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The
Baker McKenzie
**International
Arbitration Yearbook**

Sweden





Sweden

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A. Legislation and rules

A.1 Legislation

The Swedish Arbitration Act (SFS 1999:116) continues to govern International Arbitration in Sweden. In 2014, 15 years after the Swedish Arbitration Act first entered into force, a committee was given the task of assessing how well it has worked in practice and how it could be made even more attractive for both Swedish and international actors. A Swedish Government Report setting out the proposed revisions to the Swedish Arbitration Act was issued on 16 April 2015 (SOU 2015:37), but the revisions have yet to be passed. Some of the key proposed revisions are as follows:

(1) The Swedish Arbitration Act is currently silent on the law applicable to the merits. It is proposed that the law governing the merits as chosen by the parties will apply and in the absence of parties' agreement, the tribunal — using the *voie directe* method — will determine the applicable substantive law most closely connected to the dispute (without reference to any particular jurisdiction's conflict of laws rules).

(2) With regard to the appointment of arbitrators in multiparty arbitrations, it was proposed that a District Court will appoint all

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arbitrators if the parties are unable to jointly agree on the appointments.

(3) It is proposed that a tribunal's order of security for claims be made enforceable in the form of special awards if permitted under the relevant arbitration agreement.

(4) The option of consolidating arbitrations in limited circumstances has been proposed. Under the current legislation, consolidation of arbitrations has been allowed, although not explicitly addressed.

(5) It is proposed that English be the *lingua franca* for submissions and evidence tendered in support of applications to set aside awards before the Svea Court of Appeal save that the court decisions will still be rendered in Swedish.

(6) A breach of public policy, which is currently a ground for invalidating an arbitral award (see Section 33(2) of the Arbitration Act), has now been explicitly included as a basis upon which recognition and enforcement of an award may be refused.

(7) It has been proposed that declaratory applications filed in court regarding a tribunal's (positive or negative ruling on) jurisdiction be made directly to the Svea Court of Appeal, and such court application will not operate as a stay of the arbitral proceedings.

A.2 Institutions, rules and infrastructure

The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) Arbitration Rules are modern and flexible, and give the parties and the arbitrators means to form an effective procedure adapted for the individual case. The rules provide for a procedure in line with the best practices in international arbitration.

The new SCC Arbitration Rules and the Rules for Expedited Arbitrations entered into force on 1 January 2017. The new SCC Arbitration Rules 2017 are largely in line with the SCC Arbitration Rules 2010, but introduce provisions related to multiparty and



multicontract arbitration, and summary proceedings. The SCC has also introduced Appendix III for investment treaty disputes. The key amendments in the new SCC Arbitration Rules 2017 are the following.

A.2.1 Joinder of additional parties (Article 13)

A party to an arbitration may request that the Board join additional parties to the arbitration. This request must be filed in a timely manner. Such a request made after the submission of the Answer will not be considered unless the Board decides otherwise. The Board will consult with the parties and the additional party sought to be joined, and may decide to grant the request for joinder, unless the SCC manifestly lacks jurisdiction over the dispute between the parties, including the additional party sought to be joined. The SCC Arbitration Rules 2010 did not address joinder of additional parties.

A.2.2 Multiple contracts in a single arbitration (Article 14)

Parties may make claims arising out of or in connection with more than one contract in an arbitration, provided the SCC does not manifestly lack jurisdiction over the dispute between the parties. In determining whether the claims raised shall proceed in a single arbitration, the Board will consult with parties and will have regard to: (i) the compatibility of the arbitration agreements under which the claims are made; (ii) whether the relief sought arises out of the same transaction or series of transactions; (iii) the efficiency and expeditiousness of the proceedings; and (iv) any other relevant circumstances.

Where the Board decides that the claims may proceed in a single arbitration, any decision as to the tribunal's jurisdiction over the claims will be made by the tribunal. The SCC Arbitration Rules 2010 did not expressly address multiple contracts in a single arbitration.

A.2.3 Consolidation of arbitrations (Article 15)

Article 11 of the SCC Arbitration Rules 2010 has been broadened with respect to consolidation of arbitrations. As may be seen in the new Article 15, a party to an arbitration may request that the Board consolidate a newly commenced arbitration with a pending arbitration if: (i) the parties agree to consolidate; (ii) all the claims are made under the same arbitration agreement; or (iii) where the claims are made under more than one arbitration agreement, the relief sought arises out of the same transaction or series of transactions, and the Board considers the arbitration agreements to be compatible. Considerations of efficiency and expediency are also to be taken into account.

A.2.4 Joint appointment of arbitrators in multi party arbitrations (Article 17(5))

Where there are multiple claimants or respondents and the tribunal is to consist of more than one arbitrator, the multiple claimants must jointly, and the multiple respondents must jointly, appoint an equal number of arbitrators. If either side fails to make a joint appointment, the Board may appoint the entire tribunal.

A.2.5 Summary procedure (Article 39)

The SCC has introduced a summary procedure for the early dismissal of issues. A party may request that the tribunal decide summarily on issues of jurisdiction, admissibility or the merits. The request must specify the grounds relied on and the form of summary procedure proposed, which ought to be efficient and appropriate in all circumstances of the case.

A.2.6 Appendix III Arbitration rules for investment treaty disputes

The SCC has introduced Appendix III for investment treaty disputes. Appendix III applies to cases under the SCC Arbitration Rules based on a treaty providing for arbitration of disputes between an investor and a state, and Articles 13 to 15 of the SCC Arbitration Rules will apply *mutatis mutandis*. Article III of Appendix III sets out rules with



regard to submissions by a third person and Article IV relates to submissions made by a non-disputing treaty party.

B. Cases

B.1 Arbitrator's impartiality

In November 2007, the Supreme Court rendered a decision that attracted much attention, regarding an arbitrator's impartiality.⁴

In an arbitration between the Swedish telecommunications company Ericsson and one of its employees, the chair of the of the arbitral tribunal was the former Supreme Court Justice, the prominent Mr. Johan Lind. Since retiring from the bench, he had held an office at Mannheimer Swartling Advokatbyrå ("Mannheimer"), the largest and most well-known law firm in Sweden, known to attract former Supreme Court Justices for a few years of consulting after an active career as a judge. Mr. Lind was employed by Mannheimer, but only part time. He had an office in Mannheimer's main office in Stockholm, he was reached through its switchboard, he was presented on its website as an employee and a resource, and he communicated externally on Mannheimer's stationery and he used its computer systems and servers for all his work. The main part of his work, however, focused on arbitration and appointments as arbitrator, mainly the post of chairman. This business was conducted by Mr. Lind, financially separate from Mannheimer, but still in its offices and on the conditions set out above. Hence, Mr. Lind communicated with the parties in these arbitration proceedings on Mannheimer's stationery and used its computer systems for, *inter alia*, producing procedural orders and the arbitration award.

The arbitration between the employee and Ericsson proceeded to an award and the employee lost. Some time later, the employee learned that Ericsson was possibly the largest client of Mannheimer and had been one of the largest clients for several years, which was news to him. He challenged the award, arguing that Mr. Lind was biased

⁴ Decision by the Supreme Court on 19 November 2007 in case no. T 2448-06.

because of the fact that Ericsson was an important client of Mannheimer and that Mr Lind had breached the obligation to disclose all relevant information pertaining to his independence. He argued that the failure to disclose would render the award null and void, which is the result indicated in the *travaux préparatoire* to the Swedish Arbitration Act from 1999.

Ericsson objected and launched a defence based on the alleged fact that Mr Lind never had any direct client contacts, that he was only remotely involved in Mannheimer's operations, that he exclusively provided advice to the lawyers at Mannheimer and not to clients, and that his arbitration boutique was effectively separate from Mannheimer. Ericsson also alleged that Ericsson AB, the party in the arbitration, was not a client of Mannheimer's, although other Ericsson entities were.

In its decision, the Supreme Court stated that the rules regarding conflicts of interest aim at protecting the objective administration of justice. It is therefore important that the rules are applied in a way that effectively prohibits an arbitrator from participating in arbitral proceedings, even if there is no reason to assume that the arbitrator, in a particular case, would be influenced by his relation to the other party or his counsel.

The Supreme Court furthermore stated that in the context of this case, Ericsson AB should be equated with the Ericsson group of companies. The Supreme Court concluded that the assignment on behalf of the Ericsson group of companies was important for Mannheimer and that it had generated substantial income for the firm. Further, Mr. Lind was deemed to have been an employee of Mannheimer, even if it was part time and with a salary on which he was not financially dependent. Hence, there was no reason to view him differently from any other lawyer employed by that firm.

The Supreme Court stated that a relationship that is injurious to the confidence in an arbitrator may be considered to exist even if the arbitrator himself has not had direct client contact with the party, if the



arbitration activity has been run separately from the legal activities, or the arbitration dispute has concerned questions other than those the client assignment normally covers.

With an objective view, the Supreme Court found that there had been circumstances that called into question the impartiality of Mr. Lind. Consequently, the arbitration award was set aside by the Supreme Court, because of the disqualification of Mr. Lind as arbitrator.

B.2 Arbitrator's impartiality

In June 2010, the Supreme Court rendered another decision⁵ regarding an arbitrator's impartiality. The case concerned a dispute between two companies, which had been settled by arbitration. The case was brought before the Supreme Court to decide whether the arbitral award was to be set aside. One of the parties, an energy company, had appointed a lawyer as arbitrator. The law firm acting as counsel for the energy company in the dispute had previously acted as counsel in a number of other arbitral proceedings where the same lawyer had been appointed as arbitrator. The other party challenged the award based on this fact. Consequently, the debate at hand was whether or not the arbitrator was considered impartial.

The Supreme Court held that, according to Swedish case law, the rules regarding impartiality should be applied in such a manner that the impartiality of an arbitrator should be considered not just in relation to the case at hand, but on his situation as a whole, including any longstanding relationship that might exist with the counsel to any of the parties. An objective assessment should be made to determine whether there is any circumstance that may diminish confidence in an arbitrator's impartiality.

The Supreme Court also held that that the requirements of objectivity and of impartiality, according to case law, must be particularly high when it comes to arbitrators, since incorrect evaluation of evidence or application of law will not cause the award to be set aside.

⁵ Decision by the Supreme Court on 9 June 2010 in case no. T 156-09.

Furthermore, the Supreme Court stated that if a law firm often appoints the same arbitrator, it could create the impression that the arbitrator has connections with that law firm, which could thereby diminish confidence in the arbitrator's impartiality. The Supreme Court held that the number of previous appointments and the scope of these previous assignments are of significance in this regard.

However, the Supreme Court also stated that one has to consider the overall picture and take all circumstances of the individual case into account. In addition, the Supreme Court emphasized that one should make a distinction between an arbitrator appointed by the parties and an arbitrator appointed as chairman of the arbitral tribunal, since the latter is often elected jointly by the arbitrators appointed by the parties.

In the case at hand, the arbitrator in question had, from 1995 to 2005, been selected as arbitrator in 112 proceedings. He had been appointed by the law firm acting as counsel for the energy company in 12 of these proceedings. During the last three years before the beginning of the arbitration proceedings between the energy company and the other party, ie, 2002 to 2005, he had been involved as arbitrator in four arbitration proceedings where one of the parties was represented by the law firm now acting as counsel for the energy company. He had, in two of these proceedings, been appointed by the party counseled by the law firm in question.

In light of this, the Supreme Court stated that the predominant proportion of his appointments as arbitrator was made by parties represented by law firms other than the one now acting as counsel for the energy company. The Supreme Court also established that there was no information indicating that the appointments involving this law firm were made by one and the same, or merely a few, lawyers at that law firm.

Against this background, the Supreme Court concluded that the appointments made by parties represented by the law firm acting as counsel for the energy company did not constitute a circumstance that



diminished confidence in the arbitrator's impartiality in the proceedings in question.

B.3 The courts have unrestricted mandate to review a tribunal's decision on its jurisdiction and to determine the existence and scope of a valid arbitration agreement

The Swedish Supreme Court held that the courts have a wide and unrestricted mandate under Section 2 of the Swedish Arbitration Act to review a tribunal's jurisdictional ruling.⁶

The appellant had applied to the District Court for affirmation that: (i) the appellant was not bound by an arbitration agreement with the counterparties and if the appellant was considered bound by such arbitration agreement; and (ii) that the tribunal lacked jurisdiction or that the arbitration clause of the cooperation agreement did not vest the tribunal with jurisdiction to resolve the dispute.

The counterparties filed a motion to dismiss part (ii) of the appellant's application, and such motion was dismissed by the District Court. The Court of Appeal overruled the District Court's decision on the basis that the court's review of an arbitral tribunal's jurisdiction under Section 2 of the Swedish Arbitration Act was limited to the issue of whether a valid and applicable arbitration agreement exists.

On appeal, the Supreme Court reversed the Court of Appeal's decision and held that Section 2 of the Swedish Arbitration Act should be interpreted to mean that the scope of the court's review of a tribunal's jurisdiction covers all issues, including whether the parties are bound by an arbitration agreement, whether a dispute is arbitrable, and whether there are procedural impediments. In other words, the court's mandate to review a tribunal's decision on jurisdiction is unqualified and at the very least, identical in scope to that of a tribunal's assessment of its jurisdiction.

⁶ Judgment of the Swedish Supreme Court, 21 April 2016, Case No Ö1429-15.

C. Trends and observations

During the past decade, arbitration in Sweden has continued to develop in line with global business adapting to, *inter alia*, increasingly complicated contractual relations by providing rules and practices for multiparty and multicontract arbitration. As discussed above in further detail, the new SCC Arbitration Rules 2017, much in line with the other leading arbitration institutions of the world, contain express provisions on third-party joinder, multi contract arbitration and consolidation.

Sweden remains a popular seat for East-West arbitrations and is therefore often chosen as the venue for oil and gas as well as other long-term supply pricing-related disputes. In their practice, the Swedish courts remain pragmatic and arbitration friendly, prone to upholding the jurisdiction of arbitral tribunals unless very strong grounds for invalidating or setting the award aside exist. When faced with challenges involving frivolous claims or other guerilla tactics, the Swedish courts have proven to be capable of detecting such circumstances and unafraid of dismissing unfounded claims.

With the introduction of the new SCC Arbitration Rules and Expedited Arbitration Rules taking effect from 1 January 2017, it will be of interest to users and practitioners of international arbitration to witness how the new provisions, *inter alia*, on summary procedure, joinder of additional parties and consolidation of arbitrations will pan out in arbitrations seated in Sweden.