SVERIGE OCH SVENSK RÄTT I INTERNATIONELLA SKILJEFÖRFARANDEN

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INLEDNING

Sverige har en lång och stolt historia som skiljedomsland. Referenser till skiljförfarande återfinns i svenska stadslagar från medeltiden. SCC grundades 1917 och framför allt efter 1977, då AAA och USSR Chamber of Commerce slöt det s k US/USSR Optional Clause Agreement, har SCC och Sverige varit en betydande aktör inom internationella skiljeförfaranden.

Vi ska vara stolta över vår historia, som också har lett till en betydande kompetens inom skiljeförfaranden i det svenska rättssamhället. Men vi kan inte luta oss tillbaka och tro att internationella skiljeförfaranden av gammal hävd kommer att fortsätta förläggas till Sverige i framtiden.

Konkurrensen och marknadsföringsinsatserna från andra jurisdiktioner och skiljedoms-institut har ökat markant under senare år, inte minst från England där LCIA med aktivt understöd från UK Department of Justice framgångsrikt marknadsför London och engelsk rätt. Våra sonderingar bland kollegor i Ryssland och andra östländer antyder att internationella kommersiella avtal som sluts idag oftast anger LCIA/London eller ICC/Paris, med engelsk rätt som tillämplig lag för avtalen. Det är dessa avtal som kommer att sätta vår framtida karta för internationella skiljeförfaranden.

Vi är övertygade om att vi med gemensamma ansträngningar kan nå våra utländska kollegor – skiljeförfarandekollegor men även M&A- och bolagsjurister- och marknadsföra Sverige och svensk rätt som ett attraktivt alternativ för internationell tvistelösning. För att lyckas med detta är det nödvändigt att göra en inventering av vad som utmärker skiljeförfarande i Sverige och svensk materiell rätt. Det är först när vi känner oss själva som vi kan tala om varför parter ska välja Sverige och svensk materiell rätt och, med handen på hjärtat, hur många av oss kan på rak arm förklara varför en part ska välja skiljeförfarande i Sverige eller svensk materiell rätt?

Nedan finner ni ett första utkast till en inventering av positiva aspekter som utmärker Sverige som skiljedomsland och svensk materiell rätt. Vi har försökt att beskriva dessa aspekter på ett kärnfullt och korrekt sätt. Vi vänder oss nu till alla er som är aktiva inom skiljeförfaranden i Sverige för att få synpunkter och förslag hur vi kan förbättra och komplettera förteckningen. Vi kommer att bjuda in till diskussionsträffar och är även tacksamma för skriftliga förslag. Det är vår förhoppning att förteckningen ska bli ett levande dokument som diskuteras, utvecklas och förbättras – ett användbart verktyg för våra gemensamma marknadsföringsinsatser.

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1. WHY ARBITRATION IN SWEDEN?

1.1 TRANSPARENT AND TRUSTWORTHY ARBITRATION VENUE

1.1.1 Sweden is recognized globally as a transparent and open society. Year after year Transparency International ranks Sweden as one of the least corrupt countries in the world. Stockholm is also recognized as one of only a few jurisdictions in which it is safe to seat high-stakes arbitrations.

1.1.2 Stockholm is one of the leading venues for international arbitration under a variety of rules, including the SCC Rules, the UNCITRAL Arbitration Rules and the ICC Rules.

1.1.3 Stockholm is also an international hub for many investment arbitrations under bilateral investment treaties and multilateral treaties such as the Energy Charter Treaty.

1.2 LONGSTANDING TRADITION

1.2.1 Sweden has a longstanding tradition to support and respect arbitration. Arbitration awards have been enforced by Swedish public authorities at least since the 17th century and reference to arbitration as a recognised method of resolving disputes are found already in medieval legislation.

1.2.2 The New York Convention was ratified by Sweden in 1972. The Washington Convention on the Settlement of Investment Disputes was ratified by Sweden in 1966 and the Geneva Protocol on Arbitration Clauses was ratified by Sweden already in 1929.

1.2.3 Ever since the US/USSR Optional Clause Agreement (1977) between the AAA and the USSR Chamber of Commerce, the SCC and Stockholm has been the leading international arbitration venue for East-West disputes.

1.3 ARBITRATION-FRIENDLY LEGAL ENVIRONMENT

1.3.1 The principle of party autonomy is firmly anchored in Sweden. Arbitration agreements are recognised as binding and the parties' choice of substantive law and language to use in the proceedings is respected.

1.3.2 The Swedish concept of arbitrability is broad and the freedom to refer commercial disputes to arbitration is in essence unrestricted.

1.3.3 Parties are free to appoint arbitrators of their own choice, as long as the arbitrator is independent and impartial.

1.3.4 Many of the world's most prominent arbitrators act in Sweden on a regular basis. As a result thereof, Swedish arbitration practice continuously evolves in line with international best practice.

1.3.5 The Swedish tradition on evidence and production of documents is close to the IBA Rules of Evidence. For example, long before the adoption of the IBA Rules, the Swedish tradition in arbitrations and litigations alike has been to adhere to an adversarial principle, where:

- it is up to the parties to present the evidence and arguments on which they rely (cf. Article 3.1 of the IBA Rules);

- to leave to the parties to be primarily responsible for the presentation of witness and expert evidence, and to cross-examine the other side's witnesses and experts (cf. Article 8.3 of the IBA Rules);

- to sustain requests for the production of documents to the extent they concern a specific document or category of documents, which has been explained to be relevant to the case and material to its outcome (cf. Article 3.3 of the IBA Rules); and

- the tribunal is freely to assess the evidence presented to it (cf. Article 9.1 of the IBA Rules).

1.3.6 The Swedish Arbitration Act is a user-friendly and supportive system for arbitration of the highest international standard. The principles in the UNCITRAL Model Law have been incorporated in the Swedish Arbitration Act.

1.3.7 State courts have a positive attitude towards arbitration and do not attempt to assert jurisdiction when the contract in dispute provides for arbitration.

1.3.8 Upon request, state courts provide assistance in the taking of evidence and granting of interim measures in arbitration proceedings.

1.3.9 Challenge actions against awards in arbitrations seated in Stockholm are brought to a specific division within the Svea Court of Appeal which is specialized in arbitration.

1.3.10 The Swedish Arbitration Act is available in English, French, German, Russian, Polish, Romanian, Spanish and Chinese at the SCC's website.

1.3.11 There are several and comprehensive commentaries on Swedish arbitration law and practice available in English, including Arbitration in Sweden (2011) by Andersson/Isaksson/Johansson/Nilsson; International Commercial Arbitration in Sweden (2011) by Kaj Hobér; Commercial Arbitration in Sweden (2007) by Finn Madsen; and Arbitration Law of Sweden (2003) by Lars Heuman.

1.4 ACTIVE AND COMPETENT ARBITRATION COMMUNITY

1.4.1 The Swedish arbitration community has a high level of knowledge and integrity. Due to its long international experience there is a deep understanding of the expectations of foreign parties and counsel.

1.4.2 Conferences, seminars and roundtable discussions on international arbitration topics are frequently organized. This active community ensures that the Swedish arbitration environment conforms to international standards and adapts to and develops best practices.

1.4.3 Swedish arbitration practitioners are fluent in English and many are experienced in cross-border arbitration both in Sweden and globally. A number of the Stockholm based law firms have top ranked dispute resolution practices and individuals.

1.4.4 There is a multitude of arbitration organisations in Sweden supporting the arbitration community, such as the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the Swedish Arbitration Association (SAA), Young Arbitrators Stockholm (YAS), Swedish Women in Arbitration Network (SWAN), the Stockholm Centre for Commercial Law and Stockholm University.

1.5 ADVANCED TRAINING OF ARBITRATORS AND COUNSEL

1.5.1 The Swedish arbitration community works actively to train and promote up-and-coming arbitrators and counsel.

1.5.2 Education initiatives include the Training Programme for Arbitrators hosted by SCC and SAA, the Master Program in International Commercial Arbitration Law at Stockholm University, and the basic arbitration training programme for junior associates by YAS.

1.5.3 The SCC seeks to appoint well qualified young arbitration practitioners as arbitrators when appropriate.

1.6 CONVENIENT AND WELL-FUNCTIONING VENUE

1.6.1 Stockholm is a vibrant, beautiful city and an economic hub in Northern Europe. It is easily accessible by flight.

1.6.2 Stockholm has a multitude of hearing venues experienced in accommodating international arbitrations and offers a wide variety of hotels and restaurants.

2. WHY SCC?

SCC contributes to increase international trade and economic development globally by providing efficient mechanisms for dispute resolution. By being efficient and knowledgeable, and at the forefront of legal development, the SCC is one of the preferred arbitral institutions worldwide.

2.1 GLOBAL STANDING

2.1.1 The SCC is a one of the world's leading arbitration institutes. Around 200 disputes are filed with the SCC each year, of which approximately 50 per cent are international arbitrations. The SCC also acts as appointing authority in ad hoc arbitrations, UNCITRAL arbitrations and investment arbitrations.

2.1.2 Some of the largest disputes in the world are handled by the SCC. With respect to disputes for USD 500 million or more, the SCC was the 5th most frequently used arbitration institute globally in 2011.

2.1.3 Second only to ICSID, the SCC is the most frequently used arbitration institute for investment arbitration in the world.

2.1.4 Truly international – the SCC Board is the institute's decision making body and the majority of its directors are distinguished arbitration practitioners from other countries.

2.2 EFFICIENCY IN TIME AND COSTS

2.2.1 Arbitration under the SCC Rules is arguably the most expeditious of the leading institutional arbitration rules. The average time from initiation of the proceedings to the final award in international SCC arbitrations is twelve months.

2.2.2 Experienced and knowledgeable arbitrators make scrutiny of awards redundant and saves 2-3 months. The secretariat usually deals with a communication from any of the parties the day it is received by the SCC.

2.2.3 Expedited rules is a unique fast-track alternative particularly suited for smaller disputes (see below under Innovative…).

2.2.4 The SCC has the most efficient and accessible secretariat. You can always get a straight answer and a swift response from the person at in charge.

2.3 INSTITUTIONAL EXCELLENCE

2.3.1 The SCC User Survey shows that over 80 per cent of the users are satisfied or very satisfied with the arbitration as a whole.

2.3.2 Characteristic of the work of the SCC is to be close to the dispute and in constant dialogue with the parties.

2.3.3 The SCC is known for swift service and a no-nonsense approach.

2.3.4 The SCC guarantees equal and neutral treatment by always ensuring the integrity of the SCC rules and procedures.

2.3.5 The SCC's international recognition functions as a quality stamp for the arbitral awards and facilitates enforcement of awards in foreign jurisdictions.

2.4 PARTY AUTONOMY AND FLEXIBILITY

2.4.1 Parties have a choice between the SCC Arbitration Rules with one or three arbitrators, the SCC Expedited Arbitration Rules with one arbitrator, and the SCC Mediation Rules – which ever mechanism they think is best suited for resolving their disputes.

2.4.2 Parties appoint one co-arbitrator each and they may also jointly appoint the chairperson, if they so choose. When the case shall be decided by a sole arbitrator, the parties are always afforded the possibility to appoint that person jointly.

2.4.3 When the SCC appoints arbitrators, the parties' wishes will be taken into account. When balancing the interests of the parties, the SCC always strives to appoint a person with a profile acceptable to both parties.

2.5 INNOVATIVE APPROACH DEVELOPING BEST PRACTICES

2.5.1 The SCC offers the possibility of appointing an emergency arbitrator where a party seeks provisional measures before the constitution of an arbitral tribunal and time is of the essence.

2.5.2 The SCC offers expedited rules for small and medium sized disputes. The expedited rules provides for an award within 3 months and only allows a limited number of submissions per party. In practice, an award is usually made within 4-5 months. The model clause combining the expedited rules with the arbitration rules ensures maximal flexibility and a truly tailor made arbitration.

2.5.3 An award on advance on costs can be requested by a party which has provided the other parties part of the advance on costs. Such an award can be requested as soon as the case has been referred to the arbitral tribunal and is enforceable in most jurisdictions.

2.5.4 The costs of the proceedings determined by the amount in dispute which provides for foreseeability and a fair remuneration of the arbitrators. You only pay for what you ask for and can calculate the arbitration costs before you even file a request for arbitration. There is no need to count hours and no need to negotiate rates with arbitrators.

2.5.5 The SCC provides Swedish procedural and substantive legislation in translation to English, Russian and Chinese. In addition to that, the SCC provides Swedish case law on arbitral issues in English translation via the Swedish Arbitration Portal, accessible on the SCC web. SCC also provides news on arbitration matters related to Sweden and/or SCC on the web and the monthly newsletter.

3. WHY SWEDISH SUBSTANTIVE LAW?

3.1 NEUTRAL AND PREDICTABLE LAW

3.1.1 Swedish law provides a neutral foundation for international trade. It is frequently chosen as the governing law of international commercial contracts.

3.1.2 As regards international sales of goods, Sweden has ratified the CISG (United Nations Convention on Contracts for the International Sale of Goods) and the Swedish Sale of Goods Act accords with the CISG's principles.

3.1.3 The Swedish legislative process has a firmly rooted comparative approach to law making. As a result, Swedish commercial law and its principles are predictable and familiar also to non-Swedish lawyers.

3.1.4 Swedish law is oftern categorized as a "middle ground" between common law and civil law. but has no civil code. Swedish private law is found in both statutes and case law.

3.1.5 Sweden is a member of the European Union and its laws form part of the Swedish legal system.

3.2 RESPECTING FREEDOM OF CONTRACT

3.2.1 Swedish contract law is founded on the principle of freedom of contract.

3.2.2 Contracts are enforced in accordance with their terms and the principle pacta sunt servanda is fundamental. Commercial contracts may only be modified or invalidated in highly exceptional situations.

3.2.3 The law puts very few restrictions on party autonomy.

3.3 SIMPLE AND STRAIGHTFORWARD CONTRACT MECHANISM

3.3.1 Swedish law on formation and interpretation of contracts is in line with the UNIDROIT Principles of International Contracts.

3.3.2 There are no formal requirements with respect to the conclusion of commercial contracts under Swedish law (with very few exceptions, e.g. real estate contracts).

3.3.3 The starting point for contract interpretation under Swedish law is that a contract shall be interpreted according to the common intention of the parties. Normally, the wording of the contract will be conclusive evidence of such common intention.

3.3.4 Under Swedish law, contracts cannot impose obligations on others than the parties, but they can create rights for third parties if the parties to the contract so intended.

3.4 COMMERCIAL REALISM OVER LEGAL FORMALISM

3.4.1 An explicit aim of the Swedish legislator when adopting commercial legislation is to facilitate the conduct of business. Representatives of commercial interests are consulted in connection with the preparation of new commercial legislation and the legislator consistently avoids burdening parties with formalistic legal requirements.

3.4.2 A typical example of the Swedish non-formalistic approach is that a party cannot rely on another party's mistake, where the party should reasonably have noticed the mistake.

3.4.3 No requirement for consideration - One of the cornerstones in Swedish commercial law is that a party shall be entitled to rely on an offer. The law places very few restrictions on the binding nature of offers and, consequently, there is no requirement for consideration.

3.5 EFFECTIVE REMEDIES

3.5.1 Parties may freely agree on the remedies for breach of contract.

3.5.2 In the event remedies for contract breach have not been specified in the contract, Swedish law provides a number of default remedies, including damages, the right to withhold performance, the right to require performance and the right to terminate for cause.

3.5.3 Swedish commercial law provides for full compensation for damage suffered due to breach of contract, including compensation for lost profits.

3.5.4 No punitive damages.

3.5.5 Contractual penalties as well as liquidated damages are recognized and enforceable under Swedish law.

3.5.6 Limitations of liability are recognized under Swedish law. They will, typically, be set aside only in the exceptional event of intentional or grossly negligent breach of contract.

3.5.7 Swedish law provides statutory interest for payment default and for restitution of payments, unless the parties have agreed otherwise.

3.6 SWEDISH SUBSTANTIVE LAW AVAILABLE IN FOREIGN LANGUAGES

3.6.1 All key Swedish commercial legislation has been translated and is available in English.

3.6.2 Fundamental Swedish commercial legislation is also available in Russian and Chinese at the SCC's website.

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