

Arbitration Law of Sweden: Practice and Procedure

by

LARS HEUMAN



Juris Publishing

| Questions About This Publication | |
|---|----------------|
| For Questions about shipments, billing, or other customer service problems call our Customer Services Department at | (631) 350-2100 |
| or fax | (631) 673-9117 |

Copyright © 2003

Juris Publishing, Inc.

All Rights Reserved
 Printed in the United States of America
 ISBN # 1-929446-20-9

Juris Publishing, Inc.
 71 New Street
 Huntington, New York 11743
www.jurispub.com

Table of Contents

| | | |
|-----------------------------|--|------|
| Acknowledgements | | xvii |
| Abbreviations | | xix |
| Chapter 1 | Introduction | 1 |
| Chapter 2 | The Arbitration Agreement | 27 |
| Chapter 3 | The Arbitration Agreement as a Bar to Judicial Proceedings | 159 |
| Chapter 4 | Multi-party Arbitration | 183 |
| Chapter 5 | The Arbitrators | 199 |
| Chapter 6 | Procedural Principles | 249 |
| Chapter 7 | Arbitral Proceedings | 293 |
| Chapter 8 | The Award | 481 |
| Chapter 9 | Costs | 549 |
| Chapter 10 | Invalidity of Awards and the Setting Aside of Awards | 571 |
| Chapter 11 | Enforcement of Swedish Awards | 651 |
| Chapter 12 | International Matters | 665 |
| The Swedish Arbitration Act | | 747 |
| SCC Rules | | 765 |
| Table of Cases | | 783 |
| Bibliography | | 797 |
| Index | | 813 |

Detailed Table of Contents

| | |
|--|-------------|
| Acknowledgments | xvii |
| Abbreviations | xix |
| Chapter 1 Introduction | 1 |
| 1.1 General characteristics of arbitral procedure | 1 |
| 1.2 The formal and practical scope of the Swedish Arbitration Act | 3 |
| 1.3 Different kinds of arbitral procedure | 5 |
| 1.4 Factors of importance when parties contemplate agreeing on some form of arbitral procedure | 10 |
| 1.4.1 Speed | 10 |
| 1.4.2 The right to appoint arbitrators | 11 |
| 1.4.3 Costs | 12 |
| 1.4.4 The confidentiality of arbitral procedure | 13 |
| 1.4.5 Obstruction | 20 |
| 1.4.6 Lack of procedural safeguards | 21 |
| 1.4.7 Absence of consolidation opportunities | 21 |
| 1.4.8 No coercive measures | 22 |
| 1.5 The interpretation and application of the Act and its legal sources | 22 |
| 1.6 Entry into force of the Act | 25 |
| Chapter 2 The Arbitration Agreement | 27 |
| 2.1 Introduction | 27 |
| 2.2 Non-arbitral forms of dispute settlement | 31 |
| 2.3 Formation of the arbitration agreement | 32 |
| 2.3.1 Standard contracts containing an arbitration clause | 33 |
| 2.3.2 Formation of an arbitration agreement by passiveness under section 6(2) of the Contracts Act | 39 |
| 2.3.3 Reference in a contract to another individually framed contract with an arbitration clause | 41 |
| 2.3.4 Arbitration agreements entered into in the presence of arbitrators | 41 |
| 2.4 The doctrine of separability | 43 |
| 2.5 The scope of arbitration agreements | 51 |
| 2.5.1 Restrictive or extensive interpretation | 51 |
| 2.5.2 The theory of causality and the doctrine of assertion | 56 |

| | | |
|------------------|---|------------|
| 2.5.3 | Interpretation of arbitration agreements in the light of the substantive contract | 63 |
| 2.5.4 | Related contentious issues which are only partly covered by a clearly applicable arbitration clause | 64 |
| 2.6 | Interpretation of special provisions in arbitration clauses | 75 |
| 2.7 | The binding effect of arbitration agreements on third parties | 77 |
| 2.7.1 | Introduction | 77 |
| 2.7.2 | Dispute as to whether a legal subject is a contracting party | 77 |
| 2.7.3 | Universal succession | 82 |
| 2.7.4 | Bankruptcy | 83 |
| 2.7.5 | Singular succession | 92 |
| 2.7.6 | Guarantee and other joint and several liability for payment | 96 |
| 2.7.7 | The statutory joint and several liability of a third party for a contracting party's obligation | 104 |
| 2.8 | Invalidity of arbitration agreements | 104 |
| 2.8.1 | General remarks on section 36 of the Contracts Act | 104 |
| 2.8.2 | Invalidity as a result of special provisions in the arbitration clause | 113 |
| 2.8.3 | Rules of invalidity other than those of section 36 of the Contracts Act | 115 |
| 2.9 | Termination of the arbitration agreement | 116 |
| 2.10 | One party's loss of the right to assert an arbitration agreement | 123 |
| 2.11 | Special provisions in arbitration clauses | 130 |
| 2.12 | Arbitrability | 139 |
| 2.13 | Civil law effects of competition law | 148 |
| 2.14 | Filling gaps | 152 |
| 2.15 | Competence of arbitrators to establish matters of fact and to make legal characterisations | 154 |
| 2.16 | Provisions on arbitral procedure in articles of association and testatory dispositions | 156 |
| Chapter 3 | The Arbitration Agreement as a Bar to Judicial Proceedings | 159 |
| 3.1 | Introduction | 159 |
| 3.2 | Duty to plead alternative grounds for dismissal and for the invalidity of the arbitration agreement | 162 |
| 3.3 | When shall a party raise an objection of bar to judicial proceedings? | 164 |

| | | |
|------------------|--|------------|
| 3.4 | Res judicata effects of the court's ruling on a question of bar to judicial proceedings | 167 |
| 3.5 | Court examination of the issue of bar to judicial proceedings does not preclude arbitration | 169 |
| 3.6 | Motion for partial dismissal | 170 |
| 3.7 | An arbitration agreement partially covering a dispute | 170 |
| 3.8 | Set-off | 175 |
| 3.9 | The arbitration agreement is not a bar to summary proceedings | 178 |
| Chapter 4 | Multi-party Arbitration | 183 |
| 4.1 | Introduction | 183 |
| 4.2 | How is an arbitral tribunal formed? | 185 |
| 4.3 | How is a suitable joinder of different disputes to be achieved? | 189 |
| 4.4 | Arbitral tribunals in several proceedings that consist partly or entirely of the same person | 193 |
| 4.5 | Costs | 195 |
| 4.6 | The right of a court to consolidate related contractual and non-contractual disputes and to stay some disputes | 197 |
| Chapter 5 | The Arbitrators | 199 |
| 5.1 | Introduction | 199 |
| 5.2 | The need for urgent action | 206 |
| 5.3 | Appointment of arbitrators | 207 |
| 5.3.1 | Freedom of contract | 207 |
| 5.3.2 | The number of arbitrators and the manner of their appointment | 209 |
| 5.3.3 | Suitability criteria for the appointment of an arbitrator | 214 |
| 5.3.4 | Failure to appoint an arbitrator | 216 |
| 5.4 | Challenge | 221 |
| 5.4.1 | Grounds for challenge | 221 |
| 5.4.2 | The challenge procedure | 231 |
| 5.5 | Termination of the arbitrator's mandate | 239 |
| 5.6 | The right to appoint a new arbitrator | 241 |
| 5.7 | The right of a party to have an arbitrator removed for delaying the proceedings | 243 |
| Chapter 6 | Procedural Principles | 249 |
| 6.1 | Introduction | 249 |
| 6.2 | The principle of party autonomy | 249 |
| 6.3 | Mandatory rules of procedure | 255 |
| 6.4 | The principle of equal treatment of parties | 260 |
| 6.5 | The arbitrators' discretionary powers | 264 |

| | | |
|------------------|--|------------|
| 6.6 | Procedure aimed at preventing obstruction | 267 |
| 6.7 | Procedural liberties of the parties | 269 |
| 6.8 | The rule of waiver and the duty of a party to object to procedural errors | 270 |
| 6.8.1 | Functions of the waiver rule | 271 |
| 6.8.2 | At what point in time must a party state his objection to the procedure? | 272 |
| 6.8.3 | The requirement of double objections | 277 |
| 6.8.4 | Can preclusion occur when a party fails to investigate conditions constituting grounds for challenge? | 279 |
| 6.8.5 | How clear and exhaustive should a protest be? | 282 |
| 6.8.6 | Should the arbitrators inform a party of his duty to state an objection to irregularities? | 285 |
| 6.8.7 | The legal effects | 286 |
| 6.8.8 | Possibilities for a party to prevent a protesting opposing party from speculating at the party's expense | 288 |
| 6.9 | Analogous application of the rules of the Code of Judicial Procedure | 289 |
| 6.10 | Court intervention in arbitration proceedings requires statutory support | 291 |
| Chapter 7 | Arbitral Proceedings | 293 |
| 7.1 | Commencement of the arbitral proceedings | 293 |
| 7.1.1 | Contractual Freedom | 294 |
| 7.1.2 | Functions of the request for arbitration | 297 |
| 7.1.3 | Requirement of an express and unconditional request for arbitration | 299 |
| 7.1.4 | Requirement that the request for arbitration include a statement of the issue in dispute | 300 |
| 7.1.5 | Requirement that the request for arbitration indicate who has been appointed arbitrator | 304 |
| 7.1.6 | Need for proof of service of the request for arbitration | 306 |
| 7.1.7 | Limitation, preclusion and penal interest | 307 |
| 7.2 | The respondent's choice of arbitrator and the appointment of a third arbitrator | 309 |
| 7.3 | Planning the arbitral proceedings | 310 |
| 7.4 | The statement of claim | 316 |
| 7.4.1 | Introduction | 316 |
| 7.4.2 | The claims | 317 |
| 7.4.3 | The grounds | 320 |
| 7.4.4 | Evidence | 322 |

| | | |
|--------|---|-----|
| 7.4.5 | Legal argumentation | 323 |
| 7.4.6 | Deficient statements of claim and procedural guidance by the arbitrators | 326 |
| 7.4.7 | Tactical considerations | 327 |
| 7.5 | Provisional measures | 328 |
| 7.5.1 | Introduction | 328 |
| 7.5.2 | Competence of the courts to order provisional measures | 328 |
| 7.5.3 | The competence of the arbitrators to order provisional measures | 332 |
| 7.6 | The statement of defence | 336 |
| 7.7 | The prerequisites for examining the case on its merits | 338 |
| 7.7.1 | Introduction | 338 |
| 7.7.2 | Courses of action available to the respondent if he considers the arbitrators to lack jurisdiction | 342 |
| 7.7.3 | The arbitral tribunal's jurisdiction to rule on its own jurisdiction | 347 |
| 7.7.4 | Impermissible claims | 353 |
| 7.7.5 | Legal capacity | 353 |
| 7.7.6 | Lis pendens | 356 |
| 7.7.7 | Res judicata | 357 |
| 7.8 | Submissions, oral preparations and the active role of the arbitrators | 365 |
| 7.8.1 | Introduction | 365 |
| 7.8.2 | The active role of the arbitrators | 368 |
| 7.8.3 | Clarification of the claims, grounds and objections | 371 |
| 7.8.4 | Investigation of the facts | 374 |
| 7.8.5 | Investigation of legal issues | 377 |
| 7.8.6 | Statements of evidence | 380 |
| 7.8.7 | Oral and written preparations | 383 |
| 7.8.8 | Principles of due process | 385 |
| 7.8.9 | Time limits and notices | 390 |
| 7.8.10 | Settlement | 392 |
| 7.9 | Means of coercion | 393 |
| 7.10 | Obstruction | 394 |
| 7.10.1 | Introduction | 394 |
| 7.10.2 | Need for the claimant and the arbitrators to actively counteract obstruction | 395 |
| 7.10.3 | The risks incurred by the respondent not playing an active role in the arbitral proceedings | 396 |
| 7.10.4 | Lawful excuse | 398 |

| | | |
|---------|--|-----|
| 7.10.5 | Time extensions | 399 |
| 7.10.6 | Preclusion | 400 |
| 7.10.7 | The arbitrators' power to draw adverse inferences from a party's passivity or failure to comply with an order | 404 |
| 7.11 | Amendments of claims and defences | 406 |
| 7.11.1 | Introduction | 406 |
| 7.11.2 | The importance that the amendment refer to an issue which has a close or remote connection to the claims and grounds originally stated by the claimant | 409 |
| 7.11.3 | The respondent's own claims and set-off defences | 412 |
| 7.11.4 | Factors significant to the arbitrators' discretionary assessment | 413 |
| | 7.11.4.1 Challenge issues | 417 |
| 7.12 | Withdrawal and limitations of claims | 417 |
| 7.13 | The evidence | 420 |
| 7.13.1 | The responsibility of the parties with respect to the production of evidence | 420 |
| 7.13.2 | Admissibility of the evidence | 424 |
| 7.13.3 | The parties, their representatives and the witnesses | 429 |
| | 7.13.3.1 Introduction | 429 |
| | 7.13.3.2 Examination of the witnesses | 436 |
| 7.13.4 | Expert witnesses | 441 |
| | 7.13.4.1 The expert appointed by the arbitrators | 442 |
| | 7.13.4.2 The party-appointed experts | 444 |
| 7.13.5 | The written evidence | 445 |
| | 7.13.5.1 Introduction | 445 |
| | 7.13.5.2 Examination before the tribunal to determine document production | 446 |
| | 7.13.5.3 Disclosure orders by the arbitrators | 447 |
| | 7.13.5.4 Confidential information | 450 |
| | 7.13.5.5 The presentation of the written evidence | 453 |
| 7.13.6 | Computerised information | 453 |
| 7.13.7 | Site inspection | 455 |
| 7.13.8 | Court assistance in taking evidence | 456 |
| | 7.13.8.1 Introduction | 456 |
| | 7.13.8.2 Consent by the arbitrators | 459 |
| | 7.13.8.3 The court proceedings | 469 |
| 7.13.9 | The evaluation of the evidence | 472 |
| 7.13.10 | Burden of proof | 473 |

| | | |
|------------------|---|------------|
| 7.14 | The final hearing | 475 |
| 7.14.1 | Notices and extensions | 475 |
| 7.14.2 | The hearing | 477 |
| Chapter 8 | The Award | 481 |
| 8.1 | Introduction | 481 |
| 8.2 | Duty to apply the law | 482 |
| 8.3 | Deliberations | 484 |
| 8.3.1 | Introduction | 484 |
| 8.3.2 | The confidential nature of the deliberations | 486 |
| 8.3.3 | The stipulation that all arbitrators be allowed to take part in the deliberations | 488 |
| 8.3.4 | Limitations of time | 489 |
| 8.3.5 | The principle of equal treatment | 490 |
| 8.3.6 | Void and challengeable awards | 490 |
| 8.3.7 | Failure to take part in the deliberations | 491 |
| 8.3.8 | The right of the arbitrators to obtain advice | 493 |
| 8.4 | Voting | 494 |
| 8.5 | Rationale | 497 |
| 8.6 | Dissenting opinions | 499 |
| 8.7 | The requirements of writing and signing | 500 |
| 8.8 | Certificate that an arbitrator has failed to sign the award | 505 |
| 8.9 | Time limit for rendering and serving the award | 508 |
| 8.10 | Statement in the award concerning the place of the proceedings | 511 |
| 8.11 | Statements commonly occurring in an arbitration award | 513 |
| 8.11.1 | Introductory statements | 513 |
| 8.11.2 | The recital | 515 |
| 8.11.3 | The rationale | 515 |
| 8.11.4 | The ultimate order | 516 |
| 8.11.5 | Instructions for appeal | 517 |
| 8.12 | Time limits for the delivery of awards | 518 |
| 8.13 | Different types of arbitration award | 520 |
| 8.13.1 | General remarks on awards | 520 |
| 8.13.2 | Awards writing off requests or declaring no jurisdiction | 521 |
| 8.13.3 | Decisions | 525 |
| 8.13.4 | Separate award | 526 |
| 8.13.4.1 | Partial award | 528 |
| 8.13.4.2 | Interlocutory award | 529 |
| 8.13.5 | Award on agreed terms | 534 |
| 8.14 | Legal effects of the award | 536 |
| 8.15 | Correction, supplementation and interpretation | 538 |

| | | |
|-------------------|--|------------|
| 8.15.1 | Introduction | 538 |
| 8.15.2 | Correction of arbitration awards | 543 |
| 8.15.3 | Supplementations of awards | 544 |
| 8.15.4 | Interpretation of arbitration awards | 546 |
| Chapter 9 | Costs | 549 |
| 9.1 | Introduction | 549 |
| 9.2 | The arbitrators' fees and expenses | 549 |
| 9.2.1 | The amount of fees | 549 |
| 9.2.2 | Expenses | 554 |
| 9.2.3 | Interest | 555 |
| 9.2.4 | The joint and several liability of the parties | 556 |
| 9.2.5 | Freedom of contract | 557 |
| 9.2.6 | Security for the arbitrators' remuneration | 561 |
| 9.2.7 | Enforceability and right to appeal | 565 |
| 9.3 | Duty of a party to reimburse the opposing party for his costs | 567 |
| Chapter 10 | Invalidity of Awards and the Setting Aside of Awards | 571 |
| 10.1 | Introduction | 571 |
| 10.2 | The mandatory nature of the rules of challenge and the principle of <i>in dubio pro validitate</i> | 575 |
| 10.3 | The burden of proof | 577 |
| 10.4 | Does the award have legal force after it has been attacked in avoidance or challenge proceedings? | 579 |
| 10.5 | Irregularities committed by bodies other than the arbitral tribunal | 581 |
| 10.6 | Avoidance proceedings | 584 |
| 10.6.1 | Introduction | 584 |
| 10.6.2 | Lack of arbitrability | 587 |
| 10.6.3 | Public policy | 587 |
| | 10.6.3.1 Procedural public policy | 587 |
| | 10.6.3.2 Substantive public policy | 590 |
| 10.6.4 | The requirement that the award shall be in writing and signed | 592 |
| 10.7 | Challenge proceedings | 592 |
| 10.7.1 | The dispute is not covered by a valid arbitration agreement between the parties | 592 |
| 10.7.2 | Going beyond submission | 593 |
| | 10.7.2.1 Introduction | 593 |
| | 10.7.2.2 The functions of the challenge rule | 593 |
| | 10.7.2.3 The causal requirement | 596 |

| | | |
|-------------------|---|------------|
| 10.7.2.4 | Irregularities and excesses of mandates caused by the challenging party's negligence during the arbitration | 602 |
| 10.7.2.5 | The mandate concept | 602 |
| 10.7.2.6 | The borderline between misjudgments on the merits and exceeding the mandate | 610 |
| 10.7.2.7 | Award delivered after the expiry of the respite allowed for it | 613 |
| 10.7.3 | The arbitral proceedings took place in Sweden, contrary to section 47 | 615 |
| 10.7.4 | An arbitrator has been appointed contrary to the agreement between the parties or the Swedish Arbitration Act | 616 |
| 10.7.5 | Arbitrators who lack legal capacity or are disqualified | 621 |
| 10.7.6 | The general clause | 622 |
| 10.7.6.1 | Introduction | 622 |
| 10.7.6.2 | The requirement that the irregularity probably affected the outcome | 624 |
| 10.7.6.3 | The requirement that the challenging party did not negligently cause the irregularity | 628 |
| 10.7.6.4 | The requirement that a procedural irregularity was committed | 629 |
| 10.7.7 | Preclusion | 643 |
| 10.7.8 | Respite for filing a challenge action | 643 |
| 10.7.9 | Court procedure in challenge cases | 645 |
| 10.8 | Remission | 645 |
| 10.9 | Actions against awards whereby the proceedings have been terminated without any ruling on the merits | 649 |
| Chapter 11 | Enforcement of Swedish Awards | 651 |
| 11.1 | Introduction | 651 |
| 11.2 | The right of a party to obtain enforcement of the award against the opposing party | 651 |
| 11.2.1 | Objections to enforcement which relate to the grounds for challenge | 654 |
| 11.2.2 | Impediments to enforcement relating to the requirements that the award shall be in writing, shall be signed and shall not lack legal effect | 657 |
| 11.2.3 | Impediments to enforcement relating to grounds for invalidity concerning arbitrability and public policy | 660 |

| | | |
|-------------------|---|------------|
| 11.2.4 | Impediments to enforcement which can be asserted before the Enforcement Authority | 662 |
| 11.3 | An arbitrator's right to have the award enforced against the parties insofar as they have been ordered to pay compensation to the arbitrator | 662 |
| Chapter 12 | International Matters | 665 |
| 12.1 | Introduction | 665 |
| 12.2 | The applicability of the Swedish Arbitration Act to international disputes | 667 |
| 12.3 | Swedish jurisdiction and the right of the arbitrators to conduct arbitral proceedings in Sweden | 674 |
| 12.4 | Applicable law | 680 |
| 12.4.1 | Law applicable to the substantive issues and the choice-of-law rules | 683 |
| 12.4.2 | Law applicable to the arbitration agreement | 688 |
| 12.4.3 | Law applicable to the question of whether the dispute is arbitrable | 693 |
| 12.5 | International arbitration agreements as a bar to judicial proceedings | 695 |
| 12.6 | Interim measures | 698 |
| 12.7 | Lis pendens | 702 |
| 12.8 | The place of arbitration | 707 |
| 12.9 | Exclusion agreements | 711 |
| 12.10 | Enforcement of foreign awards | 718 |
| 12.10.1 | General outline | 718 |
| 12.10.2 | The scope of the New York Convention | 722 |
| 12.10.3 | The losing party's possibilities of opposing enforcement by filing challenge proceedings in the country where the award was made | 723 |
| 12.10.4 | The losing party's possibilities of resisting enforcement in the enforcement proceedings | 728 |
| 12.10.4.1 | Invalid arbitration agreement | 728 |
| 12.10.4.2 | Due process | 730 |
| 12.10.4.3 | Excess of terms of submission | 735 |
| 12.10.4.4 | The composition of the arbitral tribunal or the procedure was contrary to the agreement of the parties or the law of the country where the arbitration took place | 738 |
| 12.10.4.5 | Arbitrability and public policy | 740 |
| 12.10.5 | The procedure for enforcing foreign awards | 742 |

| | |
|--|------------|
| Detailed Table of Contents | xv |
| 12.10.6 Execution proceedings before the Enforcement Authority | 745 |
| The Swedish Arbitration Act | 747 |
| SCC Rules | 765 |
| Table of Cases | 783 |
| Bibliography | 797 |
| Index | 813 |