Delphi

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Mediation in Sweden, a viable alternative

The starting point for mediation in commercial disputes is that the parties themselves are in the best position to resolve the dispute, instead of entrusting it to an arbitrator or a judge. In this way, the parties retain control over their conflict, thus increasing the opportunities to reach a flexible solution. In this article we will briefly review the alternatives offered by the public courts in Sweden when a dispute already has emerged. We will also describe the possibility of using the Mediation Act at an early stage and briefly review the new mediation rules of the Stockholm Chamber of Commerce. We will also highlight a number of reasons to choose mediation as a dispute resolution alternative in Sweden. Finally, we will try to answer the question why mediation is not (as of yet) more widespread in Sweden.

Negotiated settlement at general courts

When a dispute already has been brought before the District Court, the court has a duty to encourage the parties to settle, if this is not unsuitable, with regard to the nature of the case and other circumstances.[1] The purpose is naturally to spare the parties unnecessary litigation costs when a settlement could have been reached. The question of settlement will almost always arise during the preparation of the case, often by the judge raising the matter during the oral preparatory hearing and then, if the parties show interest, conducting settlement negotiations. Such negotiations cost the parties no more than the time for any counsel engaged during the negotiations. Different courts and, above all, different judges have varying approaches to conducting the settlement negotiations. Certain judges are perhaps satisfied with a short question as to whether the parties wish to settle, whilst others are more active in their efforts to achieve settlement and schedule specific settlement conferences to this end.

Special mediation at general courts

The court also has the possibility to order special mediation instead of independently trying to get the parties to settle. Special mediation means that an independent mediator is appointed by the court with the purpose of settling the dispute. Formally, this is a possibility for all types of commercial disputes which the parties can settle but it is argued that the method is more suitable as regards large or technically complex cases. The special mediation can relate to the entire dispute or to a limited part of it. A precondition for special mediation is, however, that the parties consent to the proceedings. One or both of the parties may also apply to the court for an order of special mediation.

[1]See chapter 42, section 17 of the Procedural Code. For litigation in the Court of Appeal, chapter 50, section 11 of the Procedural Code applies.

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What are the reasons then to add further costs to a court case by attempting to mediate when the question of settlement has often been unsuccessfully aired prior to the parties deciding to start the dispute?

One reason to consent to special mediation might be that the parties would like to invoke other circumstances than those concerning the dispute. Sometimes, the issue which might bring the parties to settle lies outside the scope of the dispute and a mediator is not bound in the same way as a judge. The dispute is perhaps just the "tip of the iceberg" in a complex business relationship and the parties may therefore want the mediation to comprise other aspects than those relating directly to the dispute at hand.

Another reason for choosing special mediation is that the parties can have a mediator appointed, who has certain knowledge or experience, relevant to the parties. There is no formal requirement as to who the court may appoint, but consideration should be taken of the parties' wishes. In a technically complicated dispute, the parties may prefer to have an experienced building engineer as a mediator, as opposed to a retired judge.

As a rule, the cost of the special mediator is shared by the parties. The costs consist of the mediator's time for studying the material and conducting the actual mediation. The practical conduct of the mediation is a matter over which the particular mediator decides. At the same time as the court orders special mediation it must also set out a period of time during which the mediation must be concluded. The period allocated must reflect the scale of the dispute and its complexity and may be extended if there are particular reasons for doing so. The aim is, in other words, that the mediation does not become too protracted. If mediation is not successful, it should still be possible to determine the case within a reasonable time.

In order to raise awareness of special mediation, the matter is currently included in the educational programme for judges. The Swedish courts have compiled, at the behest of the government, a list of persons who are willing to undertake mediation assignments in dispositive disputes. The courts wish for more candidates to enlist as mediators.

Mediation prior to court action or before commencement of arbitration

For parties who have not yet ended up in the courts or arbitration, there is a possibility of independently engaging a mediator to handle the emerged conflict. In those cases, where a continued commercial relationship is important for the parties, it may be advantageous to try to solve the situation which has arisen at an early stage, rather than bringing out the big guns in the form of bringing a claim or calling for arbitration. This may be conducted on an ad hoc basis or by using the Mediation Act or the rules of a mediation institute.

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The Act (2011:860) on Mediation in Certain Private Law Disputes, i.e. the Mediation Act, entered into force on 1 August 2011 and is based on an EU Directive. The prospect was that the Act would increase confidence in mediation as a dispute resolution method, improve the mediation climate and otherwise raise interest in mediation. The most important provisions in the Mediation Act are the following. The mediator has a duty of confidentiality so that the parties do not need to draw up a specific confidentiality agreement. Mediation under the Mediation Act also entails that limitation periods are stayed during ongoing mediation ("stopping the clock"). The Mediation Act also contains provisions allowing the parties, if they so wish, to go to the court to make the mediation agreement enforceable. By way of these provisions, the legislator hopes that mediation will be more widely used in Sweden.

New mediation rules of Stockholm Chamber of Commerce

The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) has specific rules on the conduct of mediation. These rules have now been adapted to the Mediation Act and the amendments entered into force on 1 January 2014.

What is unique about the SCC's mediation rules is that the parties can get a mediation agreement transformed to an arbitration by the mediator being appointed by the parties as arbitrator and thus being mandated to make the mediation agreement enforceable by arbitration. Otherwise, a mediation agreement does not prevent action being brought or arbitration being commenced.

The SCC itself asserts that the advantages of their mediation rules are that mediation is fast (the mediator must complete his/her assignment within two months) and that it is cost effective. It also asserts that both parties gain when the result is a consensual solution, which means that the business relationship often can be maintained and that the outcome can be recorded in an enforceable arbitration and that third party confidentiality is maintained.[2]

If you are currently involved in contractual negotiations and are considering whether mediation may be an alternative dispute resolution method, it is good to know that the SCC has also drawn up a model clause for mediation. SCC's model mediation clauses are available in both English and Swedish and may be found here:

Concluding comments

We have reported above on a couple of mediation alternatives available in Sweden. The clear advantage, from our point of view, is that mediation – if successful – saves both money and time for the parties. A good mediator also has the ability to broaden the discussion beyond the law and give the parties the chance to reach a flexible solution. By not protracting a dispute but instead working proactively and focusing on reaching a solution, it is reasonable to assume that this will benefit the continued business relationship. But if mediation is so good, why is it not used more often? Are there any reasons for this or is it simply a matter of time?

[2]See the Arbitration Institute of the Stockholm Chamber of Commerce's website www.sccinstitute.se/medling.

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According to the mediators and lawyers with whom we have spoken, Sweden lags behind in this respect. Mediation is used to a greater extent in mainland Europe and is a well-used tool in the USA. The reason Sweden has not adopted the mediation trend may depend on established values of avoiding disputes for as long as possible. The traditional starting point in Swedish industry not so long ago was not to enter into a dispute with parties with whom the relationship was important or for whom confidence was strong – unless the dispute was justified by major financial interests or matters of principle. There was a time when the large industrial companies did not, as a matter of principle, dispute with their customers unless this could not be avoided. This can be compared with the American attitude whereby one, at a much earlier stage, begins a dispute in order to move forward in a business relationship. If the starting point is not to enter into a dispute unless it is absolutely necessary, the scope for mediation contracts for obvious reasons because disputes as a rule only arise in cases where there is a lot of money at stake or matters of important principle must be solved. When the parties, following careful consideration, already have entered into a dispute, the matter of costs etc. is not as decisive.

If the tendency to litigate increases in line with the impact of trends from the continent and the USA, the opportunities presented by mediation ought to become more apparent in Sweden as well. Our suggestion is therefore to keep the mediation alternative in mind – it may be the future solution to your dispute even in Sweden.

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