

# ARBITRATION IN SWEDEN

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# 1. Introduction

## 1.1 The Swedish Arbitration Act 1999

1.1.1 On 1 April 1999 the present Swedish Arbitration Act (**Swedish Arbitration Act**)<sup>1</sup> came into force. Although Sweden did not formally adopt the Model Law (1985),<sup>2</sup> it was an important source of inspiration when drafting the Swedish Arbitration Act. As a result, the Swedish Arbitration Act, to a great extent, contains identical or similar provisions to the Model Law (1985). Accordingly, the Swedish Arbitration Act should not present any major surprises. However, there are some features which deviate from the Model Law (1985).

## 1.2 Historical background

1.2.1 Arbitration in Sweden has a long tradition which goes back to the 14th century when it was established that disputes could be submitted to so-called “entrusted persons”. In the 1734 Statute Book, the Swedish Enforcement Code contained a provision on arbitration to the effect that if parties had referred a dispute to entrusted persons, and agreed to abide by their decision, such a decision was enforceable.

1.2.2 The first comprehensive arbitration act was adopted in 1887. Subsequently, a new arbitration act came into force in 1929. As a result of Sweden’s accession to the 1923 Geneva Protocol and the 1927 Geneva Convention, the Swedish legislature also enacted the Foreign Arbitration Agreements and Awards Act.<sup>3</sup>

1.2.3 Consequently, it was not until the 1990s that the arbitration legislation was thoroughly revised. This revision resulted in the present Swedish Arbitration Act which came into force from 1999. One reason for the revision was the fact that, since the 1970s, Sweden had become a significant venue for cross border arbitration, primarily with parties from the USA on one side, and parties from the Soviet Union on the other. Sweden has since managed to maintain this “East-West” position. Today Sweden remains a popular choice as the seat of arbitration with many parties from Russia, Ukraine and the People’s Republic of China when negotiating the terms of an arbitration agreement with counterparties from the USA, Canada and Western Europe.

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<sup>1</sup> The Swedish Arbitration Act of 1999, SFS 1999:116.

<sup>2</sup> For the full text of the Model Law (1985), see CMS Guide to Arbitration, vol II, appendix 2.1.

<sup>3</sup> The Act Concerning Foreign Arbitration Agreements and Awards of 1929, SFS 1929:147.

## 2. Scope of application and general provisions of the Swedish Arbitration Act

### 2.1 Sources of law

- 2.1.1 Sweden is a civil law jurisdiction and as such, the primary sources of law are statutes. If the legislation does not provide a sufficient answer, preparatory works (*travaux préparatoires*) and scholarly writings are taken into consideration as secondary sources of law.
- 2.1.2 The preparatory works relevant when interpreting the Swedish Arbitration Act consist of the Committee Report, *Statens offentliga utredningar*,<sup>4</sup> as well as the Government Bill.<sup>5</sup> However, it should be noted that the importance of these preparatory works has gradually diminished in recent years.
- 2.1.3 In Sweden the decisions of higher courts are not, in the formal sense, binding on lower courts. However, in practice, the judgments and decisions made by the Swedish Supreme Court are followed. The most important decisions from the Supreme Court appear in a publication called "*Nytt Juridiskt Arkiv*".
- 2.1.4 The revisions of the Model Law (1985) and the UNCITRAL Arbitration Rules (1976),<sup>6</sup> and the development of the different sets of IBA Guidelines concerning arbitration, as well as the rules and policies of the Arbitration Institute of the Stockholm Chamber of Commerce (**SCC**) and other major arbitral institutions, have all influenced the development of Swedish arbitration law. Such soft law sources have also been explicitly considered in case law when interpreting the Swedish Arbitration Act.<sup>7</sup>

### 2.2 Scope of application

- 2.2.1 The Swedish Arbitration Act applies to arbitral proceedings commenced after 1 April 1999. This includes arbitral proceedings commenced after 1 April 1999 where the parties entered into an arbitration agreement prior to this date.

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<sup>4</sup> SOU 1994:81.

<sup>5</sup> Proposition 1998/99:35.

<sup>6</sup> For the full text of the UNCITRAL Arbitration Rules (1976), see CMS Guide to Arbitration, vol II, appendix 3.1.

<sup>7</sup> *Jilkén v Ericsson* NJA 2007, p 841.

- 3.2.2 The Swedish Arbitration Act applies equally to domestic and international arbitration, provided that the seat of arbitration is Sweden.<sup>8</sup> Moreover, certain provisions of the Swedish Arbitration Act apply even if the seat of arbitration is outside Sweden, for example, the provisions regarding the recognition and enforcement of foreign awards in Sweden.<sup>9</sup>

## 3. The arbitration agreement

### 3.1 Formal requirements

- 3.1.1 Under Swedish law an arbitration agreement is, as a general rule, not considered any different from other agreements in respect of its validity. Thus, the arbitration agreement must not be tainted by duress, fraud, mistake or any other circumstances which may make it void under the ordinary rules of contract law.

- 3.1.2 No particular form is required as regards the arbitration agreement. This means that oral arbitration agreements are also legally binding and accepted. However, practically all arbitration agreements are in written form, either as a dispute resolution clause in a general business contract or, more rarely, entered into separately by the parties once a dispute has emerged.

- 3.1.3 The parties must have the legal capacity to conclude an arbitration agreement, i.e. if a party is a corporation, it must be properly constituted and validly represented.

- 3.1.4 There must not be any circumstances leading to the enforcement of the arbitration agreement being considered “unreasonable”.<sup>10</sup> In exceptional cases, the arbitral tribunal or a court may set aside or amend an arbitration agreement if it is deemed unfair, this might be the case if one party is in a disproportionately strong negotiating position relative to a much weaker counterparty.

### 3.2 Arbitrability

- 3.2.1 The subject matter of the dispute must be “arbitrable”, i.e. it must be capable of settlement by arbitration under the laws of Sweden.<sup>11</sup> Arbitrability is governed by Swedish law, even when foreign law is applied to the arbitration agreement or to the merits of the case.<sup>12</sup> Certain disputes, for example, the registration and validity

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<sup>8</sup> Swedish Arbitration Act, s 46.

<sup>9</sup> *Ibid*, s 52–60.

<sup>10</sup> Swedish Contracts Act, s 36.

<sup>11</sup> Swedish Arbitration Act, s 1(1).

<sup>12</sup> *Ibid*, s 49(2).

of patents and trademarks, questions of punishment and forfeiture, as well as family and criminal law matters, are non-arbitrable under Swedish law.

### 3.3 Separability

3.3.1 The jurisdiction of an arbitral tribunal depends on the existence of a valid arbitration agreement. Such an agreement is often incorporated by the parties in their general business contracts. If the parties have done so, the question may arise as to what influence any alleged invalidity of the general business contract will have on the arbitration clause and the arbitral tribunal's powers. Under the doctrine of separability, where the validity of an arbitration agreement which constitutes part of another agreement must be determined, the arbitration agreement shall be deemed to constitute a separate agreement.<sup>13</sup> Thus, even though the main agreement may be invalid, this does not automatically affect the validity of the arbitration clause. In practice this means that the arbitration clause is considered a separate agreement from the main contract. This safeguards the efficiency of the arbitral proceedings and allows the issue of the validity of a contract containing an arbitration clause to be submitted to arbitration.

## 4. Composition of the arbitral tribunal

### 4.1 The constitution of the arbitral tribunal

4.1.1 The statutory framework for appointing arbitrators is, to a large extent, non-mandatory. It can, therefore, be modified or replaced by the parties by, *inter alia*, express appointment provisions in the arbitration agreement, for example, by referring to the rules of any arbitral institution (e.g. the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (**SCC Rules**)<sup>14</sup>) or by designating an appointing authority.

4.1.2 The parties are free to appoint one or more arbitrators, and to determine the manner in which they are appointed.<sup>15</sup> However, sole arbitrators are normally only appointed in minor and less complicated matters. For example, the SCC has developed a specific set of rules for expedited arbitrations, the Rules for Expedited Arbitrations of the Arbitration Institute of the Stockholm Chamber of Commerce (**SCC Expedited Rules**).<sup>16</sup> Pursuant to the SCC Expedited Rules, the arbitral

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<sup>13</sup> *Ibid*, s 3.

<sup>14</sup> For the full text of the SCC Arbitration Rules, see CMS Guide to Arbitration, vol II, appendix 3.13.

<sup>15</sup> Swedish Arbitration Act, s 1(1) and 12(1).

<sup>16</sup> For the full text of the SCC Expedited Rules, see [<http://www.sccinstitute.com/forenklade-regler-2.aspx>] (last accessed on 2 December 2011).



tribunal always consists of a sole arbitrator appointed either by the parties jointly or by the SCC.<sup>17</sup>

- 4.1.3 Unless the parties have agreed otherwise, the arbitral tribunal shall consist of three arbitrators, of which each party shall appoint one and the party-appointed arbitrators shall appoint the third to be the chair of the arbitral tribunal.<sup>18</sup>
- 4.1.4 The first party shall notify the opposing party of its choice of arbitrator in its request for arbitration.<sup>19</sup> The receipt of such notice triggers an obligation for the opposing party to notify the first party of its choice of arbitrator in writing within 30 days.<sup>20</sup> If the opposing party fails to appoint an arbitrator within this timeframe, the District Court shall appoint an arbitrator at the request of the first party. Another alternative for the first party is to abandon arbitration and bring the dispute before a state court.<sup>21</sup> A valid arbitration agreement is normally a bar to the jurisdiction of the courts, but this does not apply when the other party has failed to properly appoint an arbitrator.
- 4.1.5 Should the party-appointed arbitrators fail to appoint the third arbitrator, i.e. the chair of the arbitral tribunal then, within 30 days from the date on which the last arbitrator was appointed, any party may apply to the District Court to make such an appointment.<sup>22</sup>

## 4.2 Qualifications of arbitrators

- 4.2.1 Under Swedish law, any person who enjoys full age and capacity with regard to his or her actions and property may act as an arbitrator.<sup>23</sup> Consequently, an arbitrator must be of full age and cannot have a trustee or be bankrupt.
- 4.2.2 Under the Swedish Arbitration Act, an arbitrator must be impartial.<sup>24</sup> For proceedings under the SCC Rules a person acting as arbitrator must also be independent.<sup>25</sup> Even though the Swedish Arbitration Act does not expressly refer to independence, this requirement is generally deemed to be implied in the impartiality obligation.

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<sup>17</sup> SCC Expedited Rules, art 12, 13(1) and 13(2).

<sup>18</sup> Swedish Arbitration Act, s 13.

<sup>19</sup> *Ibid.*, s 19(2) and 19(3).

<sup>20</sup> *Ibid.*, s 14(1).

<sup>21</sup> *Ibid.*, s 5(2).

<sup>22</sup> *Ibid.*, s 15(1).

<sup>23</sup> *Ibid.*, s 7.

<sup>24</sup> *Ibid.*, s 8(1).

<sup>25</sup> SCC Rules, art 14(1).

4.2.3 An arbitrator can be discharged at the request of one of the parties if there are circumstances which may diminish confidence in the arbitrator's impartiality. Under the Swedish Arbitration Act, such circumstances include:

- where the arbitrator, or a person closely associated to the arbitrator, is a party to the dispute;
- where the arbitrator, or a person closely associated to the arbitrator, may expect to benefit or suffer detriment worth attention as a result of the outcome of the dispute;
- where the arbitrator, or a person closely associated to the arbitrator, is the director of a company or any other association which is a party, or otherwise represents a party or any other person who may expect to benefit or suffer detriment worth attention as a result of the outcome of the dispute;
- where the arbitrator has taken a position in the dispute, as an expert or otherwise, or has assisted a party in the preparation or conduct of its case in the dispute; or
- where the arbitrator has received or demanded compensation in violation of Section 39(2) of the Swedish Arbitration Act.<sup>26</sup>

4.2.4 There are also other situations when an arbitrator might be disqualified, as established under Swedish case law.<sup>27</sup>

4.2.5 Both the Swedish Arbitration Act and the SCC Rules impose on arbitrators an express disclosure obligation to the parties in respect of any circumstances which, pursuant to Sections 7 or 8 of the Swedish Arbitration Act, may prevent him or her from serving as an arbitrator. This obligation starts when the arbitrator is approached with the assignment and lasts throughout the entire arbitral proceedings.<sup>28</sup> In borderline cases, the failure to disclose relevant circumstances may be a factor to take into account when assessing whether an arbitrator is impartial or not.

### 4.3 Procedure for challenging arbitrators

4.3.1 A challenge to an arbitrator must be presented to the arbitral tribunal (or the SCC for SCC proceedings) within 15 days of the date on which the party became aware

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<sup>26</sup> Swedish Arbitration Act, s 8(2).

<sup>27</sup> See *Jilkén v Ericsson* NJA 2007, p 841, where the Swedish Supreme Court (**Supreme Court**) addressed several questions concerning the impartiality of arbitrators, ultimately finding that there were justifiable doubts as to the arbitrator's impartiality since he was a part-time consultant with a law firm which had Ericsson as one of its major clients. Further, see *Korsnäs Aktieföretag v AB Fortum Värme samägt med Stockholms stad* NJA 2010, p 317, where the Supreme Court held that an arbitrator appointed by the same law firm on repeated occasions did not cause sufficient doubts as to the arbitrator's impartiality to be raised because, *inter alia*, the majority of his appointments came from other law firms.

<sup>28</sup> Swedish Arbitration Act, s 9.

both of the appointment of the arbitrator and of the existence of the circumstances forming the grounds for the challenge.<sup>29</sup>

- 4.3.2 A challenge in an ad hoc arbitration is adjudicated by the arbitral tribunal, unless the parties have decided that it shall be determined by another party, for instance an arbitral institution such as the SCC.<sup>30</sup>
- 4.3.3 If a challenge is sustained, the decision is not subject to appeal. However, a party that is dissatisfied with a decision not leading to the removal of an arbitrator may file an application with the District Court that the arbitrator should be released from his or her post. Such an application must be submitted within 30 days of the date on which the party receives the decision.<sup>31</sup> The arbitral tribunal may continue with the arbitral proceedings pending the determination of the District Court.
- 4.3.4 In an SCC arbitration, any challenge to an arbitrator is decided by the SCC Board.<sup>32</sup> Decisions of the SCC Board are final and not subject to appeal. The SCC normally does not publish the reasons for its decisions regarding challenges but does publish articles containing statistics and the outcome in anonymous challenge cases on a regular basis.

#### *Replacement of arbitrators*

- 4.3.5 If an arbitrator resigns or is discharged, a new arbitrator will be appointed by the District Court at the request of one of the parties, unless they have agreed otherwise.<sup>33</sup> Where the arbitrator cannot fulfil his or her duties due to circumstances which arise after his or her appointment, the person who was originally required to make the appointment shall do so according to the procedure set out in Sections 14 and 15 of the Swedish Arbitration Act, i.e. the same procedure as was applied when appointing the original arbitrator.
- 4.3.6 If an arbitrator is removed in an SCC arbitration, the SCC Board shall appoint a new arbitrator unless the arbitrator being replaced was a party-appointed arbitrator in which case, provided the SCC Board deems it appropriate, the appointing party shall appoint the new arbitrator.<sup>34</sup>

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<sup>29</sup> *Ibid.*, s 10(1) and SCC Rules, art 15(2).

<sup>30</sup> Swedish Arbitration Act, s 11.

<sup>31</sup> *Ibid.*, s 10(3).

<sup>32</sup> SCC Rules, art 15(4).

<sup>33</sup> Swedish Arbitration Act, s 16.

<sup>34</sup> SCC Rules, art 17(1).

4.3.7 Where an arbitrator has been replaced, the newly composed arbitral tribunal shall, after consultation with the parties, decide whether, and to what extent, the arbitral proceedings are to be repeated. In SCC cases there is the possibility to proceed with a “truncated tribunal” in order to avoid unnecessary loss of time and increased costs.<sup>35</sup> Before the SCC Board makes its decision, the parties and the arbitral tribunal have the opportunity to submit comments to the SCC Board on whether to proceed with the arbitration.

## 5. Jurisdiction of the arbitral tribunal

### 5.1 Competence to rule on jurisdiction

5.1.1 Swedish arbitration law recognises the well known principle of *competence-competence* whereby the arbitral tribunal has the authority to rule on its own jurisdiction.<sup>36</sup> This rule empowers the arbitral tribunal to declare itself authorised to conduct the arbitral proceedings and to make an award in the dispute, or to rule that it lacks jurisdiction and to dismiss the dispute.

5.1.2 If the arbitral tribunal finds that it lacks jurisdiction, it shall dismiss the dispute through an award. A dissatisfied party may appeal such an award on its merits.<sup>37</sup> However, should the arbitral tribunal determine that it has jurisdiction, this is formally a decision (i.e. not an award). A decision is, as a general rule, not binding on either the parties or the arbitral tribunal. Accordingly, the arbitral tribunal may change its decision if new circumstances occur in the course of the arbitral proceedings.<sup>38</sup> Nonetheless, a decision on jurisdiction may become binding upon a party if that party is considered to have waived its right not to be bound by continuing to participate in the arbitral proceedings without properly objecting.<sup>39</sup> A party also has a right to bring a court action for the purpose of obtaining a final and binding judgment as to whether the arbitration agreement is valid and applicable.<sup>40</sup>

5.1.3 Thus, a state court can arrive at a different decision from the arbitral tribunal when it comes to the competence of the arbitral tribunal. The court’s determination of these matters is made in a judgment issued under the challenge procedure set out

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<sup>35</sup> *Ibid*, art 17(2).

<sup>36</sup> Swedish Arbitration Act, s 2(1).

<sup>37</sup> *Ibid*, s 27(1) and 36.

<sup>38</sup> *Ibid*, s 27(1) and 27(3).

<sup>39</sup> See Swedish Arbitration Act, s 34(2) and SCC Rules, art 31.

<sup>40</sup> Swedish Arbitration Act, s 2(1).

in Section 34 of the Swedish Arbitration Act, or in litigation where one party requests a declaratory judgment resolving issues of arbitrability, validity or the applicability of the arbitration agreement.<sup>41</sup>

## 5.2 Power to order interim measures

5.2.1 According to Swedish law, an arbitration agreement does not constitute a procedural impediment against a state court granting interim relief, such as freezing orders and other security measures.<sup>42</sup> In addition to the power of a state court to order interim measures,<sup>43</sup> the arbitral tribunal may, at the request of a party, order interim measures in the course of arbitral proceedings, unless the parties have agreed otherwise.<sup>44</sup> The arbitral tribunal may prescribe that the party requesting the interim measure must provide reasonable security for the damages the opposing party may incur as a result of such interim measure.<sup>45</sup>

5.2.2 A similar provision concerning the power to order interim measures is found in the SCC Rules.<sup>46</sup> In addition, the SCC introduced new provisions in 2010 concerning a so-called "emergency arbitrator".<sup>47</sup> This is an arbitrator appointed solely to order interim measures, either before arbitral proceedings have been commenced, or before a case has been referred to the arbitral tribunal deciding the subject matter of the case. The SCC shall seek to appoint an emergency arbitrator within 24 hours of the receipt of an application for the appointment, and the emergency arbitrator appointed shall, as a general rule, make his or her decision on interim measures within five days of the date on which the application was referred to the emergency arbitrator.<sup>48</sup>

5.2.3 Interim measures ordered by an arbitral tribunal, cannot be enforced in Sweden. If parties want to be able to enforce interim measures they will, therefore, have to apply to the courts for such interim relief. In this respect, Swedish law deviates from the fairly new provisions in the Model Law (2006) on the enforceability of interim measures made by an arbitral tribunal.<sup>49</sup>

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<sup>41</sup> See *RosInvest Co UK Ltd v The Russian Federation* Case No Ö 2301-09, 12 November 2010, where the Supreme Court set out the criteria for when such a declaratory judgment is permitted.

<sup>42</sup> Swedish Arbitration Act, s 4(3) and Swedish Code of Judicial Procedure (**Procedural Code**), ch 15, s 5.

<sup>43</sup> On which see further section 9.1 below.

<sup>44</sup> Swedish Arbitration Act, s 25(4).

<sup>45</sup> *Ibid.*

<sup>46</sup> SCC Rules, art 32.

<sup>47</sup> *Ibid.*, appendix II.

<sup>48</sup> *Ibid.*, appendix II, art 8(1).

<sup>49</sup> For the full text of the Model Law (2006), see CMS Guide to Arbitration, vol II, appendix 2.1.

## 6. Applicable law

### 6.1 Law governing the arbitration agreement

6.1.1 As a consequence of the doctrine of separability, the arbitration clause, in theory, is an independent agreement and may, therefore, be governed by the laws of a jurisdiction different from that governing the main contract. Under Swedish law, an arbitration clause is not automatically included within the scope of a choice of law clause that may be in the main contract.

6.1.2 Any law chosen by the parties will apply to the arbitration agreement. Naturally it is very unusual for the parties to include a different choice of law to apply to the arbitration agreement. Where the parties have not agreed on the law to apply to the arbitration agreement, the arbitration agreement shall be governed by the law of the country which, the parties have chosen as the seat of arbitration.<sup>50</sup> Consequently, if the parties have not selected any law to be applied to the arbitration agreement but have agreed on Stockholm as the seat of arbitration, then Swedish law will govern the arbitration clause, as well as issues regarding the validity and scope of the arbitration clause. If the parties have failed to agree upon the seat of arbitration, such decision will be made by the arbitral tribunal.<sup>51</sup> If the arbitration takes place under the SCC Rules, the SCC Board will determine the seat, unless the parties agree otherwise.<sup>52</sup>

### 6.2 Law governing the arbitral proceedings

6.2.1 Arbitral tribunals are subject to the national arbitration law in the territory in which the arbitral proceedings take place. This national law is the law of the seat of the arbitration (*lex arbitri*). Under Swedish law, the Swedish Arbitration Act governs arbitral proceedings which take place in Sweden, notwithstanding that the dispute that is the subject of those arbitral proceedings has an international connection.<sup>53</sup>

6.2.2 However, it must be noted that the Swedish Arbitration Act contains very few mandatory provisions which govern the conduct of the arbitral proceedings. The principle of party autonomy leaves ample room for the parties to agree on the conduct of the arbitral proceedings, or to refer to institutional rules, such as the SCC Rules, to supplement the Swedish Arbitration Act.

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<sup>50</sup> Swedish Arbitration Act, s 48(1).

<sup>51</sup> *Ibid*, s 22(1).

<sup>52</sup> SCC Rules, art 9 and 20(1).

<sup>53</sup> Swedish Arbitration Act, s 46.

### 6.3 Law governing the merits

6.3.1 Under Swedish arbitration law, and in light of the principle of party autonomy, the parties are free to select the law governing the merits of their dispute. Usually this is done by including a governing law clause in the contract (*lex contractus*). By way of contrast to the Model Law (1985), the Swedish Arbitration Act does not contain any rules explaining which law the arbitral tribunal shall apply when considering the substantive issues in dispute. However, for an arbitral tribunal sitting in Sweden, the Swedish conflict of law rules may serve as a starting point in the search for the applicable substantive law.

6.3.2 Where the parties have not made any choice of law and have chosen the SCC Rules, it is for the arbitral tribunal to determine the applicable law. In order to avoid having to identify and apply a specific conflict of laws system, the arbitral tribunal is permitted to decide which law to apply based on what it finds appropriate given the merits of the dispute.<sup>54</sup> This straightforward approach enhances the flexibility and efficiency of the arbitral proceedings since the arbitral tribunal does not need to use a two step method, i.e. to first determine the conflict of law system which applies and then find the applicable law. For arbitrations under the SCC Rules, Article 22 applies, which follows the principles set out above. Further, the arbitral tribunal will decide the dispute *ex aequo et bono* or as *amiable compositeur* only if expressly authorised to do so by the parties.<sup>55</sup>

### 6.4 Law governing the legal capacity of the parties

6.4.1 The important issue of legal capacity, i.e. whether the parties were appropriately authorised to conclude the agreement (for example, corporations must be properly constituted and validly represented), is decided by the local law of the entity in question (*lex corporacionis*). This law is typically the law of the country where the entity has been registered, provided that registration is required for the creation and existence of a legal entity. If registration is not required, the law of the place of the legal entity is normally applied. This conflict of law rule under Swedish law is also found in many other jurisdictions.<sup>56</sup>

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<sup>54</sup> SCC Rules, art 22(2).

<sup>55</sup> *Ibid*, art 22(3).

<sup>56</sup> K Hobér, *International Commercial Arbitration in Sweden*, OUP, 2011, p 78.

## 7. Conduct of proceedings

### 7.1 Commencing an arbitration

7.1.1 A party wishing to initiate arbitral proceedings does so by sending the proposed respondent a written “request for arbitration”, containing the following:

- an express and unconditional request for arbitration;
- a statement of the issue covered by the arbitration agreement which is to be resolved by the arbitrators; and
- if applicable, a statement regarding the party’s choice of arbitrator.<sup>57</sup>

7.1.2 The request for arbitration need not set forth any claims or state any grounds. However, the description of the matter in dispute shall provide the respondent with a sufficient basis to decide on the appointment of its arbitrator. As previously stated at paragraph 4.1.4 above, the time limit by which the respondent is to appoint an arbitrator commences on the day it receives the request for arbitration.

7.1.3 An SCC arbitration (if chosen by the parties) is commenced on the date when the SCC Secretariat receives a request for arbitration from the proposed claimant. This request shall include:

- a summary of the dispute and contact details of the parties and their counsel;
- details of the preliminary relief sought by the claimant;
- a copy or description of the arbitration agreement;
- any comments on the number of arbitrators and the seat of arbitration; and
- if applicable, the contact details of the arbitrator appointed by the claimant.<sup>58</sup>

7.1.4 In addition, the claimant shall, upon filing the request for arbitration, pay a registration fee to the SCC. Presently this fee is EUR 1,500.<sup>59</sup>

#### *Proof of notification*

7.1.5 As a general rule, service of the request for arbitration and the award must be received personally, i.e. by actual receipt of the document by a person duly authorised to receive it on behalf of the recipient. The burden of proof in this respect lies with the sender. Proper notification is a key issue when it comes to the enforcement of awards.<sup>60</sup>

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<sup>57</sup> Swedish Arbitration Act, s 19.

<sup>58</sup> SCC Rules, art 2.

<sup>59</sup> *Ibid*, appendix III, art 1.

<sup>60</sup> Swedish Arbitration Act, s 54(2). See also *Lenmorniioproekt OAO v Arne Larsson & Partner Leasing AB* Case No Ö 13-09, 16 April 2010, where the Supreme Court refused to enforce a Russian award due to unsatisfactory notice.



7.1.6 In SCC arbitrations, the SCC assumes the responsibility for serving the request for arbitration on the respondent once the request for arbitration has been filed and accepted by the SCC. Usually the SCC delivers the request for arbitration to the respondent either by registered mail if the respondent is domiciled in Sweden, or by courier service with confirmation of receipt if the respondent is domiciled abroad.

## 7.2 General procedural principles

7.2.1 The arbitral tribunal shall handle the dispute that is subject to the arbitral proceedings in a fair, impartial, practical and speedy manner.<sup>61</sup> Additionally, the arbitral tribunal shall act in accordance with the decisions of the parties insofar as there is no impediment from doing so. This ensures that the arbitration is guided by the principles of party autonomy, due process and equal treatment of the parties.

7.2.2 In Sweden it is considered of great importance that the arbitral procedure maintains its flexibility. The arbitral tribunal should always adapt the procedure to the circumstances of the individual case and aim to prevent a more detailed and formalised procedure than is regarded necessary in order to conduct a fair process.

7.2.3 Moreover, the role of the Swedish state courts is restricted to supporting the arbitral proceedings in those circumstances expressly provided for in the Swedish Arbitration Act, such as to assist in the composition of the arbitral tribunal or in the process of obtaining of evidence. This standpoint is often referred to as “the principle of non-intervention”.

## 7.3 Seat, place of hearings and language of arbitration

7.3.1 In an ad hoc arbitration taking place in Sweden, the arbitral tribunal determines the seat of arbitration if it has not been decided by the parties. Unless the parties have agreed otherwise, the arbitral tribunal may hold hearings and other meetings elsewhere in Sweden, or abroad.<sup>62</sup> The legal significance of the seat of arbitration has also been confirmed by case law.<sup>63</sup>

7.3.2 If the SCC Rules apply, the seat of arbitration is decided by the SCC Board, unless otherwise agreed by the parties.<sup>64</sup> In the event that the parties have not made any agreement concerning the seat of arbitration, the SCC will usually choose

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<sup>61</sup> Swedish Arbitration Act, s 21 and 24. See also SCC Rules, art 19(2).

<sup>62</sup> Swedish Arbitration Act, s 22(2).

<sup>63</sup> *RosInvest Co UK Ltd v The Russian Federation* Case No Ö 2301-09, 12 November 2010.

<sup>64</sup> SCC Rules, art 20(1).

Stockholm, unless another place is deemed more appropriate. Additionally, in SCC cases the arbitral tribunal may, after consultation with the parties, conduct hearings in a different location to the seat of arbitration.<sup>65</sup>

- 7.3.3 The language of the arbitral proceedings is decided by the arbitral tribunal, unless otherwise agreed by the parties. This applies to an ad hoc arbitration as well as an SCC arbitration.<sup>66</sup> Although the Swedish Arbitration Act does not include any specific provisions dealing with the power of the arbitral tribunal to decide the language of the arbitral proceedings, it is deemed to be implied from the arbitral tribunal's freedom to conduct the arbitral proceedings as it considers appropriate.<sup>67</sup>
- 7.3.4 In determining the language to use, the arbitral tribunal shall take into consideration all relevant circumstances, for example, the language that has been used by the parties in their business relationship and the language of the contract in dispute.

#### **7.4 Multi-party and multi-contract issues**

- 7.4.1 Multi-party and multi-contract issues are not addressed by the Swedish Arbitration Act. Such disputes primarily raise concerns when it comes to appointing arbitrators and the consolidation of cases.
- 7.4.2 Since the Swedish Arbitration Act does not contain any provisions concerning the appointment of arbitrators in multi-party arbitrations, the parties are recommended either to set out detailed provisions on how the arbitral tribunal shall be constituted in the arbitration agreement, or to refer to a set of institutional arbitral rules that provide the parties with a practical solution on how to establish the arbitral tribunal.
- 7.4.3 The SCC Rules provide that where there are multiple claimants or respondents and the arbitral tribunal is to consist of more than one arbitrator, the multiple claimants, jointly, and the multiple respondents, jointly, shall appoint an equal number of arbitrators. If either side fails to make such joint appointments, the SCC Board shall appoint the entire arbitral tribunal.<sup>68</sup> This rule exists to ensure that the parties are treated equally when the arbitral tribunal is established.<sup>69</sup> If the SCC Board appoints all of the arbitrators, neither of the parties may argue that they were discriminated against in the appointment process.

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<sup>65</sup> *Ibid*, art 20(2).

<sup>66</sup> *Ibid*, art 21(1).

<sup>67</sup> Swedish Arbitration Act, s 21.

<sup>68</sup> SCC Rules, art 13(4).

<sup>69</sup> See the case before the French *Cour de Cassation*: *Siemens AG and BKMI Industrienlagen GmbH v Dutco Consortium Construction Co*. *Revue de l'arbitrage* 1992, pp 470–472.

7.4.4 When it comes to consolidation, it is not considered possible under Swedish law to join arbitrations without the consent of all the parties involved. However, by referring to the SCC Rules, the chances of consolidation are somewhat improved. At the request of a party, the SCC Board may consolidate cases if the cases concern the same parties and the same legal relationship.<sup>70</sup> To date the SCC Rules do not provide for consolidation of cases with different parties, or for a new party to join a pending arbitration. In order for this to occur the parties must be in agreement.

## 7.5 Written submissions

7.5.1 The arbitrators shall afford the parties, to the extent necessary, an opportunity to present their cases in writing or orally.<sup>71</sup> Further, a party shall be given an opportunity to review all documents and all other materials pertaining to the dispute which are supplied to the arbitral tribunal by the opposing party or another person.<sup>72</sup>

7.5.2 As a general rule, the arbitral tribunal establishes a timetable for the arbitral proceedings at an initial stage of the proceedings. Within this timetable, the claimant shall state its claims in respect of the issues set out in its request for arbitration, as well as its evidence in support thereof. The respondent shall then state its position in relation to the claims and, likewise, its evidence in support.<sup>73</sup>

7.5.3 A statement of claim typically includes the following parts:

- prayers for relief;
- the facts of the issue stated in the request for arbitration; and
- the legal grounds in support of the prayers for relief.

7.5.4 The respondent's statement of defence typically includes:

- any objections concerning the jurisdiction of the arbitral tribunal;
- a statement whether, and to what extent, the claimant's prayers for relief are denied or admitted;
- any counterclaim or set-off;
- the facts of the issue; and
- the legal grounds supporting any counterclaim or set-off.

7.5.5 Under Swedish law, the prayers for relief are expected to be very specific in order that there is no doubt as to the award requested. The parties are also expected to

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<sup>70</sup> SCC Rules, art 11.

<sup>71</sup> Swedish Arbitration Act, s 24(1).

<sup>72</sup> *Ibid*, s 24(2).

<sup>73</sup> *Ibid*, s 23(1).

explain the legal grounds for each prayer for relief, i.e. referring to the legal notion and statutory provision on which they are based. The same applies to any counterclaim or set-off sought by the respondent.

- 7.5.6 Usually the documents and oral evidence on which the parties rely are submitted separately in a statement of evidence. Sometimes selected documents are already enclosed with the statements of claim and defence.
- 7.5.7 After the statements of claim and defence have been submitted they are usually followed by further submissions from both parties respectively (i.e. a reply to the statement of defence from the claimant and a rejoinder from the respondent). In some cases the parties also submit post-hearing briefs.

## **7.6 Oral hearings**

- 7.6.1 An oral hearing shall be held at the request of a party prior to the determination of an issue referred to arbitration, even if the arbitral tribunal considers it unnecessary.<sup>74</sup> This provision is non-mandatory and can be deviated from if the parties so wish, for example by referring to the SCC Expedited Rules, under which a hearing only takes place if the sole arbitrator considers it necessary.<sup>75</sup>
- 7.6.2 At the main hearing, witnesses are heard and factual as well as legal arguments are presented. Naturally, the length of any hearing varies depending on the complexity of the case. When deemed appropriate, the arbitral tribunal may arrange a preliminary hearing or a telephone conference to clarify some issues in the parties' submissions. Often this enhances the efficiency of the case management of arbitral proceedings.

## **7.7 Default**

- 7.7.1 A party shall be given an opportunity to review all documents and all other materials pertaining to the dispute which are supplied to the arbitrators by the opposing party or another person.<sup>76</sup> This is a fundamental principle when conducting arbitration in Sweden.
- 7.7.2 Where one of the parties, without valid cause, fails to appear at a hearing or otherwise fails to comply with an order of the arbitrators, such failure shall not prevent a continuation of the proceedings and a resolution of the dispute on the

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<sup>74</sup> *Ibid*, s 24(1).

<sup>75</sup> SCC Expedited Rules, art 27(1).

<sup>76</sup> Swedish Arbitration Act, s 24(2).

basis of the existing materials.<sup>77</sup> In the SCC Rules it is explicitly stated that a failure by the respondent to submit an Answer shall not prevent the arbitration from proceeding, providing of course that the respondent has been properly notified.<sup>78</sup>

- 7.7.3 If a party has been afforded an opportunity to present its case but has failed to avail itself of this opportunity without valid reason, the arbitrators may, therefore, determine the dispute based on the material presented to them.<sup>79</sup> However, where the arbitrators are of the opinion that a party had a valid reason, they should afford the party a new opportunity to present its case.
- 7.7.4 It may be noted that under the SCC Rules the arbitral tribunal may draw such inferences it deems appropriate if a party without good cause fails to comply with any provision of, or requirement under, the SCC Rules or any procedural order given by the arbitral tribunal.<sup>80</sup>
- 7.7.5 The arbitrators are not entitled to issue awards in default. This means that they are obliged to try the dispute substantively notwithstanding that one of the parties has failed to enter an appearance. There are no difficulties enforcing such an award in Sweden provided that the party against whom the award is invoked was given proper notice of the arbitration proceedings. The same applies to recognition and enforcement of foreign arbitral awards.<sup>81</sup>

## **7.8 Amendments of claims**

- 7.8.1 The parties are entitled to file new claims, or to amend or supplement their respective claims. The presumption is that the arbitral tribunal should be generous in allowing new claims or amendments, as long as they fall within the scope of the arbitration agreement and, taking into consideration the time at which they are submitted to the arbitral tribunal, the arbitral tribunal does not consider it inappropriate to adjudicate such claims or amendments.<sup>82</sup> It should be noted that, under the SCC Rules, the arbitral tribunal shall declare the arbitral proceedings closed when it is satisfied that the parties have had a reasonable chance to present their cases.<sup>83</sup>

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<sup>77</sup> *Ibid.*, s 24(3).

<sup>78</sup> SCC Rules, art 5(3).

<sup>79</sup> *Ibid.*, art 30(2).

<sup>80</sup> SCC Rules, art 30(3).

<sup>81</sup> Swedish Arbitration Act, s 54(2).

<sup>82</sup> *Ibid.*, s 23(2).

<sup>83</sup> SCC Rules, art 34.

## **7.9 Evidence generally**

- 7.9.1 There are very few rules of evidence in Swedish arbitration law. Consequently, it is unusual for the arbitral tribunal to reject evidence on the grounds that it is inadmissible. The arbitral tribunal has the right and duty to freely evaluate all of the evidence presented by the parties. In general, the parties' evidence is presented by means of the production of documents, hearing of witnesses, hearing of experts and inspection of the subject matter of the dispute. The arbitral tribunal may refuse to admit evidence which is manifestly irrelevant to the arbitral proceedings or where such refusal is justified having regard to the time at which the evidence is submitted.<sup>84</sup>
- 7.9.2 The arbitral tribunal may itself appoint experts, unless both parties oppose. The arbitral tribunal may not administer oaths or truth affirmations. Nor may it impose conditional fines or otherwise use compulsory measures in order to obtain evidence.<sup>85</sup>
- 7.9.3 In arbitral proceedings in Sweden, the parties are generally requested to submit a statement of evidence. This is a document indicating the evidence on which the respective parties intend to rely. This practice emanates from the rules of Swedish civil procedure. A statement of evidence includes the name of a witness or an identified document, and what the parties intend to prove with each item of evidence, i.e. the so-called "evidentiary theme". The purpose of this statement is for the opposing party to be able to assess the need for cross-examination and rebuttal evidence.
- 7.9.4 Under Swedish arbitration law the arbitral tribunal may, at the request of a party, order the opposing party to produce documents in its possession. Although express provisions of the arbitral tribunal's power in this regard are lacking in the Swedish Arbitration Act, guidance can be found in the Procedural Code and the SCC Rules (where applicable).<sup>86</sup>
- 7.9.5 When a party asks for documents which are in the other party's possession, the document and its relevance must be properly identified and described. Hence, the Swedish approach is different from the discovery procedure practiced in common law jurisdictions. Although the arbitral tribunal's decision on the production of documents cannot be enforced, if a party fails to comply with its decision the arbitral tribunal may attach negative evidentiary weight to such behaviour.

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<sup>84</sup> Swedish Arbitration Act, s 25(2).

<sup>85</sup> *Ibid*, s 25(3).

<sup>86</sup> Procedural Code, ch 38, s 2 and SCC Rules, art 26(3).

7.9.6 The IBA Rules on the Taking of Evidence in International Arbitration (**IBA Rules**) are applicable to arbitral proceedings in Sweden only if the parties have so agreed. However, even though not directly applicable, the IBA Rules often serve as a guide on how to conduct the taking of evidence in an efficient and reasonable manner.<sup>87</sup>

## 7.10 Confidentiality

7.10.1 The issue of confidentiality is not addressed by the Swedish Arbitration Act. In practice, arbitral proceedings are held in private and there is a general view that the arbitral tribunal must maintain confidentiality throughout the arbitral proceedings. However, case law suggests that a party to arbitral proceedings is not bound by confidentiality unless it has been explicitly agreed with the other party.<sup>88</sup>

7.10.2 The SCC Rules stipulate that, unless otherwise agreed by the parties, the SCC and the arbitral tribunal shall maintain the confidentiality of the arbitration and the award.<sup>89</sup> However, the SCC Rules do not prescribe any general confidentiality obligation for the parties.

# 8. Making of the award and termination of proceedings

## 8.1 Decision making by the arbitral tribunal

8.1.1 Unless the parties have decided otherwise, the opinion agreed upon by the majority of the arbitral tribunal shall prevail. If no majority is obtained, the opinion of the chair shall prevail.<sup>90</sup> The chair's casting vote differs from the corresponding provisions in the Model Law (1985), according to which majority voting is required for all types of decisions.

8.1.2 If an arbitrator fails, without valid cause, to participate in the deliberations or the determination of the dispute, such failure will not prevent the other arbitrators from ruling on the matter.<sup>91</sup> Hence, it is permitted under Swedish law to have a "truncated tribunal" decide the dispute. This rule is important in order to prevent an arbitrator from sabotaging the proceedings. However, the application of this rule presupposes that the missing arbitrator has been afforded an opportunity to participate in the determination.

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<sup>87</sup> For the full text of the IBA Rules, see CMS Guide to Arbitration, vol II, appendix 4.1.

<sup>88</sup> See the decision of the Swedish Supreme Court in *Bulgarian Foreign Trade Bank Ltd (Bulbank) v A.I. Trade Finance Inc* NJA 2000, p 538.

<sup>89</sup> SCC Rules, art 46.

<sup>90</sup> Swedish Arbitration Act, s 30(2) and SCC Rules, art 35(1).

<sup>91</sup> Swedish Arbitration Act, s 30(1) and SCC Rules, art 36(5).

## **8.2 Form, content and effect of the award**

- 8.2.1 The issues which have been referred to the arbitral tribunal shall be decided in an award. When rendered, an award is final and binding on the parties.
- 8.2.2 An award must be made in writing. It shall state the seat of arbitration and the date when it was made. Moreover, the award shall be signed by the arbitral tribunal. However, in exceptional cases it suffices that the award is signed by a majority of the arbitral tribunal or by the chair.<sup>92</sup> In addition, the arbitral tribunal may decide a separate issue or part of the dispute in a separate award, unless opposed by both parties.<sup>93</sup>
- 8.2.3 Where the arbitral tribunal terminates the arbitral proceedings without deciding on the issues referred to it, such termination shall also take place through an award, e.g. when the arbitral tribunal finds that it lacks jurisdiction, when the parties refuse to pay advance on the arbitrators' compensation, or when the parties have entered into a settlement agreement.<sup>94</sup> The arbitral tribunal may, upon the request of both parties, record the settlement in the form of a consent award.<sup>95</sup>
- 8.2.4 Other determinations which are not embodied in an award, for example, where the arbitrators find that they possess jurisdiction to decide a dispute, are designated as decisions.<sup>96</sup>

## **8.3 Power to award interest and costs**

### *Compensation of arbitrators*

- 8.3.1 The parties are jointly and severally liable to pay reasonable compensation to the arbitral tribunal for its work and expenses. However, where the arbitral tribunal has stated in the award that it lacks jurisdiction to determine a dispute, the party that did not request arbitration shall be liable to make payment only insofar as required in special circumstances.<sup>97</sup> In a final award, the arbitral tribunal may order the parties to pay compensation to it, together with interest, calculated from the date occurring one month following the date of the award.<sup>98</sup>

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<sup>92</sup> Swedish Arbitration Act, s 31(1).

<sup>93</sup> *Ibid.*, s 29(1).

<sup>94</sup> *Ibid.*, s 27(1)–(2).

<sup>95</sup> *Ibid.*, s 27(1)–(2) and SCC Rules, art 39(1).

<sup>96</sup> Swedish Arbitration Act, s 27(3).

<sup>97</sup> *Ibid.*, s 37(1).

<sup>98</sup> *Ibid.*, s 37(2).



- 8.3.2 A party who is dissatisfied with the payment of compensation to the arbitral tribunal may bring an action in the District Court against the award. Such an action must be brought within three months from the date on which the party received the award.<sup>99</sup> The right to appeal the arbitral tribunal's compensation applies to both ad hoc arbitrations and institutional arbitrations.<sup>100</sup>
- 8.3.3 The arbitral tribunal may request advance payment for its compensation and may fix separate advances for individual claims.<sup>101</sup> However, as a rule, the parties are each asked to provide half of the advance. If a party fails to provide its part, the other party may provide the entire advance or may choose to commence court proceedings.<sup>102</sup> A party which fails to provide its share of the advance is considered to have waived any right it had to rely on the existence of the arbitration agreement as a bar to court proceedings. Where the requested advance on compensation is not provided, the arbitral tribunal may terminate the arbitral proceedings, in whole or in part.<sup>103</sup>
- 8.3.4 The costs of the arbitration consist of the fees and expenses of the arbitral tribunal and, in the case of an SCC arbitration, the SCC's administrative fee and expenses.<sup>104</sup> In an SCC arbitration, the SCC Board determines such costs in accordance with a schedule of costs included in the SCC Rules and based on the amount in dispute.
- 8.3.5 At the initial stage of the arbitral proceedings under the SCC Rules, the SCC establishes an advance on costs (for the arbitral tribunal's and SCC's compensation) to be provided by the parties, with each paying half of the costs.<sup>105</sup> If a party fails to pay its part of the advance on costs, the SCC gives the other party an opportunity to make such payment.<sup>106</sup> If the latter chooses to make such payment in order for the arbitration to continue, the arbitral tribunal may, at that party's request, issue a separate award for reimbursement of the payment.<sup>107</sup>

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<sup>99</sup> *Ibid*, s 41(1).

<sup>100</sup> *Soyak v W.M., K.H. and S.K.* NJA 2008, p 1118, where the Supreme Court held that the arbitrators' fees decided by the SCC could be appealed.

<sup>101</sup> Swedish Arbitration Act, s 38(1).

<sup>102</sup> *Ibid*, s 5(3).

<sup>103</sup> *Ibid*, s 38(1).

<sup>104</sup> SCC Rules, art 43(1).

<sup>105</sup> *Ibid*, art 45(1).

<sup>106</sup> *Ibid*, art 45(4).

<sup>107</sup> *Swedish Special Supplier AB v Sky Park AB* NJA 2000, p 773, where the Supreme Court held that such repayment required the express agreement of the parties. Therefore, such provision was included in the 2007 SCC Rules.

*Cost allocation*

- 8.3.6 The arbitral tribunal's fees and expenses, as ultimately decided by the arbitral tribunal or any arbitral institution, are established in the final award. The compensation payable to each arbitrator shall be stated separately.<sup>108</sup>
- 8.3.7 The liability of each party in respect of the arbitral tribunal's fees and expenses and the interest payable on those fees and expenses are dealt with above at paragraph 8.3.1.
- 8.3.8 Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order the opposing party to pay compensation in respect of the requesting party's legal costs. The arbitral tribunal may, under the same conditions, determine the manner in which the compensation to the arbitral tribunal shall be finally apportioned between the parties, having regard to the outcome of the dispute and other relevant circumstances.<sup>109</sup>

**8.4 Correction, interpretation and issue of a supplemental award**

- 8.4.1 If the arbitral tribunal commits an obvious irregularity, it is allowed to correct the mistake without any involvement of the Swedish courts. Under the Swedish Arbitration Act, the arbitral tribunal is able to correct, supplement or interpret an award.<sup>110</sup> Similar provisions are also to be found in the SCC Rules.<sup>111</sup>
- 8.4.2 The power of correction is limited to irregularities which are obvious oversights (i.e. clerical, typographical or computational errors), and does not include inaccuracies which can be traced back to errors in the application of the law or incorrect reasoning. A party can obtain interpretation of a specific point or part of the award if this is considered unclear.
- 8.4.3 The arbitral tribunal has the authority to make supplementary decisions in respect of matters that the arbitral tribunal, due to an oversight, has failed to determine.
- 8.4.4 A party seeking interpretation or correction of an award must make a request to the arbitral tribunal within 30 days. Subsequently, the arbitral tribunal must correct or interpret the award within 30 days of receiving the party's request. If the request is for a supplemental award, the time limit is 60 days.<sup>112</sup> Moreover, the arbitral

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<sup>108</sup> Swedish Arbitration Act, s 37(2).

<sup>109</sup> *Ibid*, s 42 and SCC Rules, art 43(5) and 44.

<sup>110</sup> Swedish Arbitration Act, s 32(1).

<sup>111</sup> SCC Rules, art 41 and 42.

<sup>112</sup> Swedish Arbitration Act, s 32(2).

tribunal may, of its own motion, correct or supplement an award, but it must do so within 30 days of the award being delivered. Before any decision is made the parties should be afforded an opportunity to express their views with respect to the measure in question.

## 9. Role of the courts

### 9.1 Interim protective measures

9.1.1 According to Swedish law, an arbitration agreement does not constitute a procedural impediment against a state court granting interim relief, such as freezing orders and other security measures.<sup>113</sup> A prerequisite for an interim measure from a state court is the applicant showing probable cause to believe that it has a claim against another party which is, or can be made, the basis of judicial proceedings or another similar procedure (i.e. arbitration). As set out in paragraph 5.2.3 above, only interim measures decided by a court are enforceable under Swedish law.

### 9.2 Obtaining evidence and other court assistance

9.2.1 One of the main tasks of the courts in a pending arbitration is to support the taking of evidence. A party that requires a witness or an expert to testify under oath, another party to be examined under oath affirmation or another party or other person to produce a document or an object as evidence, must obtain the consent of the arbitral tribunal. If the arbitral tribunal considers that the measure is justified, having regard to the evidence in the case, it will approve the request, upon which the party must then submit an application to the District Court. The District Court shall grant the application if the evidence sought can be obtained lawfully.<sup>114</sup>

## 10. Invalidity and challenging the award before the courts

### 10.1 Invalidity

10.1.1 Under Swedish law, a distinction has been made between circumstances which are of such a serious nature that they result in an award automatically becoming invalid, and circumstances as a consequence of which the award may be set aside by a court upon an action brought by a party.

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<sup>113</sup> *Ibid*, s 4(3) and Procedural Code, ch 15, s 5.

<sup>114</sup> Swedish Arbitration Act, s 26(1).

10.1.2 The provisions governing invalidity are not based on the Model Law (1985) but on a consideration of public interest and the interest of third parties. Thus, an award rendered in Sweden is invalid if:

- (i) it includes the determination of an issue which, in accordance with Swedish law, may not be decided by an arbitral tribunal;
- (ii) the award, or the manner in which the award arose, is clearly incompatible with the basic principles of the Swedish legal system; or
- (iii) the award does not fulfil the requirements with regard to its written form and signature in accordance with Section 31(1) of the Swedish Arbitration Act.<sup>115</sup>

10.1.3 The circumstances set forth above are exhaustive and cannot be waived. Due to the serious nature of the invalidity grounds they are exceptionally rare. It is worth noting that invalidity may apply only to a certain part of the award.<sup>116</sup>

## 10.2 Applications to set aside an award

10.2.1 It is a basic principle of Swedish law that an award cannot be amended or set aside in the event of the incorrect application of the law or the incorrect evaluation of evidence. However, a court can set aside the award if the arbitrators have committed a severe procedural error.

10.2.2 An award may be wholly or partially set aside, upon the motion of a party, on the following grounds:

- (i) the award is not covered by a valid arbitration agreement between the parties;
- (ii) the arbitral tribunal has made the award after the expiration of the period decided on by the parties;
- (iii) the arbitral tribunal has exceeded its mandate;
- (iv) the arbitral proceedings should not have taken place in Sweden;
- (v) an arbitrator has been appointed contrary to the agreement between the parties or the Swedish Arbitration Act;
- (vi) an arbitrator did not have legal capacity or was not properly impartial; or
- (vii) without the fault of the party, an irregularity has otherwise occurred in the course of the arbitral proceedings which probably influenced the outcome of the arbitral proceedings.<sup>117</sup>

10.2.3 In Sweden, only a very limited number of challenges lead to awards being set aside. The grounds most frequently invoked by the applicants are sub-paragraphs (iii) and (vii) above.

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<sup>115</sup> *Ibid*, s 33.

<sup>116</sup> *Ibid*, s 33(2).

<sup>117</sup> *Ibid*, s 34(1).

- 10.2.4 Notably, a party is not entitled to rely upon a ground which it may be deemed to have waived by participating in the arbitral proceedings without objection. In certain cases a party may be required to expressly reserve the right to challenge the award or otherwise express its protest, failing which the party will be deemed to have waived the right to plead the error. Such a protest may, for example, relate to the future proceedings after the arbitral tribunal has ruled that it possess jurisdiction to try the dispute.
- 10.2.5 A challenge must be brought within three months from the date upon which the party received the award. The action shall be considered by the Court of Appeal, whose determination cannot be appealed.<sup>118</sup> However, the Court of Appeal may grant a party leave to appeal the determination to the Supreme Court in circumstances where it is of importance as a matter of precedent.<sup>119</sup>
- 10.2.6 Foreign parties, i.e. those which are neither domiciled nor have a place of business in Sweden, may agree to exclude or limit the application of the grounds for setting aside an award in challenge proceedings through a binding “exclusion agreement”. An award that is subject to such an exclusion or limitation agreement shall be recognised and enforced in Sweden in accordance with the rules applicable to foreign awards (see section 11.2 below).<sup>120</sup>

## 11. Recognition and enforcement of awards

### 11.1 Domestic awards

- 11.1.1 The Swedish Arbitration Act does not include any provisions on the recognition and enforcement of Swedish awards in Sweden. Such provisions are found in the Swedish Enforcement Code. Swedish awards are enforced based on an application for execution filed with the Swedish Enforcement Authority (**SEA**).
- 11.1.2 The SEA may refuse the execution of an award only in situations where the award does not meet the requirements of written form and signature, or if the arbitration agreement includes a right to appeal the award on the merits.

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<sup>118</sup> There are six courts of appeal in Sweden, whose jurisdiction is determined by geographical area: Svea Court of Appeal in Stockholm; Göta Court of Appeal in Jönköping; the Scania and Blekinge Court of Appeal in Malmö; the Court of Appeal for Western Sweden in Gothenburg; the Court of Appeal for Southern Norrland in Sundsvall; and the Court of Appeal for Northern Norrland in Umeå.

<sup>119</sup> Swedish Arbitration Act, s 43(2).

<sup>120</sup> *Ibid*, s 51.

11.1.3 Furthermore, if the SEA believes that an award may be invalid because the issue decided is non-arbitrable, or because the award is against public policy, the SEA shall direct the party seeking enforcement to initiate court proceedings concerning the validity of the award (if this has not already been done by the opposing party).

## 11.2 Foreign awards

11.2.1 Foreign awards are, as a general rule, recognised and enforced in Sweden.<sup>121</sup> An application for enforcement must be lodged with the Svea Court of Appeal in Stockholm and undergo *exequatur* proceedings. The application is communicated to the opposing party, thereby providing it with an opportunity to express its opinion on that application.

11.2.2 The grounds for refusal of enforcement are based on the New York Convention<sup>122</sup> and laid down in the Swedish Arbitration Act. Accordingly, foreign awards are not enforced if the party against whom the award is invoked proves that:

- pursuant to the law applicable to them, the parties to the arbitration agreement lacked capacity to enter into the agreement or were not properly represented;
- the arbitration agreement was not valid, either under the law to which the parties subjected it or, failing any indication thereof, under the law of the country where the award was made;
- the party against whom the award is invoked was not given proper notice of the appointment of the arbitral tribunal or the arbitral proceedings, or was otherwise unable to present their case;<sup>123</sup>
- the award deals with a dispute not falling within the arbitral tribunal's mandate (i.e. it deals with disputes not falling within or contemplated by the terms of the request for arbitration or contains a decision on matters beyond the scope of the arbitration agreement), provided that where those parts of the dispute that fall outside of the arbitral tribunal's mandate can be separated, that part of the award which contains decisions on matters falling within the mandate may be recognised and enforced;
- the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitral proceedings took place; or

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<sup>121</sup> *Ibid*, § 53.

<sup>122</sup> See CMS Guide to Arbitration, vol II, appendix 1, section 1.1.

<sup>123</sup> *Lenmorniiproekt OAO v Arne Larsson & Partner Leasing AB* Case No Ö 13-09, 16 April 2010, where the Supreme Court refused to enforce a Russian award due to the unsatisfactory notice given to the other party.

- the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the laws of which, the award was made.<sup>124</sup>

11.2.3 Enforcement of a foreign award shall also be refused where a court finds that:

- the award includes the determination of an issue which, in accordance with Swedish law, may not be decided by an arbitral tribunal; or
- it would be clearly incompatible with the basic principles of the Swedish legal system to recognise and enforce that award.<sup>125</sup>

## 12. Conclusion

12.1.1 Swedish arbitration legislation and case law are well developed and, to a great extent, correspond with the Model Law (1985). The SCC Rules and its case management are in line with best practice established at other major arbitral institutions. Consequently, it is our belief that Sweden will continue to be an attractive venue for cross border arbitration.

## 13. Contacts

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<sup>124</sup> Swedish Arbitration Act, s 54.

<sup>125</sup> Swedish Arbitration Act, s 55.

