

SWEDEN

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

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JURISDICTION INDICATIVE TRAFFIC LIGHTS

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VERSION: 19 APRIL 2018

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Traditionally as well as today, Sweden is one of the favorite places for international arbitration. The Arbitration Institute of the Stockholm Chamber of Commerce, founded in 1917, has been seen as a preferred neutral venue for arbitrations in East/West disputes involving parties from the USA and Russia (including former Soviet Union), and later also from Asia. Stockholm has also become a much-used venue for energy related disputes and investor-state disputes. The Swedish Arbitration Act is highly developed and in line with best practices of international arbitration. The arbitral proceedings are safeguarded by arbitration-friendly courts.

Key places of arbitration in the jurisdiction	Stockholm.
Civil law / Common law environment?	<p>Unique Scandinavian legal environment with roots in Civil law tradition in substantive law but also features of Common law in procedural law.</p> <p>The prevailing Civil law traditions are evident in the dependence on statutory law as the primary source of law and in the non-binding, yet authoritative, nature of court judgments. The area of contract law has a special close connection with Civil law traditions.</p> <p>Common law features are particularly evident in the adversarial nature of court and arbitral proceedings. It is for the parties to outline the facts of the case and present the evidence they deem necessary, with judges and arbitrators rarely embarking on fact-finding or appointing their own experts.</p>
Confidentiality of arbitrations?	<p>Arbitrations are private but not confidential unless so agreed. Arbitrators have a duty of confidentiality. Parties do not have a duty of confidentiality, unless expressly agreed.</p> <p>No third-party participation. No duty to register Swedish awards.</p>
Requirement to retain (local) counsel?	No.
Ability to present party employee witness testimony?	Admissible.
Ability to hold meetings and/or hearings outside of the seat?	Yes, if not otherwise agreed by the parties.
Availability of interest as a remedy?	Yes.
Ability to claim for reasonable costs incurred for the arbitration?	Yes.
Restrictions regarding contingency fee arrangements and/or third-party funding?	<p>Contingency fees are generally prohibited for members of the Swedish bar, but no general restriction for foreign counsel.</p> <p>No restrictions on third party financing.</p>
Party to the New York Convention?	Yes.

Other key points to note	φ
WJP Civil Justice score (2017-2018)	Sweden's score is 0.86 ranking it 4 th in the world.

ARBITRATION PRACTITIONER SUMMARY

The Swedish Arbitration Act is fundamentally based on party autonomy. As a consequence, the structure of the arbitral proceedings under the Arbitration Act is primarily decided by the parties and, absent their agreement, by the arbitral tribunal. The Arbitration Act imposes very few mandatory rules, so the parties are free to contract out of the majority of provisions. Swedish courts are considered very arbitration-friendly, which is evident in that they will typically not intervene in arbitrations but will readily enforce both Swedish and foreign arbitral awards.

Date of arbitration law?	The Swedish Arbitration Act of 1 April 1999 (the “ Arbitration Act ”).
UNCITRAL Model Law? If so, any key changes thereto?	Sweden is <u>not</u> a Model Law country, but the Arbitration Act conforms to the Model Law’s basic principles.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No special courts for handling arbitration-related matters. In practice, the Svea Court of Appeal located in Stockholm is very specialised in arbitration as it has jurisdiction over e.g. challenge procedures regarding arbitrations seated in Stockholm and enforcement procedures of foreign awards.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Swedish courts have power to order pre-arbitration interim measures for arbitrations seated in Sweden and abroad. The courts will also consider requests <i>ex parte</i> , <i>i.e.</i> , without hearing the other party, if delay would place the applicant’s claim at risk. If interim measures are sought prior to commencing the arbitration, the applicant must submit a request for arbitration within one month from the issuance of the interim measure.
Courts’ attitude towards the competence-competence principle?	Courts respect the competence-competence principle that is enshrined in the Arbitration Act. However, the Arbitration Act also entitles a party to seek a declaratory judgment from a competent Swedish court on whether or not the arbitral tribunal has jurisdiction.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The Arbitration Act makes a distinction between an action to declare an award invalid and an action to set aside an award. An award made in Sweden is invalid if the dispute was non-arbitrable, if the award is clearly incompatible with public policy or if it does not meet the formal requirements of an award (written form and signature). An award made in Sweden can be wholly or partially set aside if the arbitration agreement is invalid, the award was not rendered within a time limit agreed by the parties, arbitrators exceeded their mandate, the arbitral proceedings should not have taken place in Sweden, there were irregularities in the appointment of arbitrators, an arbitrator lacked capacity or impartiality, or there are other procedural irregularities that influenced the outcome of the case.
Courts’ attitude towards the	The grounds for refusing the recognition and enforcement of a

<p>recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>foreign arbitral award are those set out in the New York Convention.</p> <p>Upon the objection of a party, an award that has been set aside at the seat is not enforceable in Sweden.</p> <p>An interim measure by an arbitral tribunal is generally not considered as a decision on the merits and is thus not recognised as an enforceable award in Sweden.</p>
<p>Other key points to note?</p>	<p>φ</p>

JURISDICTION DETAILED ANALYSIS

1. The legal framework

The law governing arbitration in Sweden is the Arbitration Act of 1 April 1999 (the “**Arbitration Act**”).¹ Notwithstanding minor technical corrections, the Arbitration Act has remained unchanged since its enactment in 1999.

Sweden has opted not to adopt the UNCITRAL Model Law as such. However, during the enactment of the Arbitration Act, particular attention was given to the Model Law. Thus, the Arbitration Act is essentially based on the UNCITRAL Model Law and conforms with its basic principles, although it does not follow the Model Law in form or in wording.

2. The arbitration agreement

2.1 Applicable law

Under section 48 of the Arbitration Act, the parties may choose the law applicable to the arbitration agreement. Absent such choice, the applicable law is that of the seat of arbitration. When assessing whether the parties have chosen the law applicable to the arbitration agreement, the arbitral tribunal or a court is to assume that a choice of law clause in the contract in which the arbitration agreement is incorporated only applies to the substantive agreement and not to the arbitration agreement.

The law governing the arbitration agreement applies to questions regarding the formation, interpretation, validity and termination of the arbitration agreement. It does not apply to the question of whether a party had capacity or was authorised to enter into an arbitration agreement. Instead, the law applicable to these issues is determined by the general Swedish choice of law rules. For example, in Sweden, the capacity of a company and the authority of its representatives are decided in accordance with the law of the company's place of incorporation.

2.2 Separability

An arbitration agreement is considered to be independent from the rest of the contract in which it is included. Swedish law has long recognised this doctrine of separability and it is codified in section 3 of the Arbitration Act.

2.3 Formal requirements

The Arbitration Act does not set any formal requirements for enforceable arbitration agreements. An arbitration agreement can thus be concluded orally, in writing, or by conduct.

However, an enforceable arbitration agreement must fulfil certain general contractual requirements. *First*, the parties must have the legal capacity to conclude the arbitration agreement. *Second*, the arbitration agreement must refer to disputes arising out of a specific contractual relationship or to a specific dispute. *Third*, the matter to be settled by arbitrators must be arbitrable. *Finally*, the arbitration agreement must be valid in accordance with the general rules of Swedish contract law, *i.e.*, it must not be tainted by duress, undue influence, fraud, mistake or any other circumstance that give rise to voidability under general contract law.

2.4 Parties

Arbitration agreements are in principle only binding on the parties to the agreement.

¹ In Swedish, *Lag (1999:116) om skiljeförfarande*, available in Swedish at: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-1999116-om-skiljeforfarande_sfs-1999-116.

However, in limited circumstances, an arbitration agreement may also become binding on third parties. For example, where a party assigns all of its rights and obligations under a contract, this assignment includes the agreement to arbitrate. Thus, the assignee will generally be bound by the arbitration agreement. Another notable example regards guarantees, where the prevailing view is that a guarantor is bound by an arbitration agreement included in the main contract between the creditor and debtor because the guarantee is ancillary to the main obligation of the debtor.

2.5 Arbitrability

Disputes that the parties may not settle by agreement are non-arbitrable. This is generally the case in disputes that affect public or third-party interests. Restrictions to arbitrability concern disputes related to criminal law, tax, declarations of bankruptcy, the personal status of individuals and companies, IP matters (the registration and validity of patents and trademarks except as between parties), certain employment law matters (disputes concerning collective bargaining agreements and discrimination), and family matters (divorce, guardianship, adoption etc.). There is a specific provision in section 1(3) of the Arbitration Act which provides that disputes concerning the Civil law effects of competition law as between parties are arbitrable.

Section 6 of the Arbitration Act includes a restriction to arbitrability with respect to consumers. Pursuant to said section, consumer disputes are arbitrable only if the arbitration agreement was made after the dispute arose. It is also noteworthy that an arbitration agreement may be invalidated or modified under section 36 of the Swedish Contracts Act.² This is relevant particularly with respect to weaker parties such as consumers or employees, if enforcing the agreement would be considered unreasonable in the circumstances of the case.

There are no general restrictions to arbitrability with respect to state entities. It is generally accepted that a valid arbitration agreement constitutes a waiver of sovereign immunity, with the possible exception for immunity from execution.

3. The intervention of the courts

3.1 The court's power to assess the arbitral tribunal's jurisdiction

Swedish courts respect the competence-competence principle that is enshrined in section 2 of the Arbitration Act. However, the section 2 of the Arbitration Act also entitles a party to seek a declaratory judgment from a competent Swedish court on whether or not the arbitral tribunal has jurisdiction. Such an action may be brought both before and after the initiation of the arbitral proceedings.³ If the arbitration is ongoing at the time of the court action, the arbitral tribunal may continue the arbitration pending the final outcome of the court proceedings.

3.2 Dismissing litigation covered by an arbitration agreement

If a party initiates court proceedings in breach of a valid arbitration agreement, the court must, at the request of a party, dismiss the action.

An objection to the jurisdiction of the court must be raised not later than when the objecting party submits its first defence brief. The party invoking the arbitration agreement bears the burden of proof to show the existence of a valid arbitration agreement.

² In Swedish, *Lag (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område*, available in Swedish at: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-1915218-om-avtal-och-andra-rattshandlingar_sfs-1915-218.

³ In a proposed bill with amendments to the Arbitration Act (SOU 2015:37), the right to initiate such an action will be more limited. The bill is expected to result in legislation in 2018.

This applies regardless of whether the place of arbitration under the agreement is in Sweden or abroad. However, if the law applicable to the arbitration agreement is something other than Swedish law (*i.e.*, the seat of arbitration is outside Sweden or the parties have agreed on applying foreign law), the Swedish court will not only determine whether the arbitration agreement is enforceable under the applicable law, but also whether the dispute is arbitrable under Swedish law prior to dismissing the action.

Pursuant to section 5 of the Arbitration Act, a party loses its right to invoke an arbitration agreement as a bar to court proceedings if the party has obstructed the arbitration by (a) opposing a request for arbitration, (b) failing to appoint an arbitrator in due time, or (c) failing in due time to provide its share of the requested security for the compensation of the arbitrators.

3.3 Effects of injunctions by foreign tribunals

It is unlikely that Swedish courts would give direct effect to injunctions by arbitral tribunals seated abroad enjoining the court to stay litigation proceedings.

3.4 Intervention in foreign arbitrations

Swedish courts are arbitration-friendly and will typically not intervene in arbitrations seated in Sweden or abroad. However, under section 49(2) of the Arbitration Act, Swedish courts are permitted to order interim measures in aid of arbitrations seated outside of Sweden at the request of a party. The available measures are provided for in Chapter 15 of the Swedish Code of Judicial Procedure.⁴ These measures include the attachment of assets or specific property and any other “*appropriate measures*” intended to secure the claimant’s claim, such as prohibitory injunctions or orders to perform a certain action under a default fine. Although it remains somewhat open for discussion, the prevailing view is that the reference to “*appropriate measures*” under Chapter 15, section 3 of the Code of Judicial Procedure does not grant Swedish courts authority to intervene in arbitrations abroad by ordering an anti-suit injunction.

The interim measures can be ordered only at the application of a party who shows that there is probable cause of a lawful claim against the other party. It must also be reasonable to suspect that the opposing party would evade payment or otherwise obstruct the applicant’s right. The applicant is generally obliged to deposit security in order to obtain the interim measure.

In addition, section 50 of the Arbitration Act allows a party to an arbitration seated abroad to have direct recourse to a Swedish court for assistance with the taking of evidence. Subject to the consent of the arbitral tribunal, a party may request assistance from the Swedish court to hear a witness or an expert under oath or a party under truth affirmation. The court may also order a person to produce a document or an item as evidence. The Swedish court will accept such a request if the measure can be lawfully taken under the Swedish Code of Judicial Procedure, the arbitration is covered by an arbitration agreement and the dispute is arbitrable in accordance with Swedish law.

4. The conduct of the proceedings

4.1 Party representation

In Swedish arbitral proceedings, parties can either retain outside counsel or be self-represented. In practice, parties most often retain outside counsel.

4.2 Court control of arbitrators

Swedish courts exercise control over the independence and impartiality of arbitrators at the application of a party in *ad hoc* arbitral proceedings. However, the party must first make a request to the arbitral tribunal to remove the arbitrator. If such request is denied by the arbitral tribunal, the matter will be tried by the

⁴ In Swedish *Rättegångsbalk* (1942:740), available in English at: <http://www.regeringen.se/49bb67/contentassets/5503f73d320b4de5bb521dd7ee07500a/the-swedish-code-of-judicial-procedure>.

court at the request of the party. The courts will remove an arbitrator if there exists any circumstance which may diminish confidence in the arbitrator's impartiality. Section 8 of the Arbitration Act lists four situations in which such circumstances are always deemed to exist:

- when the arbitrator or a person closely associated with him/her is a party, or otherwise may expect considerable benefit or detriment as a result of the outcome of the dispute,
- when the arbitrator or a person closely associated with him/her 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 considerable benefit, or detriment as a result of the outcome of the dispute,
- when 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 his case in the dispute, or
- when the arbitrator has received or demanded compensation on the basis of a private agreement concluded with only one of the parties.

In practice, Swedish courts demand a rather high standard of independence and impartiality from arbitrators. For example, in *AJ v Ericsson AB*, the Supreme Court explained that the determination of whether certain circumstances give rise to justifiable doubts must be made on the basis of objective grounds and not on the basis of a risk assessment in a specific case.⁵ The Supreme Court also acknowledged the relevance of the IBA Guidelines on the Conflict of Interest in International Arbitration in assessing impartiality under Swedish law.

An arbitrator's failure to disclose relevant circumstances does not *per se* suffice to accept a challenge of an arbitrator. However, it may in some cases be a factor to be taken into account.⁶

4.3 Court assistance in the constitution of a tribunal

Section 13 of the Arbitration Act provides that, unless the parties have agreed otherwise, each party appoints one arbitrator and the party-appointed arbitrators appoint a third arbitrator to act as chairman. Pursuant to section 14 of the Arbitration Act, if a party fails to appoint an arbitrator within 30 days, the court will appoint the arbitrator at the request of the other party. Similarly, pursuant to section 15(1) of the Arbitration Act, if the party-appointed arbitrators fail to appoint the chairman within 30 days from the date on which the last arbitrator was appointed, the court will make such an appointment at the request of any party.

There are also other instances where courts will assist in the constitution of the arbitral tribunal. Section 15(2) of the Arbitration Act provides that the court will appoint an arbitrator if a party so requests after a 30 day time-limit, when the parties have agreed that the arbitrator is to be appointed by a third party but the third party had failed to do so despite the request of a party. The same applies when the parties have agreed to jointly appoint an arbitrator but fail to agree on the person to be appointed.

4.4 Interim measures by courts

Sections 4(3) and 49(2) of the Arbitration Act grant Swedish courts power to issue interim measures during and prior to arbitral proceedings, regardless of whether the seat of arbitration is in Sweden or abroad. The available measures and the conditions under which they are issued are provided in Chapter 15 of the Swedish Code of Judicial Procedure.⁷

The available interim measures include, for example, the attachment of assets or specific property, restoration of possession, and any other appropriate measures intended to secure the claimant's claim,

⁵ Supreme Court case NJA 2007, p. 841.

⁶ Government Bill 1998/99:35, p. 217.

⁷ See, footnote 4 above.

such as prohibitive measures to restrain a party from carrying out certain actions or positive measures to require a party to take certain action under a default fine.

The interim measures can be ordered only at the application of a party who shows that there is probable cause of a lawful claim against the other party. It must also be reasonable to suspect that the opposing party would evade payment or otherwise obstruct the applicant's right. The applicant is generally obliged to deposit security in order to obtain the interim measure. The courts will also consider requests *ex parte, i.e.*, without hearing the other party, if delay would place the applicant's claim at risk. If interim measures are sought prior to commencing the arbitration, the applicant must submit a request for arbitration within one month from the issuance of the interim measure.

4.5 Confidentiality

The Arbitration Act does not regulate the confidentiality of arbitral proceedings. The Supreme Court has established that the parties to an arbitration do not have a legal duty of confidentiality unless the parties have explicitly agreed so.⁸ Parties are thus free to disclose, for example, that they are involved in arbitration unless they have agreed otherwise.

Arbitrators are, instead, understood to be under a duty of confidentiality by virtue of their assignment. Arbitrations are also private in the sense that third parties cannot attend hearings or access documents without the consent of the parties. Moreover, there is no duty to register Swedish arbitral awards with any third parties. An award which is challenged in court becomes public under the general rules of court publicity. To avoid this, a party can request the court to declare the award secret *e.g.*, on the grounds of protecting trade secrets.

4.6 Length of proceedings

The Arbitration Act does not regulate the length of arbitral proceedings. The parties may, however, agree on a time limit for rendering the award, for example, by referring to institutional rules including such a time limit.

4.7 Place of hearings

Section 22(2) of the Arbitration Act provides that, unless the parties have agreed otherwise, the arbitral tribunal may hold hearings and meetings outside the seat of arbitration.

4.8 Interim measures by arbitrators

Section 25(4) of the Arbitration Act allows for arbitrators to issue interim measures, unless the parties have agreed otherwise. The interim measures may be issued at the request of a party and for the purposes of securing the claim to be decided by the arbitral tribunal. The arbitrators may require the requesting party to provide reasonable security to cover any damage that may be incurred to the other party as a result of the interim measure.

Under the above-mentioned section 25(4), arbitrators have wide discretion in deciding whether it is justifiable to grant interim measures. Similarly, they have wide discretion as to deciding on the measures granted. At the very least, the same interim measures are available to the parties as those provided for in Article 17 of the UNCITRAL Model law, *e.g.*, orders to maintain or restore the *status quo*, to take action that would prevent or refrain from taking action that is likely to harm the proceedings, to preserve the assets out of which the award may be satisfied, or to preserve evidence. Arbitral tribunals are not, however, empowered to grant interim measures against third parties except by asking a third party to voluntarily perform in order to secure evidence.

⁸ Supreme Court case NJA 2000 p. 538.

Interim measures granted by arbitral tribunals (similar to decisions by emergency arbitrators) are not enforceable in Sweden. However, interim measures granted by arbitral tribunals seated in Sweden may be enforceable elsewhere, for example in countries which have adopted Article 17 H of the UNCITRAL Model Law. Although the unenforceability of interim measures issued by arbitral tribunals in Sweden may seem like a disadvantage compared to countries that have adopted Article 17 H, the difference does not often have much practical relevance. Parties are contractually bound by interim measures issued by the arbitral tribunal in their mutual relationship. Failure to comply with such measures can have contractual implications and may also be ascribed importance by the arbitral tribunal, for example, with respect to determining liability for losses or calculating damages. Thus, the parties generally comply with the interim measures. Also, an interim measure issued by an arbitral tribunal does not prevent a party from seeking an enforceable interim measure from Swedish courts.

4.9 Evidence

It is for the parties to outline the facts of the case and present the evidence they deem necessary, with judges and arbitrators rarely embarking on fact-finding or appointing own experts. Pursuant to section 25(2) of the Arbitration Act, the arbitral tribunal may refuse to admit evidence which is manifestly irrelevant to the arbitration. Evidence may also be refused if it is justified having regard to the time at which the evidence is submitted, *i.e.*, if the evidence is submitted at a late stage in the proceedings.⁹ Otherwise, there are few rules on the admissibility of evidence in Swedish arbitration law. For example, there are no restrictions to the presentation of testimony by a party employee or to the presentation of hearsay evidence. The arbitral tribunal is free, however, to exercise its discretion in determining the evidentiary value of such evidence in the arbitration.

4.10 Mandatory hearing

Section 24(1) of the Arbitration Act makes it mandatory to hold a hearing prior to the determination of an issue on the merits if a party so requests. The arbitral tribunal can only deny the right to a hearing if the parties have agreed that no hearings must be held, for example, by referring to institutional rules for expedited arbitrations in which holding a hearing is made subject to the arbitrator's discretion.

4.11 Awarding of interest

Section 37(2) of the Arbitration Act regulates the awarding of interest to the arbitrator's costs by providing that such interest is to be calculated as from one month after the rendering of the award. Section 42 of the Arbitration Act also mentions that the arbitral tribunal may, at the request of party, order the other party to compensate for its legal expenses with interest. Otherwise, the Arbitration Act is silent on the principles of awarding interest. Interest on the principal amount on the merits is deemed a substantive, rather than procedural, issue. If Swedish law applies to the merits, the substantive provisions for interest are included in the Swedish Interest Act.¹⁰

The Interest Act defines the applicable interest rate on the basis of a fluctuating reference rate determined by the Swedish National Bank every half-year. If the parties have not agreed otherwise, the delay interest rate for debts that have fallen due (including, for example, arbitrators' costs and compensation for the parties' legal expenses as referred to in sections 37 and 42 of the Arbitration Act) is eight (8) percentage units higher than the reference rate. Between 1 January 2015 and 30 June 2018, the reference rate has been either 0.00% or -0.50% and the corresponding delay interest rate has thus been either 8.00% or 7.50%.

⁹ Although not explicitly stated in the Arbitration Act, the arbitral tribunal will usually only refuse to admit evidence if the arbitral tribunal has set a final date for submitting evidence and the evidence is – without sufficient cause – submitted after the expiry of such deadline.

¹⁰ In Swedish *Räntelag* (1975:635), available in Swedish at: http://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/rantelag-1975635_sfs-1975-635.

4.12 Allocation of arbitration costs

Section 37 of the Arbitration Act provides that the parties are jointly and severally liable for the compensation of the arbitrators' work and expenses. There is one exception to this rule of joint and several liability, that is in situations where the arbitral tribunal has ruled that it lacks jurisdiction to determine the dispute. In such cases, the claimant is to pay the arbitration costs, whereas the respondent is liable only to the extent required due to "*special circumstances*". For example, if a respondent's negligence has increased costs, the respondent may be held liable for those additional costs.

Section 42 of the Arbitration Act provides that the arbitrators may, upon request by a party, order the opposing party to compensate for the party's legal expenses with interest. The arbitrators may also determine the manner in which the compensation to the arbitrators shall be finally allocated between the parties. The main rule in Sweden is that the costs follow the event. In cases where some requests for relief are granted and others denied, the arbitrators are likely to allocate the costs by taking into account the time and effort spent during the proceedings for the various contentious issues. The arbitral tribunal may also use its discretionary powers to allocate costs to sanction an obstructing party.

4.13 Liability

Although the Arbitration Act does not regulate the issue of arbitrators' liability, arbitrators do not benefit from automatic immunity from civil liability. However, most institutional rules include limitations on the arbitrators' liability and arbitrators may also limit their liability through contract. Limitations where the arbitrators' liability for errors caused by normal negligence is excluded are valid and respected in Sweden, whether included in institutional rules or in terms of engagement.

In the absence of such limitations of liability, the liability of the arbitrators is subject to the general rules of Swedish contract law.¹¹ This means that an arbitrator may be held liable in damages if he or she causes loss to a party through negligence in the performance of his or her duties. For example, a failure to perform the arbitrator's obligation to render an award or a procedural error that has led to setting aside the arbitral award may result, if negligence is established, in liability for the arbitrators to compensate for the additional costs incurred to the parties.¹² The lack of cases by Swedish higher courts on arbitrators' liability suggests that it is uncommon to initiate such proceedings against arbitrators.¹³

Any potential criminal liability will be assessed under the Swedish criminal law. For example, if an arbitrator accepts a bribe, he or she may become subject to criminal proceedings.

5. The award

5.1 Reasons

There is no requirement in the Arbitration Act that arbitrators must give reasons for the award. However, most institutional rules require that the award must state the reasons on which it is based and this is generally also considered good practice.

¹¹ As there are no Swedish cases from higher courts on an arbitrator's liability, the conditions under which such liability may arise are not entirely clear. The common view is that an arbitrator has a liability for damages and that the liability will be based on contractual grounds and rules applicable to trustees. The general prerequisite for liability is negligence, although some authors set the standard higher to gross negligence. Also, there are different views on the type of errors that may give rise to liability. Some authors distinguish between procedural errors (that arbitrators should be liable for) and assessment errors, such as incorrect application of substantial law (that arbitrators should arguably not be liable for).

¹² It has been discussed in Swedish legal literature whether a challenge of the award in question is a prerequisite for a claim for damages against an arbitrator. Although there are different views on the subject, it seems that a challenge is not a prerequisite for liability (and neither is the setting aside of the award). However, the setting aside of an award may serve as proof of negligence and possible damage incurred. In absence of any Supreme Court judgment on the matter, the issue remains debatable.

¹³ However, it may be that such cases are settled by involved parties (and their insurance companies) without the assistance of courts.

5.2 Waiver of annulment

The Arbitration Act makes a distinction between an action to declare an award invalid and an action to set aside an award. The right to an action declaring an award invalid cannot be waived by agreement. However, pursuant to section 51 of the Arbitration Act, 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 through a binding “*exclusion agreement*”.¹⁴ 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.

5.3 Atypical, mandatory requirements

The Arbitration Act distinguishes between awards and decisions. An award is final and binding, whereas decisions are not enforceable and may – at least as a general rule – be amended by the arbitral tribunal at any stage during the proceedings.

Pursuant to section 27 of the Arbitration Act, an *award* is to be issued when the arbitral tribunal (1) makes a determination on the merits of the case, (2) terminates the proceedings without ruling on the merits, for example due to the finding that it lacks jurisdiction or due to withdrawal of claims by the parties, or (3) confirms, at the request of the parties, a settlement agreement entered into by the parties. All other determinations that are not included in an award, such as procedural determinations that do not terminate the proceedings, are to be made in the form of a *decision*.

Section 2 of the Arbitration Act particularly provides that an arbitral tribunal’s affirmation of its own jurisdiction during the proceedings is a non-binding decision. This means that such an affirmation cannot be rendered in the form of an interim or partial award, nor can it be separately challenged or otherwise appealed until the arbitral tribunal has made a final determination on its jurisdiction in the final award. However, as mentioned in the foregoing, a party can seek a declaratory judgment from a Swedish court on whether or not the arbitral tribunal has jurisdiction.¹⁵

Awards rendered in Sweden must abide by certain formal requirements: (i) the award must be made in writing, (ii) the award must be signed by the arbitrators, (iii) the award must state the seat of arbitration, and (iv) the award must state the date upon which the award was rendered. If the award does not fulfil these requirements, then the award is invalid.

In addition to these requirements, some awards must contain instructions with respect to how to seek recourse against them. For example, a final award which does not render a ruling on the merits (for example because the arbitral tribunal finds that it lacks jurisdiction) must include instructions to the parties on how to appeal the award as per section 36 of the Arbitration Act. Moreover, where an award provides that a party has to pay the arbitrators’ compensation, it must contain instructions on how and when to challenge such an award, *i.e.*, how to challenge costs before a competent District Court.

5.4 Appeal

A Swedish arbitral award is final and binding as of the day it is rendered and cannot be challenged on the merits, but only on formal or procedural grounds. On these narrow-defined grounds, parties can apply to have the award declared invalid under section 33 of the Arbitration Act or to have it set aside under section 34 of the Arbitration Act.

The provisions governing invalidity are not based on the UNCITRAL Model Law but on a consideration of public interest and the interest of third parties. Thus, pursuant to section 33 of the Arbitration Act, an award rendered in Sweden is *invalid* if:

¹⁴ Both parties must be foreign in order to apply such an exclusion agreement.

¹⁵ See, section “The court’s power to assess the arbitral tribunal’s jurisdiction” above.

- The disputed matter was not arbitrable.
- The award is clearly incompatible with public policy.
- The award does not fulfil the requirements with regard to its written form and signature in accordance with section 31(1) of the Arbitration Act.

The circumstances set forth above are exhaustive and cannot be waived. Moreover, there are no time limits by which a party must challenge the invalidity of the award. Due to the serious nature of the invalidity grounds, such challenges are exceptionally rare. It is worth noting that invalidity may apply only to a certain part of the award.

Pursuant to section 34 of the Arbitration Act, an award made in Sweden can also be challenged and *set aside*, wholly or partly, by the court on one of the following grounds:

- The arbitration agreement is invalid.
- The arbitrators have exceeded their mandate or have not produced an award within the time limit set by the parties.
- The arbitral proceedings should not have taken place in Sweden.
- There were irregularities in the appointment of an arbitrator.
- An arbitrator lacks capacity or impartiality.
- There are other procedural irregularities that can be presumed to have influenced the outcome of the case.

An action to challenge the award under section 34 of the Arbitration Act must be brought within three months from receipt of the award. Pursuant to section 43 of the Arbitration Act, the action shall be considered by the Court of Appeal, whose determination as a main rule cannot be appealed. However, the Court of Appeal may grant a party leave to appeal to the Supreme Court in circumstances where it is of importance as a matter of precedent. If the Court of Appeal does not grant leave to appeal, the case cannot be tried by the Supreme Court.¹⁶

In addition to actions brought under sections 33 and 34 of the Arbitration Act, certain awards can be subject to *appeal* under section 36 of the Arbitration Act. Section 36 is applicable to awards through which the arbitral tribunal has terminated the proceedings without rendering any ruling on the merits, *e.g.*, due to a negative finding of the arbitral tribunal's jurisdiction. Upon appeal, not only may the court review the procedural issue, which has been answered by the arbitral tribunal's decision to dismiss, but also the actual handling of that issue by the arbitral tribunal.

Pursuant to section 41 of the Arbitration Act, parties can also appeal a decision on the payment of compensation to the arbitrators. Such an action must be brought before the District Court within three months from the receipt of the award. A judgment in which the compensation to an arbitrator is reduced applies also to the party who did not bring the action.

¹⁶ In an appeal process, there can be an oral hearing before the Court of Appeal and/or the Supreme Court if the court finds it appropriate or if requested by any of the parties. Usually, there will be an oral hearing before the Court of Appeal, whereas an appeal before the Supreme Court will usually be based on the written submissions without any oral hearing. An appeal process will take approximately 18 months before each instance. Depending on the specific case at hand, the duration of an appeal process may of course be shorter or longer.

5.5 Recognition and enforcement

The 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.¹⁷ Swedish awards are enforced based on an application for execution filed with the Swedish Enforcement Authority (the “SEA”). On a party’s application, the SEA will enforce an award rendered in Sweden directly, without prior confirmation by the courts, provided that:

- The award is made in writing and is signed; and
- The award cannot be subject to appeal under the provisions contained in the arbitration agreement.

Enforcement proceedings are generally relatively swift, provided that the award is not challenged and no other complicating circumstances arise. There is no expedited enforcement procedure.

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).

As regards foreign awards, the general rule under section 53 of the Arbitration Act is that they are recognised and enforced in Sweden. An application for enforcement together with the original award or certified copy thereof 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.

If the opposing party objects to the recognition or enforcement of the foreign award, such will be refused on grounds based on the New York Convention and laid out in section 54 of the Arbitration Act. Enforcement of a foreign award shall also be refused at the court’s own initiative under section 55 of the Arbitration Act, when it finds that (i) the award includes the determination of an issue which, in accordance with Swedish law, may not be decided by an arbitral tribunal; or (ii) it would be clearly incompatible with the basic principles of the Swedish legal system to recognise and enforce that award.

5.6 Suspension of enforcement

An award rendered in Sweden remains binding and enforceable even if the award is challenged. However, the court before which the challenge of the award is pending may, at the request of either party, decide to suspend the enforcement until it has made its final decision on the challenge.

Similarly, the introduction of annulment or appeal proceedings against a foreign arbitral award does not automatically suspend the enforcement of such foreign award in Sweden. Under section 58(2) of the Arbitration Act, the Swedish court before which the enforcement application is pending may decide to postpone its decision, if the opposing party contends that it has challenged the award and requests a stay of enforcement. If the foreign challenge is to be decided in the near future, the Swedish court may be more likely to grant a postponement. However, whether a challenge will be decided in the near or distant future is not determinative but might, at most, only have a minor influence on the court’s decision. Similarly, the amount of money involved in the award, whether large or small, is not a reason to stay execution.

If the foreign court in which the challenge is pending grants a stay of execution of the award, Swedish courts typically respect the stay and await the outcome of the challenge. This postponement is not automatic; if the Swedish courts believe the challenge is weak or unfounded they will pursue the enforcement procedure without delay. A stay of execution must be decided on a case specific basis. If the foreign court grants a stay as a matter of course whenever there is a challenge of an arbitral award, Swedish courts will typically not adhere to the foreign court’s decision.

¹⁷ In Swedish *Utsökningsbalk (1981:774)*, available in Swedish at: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/utsokningsbalk-1981774_sfs-1981-774.

If the Swedish court decides to stay the enforcement of an award that has been challenged abroad, it may, at the request of the party applying enforcement, order the other party to provide reasonable security.

5.7 Annulment at the seat

Swedish law adopts the position that an arbitral award which is set aside by a court in the country in which the award is made cannot be enforced in Sweden. However, in such case, the court will not refuse the enforcement at its own initiative but only at the objection of a party who proves that the arbitral award has been set aside by a competent foreign authority.

5.8 Enforceability in practice

As a result of the limited grounds for refusal of enforcement, the respondent's burden of proof and the pro-arbitration approach of Swedish courts, foreign awards are readily enforced in practice.

6. Funding arrangements

6.1 Fee arrangements

In general, a lawyer is free to agree on any legal fee or fee structure with the party he/she represents. However, an *advokat* (a lawyer who has been accepted to the Swedish Bar) is bound by the rules adopted by the Bar Association that all fees charged by an *advokat* must be reasonable. Fees are normally charged on the basis of several factors such as the importance and difficulty of the matter, the time spent, the responsibility of the *advokat* and the outcome.

6.2 Contingency fees

Contingency fees are generally prohibited for members of the Swedish bar. However, there is no general restriction for foreign counsel. Foreign counsel must abide by the ethical rules of the jurisdiction to which they belong.

6.3 Third-party funding

Third-party funding is allowed. A third party funding an arbitration is not a party and has no formal role in the proceedings. Thus, the third party may under no circumstances assume control of the litigation or otherwise participate therein unless the provisions regarding intervention apply.

7. Reform in arbitration law

In February 2014, *i.e.*, 15 years after the enactment of the current Arbitration Act, an expert committee was set up to review how well the Arbitration Act had worked in practice and how it measured up internationally. In its extensive Government Official Report issued in April 2015 (SOU 2015:37), the committee concluded that the current act had worked well overall. However, it suggested a number of improvements to make arbitration in Sweden even more attractive for both Swedish and international actors.

On 1 March 2018, the Government referred its report to the Council on Legislation for consideration. The referred report did not include all of the suggestions of the expert committee but it did propose the following amendments, among others:

- Repealing the provisions about positive or negative declaratory claim before a District Court regarding the tribunal's jurisdiction that can be made *at any point* during the proceedings. Instead, the Government suggests that such claims may be brought only *before* an arbitration has been initiated. It also suggests that the tribunal's decision affirming its own jurisdiction may be appealed by the dissatisfied party to the Court of Appeal.

- Improving the efficiency of procedure for challenging arbitral awards by allowing the use of English language to a larger extent in the taking of evidence through witness examination, shortening the time for bringing challenges against the award from three months to only two months, and restricting the possibilities to challenge an award on the basis of the arbitrators exceeding their mandate only to cases where it has probably had an effect on the outcome of the case.
- Improving the possibilities of a party to appoint a new arbitrator when the arbitrator cannot carry out its task.

The Government proposes that the amendments enter into force on 1 March 2019.

For more information on arbitration in Sweden, Mannheimer Swartling has published a Concise Guide to Arbitration in Sweden that is available upon request.