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The Baker McKenzie **International Arbitration Yearbook**

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. Sweden is not a Model Law country, but the Swedish Arbitration Act generally follows the UNCITRAL Model Law and is seen as modern and efficient legislation. 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 can 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. The timetable for the implementation of a new act is uncertain. It is expected to enter into force during 2018, however, the target date may be further postponed. Some of the key proposed revisions are as follows:

(a) 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 shall 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

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particular jurisdiction's conflict of laws rules). The tribunal may only decide *ex aequo et bono* if the parties have expressly authorized it to do so.

(b) With regard to the appointment of arbitrators in multiparty arbitrations, a district court shall appoint all arbitrators if the parties are unable to jointly agree on an arbitrator.

(c) A tribunal may order a security measure via a special award if the parties have agreed to this in the arbitration agreement.

(d) Consolidation of several arbitral proceedings is to be possible in certain circumstances. Under the current legislation, consolidation of arbitrations has been allowed although not explicitly addressed.

(e) English could be used as the language of proceedings in applications for setting aside awards save that the court decisions shall still be rendered in Swedish.

(f) The rule on the invalidity of an arbitral award (Section 33 of the Arbitration Act) is to be repealed. A breach of public policy, which is currently a ground for invalidating an arbitral award (Section 33(2) of the Arbitration Act), is to become a new ground for setting aside an award.

(g) Declaratory applications filed in court regarding a tribunal's (positive or negative ruling on) jurisdiction should be made directly to the Svea Court of Appeal, and such court application shall not operate as a stay of the arbitral proceedings.

It should be noted that the general perception of the Swedish Arbitration Act is that it has, on the whole, been effective. The proposal for amendments to the Swedish Arbitration Act has attempted to address a number of "problems" identified by the SCC and active arbitrators. The primary goal has been to make Sweden even more attractive as a seat for international arbitration proceedings.

A.2 Institutions, rules and infrastructure

The SCC maintains a strong position as one of the world's leading centers for international arbitration. The SCC Arbitration Rules are among the most widely used in commercial arbitration and investment arbitration globally. The rules not only offer a lot of flexibility for the parties and arbitrators to form an effective procedure adapted to individual cases, but also provide for a procedure in line with the best practices in international arbitration. As of 1 January 2017, the new SCC Arbitration Rules and the SCC Rules for Expedited Arbitrations entered into force. The new rules are largely in line with the SCC Arbitration Rules 2010, but include a number of noteworthy revisions and innovations. The key amendments in the new SCC Arbitration Rules 2017 are the following:

A.2.1 Efficiency as a guiding principle

Efficiency serves as an important guiding principle throughout the SCC Arbitration Rules 2017. For example, Article 2 of the new rules states that the SCC, the tribunal and the parties "*shall act in an efficient and expeditious manner*" throughout the proceedings. The standard of efficiency and expeditiousness can be found in provisions regarding joinder, multiple contracts, consolation, the case management conference, summary procedure and, most importantly, in the provisions regulating costs.

Under Articles 49 and 50, the tribunal has a duty to apportion arbitration costs as well as party costs having regard to each party's contribution to the efficiency and expeditiousness of the arbitration. Similarly, the SCC Board shall determine the costs of the arbitration having regard to the extent to which the tribunal has acted in an efficient and expeditious manner.

A.2.2 Joinder and multiple contracts

The new rules include provisions designed for more efficient resolution of complex disputes involving multiple parties and/or arising under more than one contract. A newly added provision in

Article 14 codifies the existing SCC practice in multicontract disputes by allowing parties to bring claims under more than one arbitration agreement in one single arbitration.

Under Article 14, the general rule is that such claims may proceed and be determined in a single arbitration, unless the other party objects. If there is an objection, the claim may be determined in a single arbitration in any event, provided that the SCC finds that it has *prima facie* jurisdiction over the dispute. In deciding whether the claims shall proceed in a single arbitration, the Board shall consult with the parties and shall have regard to: (i) whether the arbitration agreements under which the claims are made are compatible; (ii) whether the relief sought arises out of the same transaction or a series of transactions; (iii) the efficiency and expeditiousness of the proceedings; and (iv) any other relevant circumstances.

A.2.3 Consolidation of arbitrations

New Article 15 has broadened the possibility to consolidate arbitrations. A party may request the Board to consolidate a newly commenced arbitration into a pending arbitration if: (i) the parties agree to consolidate; or (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 the stage of the arbitration, efficiency and expediency are also to be taken into account. Where the Board decides to consolidate, it may release any arbitrator already appointed.

A.2.4 Administrative secretary

Article 24 is a novel provision that addresses the questions of who acts as secretary and the role of the secretary in a flexible way. The tribunal has to request the parties' approval to appoint a specific candidate as secretary, who shall be impartial and independent. The provision does not specify the role of the secretary, but requests the

tribunal to consult the parties regarding the tasks of the administrative secretary.

A.2.5 Summary procedure

The new rules in Article 39 introduced a summary procedure for early dismissal of issues. A party may request that the tribunal decide summarily on issues of jurisdiction, admissibility or the merits. The request shall 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

Recognizing that investment disputes raise different issues and involve different interests than commercial disputes, the SCC introduced Appendix III that applies only in treaty-based disputes between an investor and a state. The provisions in Appendix III allow third persons and non-disputing treaty parties to apply to an arbitral tribunal for permission to make a written submission in the arbitration. Also, Article 2 of Appendix III replaces Article 16 of the Arbitration Rules (number of arbitrators), which means that in investor-state disputes, when there is no agreement on the number of arbitrators, the tribunal shall be composed of three arbitrators, unless the Board decides that a sole arbitrator shall decide the dispute, having regard to the complexity of the case, the amount in dispute and other relevant circumstances.

A.2.7 Policy on the appointment of arbitrators

The SCC published its Policy on Appointment of Arbitrators in November 2017, which lists the factors taken into consideration when the Board appoints arbitrators in SCC arbitrations. Although the policy is now published for the first time, it has been followed by the Board since 2006. Among the factors considered by the Board are the appointee's experience as an arbitrator, legal expertise, and nationality. The Board also looks to tribunal balance, applicable law and the seat of arbitration.

A.2.8 Reasons for the SCC's decisions on challenges to arbitrators

The SCC announced that it will begin providing reasons for its decisions on challenges to arbitrators as of 1 January 2018, unless the parties agree otherwise. As a main rule, the reasoned decisions will be brief, stating concisely the analysis upon which the Board dismissed or sustained the challenge. However, more extensive reasons may be given if warranted by the circumstances of a particular challenge.

B. Cases

B.1 Ordre public

In December 2016, the Svea Court of Appeal upheld an arbitral award rendered in Sweden in December 2013, rejecting the claim that the arbitral award was clearly incompatible with Swedish *ordre public*.[4] The challenge was brought by the Republic of Kazakhstan against an award in an investor-state arbitration under the ECT in favor of a group of Moldavian investors. The arbitral tribunal concluded that Kazakhstan had breached the fair and equitable treatment obligations of the ECT by terminating the investors' extraction rights and found that Kazakhstan was liable to pay damages. Kazakhstan, in its challenge, requested that the arbitral award either be declared invalid or set aside.

Kazakhstan claimed that the award was invalid as it was tainted by fraud. It alleged that the investors had initiated a fraudulent scheme to deceive the state regarding the amount invested in a liquefied petroleum gas plant. The fraudulent scheme was claimed to include sham agreements and other means by which the investors had inflated the value of the gas plant and made streams of money flow out of the state into tax havens in the Caribbean. It also alleged that investors knowingly misled the arbitral tribunal, withheld relevant information, and presented false evidence and misleading information. To uphold the arbitral award would be clearly incompatible with the basic principles of the Swedish legal system (*ordre public*).

[4] Svea Court of Appeal judgment of 9 December 2016, Case No. T 2675-14.

As grounds for its request for setting aside the award, Kazakhstan claimed that the arbitral tribunal lacked jurisdiction as the arbitral award was not covered by a valid arbitration agreement. Kazakhstan argued that the cooling-off period for negotiations under Article 26 ECT constituted a jurisdictional requirement that must be fulfilled for a valid arbitration agreement to exist. It also asserted that the arbitral tribunal was appointed in violation of the SCC Rules, and that the tribunal's appointment was subject to a procedural error which likely affected the outcome of the case.

The Svea Court of Appeal dismissed Kazakhstan's claims. The court held that the subject of the dispute in itself (ie, the investment in a gas plant) was not in violation of Swedish public policy. It further noticed that, although the potential existence of forged or false evidence in the arbitral proceedings could be seen as a violation of public policy, the threshold for such determination under Swedish law is very high. Without determination of whether forged or false evidence was in fact invoked in the arbitral proceedings, the court concluded that such evidence, in any event, did not directly influence the outcome of the case. As such, the court held that the award was not clearly incompatible with Swedish *ordre public*. The court also concluded that the tribunal did not exceed its mandate or commit a procedural error that likely affected the outcome of the case, and the arbitral tribunal was duly appointed.

Rejecting the set-aside application, the Svea Court of Appeal also refused to grant Kazakhstan leave to further appeal to the Supreme Court. The state appealed to the Supreme Court anyway through an extraordinary application asserting that a grave procedural error had occurred. On 24 October 2017, the Supreme Court of Sweden dismissed this request by stating that Kazakhstan had failed to show any circumstances that constitute "grave procedural error." This was needed for the Supreme Court to agree to an extraordinary review after the Svea Court of Appeal denied it leave to appeal on regular grounds.

B.2 Jura novit curia

In March 2017, the Svea Court of Appeal upheld an arbitral award on the grounds of *jura novit curia*.[5] The arbitration concerned a franchise agreement entered into by and between SafeTeam and City Säkerhet in January 2008. According to the franchise agreement, City Säkerhet was to sell security systems to customers and enter into agreements with the customers on behalf of SafeTeam. The customers' official contracting party was thus SafeTeam, although City Säkerhet was in charge of delivering the purchased security system to the customer in accordance with SafeTeam's concept. When a contract was concluded on City Säkerhet's initiative, SafeTeam was supposed to make a certain payment to City Säkerhet for its services.

In March 2015, City Säkerhet commenced arbitration against SafeTeam alleging that SafeTeam had failed to pay City Säkerhet for its services, and requested reimbursement for litigation costs that City Säkerhet had paid to SafeTeam following a dispute with a customer. The franchise agreement did not explicitly regulate the issue of allocation of litigation costs. When considering whether City Säkerhet was obliged to compensate SafeTeam for the relevant costs, the arbitral tribunal applied by analogy provisions of the Swedish Act on Commissions. Neither SafeTeam nor City Säkerhet had invoked the provisions of the Act during the arbitration proceedings.

City Säkerhet challenged the award arguing that the arbitral tribunal exceeded its mandate by basing its decision on circumstances that had not been invoked by the parties. City Säkerhet further argued that the arbitral tribunal's failure to inform the parties that it considered provisions of the Swedish Act on Commissions constituted a procedural error which likely affected the outcome of the arbitration. According to City Säkerhet, the arbitral tribunal should have offered the parties the opportunity to present their case prior to deciding the dispute.

[5] Svea Court of Appeal judgment of 9 March 2017, Case No. T 1968-16.

The Svea Court of Appeal stated that the arbitral tribunal should resolve the dispute based on circumstances (legal facts) that the parties have invoked in support of their respective cases. However, pursuant to the principle of *jura novit curia*, the arbitral tribunal is not bound by the parties' legal arguments, but is free to decide which provisions of the law apply based on the invoked legal facts. The court found that City Säkerhet had not shown that the arbitral tribunal based its conclusion on any legal facts other than those invoked by SafeTeam in support of its case. The fact that the arbitral tribunal applied by analogy the provisions of the Act on Commissions did not mean that the arbitral tribunal exceeded its mandate. It is irrelevant whether the parties presented arguments concerning the provisions or not. The Svea Court of Appeal thus concluded that the arbitral tribunal had not exceeded its mandate.

The Svea Court of Appeal held that City Säkerhet had the opportunity to argue its position on the supplementation of the agreement and should not have been surprised by the arbitral tribunal's analogous application of the Act on Commission. The court concluded that no procedural error had occurred and the motion to set aside the arbitral award was denied.

C. Funding in international arbitration

There are no restrictions on third-party funding in Sweden, but the concept is not particularly well known, used or discussed, and the SCC Arbitration Rules do not contain provisions covering funding.

Pursuant to the rules of the Swedish Bar Association, a lawyer must charge clients a reasonable and fair amount. Swedish lawyers usually charge their clients on an hourly basis. It is unusual for lawyers to charge fixed fees for a particular assignment or scope of work. A member of the Swedish Bar Association may not, as a general rule, enter into a fee agreement with a client that confers a right to a share of the result of the mandate. This rule generally prohibits a lawyer from entering into a professional fee agreement that entitles the lawyer in question to a quota of the result of a mandate unless for specific

reasons. Specific reasons for allowing such an agreement include, for example, when a lawyer is representing the interests of a collective action or engaged in a cross-border mandate, the handling of which is required outside of Sweden. However, in the latter case, the question is whether parts of a mandate concerning a dispute could be handled in Sweden. Another exception is when a client without a quota share agreement finds it difficult to obtain access to justice.

Currently, there are no professional third-party funders based in Sweden. However, as a relatively large number of international arbitration proceedings take place in Sweden every year, the lack of local professional third-party funders based in Sweden does not *per se* mean that third-party funders have not been used in arbitrations seated in Sweden and/or in arbitrations under the SCC Rules. It is likely that a claimant in continental Europe, Asia or the Middle East would seek out a third-party funder from the closest financial capital rather than the seat of the arbitration or where its lawyers are located. As Swedish *lex arbitri* nevertheless applies to proceedings seated in Sweden, and Swedish attorneys are subject to the local bar rules, it would be beneficial for all parties involved to have some type of guidelines as to eg, disclosure of the use of a third-party funder, where it may affect the impartiality of an arbitrator.