, and one such proceeding was recently even streamed live in part. The SCC is one of the leading institutions in the world when it comes to dealing with investment disputes, particularly energy-related disputes. These disputes are dealt with in accordance with the SCC's standard Arbitration Rules, but an appendix to these is now being added that is applicable only in investment disputes. Among other things, the provisions being introduced allow third parties to apply to the arbitral tribunal for permission to make a submission in the case.

As we wrote at the beginning, these are not revolutionary changes, but mainly a refining of the rules with a focus on effective case management. The SCC's turnaround times are already relatively short compared with other institutions. These adjustments should mean that turnaround times continue to be kept short – which in turn typically leads to costs being kept down.

In the first quarter of 2017 Delphi's dispute resolution team will hold a breakfast seminar on arbitration proceedings in Sweden, with a particular focus on the adjustments in the rules. Invitations will be sent out at a later date, but if you would already like to register your interest you can email one of us – you will find our contact details at delphi.se.

If you have any other questions concerning the revised rules or concerning arbitration and dispute resolution in general, please do get in touch with your regular contact at Delphi or with one of us.