Current Issues in Swedish Arbitration

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Preface

This collection of essays is based on articles previously published in Swedish between 1987 and 1990. The two last essays,"Swedish Jurisdiction and Agreements which exclude Judicial Review of Arbitral Awards" and "Enforcement of Foreign Awards," written in 1989 and 1990 have not been previously published. Several essays have been substantially expanded in relation to the original Swedish versions. The new material has been added in part to facilitate understanding by foreign readers. The essays also include summaries of and commentaries to recently decided cases and to unpublished cases that have not previously been dealt with in the legal literature. Many new questions have been discussed. This has resulted in a doubling of the text in relation to the previously published essays.

Patricia Shaughnessy and David Fisher have translated certain portions of the text and provided me with valuable advice during the course of the work. Gunilla Olsson and Monika Rousseau have compiled the Table of Cases and the Bibliography and carried out checking of the manuscript. The Edvard Cassel Foundation has provided financial support to the project. I wish to express my deepest gratitude to all those who have contributed to this work.

Stockholm April 1990
Lars Heuman

Abbrevations

AB	Aktiebolag (company, corporation)
AD	Arbetsdomstolen (Labour Court Cases)
Arb. Int.	Arbitration International
HD	Högsta domstolen (Supreme Court)
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
JO	Justitieombudsmannen
J. Int. Arb.	Journal of International Arbitration
JT	Juridisk Tidskrift (Law Review)
Motiv AB 72	Motiv Allmänna Bestämmelser för byggnads-, anläggnings- och installationsentreprenader
NJA	Nytt juridiskt arkiv I (Supreme Court Cases)
NJA II	Nytt juridiskt arkiv II (Legislative history, traveaux preparatoires)
NJM	Nordiskt juristmöte
prop.	Proposition (Governmental Bill)
RH	Rättsfall från hovrätterna (Court of Appeal Cases)
Rt	Norsk Retstidende (Supreme Court Cases Norway)
SOU	Statens offentliga utredningar (The Swedish Government Official Reports)
SvJT	Svensk juristtidning (Law Review)
SvJT ref	Svensk juristtidning (Court of Appeal Cases)
TfR	Tidsskrift for Rettsvitenskap (Law Review)
TSA	Tidskrift för Sveriges Advokatsamfund (Law Review of the Bar Association)
UNCITRAL	United Nations Commission in International Trade Law

Contents

Is It Possible to Exclude Indisputable Claims from Arbitration*

1 Introduction

When parties include an arbitration clause in a commercial contract it is often in order to exclude the courts from deciding future disputes of a complicated nature. Sometimes a party may predict that it may be forced to bring different indisputable claims against a recalcitrant party to the contract during the long period which the parties have to fulfil their obligations. Perhaps a contractor wants to compel the employer (owner) to make installments. A holder of a patent may try to secure the right to call for payment of royalties which have matured. It can be advantageous to both parties if cases concerning uncontroverted claims of payment can be excluded from the scope of the arbitration agreement by a special provision. If the party claiming payment can use some kind of summary court procedure, a case could be decided in a substantially more inexpensive way than if the parties would have to pay fees to three arbitrators for having a simple case resolved. An enforceable determination can be made more expeditiously in such proceedings, partly because there is no need for the composition of an adjudicative body. The courts exist permanently and are always prepared to hear cases, whereas arbitrators must be appointed before the arbitral proceedings can take place. Furthermore, the Swedish Arbitration Act does not contain any special provisions authorizing the arbitrators to decide cases in summary proceedings. The advantages of provisions excluding indisputable claims from arbitration cannot be achieved if it is not possible to describe clearly and unambiguously the cases to be referred to the ordinary courts of law.

According to a Swedish standard arbitration clause the parties agree that disputes arising out of the contract shall be decided by arbitrators. The Swedish word "tvist", which corresponds to dispute, means in everyday language a controversy and not an indisputable claim. From that point of view one may consider that the arbitral clause could not encompass indisputable claims. However it is clear that the arbitral clause covers such claims and that the word "tvist" is construed as merely meaning a case or a claim.[1] That is why there is a need for excluding indisputable claims by means of a special provision in a standard arbitration clause.

* Printed in 8 Svensk och internationell skiljedom 7–22 (1988).

[1]Osbypannan kommanditbolag v. Folketshusföreningen i Östavall (SvJT 1954 ref p 26), Bolding, Skiljedom 96 (1962), Hassler, Skiljeförfarande 43 (1966) and Heuman, Reklamationsnämnder och försäkringsnämnder 710 (1980).Cf. Mustill and Boyd, The Law and Pratice of Commercial Arbitration in England 122-8 (1989) and Hjejle, Voldgift 62 (1987).

When a party to a contract seeks to draft an additional paragraph to a standard arbitration clause in order to exclude future indisputable cases from arbitration, he will face considerable difficulties. If the language of such an addendum can be construed in differing ways then one must consider the consequences of both a liberal and a restrictive construction. One Swedish commentator, *Bolding*, who has dealt with general problems of interpretation of arbitration clauses, has stated that an arbitration clause ought to be construed liberally, if one can thereby avoid a separation of the issues between an arbitral tribunal and a court of law. *Bolding* has stressed that a liberal interpretation in such cases would contribute to a more effective and economic dispute resolution, if the arbitrators could decide all of the issues.[2] If certain issues must be allocated between an arbitral panel and a court according to the unambiguous words in the arbitration agreement, an economical resolution cannot be achieved. Under such circumstances there are reasons to construe the arbitration clause in a restrictive way because of its burdensome nature. Generally it has been said in support of a restrictive interpretation of arbitral clauses, that they involve relinquishment of procedural safeguards and often lead to such excessive expenses which are a consequence of the obligation to pay the arbitrators' fees.[3] When interpreting an arbitration agreement and its addendum one also must take into consideration the parties' assumed purpose with the provision to exclude indisputable claims from arbitration.

In order to make a debt-collecting exclusion clause in an arbitration agreement effective the party who will benefit from it has to consider the precise wording to be used. If the provision was not enforced, it might cause the claimant subsequent problems, which shall be discussed herein. Some different clauses will also be examined.

2 The Exclusion Provision Refers to Indisputable Matured Claims

In the Swedish standard contract, "General Provisions for Building, Structuring and Installation Contract" it is stated that disputes shall be decided by arbitrators according to Swedish Law, unless it is otherwise provided for in the contract. In section 9:3 it is prescribed that a party is at liberty to initiate court proceedings concerning indisputable matured claims with reference to

[2]Bolding, Skiljedom 102 (1962). Cf Alkaprodukter AB v. Tenax AB (SvJT 1979 ref p 9) where the Court of Appeal held that the respondent could not achieve a separation of the dispute by making an objection against the Court's jurisdiction only regarding two of three grounds. See also Visby Plastindustri AB bankruptcy estate v. Express Finans AB (RH 1987:66) and Nykvarn reported infra p 68.

[3] Hassler, Skiljeförfarande 34 (1966) and Heuman, Festskrift till Sveriges advokatsamfund 1887-1987 235 (1987).

the contract.[4] According to the legislative history this provision was introduced in order to entitle a party to obtain an enforceable judgement in a summary court procedure without being forced to refer the case to a time-consuming arbitration. Furthermore, it was stressed that the interest in a speedy and an inexpensive debt colletion procedure could be secured in this way.[5] It shall be demonstrated hereafter that the debtor can easily compel arbitration and prevent the creditor from using the inexpensive summary procedure.

The above-mentioned provision has reference only to indisputable claims. This means that the creditor is at liberty to initiate ordinary court proceedings or summary proceedings if his claim is uncontroverted. In Sweden, for the time being, two different types of summary proceedings based on non-hearing procedures exist. The documentary process (lagsökning) can be used if the creditor has a claim based upon a promissory note. The other procedure (betalningsföreläggande), is applicable in a collection procedure based upon an invoice rather than a promissary note or other similar documented contractual obligation to pay. The purpose of this summary proceeding is only to establish if the debtor will oppose the claim after having been served with the creditor's application. If the debtor does not contest the claim the court will make an enforceable payment order. If the respondent denies that payment is due the case can be tried by the court in an ordinary proceeding, but only on the request of the debtor. If a party desires that a court dismiss a dispute due to the existence of an arbitration clause, then he must make the objection that the court lacks competence. He has to make the objection in his first response to the court in the substantive matter whether it be in writing or orally. If he neglects to do so he will be precluded from invoking the arbitration clause later on.[6] The dispute then will be decided by the court. If a party to an arbitration agreement has applied for provisional attachment and the adversary is only required to raise a statement of defence in this issue then he is not obliged to invoke the arbitration clause at this stage.[7] He can make his objection in his first answer after he has been served a summons application, which the creditor must file with the court one month after the court has made its attachment order.[8] In a case in which there are no interim security measures, the respondent normally has to request a dismissal at a very early stage of the proceedings. But when a dunning process has been transformed into ordinary proceedings it is sufficient that the respondent objects in his answer and thereby invokes the arbitration agreement. He is not required to do this at the earlier stage during the dun-

[4]See also Bolding, Skiljedom 108-9 (1962).
[5]Motiv AB 72 259 (1973).
[6] Code of Procedure chap. 34 sec. 2, Hassler, Skiljeförfarande 40-5 (1966) and Arbitration in Sweden 33 (1984).
[7]Aurel Hoffman v. Aktieselskabet Scandia Rodia (NJA 1973 p. 126).
[8]Code of Procedure chap. 15 sec. 7.

ning process.[9] In the summary document process (lagsökning) where the creditor has a promissory note in his possession the debtor can make certain substantive objections to the effect that the case can be referred to ordinary court proceedings. In such cases the debtor is not required to invoke the arbitral clause as early as during the summary proceedings, but of course he can do so and thereby have the case dismissed.[10]

When determining if the debt-collecting clause is inapplicable due to the controverted nature of the claim, it becomes disputable as soon as the respondent has contested the plaintiff's action. In *procedural law* the term "contesting" means a statement through which the respondent objects to the court giving an order in conformity with the plaintiff's claim for relief. It is not required that the party state the grounds for contesting the claims, for example by a denial, affirmative defense or an objection in a question in law. Therefore, it can be asserted that a claim is disputable from a procedural point of view as soon as the debtor opposes the claim for relief. It is not required that the court has tried the substantive matter in order to find the matter disputed.

It could also be maintained that the expression "indisputable claim" would be construed from a *contractual point of view as* the debt collecting clause is a part of an agreement. Then the purpose of the exclusion clause ought to be taken into consideration. When interpreting the clause one may then ask if the claim has to be strictly indisputable. However, if one emphasizes the parties' intent with the exclusion claim, strong reasons favour the opinion that it is sufficient that the claim is contested in the procedural sense of the word. The parties' intent with the clause must have been to provide a speedy and inexpensive dispute resolution through court proceedings. This is not possible as soon as the debtor contests an application in a dunning process and thereby compels ordinary court proceedings. One could imagine that a case would not be characterized as uncontroverted until the court, after a pretrial, has found the claim indisputable. One could not believe that the parties had such a complicated procedure in mind for establishing the applicability of the exclusion clause. To summarize, it ought to be determined if a case is disputable either from a procedural or a contractual point of view as soon as the respondent has contested the claim without setting out the reasons. In support of this interpretation one can state that it is rather easy in practice to establish the scope of the exclusion clause. If however, it was necessary to examine the nature of the objection to the claim in order to determine if the claim was disputable, then serious and complex construc-

[9] Edvin Östman v. Nils Karlsson (NJA 1972 p. 331) and Alka produkter (SvJT 1979 ref p. 9) mentioned in note 2 and reported Infra p. 18, See also Heuman, Advokatsamfundets skiljedomsprövning av arvodestvister mellan advokater och klienter 30 (1986).

[10] Po-Bo Byggtjänst AB v. Britt and Tord L (NJA 1982 p. 711). Cf Lihné, Lagsökning 274-81 (1968).

tion problems would result, which would be a reason for not accepting this solution. The claim could be considered disputable based upon well founded grounds but not if it were based upon marginal grounds. For example, very complicated construction problems could arise, if tenuous challenges would not make the claim disputable.

If the respondent has claimed a basis for his repudiation, he is not obliged to demonstrate probable cause in order to make the creditor's claim disputable and thereby withdraw the action from the jurisdiction of the court. The district court has to dimiss the case without trying it, irrespective of whether the objection in the substantive matter is more or less well founded.[11] Only an arbitral tribunal has jurisdiction to decide contested claims if the respondent invokes the arbitral agreeement in due time. This means that the respondent can easily sabotage the simple and rational summary proceedings by contesting with unfounded grounds at a rather late stage, even when the case has been referred to ordinary proceedings. The debtor is thereby able to cause the creditor to initiate an expensive arbitral proceeding. Perhaps the creditor will then refrain from starting an arbitral process as long as the matured debts are limited in comparision with the arbitrators' fees and there is a possibility that the respondent may try to delay the debt collecting proceedings.

The above-mentioned exclusion clause is not effective from the creditor's point of view. Maybe this is the reason why other language is used in some exclusion clauses. *Sometimes certain kinds of claims are withdrawn from the arbitrators' jurisdiction without any exception, that means irrespective of the indisputable nature of the claims*. For example matured royalty claims can be excluded from arbitration. Such demands may be decided by the courts even if they in some cases are in fact disputable and from that point of view are suited for arbitration. This kind of exclusion clause can be effective and appropriate if a certain type of claim can be demarcated in a distinctive way and those claims in practice usually are indisputable.

3 The Exclusion Clause refers to Initiating Summary Proceedings

A debt-collecting exclusion clause must not be directed to the nature of the claim. It may refer to the form for intiating certain proceedings or the use of certain procedures, mainly summary proceedings.

[11]Strömsunds Möbel & Byggnadssnickerier AB v. Otto Dahlin (SvJT 1958 ref p. 88); standard arbitration clause with an additional provision providing that the buyer irrespective of a dispute was obliged to pay the purchase money while awaiting a resolution of the dispute and that the buyer was precluded from defending himself as to the payment obligation. The case at hand was dismissed.

Alkaprodukter AB v. Tenax AB (SvJT 1979 ref p.9). In a contract between two companies, Alkaprodukter and Tenax, it was provided that disputes arising from the contract would be decided by arbitrators and could not be tried by a court. Further, it was stated that Alkaprodukter was entitled to initiate summary proceedings (lagsökning) in order to obtain purchase money based on a promissory note.

Alkaprodukter rescinded the contract and initiated a summary proceeding in order to obtain payment for samples according to a provision in the contract. After the court had made a payment order, Tenax applied to have the case tried in ordinary proceedings. Alkaprodukter invoked three different grounds in the alternative in support of its action. Tenax requested that the court dismiss the case concerning two of those three grounds. (The issues in the case, regarding the effect of an objection which only partially affects a case and the appropriateness of dividing the dispute between a court and an arbitral tribunal shall not be dealt with here.)

The district court dismissed the case and invalidated the payment order. Alkaprodukter appealed and invoked three grounds: first, payment for the samples; second, recission of the contract based on delay; and third, criminal activity.

The Court of Appeal stated: The purpose of the exclusion of summary proceedings from arbitration must be presumed to be that Alkaprodukter wanted to be able to use summary proceeding with its advantages – mainly speediness and low costs – in cases where there was in fact no dispute between the parties. The exclusion clause, however, can not be applicable in the litigation caused by Tenax's application for ordinary proceedings. The court, thus decided that the case should be tried by the district court in ordinary proceedings and remanded the dispute.

In a dissenting opinion a judge, (now on the Supreme Court), stated: Irrespective of whether the application for the summary process and the subsequent litigation is based upon the first ground, it is of such a nature that whether it is covered by the exclusion from arbitration clause *or not*, Tenax has not made an objection of jurisdiction. There are no reasons in other respects why the case should be dismissed to the extent that it is based on the first ground. (Emphasis added.)

It is difficult to understand the meaning of the dissenting opinion. Perhaps the dissenting opinion can be construed in such a way that it is obvious that the exclusion clause encompasses the right to initiate documentary proceedings, but unclear if the clause has reference to the subsequent ordinary process. It can be stated that it is clear that the creditor was entitled to apply for summary proceedings and that the exclusion provision had no reference to the debtor's application for ordinary proceedings. The exclusion clause thus should be applicable as soon as a case was brought before the court in a certain form, viz, through an application for summary proceedings. According to the clause it is not required that the claim has to be indisputable, but only that the claim shall be based upon a type of promissory note and have reference to the purchase sum. With this interpretation the creditor would be entitled to have a contested claim tried by the court provided that the proceedings were initiated by an application for summary proceedings and not by a summons application. According to this viewpoint the court would be obliged to try the case both in a summary process and the subsequent ordinary proceedings even if it could be proved that the creditor before starting the process knew that the debtor was able to present strong arguments for contesting the claim. This interpretation follows from the fact that the wording of the clause does not refer to the indisputable nature of the claim, but to the form for initiating different types of proceedings. However, this in-

terpretation was not accepted by the majority of the Court of Appeal.

The interpretation of the majority of the court was *not based upon an analysis of the wording of the clause, but upon the presumed purpose of the clause.* The Court of Appeal held that the clause was not applicable in the subsequent litigation, as the purpose of it must have been to offer the creditor a right to use summary proceedings in cases where there was no real controversy between the parties. This rather liberal interpretation which emphasizes the parties' intent is incompatible with the express language of the exclusion clause in two respects. According to the provision, it is not required that the creditor's claim is indisputable in the way the Court of Appeal presumed. Further, the exclusion clause only requires that the claim be brought before the court in a certain form, viz, an application for summary proceedings, and not that the case be entirely conducted according to rules applicable in summary proceedings.

This case shows that the debt collecting clause must be expressed in an extremely clear and considerably detailed way, if the creditor wants to be sure that he is entitled to use summary proceedings even in cases when the debtor with or without reason tries to cause a summary process to be followed by ordinary proceedings. A creditor may want to prevent the debtor from forcing a case to be tried in ordinary proceedings after a summary process. A debtor may do this only in order to get the possibility at a late stage to make an objection concerning jurisdiction and thereby force the creditor to abandon a well founded claim because of the high costs of an arbitration. Of course it is advantageous if the creditor can provide measures against such devious behavior. A debt-collecting clause could be drafted in such a way that a party is entitled to have his *claim tried by a court both in summary proceedings and in subsequent ordinary proceedings.* Such a provision may however offer the creditor excessively broad possibilities to avoid arbitration in complex cases, which could be unfavourable to the debtor. Disputable claims would be withdrawn from arbitration if a creditor applied for summary proceedings in cases where he was convinced that the respondent had good reasons for contesting a claim. The proposed clause is therefore not appropriate. This seems to be true even if the creditor would not be able to prevent arbitration according to the clause in such cases where the creditor wishes to claim damages based on a breach of the contract. The above-mentioned clause can not bar arbitration. The reason for this is that such claims according to the law are expressly excluded from the dunning process. It is simply not possible to initiate summary proceedings concerning compensation for damages.

4 Claims other than those of Pecuniary Nature Excluded from Arbitration

Parties to a contract normally do not desire to exclude certain types of claims concerning specific performance from arbitration. Usually such demands are controversial and suited for arbitration. Of course it is, from a theoretical point of view, possible to exclude cases concerning specific performance from arbitration, e. g., if they are indisputable or initiated by application for summary proceedings. In Sweden there exists a certain summary process which can be used only if the claims concern obligations other than a duty to pay money (handräckningslagen). In practice no such clauses have been found. However, there are examples where parties have tried to exclude certain types of claims in an unclear way. It seems that the parties have intended to exclude pecuniary claims from arbitration in certain cases, but the language may encompass other claims which the parties likely had not predicted when they entered into the arbitration agreement. When interpreting such a clause it must be determined if the clause should be construed in accordance with the hypothetical intentions of the parties or the ordinary meaning of the words. The clause may also be construed liberally considering the words in a legal context clearly having an extensive meaning. The Swedish word "fordran" which can be translated with the words "demands or claims", ordinarily means pecuniary claims, but in legal contexts means any claim of a generic nature. The following case illustrates this construction problem.

Media Transfer International AB v. Karlsson (HD Ö 545/88). A company had entered into a leasing contract with Karlsson, a small buisiness man. The company had undertaken to deliver videocassettes to Karlsson who was obliged to weekly account for his rentals and pay agreed upon charges. The agreement contained an ordinary arbitration clause and a provision according to which the company was entitled, but not obliged, to utilize the courts for the collection of claims (indrivning av fordran).

The company requested that the district court, in accordance with the contract, order Karlsson to hand over the cassettes in his possession or to pay a certain sum for every cassette Karlsson had not returned. He raised the objection that the case was to be tried by arbitrators.

The district court stated: Both of the parties are of the opinion that the company, if it wishes to use a court, is required to base its action upon the additional clause in the arbitration agreement. The issue in dispute must concern the collection of claims. The case concerns the settlement between the parties after the contract has been cancelled and in this respect mainly concerns the duty to return the delivered cassettes. The court does not consider that this case involves the collection of claims. The contract contains provisions regarding how to deal with cassettes, when the contract becomes ineffective. If the parties had wanted to involve the courts concerning the duty to return the cassettes, this ought to have been expressed clearly in the arbitration agreement.

Before the Court of Appeal Karlsson stated that the clause was ambiguous and that it did not encompass the claim in issue. The court, however, held that the words "collection of claims", regardless of whether they were read separately or as a part of the agreement, could not be given the strict linguistic meaning that they only had reference to pecuniary claims. As a result the Court of Appeal found that the company was entitled to have its action tried by a court of law.

Karlsson applied to the Supreme Court for certiorari and moved for dismissal of the case. Karlsson considered that the clause only referred to indisputable claims, which were not performed due to recalcitrance. Karlsson considered the claim to be disputable. Further, he stated that the requirement of restrictive interpretation of arbitration agreements was stronger in a case as the one at issue, where a party who has drafted the contract, has tried to secure a partial exclusive right to choose between arbitration and litigation. When this optional right has not been expressed in a clear way, this obscurity ought to be construed against the company according to his argument.

The Supreme Court (one judge) decided not to grant review of the case, and thus, the judgement of the Court of Appeal was allowed to stand.[12]

First, it ought to be remarked that the respondent, the weaker party in this dispute, wanted to exclude the rather inexpensive court proceedings, because he calculated that due to his limited financial resources, the creditor would find an arbitration useless as the creditor would have to pay all of the arbitrators' fees. This case demonstrates that the weaker party can evade arbitration and thereby also evade his clear obligation to perform a duty which has a lesser value than the arbitral fees. In other cases, however, it occurs that the stronger party manages to prevent the weaker from implementing well founded claims because of his lack of money and ability to pay advance costs to the arbitrators. As to collection clauses this case shows that it is important that the exclusion clause is formulated in such a way that it can function effectively even in situations where a claimant wants to prevent the respondent from forcing him into an undesirable position caused by cost considerations.

The judgement of the Court of Appeal is based upon a strictly legal interpretation of the Swedish words corresponding to "collection" and "claim". In legal language usage the Swedish word "fordran" (claim) means not only pecuniary claims but also claims that goods or property should be handed over.[13] It is more difficult to establish the meaning of the word "collection" as the corresponding Swedish word is not defined in statutes defining the concept in a precise way. It seems to be strange to speak about collection, when one intends the obligation of specific performance. In the first reported case, *Alkaprodukter*, the Court of Appeal based its judgement

[12]In the Code of Procedure chap. 54 sec. 7 it is provided: "A ruling of a court of appeals that a lower court is competent to entertain a case is not reviewable unless the challenge to the competence of the lower court is based upon a ground that the higher courts, on appeal, are required to notice on their own motion." Lack of competence due to an arbitral clause will only be taken into consideration if the party makes an objection to the jurisdiction. This means that a ruling of a Court of Appeal which involves that it is competent to try a case although the respondent had invoked an arbitral clause, is not reviewable.This prohibition against appeal to the Supreme court has reference also in cases when the Court of Appeal confirms the decision of the district court to try a case. Skånekök handelsbolag v. Klippans karosserifarbik AB (NJA 1978 p. 175). A ruling whereby a court dismisses a case may be appealed, but can only be tried by the Supreme Court after granted review dispensation according to the Code of Procedure chap 54 sec. 11.

[13]See, e.g., Tiberg, Skuldebrev,växel och check 15 (1987).

upon the parties' presumed intentions regarding the exclusion clause. If such an interpretation had been applied in the *Media Transfer* case the exclusion clause would not have been applicable. The lessee had not particularily objected that the case concerned disputable issues. For this reason the judgement of the Court of Appeal can not be considered to define the meaning of the expression "collection". In this word one may imply a requirement that the claim be indisputable. The reason for this is that one can not simply collect claims when they are highly controversial and when the subject matter must be thoroughly tried. To summarize, the exclusion clause aiming at "collection of claims" will not give the plaintiff a sure and reliable right to obtain a judgement after litigation or summary proceedings, if the respondent states that it contests the claim and the court for this reason has no jurisdiction.

In the *Media Transfer* case, the lessee argued that the exclusion clause should be construed in a restrictive way, which means that the arbitration clause would have had an extensive scope. This position was based on the argument that the leasing company in reality tried to grant to itself a one sided right to choose between litigation and arbitration. Later on it will be shown that such an *optional clause may be declared void by virtue of the provision concerning unfair contract terms* in the Swedish Contracts Act sec. 36. However it seems to be more *doubtful if this viewpoint would have significance for the interpretation of the clause, namely in the way that one would take into consideration not only the wording and the parties' joint intentions but also its more or less burdensome nature*. The word "burdensome" in this context means disadvantages which are not sufficiently severe to make the exclusion clause and the arbitration agreement void according to the provision concerning unfair contract terms (sec. 36). To return to the problem of interpretation of an exclusion clause of a less burdensome nature, an important Supreme Court case should be considered concerning the requirements for entering into a binding arbitration agreement when one of the parties refers to a standard contract with an arbitration clause. However, first it must be mentioned that the Court took another view in two earlier cases: one from 1949 the other from 1969. In both cases the Supreme Court noted that arbitration clauses were included in a general provision relating to terms of delivery and were referred to in an order confirmation regarding an offer for sale. The Court held that the clauses were not binding as no copies of the terms were handed over to the other party. As an additional argument it was stressed that the arbitral clause was not mentioned during the contractual negotiations.[14] In the following case the Court took another position.

Tureberg-Sollentuna Lastbilscentral för. v Byggnadsfirman Rudolf Asplund AB (NJA 1980 p.46). After having referred to, inter alia, the above-mentioned two cases the Supreme Court stated that the situation in commercial law had changed during

[14]Tore Johansson v. handelsbolaget Maskinfirma Hafo (NJA 1949 p. 609) and Tehno Impex v. Skandinaviska Maskinmekano AB (NJA 1969 p. 285).

the period after the 1949 case. The Court made the following general observation: The use of printed general delivery and similar terms has substantially increased. Such conditions correspond obviously to a strong need and are nowadays deemed by businessmen of some magnitude as natural and of great value in contractual connections. The general terms now seem to be elaborated with great care and under considerations of the interests of both parties. The existence of arbitral clauses in such terms are frequent and cannot be intended to surprise parties with experience of business transactions in this field. At least when it comes to businessmen who conduct their activities in the form of a legal person and who are not entitled to legal aid, the arbitral agreement can not be deemed to be an especially burdensome contractual term. The fact that a party is not particularly aware of the arbitral clause in the general terms referred to in the contract has no significance due to the foregoing. At least when it comes to domestic parties it now appears as fairly unrealistic that decisive significance should be attached to the fact that a copy of the general conditions was not handed over to the adversary. He may by a telephone call to the other party or to his own trade organisation obtain the desired information.

A change in comparision with the situation at the time when the cases from 1949 and 1969 were decided is the amendement 1976 of the Contracts Act. Section 36 concerning unfair contract terms involves increased possibilities to adjust or declare unenforceable contract terms wich are unreasonable. In the present state of things it appears to be less important than earlier to assert that a clause which is formally encompassed by a reference to the contract shall not be deemed to form a part of the contract. The clause may, if needed, be declared void as unfair by virtue of the Contracts Act sec. 36 by its new wording.

In the case at hand the Supreme Court held the arbitral clause was effective for the following reasons. The plaintiff was a businessman, without being a weaker party, who often undertook construction work and who in the transportation business usually referred to certain general conditions. These included a provision concerning disputes which prescribed that the controversies should be decided by courts of law. The existence of this clause ought to have caused the plaintiff, when he met a different clause, to investigate its content. The arbitral clause was not hidden in the general conditions.

To summarize this case, an arbitral clause inserted in general conditions will be binding on a party even if the printed conditions were not handed over to the party or even if the arbitral clause was not mentioned during the contractual negotiations. In exceptional cases the clause will be ineffective, for example in an unpublished case where the district court held that the situation was different from the one in the Supreme Court case.[15] The district court found that an arbitral clause in a standard contract which is unexpected and especially burdensome according to general principles and the Supreme Court is effective only if the clause has been mentioned during the contractual negotiations or otherwise ought to be known by the party contesting the applicability of the clause. In the case at hand the district court stressed that the plaintiff who had undertaken to mount some machines in his capacity as a natural person had no experience of standard contracts with arbitral clauses. Further, the court mentioned that the standard contract was designed in the first place for deliveries and mountings of substantial scope, a kind of undertaking which was outside the plaintiff's activities. This district court case does not mean that a party to a business contract involving two large

[15]Taisto Lööf v Wahlgren Ingenjörsbyrå AB (Härnösands tingrätt T 94/88 aktbil 26.)

companies can avoid arbitration by stating that the arbitral clause in the standard conditions was not mentioned during contractual negotiations or handed over to the party. In international business relationships however, a party may invoke special grounds for having the arbitral clause declared inoperative. In Lastbilscentralen this is suggested by the Supreme Court stating that the old principle appeared unrealistic at least as concerns domestic parties. Further, it was stated that the situation like the one in the case from 1969 (concerning a Swedish and Jugoslavien party) *to a certain extent* had changed. In a case decided shortly before Lastbilscentral two Swedish companies had entered into an agreement and thereby referred to an earlier contract according to which the seller had bought the goods from a Soviet company. This contract contained a clause providing for arbitration in Moscow. The district court and the Court of Appeal held that no valid arbitration agreement was established between the Swedish parties by the reference to the earlier contract, since this clause had not been discussed during the contractual negotiations. Another reason for this opinion was that the Swedish seller had not by the reference in a clear way declared to the buyer that the arbitral clause should be valid also between the Swedish parties. These two reasons would according to Latsbilscentralen no longer be decisive. The Court of Appeal, however added that the arbitral clause was not a natural part of the contract terms, since the businessrelationship in several respects had a close connection to Sweden. Therefore the buyer ought not to realize that the reference was aimed at making the clause binding between the Swedish parties.[16] Even after Lastbilscentralen this outcome of the dispute seems reasonable due to the last-mentioned reason in the opinion of the Court of Appeal.[17] It seems that the increasing use of standard conditions in domestic relationships and its effect on arbitral agreements according to the new principle formulated by the Supreme Court, could not be accepted without modifications in international business relationships.

After this general discussion on arbitral clauses in standard contracts and the new principle established by the Supreme Court in Lastbilscentralen it is appropriate to return to the problem on clauses entitling one party to choose between arbitration and court proceedings. Earlier it has been stated that

[16]Bo Billing & Co AB v. Sydtimmer AB (SvJT 1979 ref p. 1).

[17]A dissenting judge held that the seller had an interest in having claims from the buyer decided in the same way as its own consequential claims against the Soviet seller. This judge held that it was natural for the Swedish seller that the clause would be valid even between him and his Swedish buyer. Further, he stated that it was not unnatural to the buyer that the clause would be effective between the two Swedish parties. Perhaps this opinion is not based upon sufficient considerations of the buyer's interest. The Swedish buyer has an interest in having his claims decided as fast as possible if the goods were defective or there was a shortage when he received it, but it may be highly questionable if so was the case already when the seller received the goods from the Soviet Union. One also has to stress that a dispute between the two Swedish parties and a dispute between the Soviet and the Swedish party cannot be consolidated without all of the parties' consent. Cf Pålsson, Svensk rättspraxis i internationell processrätt 175-6 (1989).

such clauses may be declared void according to the provision concerning unfair contract terms. If an optional clause is contained in standard conditions it is according to the Supreme Court not important to declare the clause as not binding, for example one may imagine in cases when a party invokes the burdensome nature of the clause. The Supreme Court seems to be of the opinion that the provisions concerning unfair contract terms would be a sufficient remedy. However this provision is mainly applicable when one of the parties has an inferior position. In an international business contract between two equal companies the provision is often inapplicable. Perhaps an optional clause in standard conditions can be declared inoperative, because of its burdensome nature and the fact that it was not mentioned during the contratual negotiation and other circumstances.

5 Exclusion Clauses Referring to Contract Claims Later Confirmed in a Promissory Note

If a party to a contract gradually becomes liable to pay for different performances the creditor sometimes requires the debtor to accept a bill or to sign a promissory note. Suppose that the bill or note lacks an arbitral clause unlike the original contract. Under such circumstances the problem arises if the creditor is entitled to obtain an enforceable judgement by initiating litigation or summary proceedings. The promissory note may be worded in different ways. The payment obligation either may appear as a new legal relationship or as a development or specification of the original contractual relationship. In the latter cases the court ought to be inclined to consider the arbitration clause in the contract to encompass the payment obligation confirmed by the promissory note. If the court on the contrary would consider that a new legal relationship was created by the note because of its wording or other circumstances, it seems to be unnatural to extend the scope of the arbitration agreement to cover the payment obligation.

Bolding has dealt with this problem in connection with an old Supreme Court case Södra Rörums Församling v Svensson (NJA 1898 p. 479), a case which has questionable value as a precedent according to this author. An employer and a contractor had entered into a contract with an arbitration clause. The employer signed a promissory note concerning a certain contractual payment obligation. The contractor initiated a litigation invoking the promissory note in support of his action. The employer claimed set off and stated that he was entitled to damages because the constructed building, a church, was defective. The contractor requested that the set-off claim be dismissed due to the lack of jurisdiction. However, the courts tried the case in all its respects. Bolding proposes that three solutions are conceiveable. He rejects a solution involving that both claims based upon the promissory note and the request for damages presented as a set off-claim would be encompas-

sed by the arbitration clause. He also repudiates the proposal that the note-claim would fall outside the arbitration agreement, but that the set-off claim would be dismissed by the court. He justifies this with the following statement. If the promissory note claim would create any controversial issues at all it would be regarding the substantive matter. Bolding seems to be of the opinion that the arbitration agreement encompasses issues concerning the interpretation and the applicability of the contract as well as claims based upon the promissory note.[18]

This view appears to have been accepted by the Supreme Court in two cases decided after Bolding made his comments.

Hans Schröder AB v. Svenska AB Lebam (NJA 1964 p.2). After a company had sold property the buyer accepted some bills of exchange in order to pay the purchase sum. The seller initiated summary proceedings (lagsökning) and invoked the bills. The district court pronounced a payment order whereupon the buyer applied for ordinary proceedings and requested the court to overrule the payment order as the buyer had annulled the contract because of defects. The seller invoked the arbitration clause and stated that the court had no jurisdiction to decide an issue concerning the legal relationship, which had caused the buyer to accept the bill.

The Supreme Court considered that the proceedings proved that the bills at issue and some other bills were accepted as payment for the purchase sum by the buyer in connection with the contract of sale. For this reason the Supreme Court held that it could be assumed that the arbitration clause in the contract also encompassed disputes concerning the buyer's duty to redeem the bills. By applying for summary proceedings the seller had lost his right to request arbitration concerning the two bills. Because of that the Supreme Court held that there was no bar to trying the buyer's action in ordinary proceedings.

In this case the Supreme Court did not approve the opinion of the district court implying the payment order would be confirmed subject to the buyer's right to have his defense tried by arbitrators. The Supreme Court however, considered that all the issues in dispute were covered by the arbitration agreement.[19] The judgement of the Supreme Court expresses that evidence of rather limited value was sufficient for establishing that the arbitration agreement also encompassed the payment obligation according to the bills. This can be concluded from the wording of the judgement, namely that it could be assumed that the arbitration agreement covered such a dispute. The Supreme Court considered that the arbitration clause had an extensive scope and thus not that a new arbitration agreement was made, e. g., because of an implied common intent of the parties.[20]

The seller lost his right to arbitration with reference to the disputable issues raised by the buyer's defence. The seller was deprived of the right to arbitrate, as he against the arbitration agreement initiated court proceedings concerning other closely connected issues. In this respect the Supreme Court obviously considered that it was insignificant that the plaintiff had a certain

[18]Bolding, Skiljedom 104–6 (1962)
[19]Hassler, Skiljeförfarande 37 (1966).
[20]See infra p 60 and 76.

basis for his comprehension, viz., that he acted in violation of the arbitration agreement in good faith. *Nevertheless the plaintiff lost his right to invoke the arbitration agreement not only concerning his claim, but also regarding other closely connected claims raised by the respondent.*[21]

The Supreme Court has not expressly declared if the outcome was based upon contractual reasoning or an analogous application of the Arbitration Act, Sec. 3. This provision entitles one of the parties to choose between litigation and arbitration. It states as follows:

"If, after a request has been made for the application of an arbitration agreement, that request is rejected by a party, or a party fails in his duty to appoint an arbitrator, and the other party prefers to bring the dispute before a court of law rather than insist on an arbitration award, then the arbitration agreement shall be no bar to the jurisdiction of the court over the dispute."

Just for two specially described situations it is directed that a party will be deprived of his right to invoke the arbitration agreement, namely when he has failed to appoint an arbitrator and when he has contested the arbitration agreement. In these two situations the other party is entitled to choose between litigation and arbitration according to this provision. However, it seems to be reasonable to apply this section by analogy when a party in other ways has contested the validity of the applicability of the arbitration agreement, e. g., by initiating court proceedings. The opposing party ought to have an optional right even in those cases. It might be said that this party anyhow to a certain extent is capable to dispose of the question of the choice of deciding forum by utilizing his freedom to contest jurisdiction or to omit to do so. The analogous applicability of section 3 is however of significance if a party, as in *Schröder*, will be precluded from invoking the arbitration agreement to a larger extent than follows from his action. In the Arbitration Act sec. 3 it is prescribed that the optional right refers to *the dispute*. Defences of different types which the respondent may raise can be referred to "the dispute" and thus be tried by the court and withdrawn from the arbitrators' competence, perhaps contrary to the opposing party's desire. The respondent may also state that his defence is encompassed by the arbitration agreement and that he has chosen arbitration.

Schröder may also be explained with a *contractual principle* not by analogous application of the Arbitration Act sec. 3. This contractual principle would imply that a party in different ways may unilaterally waive wholly or partly his right to invoke the arbitration agreement. This means that the adversary retains his right to request arbitration. Thus, he has an optional right. He is entitled to initiate arbitral proceedings, but he also is at liberty to file an action. If the respondent states that the court lacks jurisdiction the court may entertain the dispute, as the respondent has refrained from invo-

[21]54 NJA II 15 (1929) and 12 NJA II Nr 4 27-8 (1887).Cf. Hassler, Skiljeförfarande 44 with note 15 (1966).

king the arbitration clause. If a party has waived its right to invoke the arbitration agreement and after that commences an action or requests arbitration, the other party is entitled under his free choice to force the court or the arbitrators either to try the case or dismiss it. (This is of significance in four situations.) Whatever choice of the two forums the first party makes the opposing party may have the other forum to decide the case. With this contractual reasoning the question arises if section 3 of the Arbitration Act merely involves an incomplete regulation of what follows from the general principle that a party may waive its contratual right with binding effect. If so, the section is incomplete due to the fact that it covers only special situations of waiver, namely denial of an arbitral agreement after a request for application of the agreement and omission to appoint an arbitrator.

Of course it is difficult to indicate in what way a waiver may be expressed and whether different kinds of statements may be interpreted as binding waivers, e.g., a revocation of a request for arbitration.[22] If a party is deemed to have refrained from invoking the arbitral agreement in a certain situation it also may be difficult to decide to what extent he has relinquished his right. If, for example, a party to an arbitral agreement institutes an action invoking only one ground for the relief sought, it may be argued that he has waived the arbitral agreement only as to that claim and ground, but not concerning other possible alternative grounds or defences. However, it may be asserted that the waiver refers also to a defense encompassed by the arbitral agreement even though the plaintiff did not initially have such defense in mind. However, one may argue that he ought to have done so. He should have understood that the respondent might so plead and that the court proceedings like summary proceedings in the end will result in a defence which the court would have to entertain. By commencing an action regarding a pecuniary claim one therefore may maintain that the plaintiff has waived his right to arbitration as to his claim and the respondent's possible defense. When deciding which of these two opinions would be preferred it has been stated that one-sided contractual waivers ought to be interpreted restrictively.[23] A party who initiates summary proceedings believing that a claim based upon a promissory note is indisputable, notwithstanding the existence of a set-off claim, can not with a restrictive construction be held to have waived its right to invoke the arbitral agreement concerning the controversial set-off claim.

The forfeiture of the creditors' right to arbitrate as to the set-off claim may in this case hardly be explained by contractual principles. It is more likely to explain the case as an expression of an analogous application of section 3 of the Arbitration Act or perhaps an application of a special arbitral principle sui generis which has a more far-reaching scope than section 3. With such an

[22]Hassler, Skiljeförfarande 44 (1966), Weslien 52 SvJT 196 (1967) and Hassler, Specialprocess 130 with note 15 (1972). See also Jon Warmland reported infra p. 192.
[23]See Ramberg, Allmän avtalsrätt 32-3 (1989).

explanation of the two Supreme Court cases the rationale becomes weak and the outcome may be criticized. The principle of the cases must however be upheld as it has been declared in two fairly modern cases. The analysis of the following case substantially focuses on some practical inferences which may be drawn.

Byggnads AB Lennart Hultenberger v Bostadsföreningen Hytten (NJA 1972 p. 458). After an employer and a contractor had entered into an agreement which contained an arbitral clause, the contractor granted the employer, an association, credit and received mortgages and promissory notes. The contractor invoked the mortgage promissory notes and claimed that the employer should be required to pay a certain sum. The employer stated, as respondent in the summary proceedings, that the case was controverted and requested that the case be referred to ordinary court proceedings. The reason for this was according to the employer that he possessed set-off claims due to the fact that the building was defective. The employer waived his right to invoke the arbitration agreement. The contractor however asserted lack of jurisdiction as to the set-off claims. The relief sought by the employer based upon the promissory notes ought to be decided by the the court according to contractor's view. He stressed that the promissory notes were provided with special clauses entitling him to collect his claims in a way he held appropriate. Under these circumstances the contractor meant that the arbitral clause could not possibly cover the issue of whether the debtor was under an obligation to pay the promissory note. He stated that the notes in any event had no such connection with the contract that the arbitral agreement could be applicable.

The employer stated that the collection clause (not to be confused with the arbitration agreement) only had a contractual significance, not a procedural or arbitral one.

The district court stated: It is true that the creation of the promissory notes formed a part of the financing of the building whose construction is encompassed by the contract. According to the wording of the promissory notes the legal relationship regulated by the notes is outside the scope of the contract.

The Supreme Court approved the following opinion of the Court of Appeal: The arbitral agreement also encompasses disputes concerning claims based upon the promissory notes, since these have reference to claims derived from the contract. By commencing summary proceedings the contractor has lost its right to request arbitration as to the promissory notes and the parties' legal relationship based upon the contract to the extent that this relationship is of significance for deciding the pecuniary claims founded upon the promissory notes.

The judgement of the district court means that the wording of the promissory note should be decisive. If the promissory note is worded in such a way that it aims at a new legal relationship as compared with the contract, the arbitration clause in this agreement would not embrace the claims based upon the note. The Supreme Court did not confirm this reasoning. The Court started from the assumption that it was established that the pecuniary claim had arisen from the contract. The debt-collecting clause of the note could not set aside the arbitral clause. This cannot be read expressly in the judgement of the Supreme Court, but must have been intended. This means that *a party, who wishes the opposing party to sign a promissory note, will find it difficult to make the arbitration agreement in a related contract ineffective by only formulating the note in a certain way. The decisive fact is whether the cause of the promissory note has reference to contractual issues within the scope of the arbitral agreement.*

The creditor has in this case, as in the previous case, lost his right to arbitrate by instituting summary proceedings and thereby acting in violation of the arbitral agreement. In this case the creditor acted in good faith and had reason to believe that the arbitral agreement would not impede him from applying for summary proceedings, especially as the debt-collecting clause in the promissory notes supported the creditor's view. He lost his right to arbitration also regarding the controversial set-off claims. The contractor was not precluded every possibility from requesting arbitration, e.g., as to future disputes on breaches of the contract and on its interpretation. According to the case, the contractor only lost his right to arbitrate concerning the promissory notes and the legal relationship based upon the contract "to the extent it is of importance for deciding the company's pecuniary claims according to the notes."[24] The opposing party may choose between different set-off claims up to the amount sought by the plaintiff. Nothing would prevent him from choosing an extremely complicated set-off claim as a defense and to maintain that precisely that claim should be decided by the Court thereby causing other indisputable or less complex claims to be resolved by arbitrators. The contractor is by no means entitled to determine which set-off claims of the employer are to be tried by the Court. If the employer is uncertain which of his different defenses and claims will be accepted by the Court, he may present them in the alternative. He may under these circumstances be entitled to have an opportunity to produce evidence in all parts of the case, because the set-off claim raised in the first instance may be rejected and thereby result in the need to prove other set-off claims which were presented in the alternative. As long as the claims in the alternative are pending before the Court, the employer may not insist that some of the set-off issues be decided by an arbitral tribunal, e.g., after the employer had asked the arbitrators to make a negative declaratory award. They have to dismiss such a request for arbitration due to lis pendens.

This case demonstrates that a creditor may be put into an extremely undesirable position if he commences summary proceedings and the debtor utilizes his optional right contrary to the wishes of the creditor. The result of the creditor's application may be that the claim based upon the promissory note – the indisputable claim, which ought to be withdrawn from arbitration and decided in an inexpensive summary procedure – will be tried in a costly arbitration. Contemporaneously the debtor's contentious set-off claim will be decided by a Court if the debtor wishes so, although it is appropriate to be tried by arbitrators. By requesting the debtor to sign a promissory note, the creditor will direct both the indisputable and the contentious claims to inadequate forums for dispute resolution which may be contrary to his original desires. In order to avoid this situation it is necessary that he provides

[24]Cf Hassler, Skiljeförfarande 44 with note 15 (1966). See also Lindskog, Kvittning 614 fotenote 39 (1984).

the promissory note with a clause prescribing that a Court, not arbitrators, have jurisdiction to try the creditor's claim based upon the note. An otherwise applicable arbitral clause inserted in a contract will thereby expressly be set aside. An ordinary debt-collecting clause of the type discussed in the above-noted case will not make the arbitral clause ineffective as one may conclude from the judgement of the Supreme Court.

Disputes concerning a promissory note may be decided by a Court provided that the note is not founded upon a contract with an arbitral clause, but rather is based upon a contract without an arbitral clause. *When only one out of two separate but connected contracts contains an arbitral clause it can be difficult to decide if the promissory note has its only basis in one of the contracts*. If the contract without an arbitral agreement has been entered into first and the promissory note concerning this contract has been signed later, but before the parties have come to one more contract with an arbitral clause, this clause can not cover disputes regarding the earlier signed note. These and similar problems have arisen in a Court of Appeal case.

Visab v Värmecenter AB (RH 1985:51). Visab and Värmecenter on a certain day entered into two agreements. According to an agency-contract with an arbitral clause, Värmecenter would market Visab's products. Further, the parties came to a contract regarding Värmecenter's debt to Visab, a debt which had arisen during earlier business relationships between the parties. In this contract it was prescribed that the debt should be paid by installments every month by settlement of compensation accrued to Värmecenter according to the agency-contract. The same day Värmecenter recognized the debt in writing. This promissory note contained, as the debt-agreement no arbitral clause.

In support of the note Visab initiated summary proceedings. Värmecenter contested the application invoking a set-off claim. The case was referred to ordinary procedure. Värmecenter filed a counter-claim requesting Visab to pay a certain sum, mainly based upon the agency-contract. Further, Värmecenter asked the Court to declare that Visab had no right to payment of sums remaining unsettled according to the "contractual relationship." With reference to the arbitration clause Visab requested that the counter-claim be dismissed by the district Court. Värmecenter contested this claim for dismissal and stated that Visab by its application for summary proceedings had waived its right to arbitration. Further, Värmecenter alleged that the arbitration agreement was void according to the provision of section 36 of the Contracts Act concerning unfair contract terms.

The district Court pronounced: The promissory note and the contents of the debt-contract and the fact that those documents were drawn up separately from the agency contract and they referred to an indisputable claim, demostrates that the arbitration clause was not intended to be applied in issues concerning the promissory note. The arbitral clause should therefore constitute a bar to litigating Värmecenter's set-off claim which was based upon the agency contract. The parties have, however, presumed that the way of paying the note claim was to some extent dependent on the agency contract. Because of this the district Court held it dubious to deprive Värmecenter of the right to invoke the set-off claim in the same form of dispute resolution as the suit brought before the Court by Visab. The circumstances presented in the case seem to indicate that Värmecenter, which was a one man company, and entirely dependent on Visab for its activities only had a very limited possibility to influence the content of the relevant part of the agency contract. The arbitration clause ought to be unenforceable by virtue of Section 36 of the Contracts Act.

The Court of Appeal stated: By the legal transactions between the parties, who are businessmen and who have had business relationships for a long time, they have

entered into a continuous agency-agreement and regulated Värmecenter's debt to Visab. The contents of the separately drawn-up documents and the circumstances in other respects clearly show that the arbitration clause of the agency-contract was not designed to be applied in regard to the note-claim. By initiating summary proceedings against Värmecenter regarding the note-claim, Visab can not therefore be deemed to have waived its right to invoke the arbitration clause.
The Court of Appeal (two judges) held further, unlike a dissenting judge, for certain reasons that the arbitration clause was not unenforceable as being an unfair contract term according to Section 36 of the Contracts Act.

If a contract with an arbitral clause and another related contract without such a clause have been drafted on separate occasions this cannot be sufficient to deem the arbitral clause inapplicable on a note-claim. *The point of time when the different contracts were drawn up is not decisive*, but the substantive connection between the contracts is. The judgement of the Court of Appeal is however not based upon such reasoning, but from the standpoint on the question of whether or not the clause was *designed* to be applied to the note-claim. If the parties had not discussed their intentions with the arbitral clause, which often is the case, it will be difficult or impossible to establish a *common real object of the parties*. Therefore, the case rather indicates that the Court of Appeal in support of the connections between the contracts and the factual background of the agreement had made *assumptions about the parties' intentions*. This method of interpretation is of an objective nature, and not a subjective one in the sense that it referred to the parties' personal intentions. This may explain why the Court of Appeal had found it possible to state that the contracts and the circumstances in other respects *clearly* showed what has been intended. No evidence was presented concerning what the parties had declared and thought as to the scope of the arbitral clause, most likely because no such deliberations were made by the parties when they entered into the contracts. This means in fact that the Court of Appeal has decided the scope of the clause after objective considerations of the connections between the contracts. The interpretation problem has according to the wording of the judgement also been considered in view of the circumstances in other respects, which ought to refer to the business background of the contracts. Even in these respects external facts have been taken into consideration, and not the unknown thoughts of the parties. The arrangement between the parties meant that all old disputes concerning the debts would be settled once and for all by a contract and the establishment of a new business relationship. In many respects the debt-contract and the agency-contract seem to be substantially independent contracts. If such is the case it must be difficult in similiar future disputes to decide in regard to the relationship between the contracts and their background whether the note-claim is encompassed by the arbitral agreement. To avoid such difficulties it may be necessary to state explicitly in an arbitral agreement that the arbitral clause has no reference to a claim based upon the promissory note. Such a statement may be inserted in each business contract or a simultaneously but

separately drafted contract. *A special exclusion clause is thus needed.* To avoid risks of misunderstanding the intended limited scope of the arbitral agreement could be expressed also in the note itself.

A criticism in the judgement of the Court of Appeal is that a certain connection between the two contracts was not taken into consideration, namely the provision of the debt contract prescribing that the debt should be paid by monthly settlements of compensations based upon the agency-contract. Such a dispute concerning the right of reduction ought to be under the arbitrators' competence based upon the arbitral clause in the agency-contract. This would further imply that the promissory note claim could not be deemed as a wholly independent legal relationship in comparision with the agency-contract. If Visab had applied for summary proceedings regarding the note-claim and thereby caused Värmecenter to demand reduction, one might say that Visab had acted in violation of the arbitral agreement of the agency-contract. Under those circumstances one might consider that Visab partly waived arbitration as to both its note-claim and Värmecenter's claim based upon the agency-contract up to a sum corresponding to the note-claim.

This case gives rise to several almost unsolvable problems, inter alia, in what way connected issues should be separated between a Court and an arbitral tribunal. Only one practical inference from the case shall be presented. If a creditor wants to exclude an indisputable claim from arbitration it is not necessary to express this in the promissory note, if the claim refers to an earlier established independent contract without an arbitral clause. Complicated problems would however arise if the note contains an additional provision connecting the payment obligation to another contract with an arbitral clause. These problems can not simply be solved by a clause in the note prescribing that the creditor, independent of the existence of arbitral clauses in other contracts, is always at liberty to commence an action in order to obtain an enforceable decision. Such an additional provision is insufficient. The right of the debtor to raise objections connected to the contract with the arbitration clause has to be regulated by the provision of the note in order to exclude any uncertainty that the arbitral clause has no reference to the note-claim.

6 Exclusion Clauses Granting a Party the Right to Choose between Litigation or Arbitration

An arbitral agreement may be formulated in such a way that both parties are entitled to request arbitration, but one of them may also be empowered to *choose between commencing arbitration or Court proceedings.*[25] The word

[25]See Ylöstalo 28 TSA 324-26 (1962), Bolding, Skiljedom 82 note 51 (1962) and Heuman, Advokatsamfundets skiljedomsprövning av arvodestvister mellan advokater och klienter 5 and 6 (1986).

"commencing" grants the party only a limited optional right. If the opposing party had requested arbitration regarding a dispute, the other party is not capable of forcing the court to entertain the controversy by invoking the optional clause. But if he forestalls the other party and commences a dispute resolution in any of the two forums he is not barred from doing so. If he would file a suit before the opposing party has requested arbitration and the latter objects to the jurisdiction of the Court, this objection will be rejected as the optional clause authorizes the plaintiff to have the dispute decided by a Court.

An optional clause may have an extended scope and give *one of the parties complete freedom to decide whether future disputes shall be tried either by a Court or by an arbitral tribunal, irrespective of who is commencing a litigation or an arbitration*. Assume that a party requests arbitration and that the adversary invokes the optional clause and demands court proceedings. The request of the latter means that the dispute will not be decided by arbitrators provided that the objection against the arbitrators' jurisdiction is not made at such a late stage that the party may be deemed to have waived its right to Court proceedings. If an arbitral panel nonetheless resolved the dispute in violation of the optional clause, the award may be set aside. It is not easy to say if the award can be declared void by virtue of Section 20 (1) of the Arbitration Act which applies to cases where there is no valid arbitration agreement or if the award only can be set aside under Section 21 (1), a provision applicable in cases where the arbitrators have gone beyond the matters submitted to them. If the award is to be declared void such action can be commenced without any time limitation. If the award is only challangeable according to Section 21, an action must be commenced within sixty days pursuant to the Arbitration Act sec. 21 par. 3. One further difference between the two sections ought to be stressed: a waiver from challenging irregularities made explicitly or implicitly during the arbitral reference has effect if the party challenges the award, but not if he wants the Court to declare the award void. Arbitration Act sec. 21 par. 2. As there exists an arbitration agreement in the optional clause *it seems probable that the award is only challengeable*.[26] If a respondent has raised a defense without invoking the optional clause in order to have the dispute dismissed by the arbitrators, they are competent to decide the controversy. One may deem that a party has waived his optional right to request court proceedings. In such circumstances Section 21 par. 2 of the Arbitration Act demonstrates that an award can not be set aside because of lack of jurisdiction. The reason for this is that the party has not objected to the arbitrators' intention to try the case and thereby has waived his right to challenge the award. *In the event that it should be possible* to have the award declared void it is true that a waiver is ineffective, but one might state that the parties had entered into an arbitration ag-

[26]Bolding, Skiljedom 184 (1962).

reement with reference to the existing arbitral agreement in the optional clause and the omission to request court proceedings during the arbitral procedure.[27]

What are the useful functions of an optional clause? The purpose can not only be that a party is expected to choose the kind of dispute resolution which is most inexpensive and speedy in consideration of the special circumstances in the case at hand. The clause does not necessarily signify that there has been made an attempt beforehand to divide future disputes into two categories of cases suited for litigation and arbitration. One of the parties is at liberty to choose whatever kind of dispute resolution he prefers and may abuse his privilege, but he can also utilize his right in such a way that it is advantageous for both parties. If a party uses his optional privilege by requesting a Court to decide an indisputable claim in summary proceedings, there are no grounds for criticism against him. The party may however abuse his right and demand that three highly remunerated arbitrators decide the valid and indisputable claim of the opposing party, but request that his own dubious claims of damage be tried by a court, even though those claims concerning complicated business issues are designed for a flexible arbitration. There may be reasons to declare such arbitral agreements unenforceable wholly or partly in virtue of Section 36 of the Contracts Act due to the fact that the possessor of the optional privilege has a possibility to abuse his right in a situation not foreseen when the parties entered into the contract.

A party entitled to an optional privilege may state that the clause has not been inserted in the contract in order to be utilized in an economically effective way. He may argue that the purpose has been to authorize him to choose whatever dispute resolution he prefers without taking into consideration the reasonable interests of the opposing party. If the possessor of the optional privilege is capable of convincing the Court that the parties have accepted such an interpretation with open eyes the Court will probably be more disinclined to declare the clause unenforceable than in cases where the parties have presupposed a good faith use of the optional clause. The reasons for Court's disinclination to apply the provision concerning unfair contract terms would be that the opposing party of the possessor of the optional privilege in the first-mentioned case ought to have taken into consideration the negative economical consequences and accepted them.

From a Supreme Court case one can conclude that the arbitration agreement and not just the optional clause may be declared void if a party has been empowered with an optional privilege. However the Supreme Court also gave other reasons for declaring the arbitral clause unenforceable. The case does not illustrate the problem if a party may have the optional clause adjusted and substituted with a standard arbitration clause entitling both parties to request arbitration. Nor does the case give an answer to the ques-

[27]See infra p. 177.

tion whether the possessor of the optional privilege is empowered to commence arbitration provided that he has waived his right, e.g., on the request of the opposing party during negotiations of friendly settlement of the dispute. Before reporting the case Section 36 of the Contracts Act has to be cited.

A contract term may be adjusted or held unenforceable if the term is unreasonable with respect to the contract's contents, circumstances at the formation of the contract, subsequent events or other circumstances. If the term is of such significance for the contract that it cannot be reasonably demanded that the contract shall otherwise be enforceable in accordance with its original terms, the contract may also be adjusted in other respects or held unenforceable in its entirety.

With respect to the application of the first paragraph, special consideration shall be given to the need for protection of consumers and others who assume an inferior position in the contract relationship.

The first and second paragraph shall be given similar application to terms in other legal relationships than that of a contract.

This provision is mainly applicable in relationships between a strong and a weaker party and arbitral agreements between large business companies have never been declared void in virtue of this section.[28]

Carleric Göranzon v. Skandinaviska Aluminium Profiler (NJA 1979 p 666). The general conditions referred to in a contract between the parties contained a clause prescribing that disputes arising out of the contract shall be settled according to Swedish law, pursuant to the seller's choice of either a Swedish court or by arbitration. After the buyer Göranzon had filed a suit and claimed damages before the district court, the seller SAPA asserted an objection that the court lacked competence to try the case.

The Supreme Court first made some general statements of principles and after that a deliberation of the case at hand.

The Supreme Court stated: An arbitration clause may cause the result that a party who is financially weaker, will be deprived of the possibility to have his claims tried due to the costs of the arbitration. Already this fact may make the clause stand out as unfair due to the circumstances. This is true to an even greater extent, if the clause gives the stronger party a right to unilaterally decide whether a dispute shall be arbitrated. The fact that the dispute resolution in cases of controversies is not decided in the contract, but is dependent on a decision in the future, may of course involve that the consequences of the clause as to the way of dispute resolution have not completely been taken into consideration.

The case at hand concerns a contract between businessmen. However they did not have an equal position at the time that they entered into the contract. SAPA was an established enterprise with substantial experience in business relationships, whereas Göranzon had limited financial resources and was inexperienced in business contracts of such nature. Further, Göranzon was anxious to obtain the ordered goods and could not obtain them from any other Swedish company. The inconspicuous place of the clause and the fact that it was not discussed during the contractual negotiations explains why Göranzon did not pay sufficient attention to the clause or considered its consequence respects as he has stated.

The Supreme Court held that the circumstances were such that the above-mentioned problems with an arbitral clause of the present kind manifested themselves in the

[28]Arbitration in Sweden 29 (1984).

dispute at hand. The Court held that the claim ought to be declared unenforceable by virtue of Section 36 Contracts Act. The district court has jurisdiction to try the case.

In principle the introductory statement means that an arbitral agreement with an optional clause often can be declared inoperative if the option can be used against an inferior party in a business relationship.[29] Thus, the clause probably can be approved if the parties are in an equal position. Above all it is risky for a large company to insert an optional clause in a contract with a small businessman. There is a potential danger that a time-consuming court dispute concerning the validity of the clause will arise as a consequence of a contractual controversy between the parties. From this point of view, a large company should exclude the clause from the contract from the very beginning.

If a party wishes to maintain that an arbitral agreement is unfair due to the optional privilege of the opposing party, he is recommended to try to invoke several different circumstances in support of his action. He ought to develop in what respects he was a weaker party, e.g., that he was inferior from a financial point of view, that there was no competing company prepared or capable to sell the goods, that he had no experience in business relationships, and that he had not noticed the clause or understood the meaning of it. Invoking just one of those circumstances will perhaps not be sufficient to invalidate the arbitration agreement. Regarding the content of the optional clause the weaker party may state that he had not predicted or been able to foresee the different consequences at the time he entered into the contract. The Supreme Court stresses the importance of such deliberations at the point of time the parties came to an agreement. This statement in the judgement will not bar a court from considering circumstances which were manifested after the dispute arose. Irrespective of what the weaker party reasonably could have foreseen, the Court may hold it more or less unfair to use the optional privilege in the case at hand. If the large company is able to give good reasons why the arbitral procedure is an expedient and inexpensive way of resolving the dispute in comparision with litigation, the arbitral agreement may be upheld. Such can be the case, according to a Supreme Court judgement, if expert evidence can be dispensed with or be substantially limited in arbitral disputes with arbitrators with expert knowledge.[30]

For the purpose of preventing an application of Section 36 of the Contracts Act, the parties may provide the arbitral clause with an additional provision prescribing that each party is entitled to request that future disputes be determined by a Court or by arbitrators. Such a provision put the parties on an equal basis, but is clearly unacceptable for logistic reasons. The clause

[29] Cf. Mangård, 1 Svensk och internationell skiljedom 24-5 (1981).

[30] Lars S v. Försäkringsaktiebolaget Skandia (NJA 1984 p. 229). Cf Ragne U v. Kvissberg & Bäckström Byggnads AB (NJA 1981 p. 711).

means for example that one party has an unconditional right to request litigation of a dispute and the other party to request arbitration regarding the same dispute. The aforementioned clause is obviously useless.

7 Summary

It is nearly impossible to frame a well-functioning clause excluding indisputable claims from arbitration. If the exclusion is expressed in such a way that the clause aims at the indisputable nature of the claim, a respondent (debtor) may with our without a basis state that the claim is controversial. A court then has to dismiss the case, if the respondent has requested so and asserted that the claim is contentious. It could be argued that the exclusion clause still has a certain function in cases where the respondent realizes that he is under a payment obligation and therefore accepts that an enforceable determination is made in a speedy and inexpensive way, e.g. after summary proceeding. In many cases the creditor may find it worthwhile to attempt to obtain an enforceable payment order in an inexpensive way, hoping that the debtor will not object against the jurisdiction of the court. The creditor will not be obliged to pay high costs to the opposing party if an application for summary proceeding or a summons application will be dismsissed at an early stage of the procedure. But the creditor takes a certain risk for the following reasons. If the creditor realizes that the other contractual party may assert complex claims, he may be precluded from having those disputable issues decided by arbitrators, if his application for summary proceedings will be dismissed after the respondent had made an objection against the court's competence thereby alleging that the creditor's claim is disputable. Before the creditor applies for summary proceedings he ought to consider carefully the risk that disputable set-off claims will be asserted. Initially he must determine in what dispute resolution forum he desires to have his own and the opposing party's claims decided.

An exclusion clause may be drawn up in such a way that a party's right to commence court proceedings is dependent on what kind of application is to be used for initiating a procedure. If a party is authorized to apply for summary proceedings without any limitation, he is not entitled to have damage claims decided by a court. According to Swedish Procedure law, for the time being, such claims can only be determined by a court in ordinary proceedings. The creditor is however entitled to raise several types of claims in a summary proceeding. According to the above-mentioned clause, this can be done even if the claims are controversial. If the court thereby proceeeds to try the case in an ordinary litigation, the creditor has been entitled to choose between arbitration and litigation in a manner which is too extensive. As a matter of fact, the exclusion clause is similiar to a provision which would give one of the parties complete freedom to choose between arbitration and

litigation. If a stronger party, e.g., a large company, granted itself a complete optional privilege or a right to institute court proceedings in a certain way, the arbitral agreement in many cases can be declared unenforceable in virtue of Section 36 of the Contracts Act. Between two companies in an equal position the two mentioned exclusion clauses can not be declared void by a court, but the clauses can be abused by a creditor in such a way that disputable business controversies can be determined by a court in a public litigation.

A party to a contract often needs to obtain an enforceable payment order in a speedy and expedient way. This interest of the creditor can often not be met entirely by compelling the debtor to sign a promissory note based upon debts arising out of a contract with an arbitral clause. If the note lacks an arbitral agreement, unlike the contract, the creditor is not entitled to obtain an enforceable payment order by applying for summary proceedings, if the debtor asserts that the court has no jurisdiction due to the fact that the arbitral agreement is applicable as to the note-claims because his defense is based upon the contract.

The method of compelling a party to a contract to sign a promissory note may function well if the creditor provides the note with a provision expressly excluding note-claims from arbitration. In some cases it is possible that a court may hold it unfair that a debtor can not have his defense fully tried by the court in connection with a determination of the note-claim.

What has been said demonstrates that it can be very difficult for a creditor to draft a contract which entitles him to exclude indisputable claims from arbitration. Complications which have arisen in many of the reported cases show that a creditor may lose time in his debt-collecting activities and that he can be obliged to pay costs for litigation which do not in a speedy way result in enforceable payment orders. One may question if not other solutions can function in a more effective way than such clauses. If a party to a contract in his capacity as a debtor refuses to pay an uncontestable and matured debt, it can be more effective in domestic situations to send such a payment request to the debtor, since such a request according to Swedish law will create a presumption of insolvency. If the debt is not paid within one week the debtor can only avoid bankruptcy if he proves his solvency. This kind of payment request functions in a very effective way because the bankruptcy threat forces the debtors to pay.[31]

[31]Heuman, Specialprocess, utsökning och konkurs 155-60 (1987).

Singular Succession and Arbitration*

1. Introduction

An arbitration agreement is in principle binding only on the parties to the contract.[1] A third party is not bound by an arbitration agreement entered into by other parties. Thus a third party may not in principle commence arbitral proceedings against one of the contractual parties. When a party initiates arbitration against another party an arbitration agreement must have been entered into at an earlier stage. If such is not the case, the arbitrators will still be competent to decide the dispute provided that the parties come to an agreement to arbitrate before the arbitrators. This is expressly stated in the Arbitration Act sec 11.

According to Swedish law an arbitral agreement need not be in writing. However such agreements are usually made in this form. If a party maintains that there is an oral arbitral agreement, then he must prove it, which can often be a difficult task. When deciding if an arbitral agreement is entered into wholly or partly by tacit acceptance or by an ambiguous reference to an arbitral clause in an earlier contractual relationship, such circumstances may be taken into consideration irrespective of whether they are expressed in writing. From this point of view, problems may exist when construing and applying other foreign acts which, unlike Swedish law, require that the arbitral agreement is documented.[2] As an exception to the rule that an arbitration agreement is binding only on the parties, it is opined that the agreement may be effective on a third party due to a transfer of contractual rights and obligations. A party who thereby has left the contractual relationship may be interested in raising claims against the one who acquired his rights and duties, notwithstanding that the latter is entitled to the rights according to the contract. Civil procedural case law demonstrates that the assignor may sometimes have standing.[3] In such cases the original arbitration agreement does not cease to be effective between the assignor and his previous contractual party after the assignor has left this legal relationship.[4] Thus the assignor is entitled to commence arbitral proceedings against his earlier contractual party and the arbitrators have to handle such cases if the plaintiff has standing.

*Printed in Festskrift till Sveriges Advokatsamfund 1887–1987 229–257 (1987).

[1]Dillén, Bidrag till läran om skiljeavtalet 245 (1933), Hassler, Skiljeförfarande 38 (1966), Hassler and Cars, Skiljeförfarande 45 (1989) and Arbitration in Sweden 36 (1984).

[2]Möller 124 Tidskrift,utgiven av juridiska föreningen i Finland 282 and 294-5 (1988).

[3]Graningeeverkens AB v. Vattenfallsbolaget m fl (NJA 1944 p. 676), Brattström and Nederberg v. Jonsson (NJA 1946 p. 638) and Filadelfiaföreningen, Avesta v. Åberg (NJA 1975 p. 362.)

[4]Arvidson v. Drätselkammaren i Simrishamn (NJA 1972 p. 54) and Östen Forsman v. Inovius (NJA 1973 p. 480).

This essay will first discuss different types of transfers which are implemented before a party has requested arbitration. Then the effects of different types of assignments made during an arbitration shall be investigated. In order to deal with the issues consistently it is necessary to discuss arguments both pro and contra to making the arbitral clause binding on the assignee. The results of this discussion will be utilized in the subsequent sections. First however, a basic contractual principle must be examined.

A systematical legal argument is of great importance. If an arbitral agreement is recognized or established, it is binding on both parties. One can not imagine that one of the parties may invoke the agreement in his favour, but not the other party.[5] When one shall consider if it is appropriate to expand the arbitral clause to be effective against one of the original contractual parties and a third party, one has to determine if it is appropriate both in cases when the original party and the third party want to commence arbitration. From this point of view perhaps one may criticize a statement in *Arbitration in Sweden*. It states that a guarantor is entitled to invoke the arbitration agreement as a bar to court proceedings according to some Supreme Court cases. It is further stated that it is doubtful if the guarantor can be compelled to arbitrate by a party who is a claimant to the main contract. This last statement is made without supporting case law. However, the authors have reasoned that the guarantor may rely on the arbitration agreement, since it is generally considered that he may raise the same defence as the debtor and cannot be placed in a worse situation than the debtor.[6] Perhaps the authors construe complex multiparty arbitral agreements such that the parties have agreed that the guarantor may invoke the arbitral clause in his favour if he

[5]I do not discuss cases where an arbitral agreement is rescinded due to breaches of this contract. Cf. Jon Warmland reported infra p. 192. The bylaws of the Swedish Bar Association sec. 33 provide that a member (i.e. a lawyer) is obliged to submit to arbitration with a client in disputes concerning the fees and costs, if the client requests arbitration within one year from the time that the final invoice was issued. This means that the lawyer is not empowered to commence arbitral proceedings, if he wishes to obtain an enforceable decision against a client unwilling to pay the invoice. If the lawyer would try to obtain an enforceable payment order from a court, such dispute may be dismissed, if the client objects and the application has been made before the one-year time limit has elapsed. This means that only one of the parties is entitled to commence arbitration and that the other has no possibility whatsoever to obtain an enforceable decision. This is a result of the bylaws and the lawyers' commitment to follow those rules. One could ask if this system is acceptable to lawyers, since it involves a kind of "déni de justice." Such a state cannot of course be accepted in general, but when it is limitied to a fairly reasonable time it is acceptable, at least as the rules are based upon a commitment from the stronger party against a party who often is the weaker. See Heuman, Advokatsamfundets skiljedomsprövning av arvodestvister mellan advokater och klienter 5 and 28-33 (1986). This system may be criticized because the arbitral tribunal is composed only of lawyers and because an arbitral agreement according to the Arbitration Act Sec.1 is only valid if it has reference to an existing legal relationship, which is not the case when the lawyers will be bound by the arbitral provision when entering into the bar association a long time prior to any contracts with clients. Id. 34-38 and 42-49.

[6]Arbitration in Sweden 40 (1984). See also, Dillén, Bidrag till läran om skiljeavtalet 258-9 (1933).

so wishes, but that the creditor has no such privilege. This means that the guarantor has an optional right. It is difficult to determine if this is a correct conclusion drawn from the significance of the contractual situation and the civil law regarding guarantees or if this principle asserted by the authors is doubtful.

2 Reasons for and against the Application of an Arbitral Agreement against a Third Party

Because of the special nature of arbitration an arbitral agreement can be binding in a way which deviates from general principles of contract law. It is important to discuss some reasons pro and con for extending the application of an arbitral agreement to a third party.

2.1 The Relationship Based upon Mutual Trust between the Parties to an Arbitral Agreement

When two parties to a contract prefer arbitration over litigation as to the resolution of future disputes, often their choice may be based to some extent upon their mutual trust, at least in domestic arbitrations.[7] (In international business contracts the parties are usually forced to accept arbitral clauses for other reasons, e.g., because each party wants to avoid litigation before the national courts in the country of the opposing party.) In certain situations a party prefers litigation over arbitration because the other party is untrustworthy or is known as being difficult to do business with and therefore may be expected to delay an arbitration. By extensive obstruction tactics a party is able to cause the other substantial costs. A recalcitrant respondent in some cases is capable of delaying the arbitration for such a long time that the case cannot be decided before the time for rendering an award has elapsed. According to Section 18 of the Arbitration Act, the dispute must be decided in six months, but the time for rendering an award may be prolonged by the district court, however only for six months except in extreme cases. This time period shall not apply in cases where the parties or one of them is resident outside Sweden. If a party has entered into an arbitration agreement it is important whether the opposing party be substituted by a third party. It may sometimes be anticipated that this party will delay a future arbitration and cause consequent costs, irrespective of whether he has substantial financial resources. From that point of view the acceptance of a party substitution to the arbitral agreement is not merely a question of whether the third party is capable of performing all of his duties according to the business contract. If a third party has acquired all the contractual rights and obligations accor-

[7]Dillén, 246 note 159 (1933), Vahlén, Avtal och tolkning 153-4 note 88 (1960) and Welamson 49 SvJT 280 (1964). See also, Millquist, Finansiell leasing 223 and 226 (1986).

ding to a contract, the other party to the contract may only be prepared to submit to arbitration with his original contracting party, and not with an unreliable third party.

One may object that reasoning premised upon the existence of a relationship based upon trust between the original parties is not pertinent to cases where the parties are legal entities. The representatives of a company will change over time and the business activities may be directed towards new aims and become less profitable. However, when entering into an arbitration agreement it is possible that the opposing party has confidence in the other company and believes that its management and activities will not be changed in such a drastic way that the reason underlying the arbitral agreement will be undermined. From this point of view a kind of a relationship based upon trust forms an essential basis for the arbitral agreement entered into by the two legal entities. In a simplified way one could maintain that party substitution in contractual rights and obligations will not automatically involve party substitution in the arbitral agreement or the establishment of a new arbitral agreement. If a party has entered into an arbitral agreement with a highly renowned company which has subsequently transferred its contractual rights and duties to a poorly reputed company, there is no basis for an assumption that the remaining original party wants to enter into an arbitral agreement. Such an assumption requires support in the expressed intentions of both parties to accept a new arbitral clause. It will later be discussed if one may establish by interpretation an arbitral agreement resulting from a third party having become substituted to the contract and the other approving this. Such approval is a neccessary condition for party substitution if the assignor shall be releived of its obligations to the other original party of the contract.

The binding effect of arbitral agreements on third parties has to be considered specifically in each case of party substitution and assignment. This will be illustrated by different cases of universal succession. If a debtor and another person have entered into an arbitral agreement and a dispute arises between the debtors' bankrupt estate and the debtors' contract party, such controversies concerning ownership or pecuniary claims may be arbitrated.[8] An old Supreme Court case demonstrates that a decedents' estate is entitled to request arbitration of claims based upon a contract entered into by the opposing party and the deceased.[9] According to the Swedish Companies Act a company can not acquire rights or enter into obligations prior to its regi-

[8]Westerblad v. Byggnadsfirman Oscarsson & Söderberg Bankruptcy Estate (NJA 1931 p. 647), Theorin and Malmberg v. Byggnadsaktiebolaget Holger Preisler Bankruptcy Estate (NJA 1913 p. 191) Welamson, Konkursrätt 310 (1961), Welamson, Konkurs 97 (1987), Hobér 3 Swedish and International Arbitration 44 (1983), Hassler, Skiljeförande 39 (1966), Dillén 247-57 (1933) and Arbitration in Sweden 37 (1984).

[9]Rinqvist decedents Estate v.Ljusne elfs Flottningsförening (NJA 1986 p. 398) and Arbitration in Sweden 36-7 (1984). See also Ingela C v. Kommunernas Försäkringsaktiebolag (NJA 1981 p. 1205).

stration. Persons who have taken part in an activity or a decision, in violation of this provision, on behalf of a company are jointly and severally responsible for any obligation entered into prior to the registration. After a person on behalf of an unregistered company had entered into an employment-contract with an arbitral clause, the employee filed an action for compensation against the persons who had taken part in the formation of the company. The employee asserted that they were personally responsible. The district court held that the arbitral clause was binding also on those persons who took part in the formation of the company without having signed the employment contract. The judgement indicates that the reason for this was the wording of the clause, namely that the clause had reference to disputes regarding the legal consequences of the contract. It also covered legal relationships arising from the contract. This last expression could be construed in such a way that the arbitral clause would cover legal relationships which did not exist when the parties entered into the contract, but could develop out of the contract.[10] However it is difficult to understand how persons other than those who signed the contract could be bound by the clause for this reason. The Court of Appeal and the Supreme Court affirmed the judgement of the district court.[11] It is possible that the district court's reasoning was not approved by the Supreme Court. A possible explanation of the outcome may be that a third party will be bound by an arbitral agreement, when statutory provisions hold him responsible for contractual obligations jointly with a party to the contract.

Perhaps there is a common explanation why a bankruptcy estate, a decedents' estate, and representatives of an unregistered company are bound by arbitral agreements, though such legal entities are not parties to the arbitral agreement. The reason for the binding effect of arbitral clauses against such third parties could be that the liability was not transferred in a new voluntarily established contract. Liability was compulsory by operation of the law due to certain events which occurred after the original parties made the arbitral contract. This view is supported by the established opinion that an arbitral clause binding on a trading company, will also be binding on the partners due to the statutory responsibility for the company's obligations.[11a] Unlike *Hobér* I will not exclude that some cases of succession by merger may be dealt with in a different way than the aforementioned instances of univeral succession.[12] This will be developed herein.

Suppose that an arbitral agreement has been entered into by a natural person in his capacity as a small businessman and a company which later has

[10]See supra note 5.

[11]Hallbäck v. Ekman (NJA 1925 p. 303).

[11a]Dillen, 259 (1933), Hassler, Skiljeförfarande 39 (1966) and Kurt and Irene Ljung v. Josef and Juliana Szabo Handelsbolag (HD Ö 1915/88).

[12]Hobér, 3 Swedish and International Arbitration 46 (1983). See also, Arbitration in Sweden 38 (1984).

merged with a large company. It may be asserted that the purchasing company has to accept all obligations of the acquired company, including obligations to arbitrate future disputes. However, it must be considered that the small businessman made an arbitral agreement with a well-reputed company with limited activities and financial resources. The businessman might allege that this company and his own enterprise had been on an equal footing, which in fact was a condition for accepting the arbitral clause. Further he might maintain that he is not at all prepared to arbitrate a dispute with the large company. The large company may aggressively pursue a dispute without being limited by financial considerations. The relationship of trust between the original parties and the changed circumstances after the merger may not in all situations deprive the arbitral agreement of its binding effect. However these factors support the view that the arbitral agreement should not be binding on a third party. If as a principle, the binding effect of the arbitral agreement would without exception be extended to the merging company as a type of third party, the other party to the contract may claim that the arbitral clause is unenforceable by virtue of the Contracts Act sec. 36 regarding unfair contract terms. Of course the courts cannot treat all such disputes concerning unfair contract terms alike, but must consider the specific circumstances in each case of merger. The Göranzon case, mentioned on p. 36 demonstrates the Swedish courts application of this sec. of the Contracts Act.

2.2 The Same Substantive Issues Will Arise in Disputes between the Original Parties and in Disputes between the Assignee and the Remaining Party

When two parties enter into an arbitral agreement each of them should consider that it will become necessary to take part in arbitrations regarding disputes which are typical consequences of the present kind of contract. If the contract concerns the sale of machines the parties ought to predict that disputes may regard defects which require expert evidence and perhaps require arbitrators with technical knowledge. If the contract, on the other hand, mainly refers to legal issues regulated in a complicated way, disputes regarding problems of interpretation ought to be foreseen by the parties. If all the rights and duties in a contract will be transferred to a third party the same kind of disputes may arise between the new parties in the future. This may be a reason why the remaining original party would be bound by the arbitral agreement. From this party's view the assignment does not change the presumptions for future arbitrations regarding the nature of the disputes. As mentioned in the previous section, this basis for arbitration may however be altered due to the fact that the opposing party has been changed.

Assume that one of the original parties has transferred his contractual rights to a third party under terms which are different from those in the origi-

nal contract. Under such circumstances the remaining party to the contract would be forced to participate in disputes of a kind he was not able to predict when entering into the arbitral agreement. This is a reason for not extending the binding effects of the arbitral agreement to the remaining party and the assignee in his capacity as a third party. However it is difficult to imagine a contractual situation where a third party, after an assignment, would have the possibility to assert quite different types of disputable issues than those which the original contract could give rise to. When a party transfers his rights and duties, the contractual obligations of the opposing party may not be expanded without his consent.[13] However his consent may not be required if only rights based upon the contract would be transferred to a third party. The position of the remaining party will not be worsened by such a tranfer; it is inconsequential to him if he is obliged to pay a sum, e.g., as damages to the original party or his assignee.

When a party to a contract transfers his rights he may provide in the assignment contract, an exempting clause in order to limit the liability of the original contracting party. Such a clause is only favourable to the remaining party and therefore does not require his consent. The assignor may be entitled to compensation for losses of an indirect nature in cases of contract breaches, while the assignee has been deprived of this type of damage by a clause in the transfer contract. One may state that the remaining contract party ought to be entitled to refuse to participate in arbitrations concerning disputes with the assignee regarding issues which may not arise out of the original contract. The following contrary position is also conceivable. Since the exempting clause has been included in the transfer contract, not by the remaining party but by the assignor thereby favouring the remaining party, the latter in arbitral disputes with the assignee has to choose between invoking the clause in the arbitration or omitting to do so if he wants to avoid complicated contractual issues not foreseen when entering into the arbitral agreement.[14] What has been discussed will be illustrated with problems concerning guarantees.

The Supreme Court has established that an arbitral agreement made by two parties is also applicable in disputes between one of the parties and a legal entity who has guaranteed the fulfilment of the opposing party's obligations.[15] The Supreme Court has not given any reasons for these decisions. Some commentators have recommended that the binding effect of the arbitral clause be limited to cases where the guarantor knew or should have known that the arbitral clause was in the main contract.[16] One may ask if a

[13]Rodhe, Obligationsrätt 641-5 (1984) and Ekelöf, Rättegång II 147 (1985).

[14]See also infra p. 64–5.

[15]Örsjö Församling v. Gustafsson, Petterson and Månsson (NJA 1896 p. 136), Medicinalstyrelsen v. Jonsson and Blomberg (NJA 1916 p. 100) and Kronan v. Lindroth, Krook and Flodquist (NJA 1922 p. 135).

[16]Dillén 259 (1933) and Arbitration in Sweden 40 (1984).

practical consideration may have contributed to an expanded application of the arbitral clause encompassing guarantors. The liability of the guarantor is dependent on the existence of the debtor's liability, and a judgement in a dispute between the creditor and the debtor is binding and will have res judicata effect in the guarantor's favour, but not to his disadvantage.[17] From many points of view it is expedient if the liability of the debtor and the guarantor is decided in the same proceeding.[18] If the creditor requests arbitration against the debtor and the guarantor, he is not able to force a consolidation of the disputes without the consent of the two opposing parties.[19] They are, e.g., entitled to appoint one arbitrator each in two separate arbitral disputes, if not otherwise agreed. The interest in a speedy and inexpensive dispute resolution by consolidation of the two controversies can not be achieved over a party's objections and is therefore hardly a reason for extending the binding effect of the arbitral agreement to the guarantor. Further, issues regarding the validity and interpretation of the guarantee will arise in arbitration only in cases where the guarantor is a party to the dispute and not merely the creditor and the debtor. After the debtor's payment obligations have been established in an arbitral award, the guarantor may assert in a new arbitration that the debtor in fact had a more limited obligation and that the guarantor can not be adjudged to pay more than that. As mentioned above, the res judicata doctrine will not bar a court or an arbitral tribunal from deciding in this way.

What has been said demonstrates that it can be impossible to consolidate disputes between the three parties. Disputes between the creditor and the debtor and disputes beween the creditor and the guarantor would concern somewhat different issues. Because of this it is difficult to see that the rationale of the binding effect of an arbitration agreement to a third party like the guarantor should be that the disputable issues would be identical. The applicability of the arbitral agreement against the guarantor in situations when he was aware or ought to have been aware of the arbitral clause, may be based upon the fact that the guarantor may be deemed to have *tacitly accepted the clause*.[20] But even this explanation is not convincing, since there is no support for this position that the guarantor tacitly accepted the arbitral clause which he was not aware of, but ought to have been aware of. The principles of modern contract law seem to give no support to the criticized view. A Court of Appeal case from recent years confirms however that an arbitral

[17]Ekelöf Rättegång III 129 (1988).

[18]Cf. Bolding, Skiljedom 102 (1962) as to construction of an arbitral agreement and its effect on third parties.

[19]Westerling, 1 Svensk och Internationell Skiljedom 14 (1981) and Herrlin, 1 Svensk och Internationell Skiljedom 31 (1981).

[20]Hjejle, 64 (1987). Cf Adlercreutz, Avtalsrätt I 61 (1980).

agreement is binding on a guarantor, but the judgement gives no reasons for this.[21] The rationale of the principle remains somewhat unclear.[22]

2.3 Restrictive Interpretation of Arbitral Agreements

A contractual clause providing for private dispute resolution will be effective as an arbitral clause only if it is clearly prescribed that the parties agree to submit to arbitration and not merely to any other kind of dispute resolution or assessment procedure.[23] If it is stated in a contract or insurance contract that certain future disputes shall be decided by a board, without using the word arbitration or a derivative word, such clause is usually not construed as an arbitral clause. This is because an arbitration agreement is of a burdensome nature due to the obligation to pay the arbitrators' fees. For this reason a party may only be deprived of the legal safeguards associated with court proceedings by an unambiguous provision for arbitration. Contracts concerning assignments of companies or their assets sometimes contain both an arbitral clause and a special provision prescribing that the assessment of the assets and the debts be made in a binding way by an auditor. If the seller wants to compel the buyer to pay the purchase money after the assessment is completed, he must request arbitration. The auditor's report or decision is not enforceable as an arbitral award, but binding as a contract. The assessment report may not be deviated from by the arbitrators and they must base their award upon the report without trying the issues decided by the auditor.[24] If a party wishes to present evidence in order to demonstrate that the assessment is incorrect the arbitrators should reject such a request.

The above-mentioned type of restrictive interpretation is not of direct significance for the problem as to the binding effect of an arbitral agreement to a third party, but it demonstrates a general tendency of restrictive interpreta-

[21]Lönnström OY v. Convexa AB (RH 1985:137).

[22]If the creditor has requested arbitration against the guarantor, perhaps he is not forced to raise such defences which concern the validity and the interpretation of the guarantee lacking an arbitral agreement. The dispute perhaps will be based only upon the liability according to the main, obligation. Suppose it is true that an arbitral agreement in a promissory note will cover disputes with guarantors only concerning the note, not regarding the guarantee itself, if this lacks an arbitral clause. An award ordering the guarantor to pay a sum to the creditor, would probably not, according to the doctrine of res judicata, prevent the guarantor from commencing court proceedings based upon a request to be released from his payment obligation due to the inapplicability or invalidity of the guarantee. The scope of the res judicata effect of the arbitral award ought to be limited to the same extent as the arbitrators' competence was restricted. This res judicata principle has reference to court judgements. See, p. 208 note 5.

[23]Rita Urhelyi v. Arbetsmarknadens Försäkringsaktiebolag (NJA 1974 p. 573) reported on p. 235, Heuman, Specialprocess, Utsökning och Konkurs 23 (1987) and Magnusson and Sandberg, Rättssäkerheten i fackföreningar 150-1 (1985).

[24]Cf. Heuman, Reklamationsnämnder och försäkringsnämnder 11-15(1980). Probably such a decision is not binding if the auditor has violated basic rules concerning due process.

tion. However it is important in this connection that some commentators have stated that *the scope of the arbitration agreement should be construed in a restrictive way*.[25] They probably have not been considering the possibilities to extend the effect of the arbitration agreement to third parties. However, it is difficult to justify extending the binding effect of an arbitral clause to third parties by applying principles of contractual construction which substantially deviate from the general principles of contract law.[26]

In opposition to a restrictive construction, one may invoke *Tureberg-Sollentuna Lastbilscentral*, supra at p. 22. The Supreme Court held that an arbitral agreement was established between businessmen simply by a reference in a contract to general conditions which contained an arbitral clause. Deviating from earlier practice the Supreme Court established that an arbitral clause would be binding even if no copy of the general conditions was handed over to the opposing party or if this party for other reasons was not aware of the arbitral clause,for example, because the clause had not been discussed during the contractual negotiations. This case may be construed such that the demand for evidence for fulfilling the burden of proof has been reduced in certain situations. However, a better interpretation is that the court would now not require evidence to the same extent as previously required for approving that the general conditions form a part of the individual contract. It is not a new legal principle concerning arbitration, but rather regarding general conditions. Therefore, there is no reason for invoking this Supreme Court case in support of the position that an arbitral clause in a contract would be binding on an assignee and the remaining party to a larger degree than follows from earlier precedents. In cases where the issues of the binding effect of general conditions will be the only decisive factor for determining if the assignee will be bound by the arbitral clause, Tureberg-Sollentuna Lastbilscentral will be of great importance. However usually other factors will be of significance when determining if the arbitral clause is binding on a third party. It is not merely a problem concerning the impact of general conditions. Quite a different thing is that there are reasons to maintain that the courts should not be strictly bound by such old precedents regarding different types of assignments, because some of these cases may be criticized from basic principles established in modern Supreme Court cases and in the development in international arbitration during the last decade.

[25]Hassler 34 (1933) and Berglund, Om Skiljeavtal och Skiljedom 67 (1920).

[26]Cf. Dillén 22 SvJT 692 (1937), Vahlén 148-9 (1960). See also Bolding 90-110, Heuman, Advokatsamfundets Skiljedomsprövning av arvodestvister mellan advokater och klienter 47 (1986) and Swedish Marine Equipment AB v. Bo J (RH 1985:90).

3 Singular Succession, Prior to the Commencement of an Arbitration

3.1 Singular Succession of All Rights and Obligations of a Contract Containing an Arbitral Clause

According to *Arbitration in Sweden* an arbitral agreement is binding on a third party in two exceptional cases, apart from multi-party arbitration, first, in party substitution by way of universal or singular succession, and second, in guarantee agreements. In *Arbitration in Sweden* the authors have stated that the position of Swedish law as to assignments of contracts seems to be that the assignee is bound by the arbitration agreement as well as by other terms of the agreement; this applies at least if the assignee was or ought to have been aware of the existence of the arbitration agreement. The authors opine that the assignee consequently will be bound by an arbitral award and such an award may be executed against him.[27] It seems that this last sentence is based upon the principle that a judgement has res judicata effect on a successor who acquired his rights or obligations after or during the litigation, but not on a successor who acquired his rights or obligations prior to the litigation.[28]

Arbitration in Sweden has stated that party substitution is an exception to the principle that arbitral agreements are not binding on third parties. Perhaps this refers only to assignments made during an arbitration, and not to assignments made before an arbitration. *Arbitration in Sweden* cites *Dillén*, who seems to deal only with assignments and the binding effect of an arbitral agreement without consideration of the effects of existing arbitral disputes.[29] This means that a completed assignment before the commencement of an arbitration should result in a binding effect of the arbitral clause on the assignee, at least if he was aware of the clause. In *Arbitration in Sweden*, *Hassler* is also cited as support. *Hassler* has, however, declared that as a rule, an arbitral agreement is not binding to any other person than the parties, but that there may exist exceptions. To such exceptions *Hassler* does not seem to refer cases where a third party has substituted a party and thereby entered into the position as a party. *Hassler* refers in this connection to a leading Danish commentator, *Hjejle*, who has stated that there is no exception from the main rule, when it may be assumed that a successor of a party to the contract will be bound by the arbitral agreement in the contract.[30] *Hassler* states that a successor of a party is bound by the arbitral agreement, but that

[27]Arbitration in Sweden, 38-9 (1984).
[28]Ekelöf, Rättegång III 126(1988).
[29]Arbitration in Sweden 36 and 38–9 (1984) and Dillén 246-7 (1933).
[30]Hassler,Skiljeförfarande 38 (1966) with reference to Hjejle in note 17. Now see Hjejle 63-4 and 72 (1987),who has not changed his opinion.

this is not an exception from the main rule. *Hassler* seems to be of the opinion that the assignment of the contractual matters means that a new arbitration agreement is made between the assignee and the remaining party.

According to a principle of civil law a party may not be replaced by a third party with the effect that the original party will be released from his duties. The successor can not alone be liable according to the contract unless the remaining party to the contract gives his consent. This party, entitled to specific performance or payment, shall not be forced to accept a worse situation because the assignor transfers his obligations to a person who is in no way as capable as the original party to fulfil the duties. It is required that the other party consents to the assignment if this shall release the assignor from his duties.[31] If such consent is not given the assignor remains liable.[32] This has reference to the transfer of a combination of rights and duties, e.g., according to a sales contract. If all of the rights and obligations according to such a contract will be transferred to a third party, the assignor will be released from his liability to the other party of the original contract, provided that the latter accepts this. This party has an opportunity to determine if the assignee has a sufficient capacity to pay the purchase money. When he gives his consent to an assignment this means that he accepts that the assignee alone has to fulfil all of the obligations according to the original contract and that the assignee is entitled to the benefits of the contract. The consent of the original party, for example, a seller, means that he accepts that the successor of the buyer entering into the arbitral agreement, even in cases where the successor may be predicted to be a less desirable party in an arbitral dispute than the assignor, e.g., as to the capacity to pay the fees of the arbitrators.

This means that *a new arbitral agreement may be established between the original party, the seller, and the assignee* by a transfer of all the rights and obligations according to a contract and by an acceptance of this assignment. Such a new arbitral agreement may probably only be established if the assignee is aware that the assignor intends to obtain the original party's consent to the assignment and the release of his obligations. However, this seems to be normally presumed by the assignor and the assignee. This probably explains why *Hassler* states that a third party substituting a party to the contract will be bound by the arbitral agreement and that this is not an exception from the main rule that an arbitral agreement is only binding on the parties.

Hassler does not deal with the problem of whether a successor would be bound by an arbitral clause, *if a new arbitral agreement would not be made by an assignment* and one might ask if there is another basis for considering the assignee to be bound by the clause. It is possible that the arbitral agreement is binding on the assignee, because of an *expanded application of the arbitral clause in the original contract*. The meaning of "expanded applica-

[31]Rodhe 642 (1984) and Millquist 222-3 (1986).
[32]Hellner, Speciell avtalsrätt II 169 (1984).

tion" is difficult to envision. If it is a kind of one-sided binding legal action the idea could be criticized because one should not be forced to submit to arbitration without having made an agreement to do so with the other parties, except when arbitration is based upon special provisions in the law. The meaning of expanded application will be discussed in light of the existing legal literature on the subject.

Regarding cases of guarantees *Hassler* has maintained that an extension of the effect of the arbitral agreement to a third party may be found in so far as the arbitral clause in a contract will be applicable in the relationship between a party and a person who, after the establishment of the clause, has guaranteed the fulfilment of the opposing party's obligations according to the contract. *Hassler* has added that it can be presupposed that the guarantor in such cases is aware of the existence of the arbitral clause and therefore must take into account that the clause may be applied.[33] The idea that an arbitral agreement would be binding on a third party, provided that he knew of the clause or ought to, has been clearly expressed. This opinion corresponds with what has been asserted in *Arbitration in Sweden* and by *Dillén* as to cases of succession.[34] This notion is also confirmed in *Arbitration in Sweden*, that it would seem difficult to hold the guarantor bound by the arbitration agreement, at least if he was unaware of the existence of the arbitration agreement.[35] .

This was later confirmed in Lönnström Oy v. Convexa AB, a modern Court of Appeal case. The Court of Appeal relied upon legal commentary in holding that a notion presented in the legal litterature involves that the guarantor may be bound by an arbitral agreement between the debtor and the creditor, if the guarantor knew or ought to know about the arbitral agreement, when he made his commitment.[36]

This demonstrates that the effect of an arbitral clause may not be expanded to a third party, if he was not aware of its exsistence nor ought to be. Three rather old Supreme Court judgements as to guarantees express the opinion that the arbitral clause of the main contract was applicable in relationship to the guarantors, without the requirement that they were aware of the clause or should have been so aware.[37] However the circumstances in the cases may have been such that the guarantor ought to have known about the clause. Statements made later in the legal litterature seem to have led to a restricted interpretation, i.e. to accept the binding effect of the clause to a third party provided that an additional prerequisite not expressed in the judgements was met, (aware of or ought to be aware of the clause).

What has been said on the extended application of an arbitral clause to a

[33]Hassler. Skiljeförfarande 38 (1966).
[34]Arbitration in Sweden 38-9 (1984) and Dillén 247 (1933).
[35]Arbitration in Sweden 40 (1984).
[36]See note 21
[37]See note 15.

third party may be summarized as follows. The problem of whether an arbitral clause is binding on a third party has to be decided after *considering the interests of the third party*. It shall not be possible to force him to participate in a costly arbitration, when there was no possibility for him to predict that an arbitral agreement would be invoked against him. However, it is important that one *consider the interests of the opposing party in a dispute*, i.e. in cases of succession the interests of the original contracting party to the assignor and in cases of guarantees the interests of the creditor. The one who has become the opposing party to the assignee after the transfer may require that his legal position not be deteriorated regarding the choice of dispute resolution forum (litigation or arbitration). This problem will be discussed as to cases of assignments, taking a statement by *Hassler* as a starting point.

Hassler has declared that *Vahlén* has stated that an arbitral clause in a contract appears not to be applicable to a third party, who after a transfer has acquired one of the parties' rights, unless he by assignment also must be deemed to have undertaken to comply with this clause.[38] It is possible that *Vahlén* had not considered conveyance of all the rights and duties according to the contract, but only a transfer of a sole right or an object. When a transfer has taken place without referring to the original contract, there are no reasons for the assignee to be aware of the arbitral clause. In the following parts of this essay two such problems will be discussed under the headlines, "transfer of an object" and "transfer of damages claims or a limited right". For the present, the difficulties of establishing the types of transfers *Vahlén* referred to will be disregarded. *Hassler* has criticized *Vahlén*, alleging that his position is not based on reasonable consideration of the interests of the opposing party. He has added that a person who has entered into the rights of one of the parties to a contract as a rule ought to be bound by the arbitral agreement in the contract.[39] *Hassler* seems to be of the opinion that *a party to the original contract shall not be forced to accept a worsening of his position because the assignee is not obliged to submit to arbitration unlike the the assignor.* If, for example, a seller has entered into a contract under the presumption that disputes later arising should be decided in a speedy and confidential way by arbitrators, the assignee shall not be entitled to force litigation. *Hassler* may be interpreted in this way.

On the other hand, the seller also may assert that he cannot agree to arbitrate with the assignee because the latter, unlike the assignor, is not capable or willing to pay the arbitrator fees. It is not unusual that the plaintiff alone has to pay advance costs, i.e. also on behalf of a recalcitrant respondent. This can be rather burdensome, at least as it may be difficult for a prevailing plaintiff to force a respondent with limited financial resources to pay the fees according to the arbitrators' award. Further, the seller may oppose arbitra-

[38]Hassler 38 note 17 (1966).
[39]Id.

tion with the assignee because the original arbitral clause was based upon such a relationship of trust which does not exist between the seller and the assignee.

One may think that the interests of the seller require that he be at liberty to choose between arbitration and litigation. Such a system seems to be unreasonable. Either there is an arbitral agreement binding on both parties or there is no arbitral agreement, this is independent of who is commencing the arbitral proceedings. This is a basic principle even when considering problems of expanded applications of arbitral clauses. An optional right for one of the parties needs clear support in the law. The Arbitration Act sec. 3 does not give the seller such an optional right. See supra p. 27.

It is not really possible to solve the problem in a consistent way if the seller *either* may assert that the dispute should not be tried by a court since the assignment must not result in a worse position for him *or may* assert that the dispute shall not be decided by arbitrators, since the arbitral agreement is not binding on a third party and that the latter therefore shall not be entitled to force the seller to participate in a costly arbitration, where the assignee can not pay the fees. It seems to be an insolvable contradiction. It is quite different if a new arbitral agreement will be made if the seller has given his consent to the assignment. The seller thereby approves the risk that the assignee is not capable or willing to pay the arbitrators' fees and that he may be a recalcitrant opposing party unlike the assignor might have been.

As mentioned above it seems to be impossible to decide the effect of an arbitral clause in cases where *the assignment has not been accepted by the seller in his capacity as the remaining party to the original contract.* According to the principle of civil law mentioned earlier, those cases are characterised by the fact that the assignor will not be released from his obligations. On the other hand the assignee is entitled to assert his contract rights against the seller, e.g., by claiming damage due from breaches of the contract. With reference to the interest of the seller, it is in such cases very difficult to determine if an arbitral clause is binding. The seller may state that he has not accepted the assignment as to the substantive matters and that his position must not be worsened because disputes would not be decided in an expeditious and confidential manner. But he could also maintain that he does not wish to have a dispute with the assignee determined by arbitrators. It is my opinion that such disputes shall be decided by courts and not by arbitrators. This is because it can be more burdensome to the seller to be forced to participate in costly and time-consuming arbitration due to obstruction tactics, than it is for him to be forced to litigate, notwithstanding that a judicial process may result in appeals and protracted court proceedings. The relationship of trust between the original parties and the inclination to construe arbitral agreements restrictively supports the proposition that *an arbitral agreement is not binding between the assignee (a third party) and the remaining*

party to the original contract with the arbitral clause.

In light of the above discussion one can not rely upon a frequently recurring idea. According to this idea a transfer of all the rights and obligations according to a contract involves that the assignee will be bound by an arbitral agreement in the contract, i. e., that the arbitral agreement has an expanded application. This notion is based upon the presumtion that one only considers the assignee's interest and does not consider that the seller perhaps wants to avoid arbitration with the assignee. *Hassler's* interpretation of a Supreme Court case expresses this view which was criticized earlier. However, it seems his interpretation is based upon a misunderstanding, as shall be demonstrated.

Kooperativa förbundet förening upa v. S.J.Norman AB (NJA 1948 p. 714). According to a time charter-party (charter agreement) between the shipowners and a charterer it was provided that any dispute arising under the charter-party should be decided by arbitrators. Further, it was prescribed that the charterer was entitled to subcharter the ship, however was still liable to the shipowners as to the fulfilment of the charter-party. The charterer transferred to Kooperativa förbundet one half of the cargo space with all the rights and obligations mentioned in the charter-party. The subcharterer commenced an action against the charterer and claimed compensation because the cargo was damaged.

The Court of Appeal held that it may be assumed that the subcharterer also had submitted to the arbitral clause in the charter-party due to the fact that it was prescribed that the assignment encompassed all of the rights and obligations contained in the charter-party. The Supreme Court did not grant certiorari.

Hassler has commented upon this case by stating, first, that even outside of guarantee relationships one may imagine that a third party will be bound by an arbitral clause and that thus such a clause in a charter-party was applicable against the one who, owing to a time charter-party, had cargo space transferred to himself.[40] It is highly doubtful that such a conclusion may be drawn from the judgement. In this case the issue was not whether the assignee, in his capacity as a third party to the shipowners, was bound by the arbitration clause in the charter-party because of the assignment. In this case the question arose if the assignor and the assignee were bound by an arbitral agreement. The court seems to have been of the opinion that the charterer and the subcharterer had entered into a new arbitration agreement because the wording of the transfer-contract encompassed the rights and obligations mentioned in the charter-party which included an arbitral clause. A binding arbitral agreement was established in a way similar to when an arbitral clause in general conditions will be binding merely by a reference.

One may raise the question if the case also may by construed such that the original arbitral agreement in the charter-party was expanded to be effective beween the subcharterer and the shipowners. Some language in the judgement of the Court of Appeal indicates that the court was not of the opinion

[40]Hassler 38-9 (1966).

that such a new arbitral agreement was established only between the charterer and the subcharterer. The Court of Appeal, rather, held that the original arbitration agreement also became binding on the subcontractor. The Court of Appeal stated that the subcharterer must be deemed to have submitted to the arbitral clause in the charter-party. In this manner the arbitral clause in the charter-party would be effective to three categories of parties, namely the shipowners, the charterer and the subcharterer. This means that a type of multi-party arbitration clause should have been created. Such a clause can not be effective if one of the parties requests arbitration against the other parties. An arbitral tribunal can not be composed in such cases, because the Arbitration Act, sec. 6 provides that there shall be three arbitrators, one appointed by each party and the third by the party-appointed arbitrators. According to the law the arbitrators shall be three, but the multi-party clause has to be applied in such a way that each of the three parties have to appoint one arbitrator and those appoint one more arbitrator, who will be the fourth, but must be the third according to the law. Because of the principle of party autonomy, the arbitral board may be composed in a way deviating from the provision in the law, if the parties so agree. The multi-party clause can not be construed in such a way that the three parties have agreed that there shall be four arbitrators, at least not in cases when the charterer and the subcharterer have a mutual interest in the dispute against the shipowners.[41] There is no reason to believe that by an agreement he should have accepted that the two opposing parties would be empowered to appoint two arbitrators while he only would have been authorized to appoint one. It is likely that the possibility to establish a multi-party arbitration clause by an expanded application of the original arbitral clause to the third party would be rejected by the courts because no arbitral tribunal could be composed in a reasonable way.

If one only considers the problem of the composition of the arbitral tribunal, it can, however not be excluded that the expansion of the arbitral clause to three parties could be effective if a party commences separate arbitrations against his two opposing parties. Under those circumstances one may ask if the subcharterer would be prevented to invoke the arbitral clause against the shipowners due to the possibility that they did not want to be forced to participate in a costly arbitration with the subcharterer. *The shipowners interests require consideration, even in cases where the subcharterer is deemed forced to submit to arbitration with the charterer by signing the transfer contract.* One should, however, notice that the shipowners had previously accepted that the charterer was entitled to subcharter the ship. By construction of the charter-party one must decide if the shipowners would have accepted the contingency that in the future they would be involved in an arbitration with a subcharterer, and this irrespective of whether the subcharterer in some cases

[41]See p. 235.

would be a recalcitrant opposing party unwilling to pay the fees of the arbitrators. It is quite possible that such a binding arbitral agreement would be established and recognized by the courts.

To summarize, one may state that the assignee in his capacity as a third party probably is not entitled to commence arbitration against the remaining party to the original contract merely because he has entered into all the rights and duties of a contract containing an arbitral agreement. If the original party to the contract has accepted that the other party may transfer his rights and obligations to a certain third party or to anyone in the future, a new arbitral agreement will by such transfer be established between the original party and the assignee.

3.2 Transfer of an Object

Assume that a seller has disposed of a certain object to a buyer, no 1, and that the contract contains an arbitral clause. Normally the buyer is entitled to sell the goods to another person. Usually the new parties will draw up a different contract, perhaps including terms deviating from those in the first contract. If this new contract does not contain an arbitral clause buyer no. 2 is not entitled to initiate arbitral proceedings against buyer no. 1. A new arbitral agreement can not be established between buyer no. 1 and 2, even in cases when buyer no 2 for some reason had prior knowledge of the existence of the arbitral clause in the first contract.

According to civil law principles buyer no. 2 is as a rule, only entitled to claim compensation from his contracting party and thus not from the first seller. If buyer no. 2 claims damages from the first seller due to a defect in the object, such an action will be rejected, unless the buyer has a special recognized basis for being compensated by the seller in his capacity as a third party. A guarantee made by the first seller in his capacity as a manufacturer may entitle a consumer to damages from the seller, when the consumer has bought the goods from the retailer and not directly from the manufacturer. Certain exceptions from the main rule also exist according to law.

Suppose that buyer no. 2 requests arbitration against the first seller in order to obtain an award as to the issue of whether the seller is liable according to some exception provision in the law or a guarantee. Even if such a claim clearly must be rejected, it is not quite clear whether the arbitrators lack jurisdiction. Buyer no. 2 can not refer to an explicit arbitral agreement. He has not entered into the duties and rights of the buyer no. 1 and can not require that the dispute shall be determined by arbitrators on this ground. Buyer no. 1 is entitled to dispose of the object to buyer no. 2 without asking for the consent from the first seller to sell the goods. Since there is no such permission one can not on this ground construct any new arbitral agreement between the first seller and buyer no. 2. A transfer of an object will not involve that an arbitral agreement in an earlier contractual stage will be effec-

tive in a later contractual stage. This reasoning is supported to some extent by a Court of Appeal case.

Bostadsrättsföreningen Sländan no 9 v. Trollsländan AB (SvJT 1950 p. 260). A company owned three pieces of land. In favour of lots 7 and 8 the company created an easement on lot 9 with the purpose that the owner of lots 7 and 8 should be entitled to heating for all future. The owner of lots 7 and 8 was obliged to contribute to the costs for maintenance and possible reconstruction of and addition to the heating installation. The company declared in the easement document that the easement could be registered. These provisions and an arbitral clause were contained in two separate documents which were identical in wording, one document regarding lots 9 and 7 and the other regarding lots 9 and 8. These two documents were signed only by the company in its capacity as owner of the three lots. The court register granted registration of the easement which encumbered lot 9 for the benefit of lots 7 and 8.

Lot 9 was bought by an association, which made an agreement with the company that an oil-heating-aggregate should be installed. After a dispute had arisen as to the obligation of the company to contribute to the costs for this installation, the association filed a suit at the district court. The company invoked the arbitral clause and argued that the court had no jurisdiction.

The district court held that the registration of the easement in the two documents could not encompass the arbitral clauses in these documents. Further, the court stated that the association, which had not entered into an agreement with the company to arbitrate disputes, otherwise was bound by the provisions in the two documents. The court rejected the objection against its jurisdiction.

The company filed an appeal and maintained that the association, by its purchase of lot 9 made an agreement to refer all disputes as to the construction of the easement-documents to arbitration.

The Court of Appeal did not change the decision of the district court.

From this case it is evident that an arbitral clause in a previously drafted contract or document can not be operative at a later contractual stage, when the object has been transferred. The last buyer is a third party to the original arbitral agreement made by other parties. To be entitled to arbitrate, he must prove that a new arbitral agreement has been entered into. The Court of Appeal did not accept the argument of the company that a new arbitral agreement was made merely by the purchase contract. When no new arbitral agreement is expressly made, then the purchase contract must include a provision referring specifically to the arbitral clause or to all the terms of the earlier contract which included an arbitral clause.

A decision of the Supreme Court may be construed similarily. The Court refused to appoint an arbitrator at the request of the plaintiff.

A. Bernstein v. Stenkol AB (NJA 1931 p. 19). A bill of lading concerning a cargo of coal referred to an arbitral clause which was included in a charter-party. Three companies took away different parts of the cargo without being able to present a bill of lading. The shipowner commenced arbitration against the three companies and claimed that in their capacity as receivers of the cargo they should pay compensation for freight, etc. The shipowner requested that the chief execution authority (no longer existing) should appoint an arbitrator, since the companies had not given notice of their choice of arbitrator. The Supreme Court held that the shipowner could not invoke the arbitral clause of the charter-party upon the basis that the companies had bought coal, had taken away the cargo and had paid harbor charges and in writings to the custom authority had declared themselves as receiver of the coal freight.

Some statements made by *Bolding* also support the notion that a third party will not be bound by an arbitral clause in such situations as discussed here. *Bolding* does not deal with cases when a party assumes another party's contractual rights and duties. However, he begins his reasoning from an example where employer A and contractor B entered into an agreement with an arbitral clause. Later, B made an agreement with C in his capacity as a subcontractor. According to this agreement, C must perform certain work completely in accordance with the contract between A and B. *Bolding* assumes that the later contract does not contain an arbitral clause. *Bolding* is of the opinion that the arbitral clause in the contract between A and B obviously can not be applicable in disputes between B and C. The reason for this is according to *Bolding*, that C is not at all bound by the arbitral clause.[42] The effect of an arbitral clause may not be transferred to a third party only on the basis that one of the original parties of the contract which did contain an arbitral clause entered into a new contract with identical terms as the first one, except lacking an arbitral clause. An arbitral agreement can not be established in this way between B and C nor between A and C. C has not assumed B's rights and duties according to the contract with A.

What has been said is supported by some statements in the German legal litterature. As to " Wirkung der Schiedsvereinbarung gegenüber Dritten" Maier differs between "Gesamtrechtsnachfolge und Einzelrechtsnachfolge." Under the headline "Einzelrechtsnachfolge Maier has stated: "So ist derjenige, der das Eigentum an einer bestimmten Sache erwirbt, nicht an Vereinbarungen gebunden, die der Veräusserer mit einem Dritten abgeschlossen hat, während anderseits etwa derjenige, der etwa in ein bestimmtes Vertragshändlerverhältnis zwischen einem Hersteller und einem Händler eintritt, sich eine daruf bezügliche Schiedsvereinbarung entgegenhalten lassen muss."[43]

3.3 Transfer of the Right to Damages or a Limited Right

If a party wants to transfer obligations or obligations together with contractual rights, he can do so only with the the contracting party's consent if he wants to be released from his obligations. If a party only wishes to transfer his rights no such consent is required, because the other party's position is not considered to be prejudiced. This is a reason why cases concerning transfer of rights can not be dealt with in the same way as assignments of all contractual rights and obligations.

Suppose that a person has sold an object according to a sales contract with an arbitral clause and that the buyer later has transferred his right to claim damages from the first seller due to defects in the object. The contract of the damage-transfer contains no arbitral clause. The assignee, entitled to da-

[42]Bolding, Skiljedom 110 (1962).
[43]Maier, Handbuch der Schiedsgerichtsbarkeit 101 (1979).

mage from the first seller, has not entered into any arbitral agreement with the latter. As in cases concerning transfers of an object, an arbitral agreement can not be established between the first seller and the assignee merely because of the existence of an arbitral agreement at an earlier contractual stage. An arbitral agreement can not be made between the first seller and the assignee of the damage claim, merely because the latter was aware of the arbitral clause in the first sales-contract, especially if he only ought to be aware of that clause. Otherwise an arbitral agreement would be based upon only one party's intentions, which would clearly be a violation of basic contractual principles.

This means that the position of the first seller would be prejudiced if the buyer, without the seller's consent, transfers his damage-claims to a third party. The deterioration would consist of the seller not being able to have disputes concerning defects decided by arbitrators, but would be forced to participate in litigation with the assignee claiming damages. This dispute would become public in a way that the seller had not considered when he sold the objects and entered into the arbitral agreement. This is, however, no reason for considering an arbitral agreement being established between the seller and the assignee. A party to a contract must always take into account that his contracting party is authorized according to the law to tranfer rights and that the assignee may cause him problems to a larger extent than the original contract-party. If the seller wants to impede such a risk he has to include in the original contract a clause prohibiting transfers or a clause prescribing that pecuniary claims directed to the seller may only be transferred if an arbitral agreement is made with the assignee in favour of the seller.

What has been stated is not applicable if a person has acquired pecuniary claims in his capacity as a debt-collecting agent or for a similiar reason (dummy). That can be concluded from a Supreme Court case.

Himledalens elektriska distributionsförening upa v. J.A. Johansson (NJA 1926 p. 209). A member of an association which distributed electricity had given a promissory note as security for loans being granted to the association. This was in accordance with the associations by-laws, which contained an arbitral clause. The association instituted court proceedings against the now resigning member and claimed that he should pay the note. In a final judgement it was established that this dispute should be decided by arbitrators. In his capacity as possessor of the promissory note, Mellin commenced litigation against the former member and asked the court to order the former member to pay the sum in dispute. The respondent objected that the note had been transferred to a bank as security for a loan to the association and that Mellin only had borrowed the note from the bank. (Mellin was a disgruntled association member who somehow managed to get the bank to loan him the note. No rights under the note were assigned to him.)

The Supreme Court held that Mellin was not the owner or real possessor of the note, but that he had only borrowed it. Under those circumstances the Supreme Court found that the dispute had to be dealt with as the association itself conducted the action against the former member relying on the note. The case was dismissed since the district court had decided in a final judgement that such disputes should be determined by arbitrators.

From this case it can be concluded that a person who has acquired pecuniary claims will be bound by an arbitral agreement made by the assignor and his contracting party who is liable to pay compensation, provided that the assignment was not intended to give the assignor any "real right." This last expression is directed to straw-man situations. It is possible that the principle established in this Supreme Court case will also encompass disputes involving debt-collecting agents, as *Bolding* has called in question.[44] If the debt-collecting undertaking means that the agent would not have a real independant right, but a duty to account for his results, then the principle in the opinion seems to be applicable.

As a rule, one may not draw reverse inferences from precedents when construing different cases. Such a conclusion may, however, be allowed if there are good reasons. In this case the judgement of the Supreme Court is formulated in such a way that the assignee/the third party will be bound by the arbitral clause because a legal relationship was lacking. This reason needed not be presented, in case where an assignee of pecuniary claims always was bound by an arbitral clause in the original contract. The judgement gives the impression that the arbitral clause would not have been effective, if a real transfer of a substantive matter had been intended and the question regarding the binding effect of the clause would not be considered "as if the association instituted proceedings itself." A reverse conclusion seems to be rather well founded. This is because the Supreme Court would not have been forced to present a somewhat complicated opinion for this special situation if the same principle as to the applicability of the arbitral clause to a third party would be upheld in all cases, when a third party had acquired a right to compensation or another limited contractual privilege.

3.4 Transfer of Promissory Notes

If a person transfers only certain contractual *rights* the consent of the opposing party is not required. A creditor is at liberty to assign a promissory note, unless it is otherwise provided for in the note. Assume that such a document contains several complicated terms as to the payment time, the currency and so on, together with an arbitral clause. This means that a dispute may easily arise between the debtor and the creditor or his assignee.

Regarding transferable promissory notes, *Dillén* has stated that the assignee will not acquire lesser rights than the assignor had and that the assignee therefore may rely upon the arbitral clause. Further, *Dillén* has considered that another solution to the problem is not justified because of the interests of the opposing party, since this party had earlier accepted that the legal relationships would be tried by arbitrators.[45] However it may be argued that the

[44]Bolding, Skiljedom 111 note 8 (1962).
[45]Dillén 247 (1933)

debtor had only agreed to submit to arbitration with the original creditor, in whom he had confidence in business relationships. On the other hand it is the nature of a transferable note that an unknown assignee will enter into all the rights of the original creditor. This may be construed to mean that the debtor has tacitly accepted beforehand to arbitrate with an unknown assignee and that the latter agrees to arbitrate by acquiring the note. A new arbitral agreement would thus be established. The relationship of confidence between the debtor and the original creditor would not in such cases be a reason to assert that an arbitral agreement is only made between those two parties.

3.5 Transfers of debt-liability

If a person is obliged to pay a certain sum, e.g., according to a sales contract with an arbitral clause, he is not prevented from making an agreement with a third party involving that the latter will take over the pecuniary-liability and other obligations.[46] The original debtor, the buyer, will not be released from his liability and obligations, unless the first contracting party, the seller, agrees. The situation will now be discussed when the seller has given such a consent. Later, it will be discussed whether the issue as to the binding effect of arbitral clauses has to be determined in a different way if a transfer of liability is made without the seller's approval.

If a contract as to transfer of liability means that the creditor – seller is entitled to claim against the third party, it may be argued that future disputes between them shall be decided by arbitrators, provided that a new arbitral agreement was made between those two parties. It is doubtful that the seller's consent to a transfer releasing the buyer from his obligation and the third party's commitment to take over the liability has such reference to the arbitral clause in the sales-contract that a new arbitral agreement is made, even though it is not required that an arbitral agreement be in writing. This construction problem should be resolved by considering the different circumstances in each transfer case. The seller's acceptance in writing may refer to the attached original sales-contract in such a way that the arbitral clause must have been designed to be operative between the seller and the one who took over the liability of the buyer.

If the transfer contract contains an arbitral clause one may assume that this was primarily intended to be applicable in disputes between the contracting parties, the buyer and his assignee. This clause can not encompass disputes regarding the seller's claims against the one who has assumed the liability, unless a new arbitral agreement is made between them. When the seller accepts a change of the responsible debtor, he usually does this in a document referring to the transfer-contract with the arbitral clause. If it was presumed that the transfer-contract which had an arbitral clause would be

[46]Cf. Rodhe 717-9 (1984).

shown to the seller for his approval and the latter did accept the transfer of the liability then it is justifiable to consider that a new arbitral agreement is made. If the original sales-contract also included an arbitral clause, thus implying the seller's desire to have future disputes decided by arbitrators then perhaps a new arbitral agreement was made. The lack of such clause in the sales-contract would, on the contrary, make it more difficult to solve the construction problem. In order to avoid these problems it is important that the seller and the new debtor clarify whether disputes concerning their legal relationships shall be decided by arbitrators. Thus, it is not sufficient to include or exclude an arbitral clause in the original sales-contract between the seller and the buyer, and another in the transfer-contract between the buyer and the assignee. When transferring the liability, with a release of the original debtor, the seller and the new debtor ought to make an agreement expressly indicating whether their legal relationship is covered by a new arbitral agrement.

In some cases the buyer may have transferred his obligations without intending to be relieved of his duties to the seller. The obligation of the assignee may be worded in such a way that the seller is entitled to claim against the assignee even though the buyer is still liable to pay the purchase sum. Such an undertaking made by a third party, e.g., a parent company to the buyer, may be a *promise to the benefit of a non-contracting party,* namely the seller. If this agreement contains an arbitral clause, it is binding on the seller despite his not having signed the document. This is because of the gratuitous nature of the transaction. If the seller wants to utilize the favourable option, as in cases where the buyer is not financially sound, unlike the parent company, the seller has to accept the arbitral clause, i. e., a condition for the obligation. This type of undertaking can be compared with deeds of gifts and wills including arbitral clauses. The validity and the scope of these one-sided transactions will be established by considering only the donor's or the testator's intentions. When construing the scope of an arbitral clause or its binding effect, one should not attach any actual significance to the interests of the beneficiaries. This means that the arbitral clause in the assignee's beneficial obligation is binding on the seller, if he wants to utilize the option by claiming the purchase money from this third party.

When the buyer *transfers the liability to pay the purchase sum to a third party, this often forms part of a contract with many other terms.* If this contract includes an arbitral clause, it is obvious that it is designed to cover disputes between the contracting parties, i.e. the buyer and the one who has taken over his obligations. The commitment of the latter, directed towards the seller in his capacity as a third party, is a unilateral promise for the benefit of the third party. If he wants to claim the sum from the assignee, a question will arise as to whether the arbitral clause encompasses not only disputes between the contracting parties but also between the seller and the assignee.

If the arbitral clause had been a beneficial option signed by the assignee only, the clause could not have any other reference than disputes between the seller and the assignee. But in the case at hand the binding effect of the clause may be limited to the contracting parties. One must determine the effect of the clause by interpreting the language of the clause and the contract in other significant respects and by considering the assignee's supposed intentions with the scope of the clause. An unpublished Court of Appeal case is of interest, although it does not concern a transfer-contract.

Stig Rosö v. Grängesbergs Industrivaru AB (Svea hovrätt Ö 724/88). Before the Court of Appeal, the plaintiff asserted that a delivery-contract entered into by the respondent (a seller) and another company, contained a guarantee commitment involving a promise to the benefit of the plaintiff in his capacity as a third party in relation to the contracting parties.

The Court of Appeal held that the contracting parties had not intended to give the plaintiff such an independent right that he had standing to litigate. Even if the delivery-contract would be a promise to the benefit of the plaintiff entitling him to raise claims directly against the respondent, the court noted that the contract contained an arbitral clause. This had, according to its language, reference to interpretation of the contract and all other legal relationships arising out of the contract. Due to those circumstances the plaintiff was held to be bound by the arbitral clause, even in the event that he should have standing to litigate.

When interpreting the arbitral clause as to disputes between the contracting parties, one has to take both parties' interest into consideration, e.g., when determining the meaning of the words and the significance of the parties' intentions. The binding effect of the clause in its beneficial part towards the plaintiff has to be determined mainly in light of the guarantors' interests. The beneficiary's personal and perhaps unfounded expectations are not a basis for establishing a binding effect of the arbitral clause. The guarantor's promises shall be construed restrictively in his favour. The Court of Appeal referred to the expression "legal relationships arising out of the contract" as a basis for accepting the binding effect of the clause on the plaintiff. However, this expression probably was used by the contracting parties to give the clause as extensive a scope as possible regarding future disputes between them. Obviously the seller had no comprehension of the importance of the language used as to the scope of the clause betweeen him and a third party. It is possible that the guarantor was not considering the meaning of the words at all in his legal relationships towards the plaintiff. Rather than stressing the importance of the wording of the clause, one should consider the guarantor's implied presumptions and intentions. If he had made an unilateral beneficial promise favouring the plaintiff, it is likely that he would not prefer a costly arbitration over litigation, especially if the plaintiff's allegations as to the binding nature of the promise are unfounded. What has been said has also reference to cases when one has to decide if an arbitral clause in a transfer contract is also binding between the assignee and the seller in his capacity as a beneficiary. The implied presumtions and intentions of the

assignee may be more important then the words of the arbitral clause when determining the binding effect of the clause between the seller and the assignee.

A special problem regarding standing to arbitrate shall be discussed. Assume that a contract which transfers liability for debt contains an arbitral clause. If the creditor has made a claim against the original debtor, the latter, of course, wants the assignee to relieve him of his liability as soon as possible. Irrespective of whether the original debtor alone is liable directly to the creditor or the two debtors are severally and jointly liable, the first debtor may try to force the second to pay the sum without undue delay. If the original debtor, as a plaintiff, requests that the second debtor, as respondent, shall be ordered to pay the disputed sum to the creditor, it seems clear that the arbitral clause has reference to the dispute. The parties to the arbitral agreement and the dispute are the same. The creditor is not assumed to be a claiming party in the dispute. Thus, the arbitrators would have jurisdiction to decide the controversy. According to a Supreme Court case the plaintiff lacks standing to litigate when he claims that the respondent shall be ordered to pay a sum to a third party not participating in the litigation. Standing to litigate in such cases without support of the law can only be accepted if there exist special circumstances.[47] Only the creditor is authorized to file a suit in order to obtain a payment judgement in his own favour.

After an arbitrator has accepted an appointment on the request of the plaintiff, he may find a few days later that it is quite clear that the party has no standing. If the arbitral tribunal is not yet composed, the arbitrator ought to inform the party to consider withdrawing his request. An arbitrator has a certain obligation to act in this way on a type of contractual basis.[48] He should try to minimize the costs, e.g., by attempting to terminate the arbitration with the parties' consent, when it is manifest that the dispute will be dismissed due to its unarbitral nature or lack of standing. If the plaintiff insists on a continuation of the arbitral proceedings because he is not convinced that it shall be dismissed, then the arbitrators have to fulfil their assignment. For this reason it is important that the arbitrators do not make statements prejudicing them and thereby creating a basis for possible challenge of the arbitrators and possible actions for setting aside an alleged wrongful decision of dismissal.[49]

[47]Karl Gustaf G v. Nils S (NJA 1984 p. 215).

[48]Cf. proposition 1984/85:110 38-41 and 166-173, Hellner, Speciell avtalsrätt II 71 (1984) and Wiklund,God advokatsed 166-175 (1973).

[49]Actions for setting aside final decisions are accepted. See p. 79 and 175.

3.6 Continuous-transfer Contract

After a party has transferred all the rights and duties according to a first contract with an arbitral agreement, this clause sometimes is not binding between the assignee and the remaining original party, unless a new arbitral agreement is made expressly or tacitly. If the contract would be assigned once again to a new company without referring to the arbitral clause, this may be binding according to principles applicable to the first assignment. This does not mean that the second assignee is always bound by the clause in the original contract if the clause was binding on the first assignee for some reason. If the assignment of a sales-contract has been made without the consent of the seller and thus a new abritral agreement was not established between the seller and the assignee, nothing prevents the seller from accepting a new assignment made by the first assignee and a second assignee. It is quite possible that the second assignee and the seller thereby have come to a new arbitral agreement.

If the buyer transfers the goods, then the assignee normally is not bound by an arbitral clause in the first sales-contract. Nor will the second assignee be, if the goods were sold a second time.

3.7 Re-transfer Contracts

It has been maintained in this essay that an arbitral clause in a contract may be inoperative as to an assignee in some cases. Assume that the assignee in such a case later would transfer all the acquired rights and duties or only some of them back to the assignor, i. e., to the original contracting party. (Re-transfer contract.) Irrespective of whether the two transfer contracts have identical wording or encompass more limited rights, there are mainly two ways of attacking the problem on the binding effect of the arbitral clause on the second assignee, earlier the contracting party bound by the arbitral clause.

First, one may look upon the problem as a continuous transfer. If one considers the idea of expanded effect of the arbitral clause when transfering all the rights and duties according to a contract with an arbitral clause, it is difficult to believe that the clause is binding on the second assignee, if it is not operative with the respect to the first. However it can not be excluded that the first assignee neither knew nor should have known about the clause, unlike the second assignee, who was especially informed of the existence of the clause beforehand by the seller. It is indeed doubtful if the extinguished effect of the clause in the first transfer link could be awakened at a later transfer stage. If the basis for the binding effect of the clause should be the existence of a new arbitral agreement, it is due to the possible circumstances that both assignees are bound or that one is, but not the other.

The second way of attacking the problem means that one would disregard the fact that the original party for a limited time was not a party to the cont-

ract. Thus he should be deemed to be a contracting party all of the time when determining the effect of the arbitral clause. This notion appears to be well-founded in cases where the two transfer contracts are identical and all the rights and duties have been transferred and then assigned back to the original party putting him into the same position as from the very beginning. The binding effect of the clause seems to be even more clear if the first transfer contract has been rescinded, e.g., for reasons presumed in that contract. At least one is strongly inclined to uphold the binding effect of the clause if it is supposed that the two transfer contracts were made only for the purpose of circumventing the effect of the clause and setting it aside by a formal transfer arrangement. (See Himledalens elektriska distributionsförening at 3.3.)

The problems described above arose in a recent Supreme Court maritime case. Before discussing this complex case it is neccessary to depict and briefly comment on another modern Supreme Court judgement regarding jurisdiction, when *the arbitral clause covers only some of the issues in dispute*. Should such a complex controversy be decided partly by arbitrators and partly by a court or is one of the two forums competent to try the whole dispute?

Nykvarns Skyltaktiebolag v. Esselte Dymo AB (NJA 1982 p. 738). Nykvarn, a holder of a registered design, entered into a licencing agreement with Dymo entitling this company to utilize two designs. The agreement contained an arbitral clause. Nykvarn filed a suit at the district court and claimed non-contractual damages. Nykvarn maintained that the contract had ceased to be effective due to breach of the contract. Dymo stated that the contract was still effective and requested the court to dismiss the case due to the arbitral agreement.

The Supreme Court began by summarizing the parties' positions in the following way: It is uncontroverted that Dymo, after entering into the licencing contract, manufactured products covered by the registered designs and that Dymo sold those products in Sweden and abroad. Nyvkvarn alleges that Dymo's unlawful activities took place after the contract had ceased to be effective and that the manufacturing for sale abroad never was covered by the contract. Dymo, on the other hand states that the contract is still operative and that all of the sales were in accordance with the contract.

The Supreme Court continued: The arbitral clause has no reference to the plaintiff's cause of action, but only to Dymo's defence involving that Dymo was entitled to perform the activities in dispute. When the scope of the arbitral clause is limited in this way it must not result in the dismissal of the case. Otherwise a party would be forced to choose to commence a perhaps unneccessary arbitration or, if he should file a suit, to risk that his action would be dismissed and be liable for litigation expenses. In this case it is not conceivable, mainly for procedural-effectiveness reasons, that the court would pronounce a judgement conditioned on what may follow from a later rendered arbitral award. The only remaining possibility is to offer the party an opportunity to obtain an arbitral award before continuing with the litigation. It seems to be natural that the party relying on the arbitral clause will be directed to demonstrate within a certain time limit that he has commenced arbitration. When it is a respondent invoking the arbitral clause, the effect of the failure to comply with the order would be that the dispute will be tried by the court. Even if such a sanction is reasonable it is unacceptable. An arbitral agreement may not be deprived of its legal effect as a bar to court proceedings for such reasons. A court order to show that an arbitration has been commenced therefore has to be directed towards the plaintiff and be enforced with the sanction that the case may be dismissed. The district court ought to have ordered the plaintiff to prove within a certain time limit that an arbitration

was instituted with the consequence that the dispute otherwise would be dismissed. If the plaintiff would have complied with the order the district court would have declared the dispute pending until the arbitral dispute was decided or the arbitral agreement would have terminated.

This case seems to confirm a principle of jurisdiction expressed earlier by *Welamson* in his capacity as professor of procedural law. *Welamson*, later appointed Supreme Court judge, was on the bench in this case. This principle means that the jurisdiction shall be based upon each party's allegations, nameley the plaintiff's basis in his summons application or request for arbitration and the respondent's defense.[50] The problem of whether the court or the arbitral tribunal has competence to decide a dispute shall not be founded upon what the court considers to be proven, e.g., after a preliminary investigation. *Welamson* expresses this by stating that the decisive factor for determining the scope of a standard arbitration clause is the relationship between the *dispute* and the main contract, not the correct resolution of the dispute.[51] The application of this principle facilitates the possibility to solve the jurisdiction problem. If the plaintiff's cause of action according to his own presentation is non-contractual, arbitrators are not competent to determine the issue. Further, a court has no jurisdiction to try the respondent's defense if it is described as a contractual one in his reply. The same principle is applicable if the defence is non-contractual and the platiff's cause of action is contractual. The complex dispute in these cases must be separated between two forums. However, one may question if such a separation always has to be made, e.g., if the plaintiff's grounds are non-contractual and the defense mainly non-contractual, but to some extent contractual.[52]

If a complex dispute has to be separated between an arbitral tribunal and a court it is difficult to determine if the litigation should be stayed, pending the outcome of the arbitration or vice versa. It is not obvious that the problem shall be solved in the same way as in Nykvarn as in other disputes.

[50]Welamson 49 SvJT 278-9 (1964).

[51]Welamson 49 SvJT 279 (1964).

[52]Cf Alkaprodukter mentioned earlier on p. 18, where the Court of Appeal held that the third ground, non-contractual, based upon criminal behavior, was deemed to have such connection with the contract, that the arbitral clause was applicable. In Visby Plastindustri AB bankruptcy estate v. Express Finans AB (RH 1987:66) the Court of Appeal made a statement which may be criticized. The court declared that claims based upon fraudulent tranfers according to the Bankruptcy Act did not arise from the contract with the arbitral clause, but from the law. Therefore, the court held that it had jurisdiction in this respect. Regarding a contractual ground it was stated that only in exceptional cases should a court try a ground and arbitrators another. Since the action as to fraudulent transfers should be decided by the court, it held that the arbitral clause did not bar the court from deciding the dispute in its entirety. References were made to several cases, but not to Nykvarn, and to several books and articles, but not to Welamson. For this reason this judgement can not be understood as an expresson of an intentionally made exception from the principle established in Nykvarn, Forsman and a case not mentioned earlier, Björklund and others v. Lundquist (NJA 1955 p. 500). See also Medicinalstyrelsen v. Jonsson and Blomberg (NJA 1916 p.100) and note 8 in the essay on Judicial Control of Arbitration.

One can not even exclude the possibility that the two disputes must be conducted simultaneously. At least this may be true in cases where the parties agree to this, even if the principle of party autonomy is not applicable in court proceedings. Further, the Supreme Court has indicated that the court shall continue to handle a case when a conditional judgement is an effective way to resolve the entire dispute. It seems that the court is aiming at an earlier Supreme Court case, Östen Forsman v. Inovius (NJA 1973 p 480). In this dispute concerning a patent, the respondent alleged first that he had acquired the patent according to a contract with an arbitral clause and second that he, and not the plaintiff, was the inventor. The Supreme Court held that arbitrators were competent to decide the first issue and a court the second. According to the directive of the Supreme Court the district court should determine which of the parties was the inventor and upon this basis resolve the dispute without deciding the issues to be tried by arbitrators. If no arbitral award should have been made the court may, provided it would find the plaintiff to be the inventor, establish only that the plaintiff is owner of the patent before the respondent, unless the respondent according to a later rendered award would be declared to have acquired the patent by the contract.

Before discussing the maritime case concerning re-tranfer assignments, it should be mentioned that the Supreme Court indicated that an exception from the main principle on separating the issues between the two forums had to be made. If the respondent's defense with reference to a contract with an arbitral clause is plainly baseless, the court will have jurisdiction to deal both with the plaintiff's non-contractual ground and the contractual unfounded defense. This exception impedes dilatory tactics from a recalcitrant respondent.[53]

Rasvatuote OY v. DEF Rederierna AB bankruptcy estate (HD SÖ 550/1989). Rasvatuote sold mink oil to Smit & Zoon. The same month Rasvatuote entered into a charter party with DEF Rederierna on the transport of the oil from Helsinki to Amsterdam. The charter-party contained a clause providing for arbitration in London. During unloading it was detected that the oil was defective. After a settlement between Rasvatuote and Smit & Zoon the oil was sold as second rate goods to a new buyer. Rasvatuote claimed damages from the shipowner before the district court in Stockholm. Rasvatuote, i.e. the seller relyed upon a document issued by the buyer Smit & Zoon transfering the right to claim damages from any liable person. The shipowner requested that the court dismiss the case due to the arbitral clause in the charter-party entered into by the parties.

The seller Rasvatuote defended the jurisdiction of the court for the following reasons. The sale was completed upon the loading of the oil in Helsinki, when the risk of damage to the goods passed to the buyer. From that day the buyer was entitled to claim damages in his capacity as the owner of the cargo. The responsibility of the shipowner for the goods was provided for in the bill of lading which lacked a reference to the charter-party, and even less so to the arbitral clause in this document. The seller had, according to this view, no independent rights and thus was not entitled to demand damages from the shipowner. Such claims could only be based upon the transfer from the buyer to the seller. Thereby the seller had entered into Smit

[53]See also Welamson 49 SvJT 278-9 (1964). See also infra on p. 151 as to discovery.

and Zoon's contractual relationship to the shipowner. The seller therefore can not be in a different position in relationship to the shipowner than the buyer was. From this reason the seller argued that he was entitled to bring an action against the shipowner before the district court in Stockholm.

The shipowner asserted that the parties to the dispute were bound by the arbitral clause in the chater-party and made three different objections against the sellers' allegations that the court had jurisdiction. These objections were determined by the Court of Appeal and its opinion and judgement were upheld by the Supreme Court.

First, the shipowner alleged that the purchase was never completed, but was rescinded. As the buyer had no damage claim based upon the bill of lading, which could be transferred to the seller, the seller alone was the injured party and had to submit the terms of the charter-party. According to the shipowner, the seller accepted that the buyer refused to complete the purchase and that the Rasvatoute as seller should undertake the primary responsibility for the damage. For these reasons, the shipowner maintained that the cargo in reality was unloaded for the seller's own account. The Court of Appeal held that Rasvatuote had based its action against the shipowner upon the fact that the buyer had transferred its right to damages according to the bill of lading due to cargo damage and shortage. The question whether the purchase was never accomplished and the buyer never had a damage claim transferable to the seller, was according to the Court an issue to be tried as the substantive matter, not an issue regarding the jurisdiction of the district court. Further the Court of Appeal stressed that the district court had to base its decision as to jurisdiction upon the facts invoked by the plaintiff.

Second, the shipowner asserted that irrespective of whether the seller would be entitled to base its claim upon a transfer from Smit & Zoon, the seller was bound by the arbitral clause of the charter-party which encompassed all types of disputes between the parties regarding the freight with the ship independent of the basis of the disputes. – In opposition, the seller maintained that an insurer's right of recourse against the shipowner was derived from the buyer according to two precedents, and that the seller also derived its right from the buyer Smit & Zoon.

Third, the shipowner maintained, that irrespective of which rights Smit & Zoon, as holder of the bill of lading, may be entitled to assert against the shipowner, the terms of the underlying charter-party should apply, when in a cases like the one at hand, a claim is based upon the bill of lading. Even if Smit & Zoon according to the Maritime Act was not bound by the arbitral clause of the charter-party, this does not mean that the seller now should not be bound by the clause. Regardless of whether the printed text of the bill of lading "To be used with charter-parties" may have any effect against Smit & Zoon in the event that this company had obtained a damage claim against the shipowner, this reference in the bill of lading must be of significance. It is significant when the charter-party Rasvatoute itself presents claims against the shipowner thereby invoking the bill of lading.

According to the seller the printed text was designed to indicate the range of applications for this formula. This addendum does not in any way inform the party who acquires the bill of lading that there in fact exists an underlying charter-party. At least it is required that the date of the charter-party is contained in the bill of lading in order to give the terms of the charter-party any significance against the person who acquires the bill of lading.

The Court of Appeal began by summarizing the objections in the following way. Even in the event that the seller could prove a transfer of the buyer's rights according to the bill of lading, the shipowner has asserted that the seller remains bound by the charter-party and its arbitral clause, since this has reference to all disputes between the parties arising out of the present shipment. The Court of Appeal went on and declared: In cases involving a charter-party the freight-contract is the basic contract between the charterer and the shipowner, while the bill of lading is a one-sided commitment made by the shipowner for the purpose of regulating the relationship with the receiver. The Maritime Act (sec. 160 p. 1) stresses this difference by expressly providing that the position of the receiver only is determined by the bill of lading and

that the content of the charter-party may not be invoked against the holder of the bill of lading, unless this document contains a reference to the charter-party. The terms of the charter-party, on the other hand, may always be asserted against the receiver when he at the same time is the charterer. The same applies in cases when the charterer has the bill of lading in his possession not in his capacity as the cargo receiver, but due to an assignment from the cargo receiver. Irrespective of the basis of the charter-party's action the shipowner is always entitled to invoke the provisions of the charter-party in a dispute regarding the contracted shipment. Thus, the shipowner is empowered to rely on the arbitral clause of the charter-party. The seller's action was dismissed.

According to the *first objection of the shipowner no transfer and retransfer transactions took place*. It is quite evident that the seller and his contracting party, the shipowner remained bound by the charter-party and its arbitral clause. However the situation became more difficult to determine because the seller asserted that a transfer and retransfer transaction entitled him to compensation from the shipowner. In the discussion of the *Nykvarn* case it has been established that the jurisdiction of courts and arbitral tribunals must be solved on the basis of the plaintiff's allegations in his cause of action and the respondent's allegations in his defense. Arbitrators are competent to try disputes to the extent that the allegations refer to a contract with an arbitral agreement. The plaintiff's allegation in his suit involved that a transfer and re-transfer would entitle him to damages. Before starting to try the case, the court must check that the plaintiff's cause of action was not based upon a contract with an arbitral clause. This means that a court is competent to order compensation or to refuse to do so to the extent that it is based upon a non-contractual ground or a contractual ground where there is no arbitral agreement. The court has no competence to try and thereafter reject a claim which the plaintiff has based upon a contract with an arbitral clause. Such an issue shall be decided by arbitrators. The Court of Appeal held that the shipowner's allegations that the purchase was never completed and that the buyer therefore had no damage claim to transfer back to the seller, was not an issue of jurisdiction, but a reason for rejecting the claim after having tried the substantive matter in this respect. This is quite correct.

When the plaintiff only asserts that he is entitled to compensation due to a transfer and a retransfer transaction he can not be awarded damages on this basis if no such transaction took place and he was the holder of the claim all of the time. The question whether the seller can be awarded compensation on the last mentioned ground (possessor of the damage claim all the time) is a different issue which has to be invoked as cause of action in the alternative to be tried. This problem is not dealt with in the first part of the opinion of the Court of Appeal, which is quite correct. One explanation is, however, missing in the first part of the judgement. The Court of Appeal only declared that the issue whether the purchase never was completed and the buyer never obtained a right to transfer back was not a question of jurisdiction, but a issue regarding the substantive matter. The Court did not ex-

plain which forum, a court or an arbitral tribunal, should try this issue concerning the substantive matter. Prior to beginning to try a dispute, it is necessary to first decide if jurisdiction may be accepted due to the allegations which a party has invoked as the basis for his claim. *The plaintiff asserted* that a transfer and retransfer were made which entitled him to damages and that his damage claim therefore was not encompassed by the arbitral clause in the charter-party. The plaintiff did not invoke only the charter-party and the defects of the cargo as his cause of action. Thus, it seems clear that this claim ought to be within the court's competence. This view is completely based upon *Nykvarn* and is inconsistent with the decision to dismiss the maritime dispute entirely. The Court of Appeal should have at least explained why this claim was within the arbitrators' jurisdiction. The opinion can not be accepted as a confirmation of the suggested general principle that a transfer and re-transfer claim would involve that the question of jurisdiction should be determined as if no transaction was made and as if the assignor was a contracting party all of the time. Such a conclusion may not be drawn, because it needs clear support in the language of the opinion.

As to the shipowner's first objection against the jurisdiction of the courts, it has been said that it is correct that the courts are competent to decide the dispute to the extent that the plaintiff's cause of action is not covered by an arbitral clause. From *Nykvarn* it is concluded that arbitrators have *jurisdiction to try the defense* if this is encompassed by an arbitral clause binding upon the parties. It is, however, necessary to distinguish between the respondent's objection against the jurisdiction of the court and the respondent's allegations in his defense in the substantive matter, especially when the same circumstances may form an objection as well as a defense, but a party only had relied on the facts for either an objection or a defense. In this case the plaintiff never asserted that he was entitled to damages because he had been the continuous possessor of the claim from the beginning of the sale. He only relied upon the transfer and retransfer transactions. The Court of Appeal held that the lack of those transactions was a defense. According to *Nykvarn* this defense shall be determined by arbitrators if it is encompassed by an arbitral clause. When a party relies upon an allegation of existing facts it is often easy to determine if they are covered by an arbitral clause. But if the defense is based upon the non-existence of certain facts it is difficult to determine whether an arbitral clause is applicable. One way of solving this problem is to say that the *non- existing facts are the same as the existence of the contradiction of those facts*. If those facts are non-contractual or refer to a contract without an arbitral clause, courts have jurisdiction. One Supreme Court case concerning jurisdiction of a special court in relationship to an ordinary court indicates that this solution has been accepted. The plaintiff had claimed a declaratory judgement and requested the court to establish that there was no binding leasehold contract between the parties. When deciding

if this dispute should be tried by a district court or a land court it was held that the plaintiff's action anticipated an opposing suit based upon an allegation of an existing leasehold contract.[54] This opinion seems reasonable when the dispute only concerns the question of whether the parties had made a binding agreement after negotiations. But in some cases where a plaintiff requests a negative declaratory judgement he may invoke one version of the facts in order to contradict the one the opposing party will assert. Then it is difficult to determine if the dispute will substantially concern the plaintiff's allegations or the respondent's. In such a dispute it is quite possible that it will be separated into two parts, an arbitral dispute and a litigation as in *Nykvarn*.

The shipowner's defense referred to the nonexistence of the transfer and retransfer, the latter based upon an agreement between the buyer (a third party) and the seller. When determining if the non-existence of the two transfer transactions is under the arbitrator's competence it seems that it does not matter if one considers the defense as an anticipation of a positive allegation of the adverse party or considers the decisive factor to be the central issues of the conduct of the future dispute. In any event it seems that there are two main issues, the completion of the purchase and the retransfer agreement. The Court of Appeal should have declared whether this defense was encompassed by the arbitral agreement in the charter-party. Probably the retransfer is not covered by this arbitral clause. However, it is unclear whether one really should separate parts of a dispute in this extensive manner or whether the defense should be entirely tried by arbitrators, since it was generally covered by the clause.

If the respondent's allegation that no transfer and retransfer transations were implemented was designed to be merely an *objection against the jurisdiction and not a defense*, only the plaintiff's allegation has to be taken into consideration when determining jurisdiction. Such an objection therefore seems to be meaningless.

The shipowner's second and third objections were based upon an assumption that the seller's damage claim is derived from the buyer, i.e. a retransfer. The Court of Appeal did not determine whether the reference in the bill of lading (to be used by charter-parties) involved that the seller and the shipowner were bound by the arbitral clause, although the buyer could not be bound by the clause, since he was not a charter-party. It is not excluded that this reference to the charter-party and its arbitral clause would create a new arbitral agreement. But even without such a reference the shipowner considered that the original arbitral clause of the charter-party was effective between the parties. This allegation is questionable and the Court of Appeal did not deal with it.

[54]Gustaf D and others v. Sven T (NJA 1983 p. 724).

The Court of Appeal held that the seller and the shipowner were bound by the arbitral agreement in the charter-party due to the bill of lading and the construction of a certain section in the law and not due to a type of legal action from the seller's side. Unlike a contract, e.g., a charter-party, a bill of lading is a one-sided document issued by the shipowner or a charterer of the ship. An arbitral clause in this document is binding on the receiver of the goods even if he has not signed the document.[55]In this case the bill of lading did not contain an arbitral clause, but only a reference "to be used by charter-parties." According to the Maritime Act sec. 160 the terms for the shipment and the delivery of the cargo are determined by the bill of lading as far as it concerns the receiver. Further, it is provided that the terms of the freight-contract are not effective against him, unless a reference to this contract is made in the bill of lading. In the case at hand, the bill of lading contained a reference to the charter-party, but it is doubtful that this could be construed in such a way that the buyer, i.e. the receiver of the cargo, was bound by the clause. However, it was not necessary to give an answer to this question in order to decide if the seller was bound by the clause after the transfer and the retransfer transactions. Even if the clause was not binding on the receiver it could be effective against the seller due to the establishment of a new arbitral agreement or due to a provision in the Maritime Act, sec. 160. This rule does not expressly provide that the terms of the charter-party will be binding to the receiver of the goods in cases where he is the charterer, but this is indicated in the legislative history and later confirmed by a leading commentator.[56] This means that a binding arbitral agreement may be established partly due to an interpretation of a provision in the law. (See also on p. 44 regarding bankruptcy estates, decedents' estates and unregistered companies under formation.) This maritime case does not illustrate that there is a general principle that a contracting party, bound by an arbitral agreement, always will be bound by the clause after different types of transfer and retransfer transactions. Probably this question has to be solved in different ways due to the varying circumstances.

4 Singular Succession during Arbitration

When a party enters into an assignment agreement with a third party during the arbitration between the original contracting parties one has to distinguish between two situations. First, the assignor may have transferred the substantive matter, e.g., all contractual rights or the purchased goods. Second, he may have transferred the subject matter in dispute in order to bring

[55]Möller, 124 Tidskrift, utgiven av juridiska föreningen i Finland 113 and 294 (1988).See also on p. 64 about a promise to the benefit of a third party.

[56]16 NJA II no 1 85-6 (1891) and Grönfors,Sjölagens bestämmelser om godsbefordran 301 (1982).

about party succession in the arbitral proceedings. The first transaction is of a contractual nature, the second is procedural, at least partially.

4.1 Transfer of Substantive Matters

If an arbitral dispute involves contractual issues, e.g., damage claims based upon a breach of contract, it is quite possible that one of the parties transfers all his rights and duties to a third party. Is this party entitled to enter into the ongoing arbitral proceedings?

Above at 3.1 it has been asserted that a new arbitral agreement may be established between the assignee and the opposing contracting party of the assignor. If so, it is insufficient to allow the assignee to enter into the arbitral proceedings and take over the assignor's position in the arbitration. *Strictly speaking, the assignee relys upon a new arbitral agreement which is distinct from the one which is the basis of the earlier commenced arbitration.* If this is correct the assignee has to institute a new arbitration, unless the remaining party accepts the party-change on the other side in the first arbitration. From this point of view it is important to clarify whether the original arbitral clause is expanded to be binding on the assignee. When transferring all of the rights and duties according to a contract with an arbitral clause, it has been maintained in the legal literature that the binding effect will be extended to the assignee provided that he was aware or should have been aware of the clause.[57] *Such an expanded arbitral clause seems to encompass all three of the parties and there are not two different arbitral agreements.* The expanded effect of a clause to a third party has been criticized earlier. However, if this notion would be accepted, the assignee may rely on the same arbitral agreement as the assignor. In this respect there is no obstacle to party-succession, but other reasons may prevent him from entering into the arbitral proceedings.

If the assignee enters into the arbitral procedure he has to *amend the claim of the assignor* and request that an award will be made in his favour, e.g., that the arbitrators shall order the opposing party to pay a sum to him, not to the assignor. Further, he has to supplement the basis of the assignor's claim by adding the assignment as a basis for the award. These amendements are accepted according to civil procedural law.[58] In the Code of Judicial Procedure chap. 13 sec. 7 it is provided:

If the plaintiff transfers the disputed matter, the transferee has the right, without a new summons, to take over the claim in the action in the shape it has at the time of his admission in the proceeding. The liability of the transferor for litigation costs is prescribed in chapter 18,section 10.

If a transfer occurs on the defendant's side, the transferee, upon the consent of the plaintiff, may be substituted for the original defendant.

[57]See supra p. 51.
[58]Ekelöf Rättegång II 145 (1985).

In the event of a transfer of the disputed matter by either the plaintiff or the defendant, on application of the adverse party the transferee is obliged to join as a party in the action.

Some of these principles ought to be applied in arbitration.[59] This can often be explained by construing a consent to an assignment as an acceptance of party succession in its procedural meaning. It is conceivable that the arbitrators' assert that they have not undertaken to determine a dispute involving the assignee as a party instead of the assignor as was initially agreed to. For example, perhaps the arbitrators fear that the assignee is not capable or willing to pay the fees.

Considering just the *fee issues,* it seems that the arbitrators are not empowered to resign, if the assignor makes a commitment to pay the fees even after the party succession or if either the assignee or the assignor gives security or pays advance costs. The assignor is probably not responsible for costs incurred after the succession without support in the law, a contract, or a commitment. The Arbitration Act lacks a section corresponding to the rules in the Code of Procedure chap. 18 sec. 10 providing that the original plaintiff and his successor are jointly and severally liable for expenses incurred prior to the party substitution on the plaintiff's side. After such a substitution the successor bears sole responsibility according to the law. Further, it is prescribed in the Code that the successor of an original defendant is solely liable for the litigation expenses. The reason for this last rule is that defendant substitution is only accepted with the plaintiff's consent.[60] Such an acceptance of party substitution in arbitration should be interpreted to mean that the plaintiff has waived his right to compensation for his costs from the first defendant. But of course, the plaintiff is not entitled to dispose of the arbitrators' right to remuneration from the defendant-assignor.

Returning to the problem regarding an obstacle to party substitution due to the arbitrators' interests, they may require that either the assignor or the assignee shall give acceptable security or pay advance costs as a prerequisite for their continuous participation in the arbitration. This applies not only to the arbitrator appointed by the assignor, but also to the two other arbitrators. Party substitution may therfore be difficult to implement in cases when the arbitrators or one of them refuse to accept the offered security or the advance costs or otherwise are unwilling to approve the party change. The opposing party of the assignee may try to obstruct the arbitration by asking the arbitrator appointed by him to claim high advance cost. A responsible arbitrator would not even discuss such tactical issues with the appointing party. If the assignee however is not capable of paying a reasonable sum requested as advance costs the arbitrator may be entitled to resign. This does not mean that the arbitral dispute has to be terminated and the assignee for-

[59]Hobér 3 Swedish and International Arbitration 47 (1983).
[60]SOU 1938:44 p. 239.

ced to commence a new arbitration. The resignation is not a ground for the termination of the arbitral proceedings, but for the district court to appoint a new arbitrator on the application of a party. If the resignation is due to a lawful excuse the party is entitled to appoint a new arbitrator. (Arbitration Act sec. 10 p. 1 and 2.) If the arbitrator has raised unreasonable demands for his continuous participation there is no lawful excuse for his resignation. In some cases it might be doubtful if the resignation is based upon an acceptable ground. It may then also be doubtful whether the party or the district court is competent to appoint an arbitrator. If the arbitrator is appointed in an incorrect way the award may be set aside, unless the parties are deemed to have accepted the new composition of the arbitral tribunal.

An arbitrator is perhaps entitled to resign because one may deem that he had not undertaken to fulfil his functions with a new party composition. Maybe it is required that he is able to refer to a valid excuse for his resignation, e.g., that the transferee had requested the arbitrator to hear the case in accordance with a new time schedule, substantially deviating from the original one. In such cases it seems that a *lawful excuse* has arisen after the appointment of the arbitrator. Under those circumstances the appointing party is, according to the Arbitration Act sec. 10 p 2, authorized to designate a new arbitrator. If the new appointee later refuses to participate in the arbitration just because of the new party composition and its effect on the conduct of the proceedings, the appointing party has no right to make another choice. There is not a lawful excuse for the resignation since the appointing party seems to be obliged to designate a new arbitrator who is prepared to try the dispute after the party substitution. At least such a duty is incumbent upon the assignee when he designates a new arbitrator. In cases of resignation without an acceptable excuse the district court will appoint a new arbitrator on application of a party according to the Arbitration Act sec. 10 p. 1. Such an application may be filed by the assignee, if the opposing party has appointed an arbitrator, who refuses to participate in the arbitration. This discussion demonstrates that the adverse party to the transferee has several possibilities to delay the arbitration, perhaps for such a long time that an award can not be made before the time for rendering an award in domestic cases has elapsed acccording to the Arbitration Act sec. 18.

Assume that a party to a contract has transferred only a disputed object or damage claim. Under such circumstances there is no binding arbitral agreement between the assignee and the remaining party due to the reasons discussed supra at 3.2 and 3.3. If the remaining contracting party refuses to accept the party substitution the arbitral tribunal has to dismiss the assignee's claims. Sometimes however, it is difficult to determine if the assignee may rely upon a binding arbitral agreement. The arbitrators shall not allow the amendment without deciding if this is within the scope of a valid arbitral

agreement.[61] If the assignee considers that the arbitrators have wrongfully dismissed his claims, he may file a suit for a declaratory judgement in order to obtain a binding decision whether there exists a valid arbitral agreement between him and the remaining party. If he prevails there is no longer any bar to the arbitral proceedings.

If the assignee is barred by time limitations to commence a new arbitral procedure, he may challenge the arbitrators' decision to dismiss the case. According to the Arbitration Act sec. 21 par.1 pt 4 an award shall be set aside by the court if, through no fault of the party, any other irregularity of procedure has occurred, which in probability may be assumed to have influenced the decision. It is quite reasonable to consider that a procedural irregularity influencing the outcome has occurred if the arbitrators have dismissed a case instead of trying the dispute. According to a Supreme Court case Paul Jansson v. Reprotype AB (NJA 1975 p. 536) Section 21 of the Arbitration Act concerning challenge of awards is applicable by analogy upon decisions wherein an arbitration is terminated. The Supreme Court held that such an incorrect determination of a procedural issue is a challengable irregularity as well as an incorrect handling of these issues. In a domestic case, it may be futile for the plaintiff to challenge a wrongful arbitral decision even in the event that the plaintiff would prevail. If the court would declare that the arbitration agreement was valid and that the arbitrators should have tried the case, it is not quite clear that a new arbitral procedure can be commenced. This is because the time for rendering an award may have elapsed. Even if this time period should be deemed to have elapsed after an award has been set aside,[62] it is doubtful whether the time for rendering an award has started to run if the arbitration is terminated by a dismissal of the dispute. Let us assume, however, that the time for rendering an award starts to run from the commencement of the arbitration even though the dispute is later dismissed. If a prevailing party challenges the arbitrators' wrongful decision, then this shall not mean that a new time limit starts to run. This is because it is required that the party be granted restoration of expired time according to the Procedural Code chap. 58 sec. 11. Probably the time limit for rendering an arbitral award is not within the scope of this section and the time limit can not with likelihood be restored according to the Code. This is because the sections in the Procedural Code regarding this extraordinary remedy would not be applicable by analogy in the same way that the rules in this chapter regarding relief for substantive defects are not applicable to arbitral awards according to a Supreme Court case where a party had applied for such an extraordinary remedy.[63] If the arbitrators in an

[61]Wetter, The International Arbitral Process IV 54 (1979).Cf. Mustill and Boyd, Commercial Arbitration 125-7 and 130. (1989)
[62]Hassler 44-5 and 48-50 (1966) and Arbitration in Sweden 123-5 (1984).
[63]Gun M. v. staten (NJA 1986 p.620).

international dispute have dismissed a case, it is quite clear that a party would be entitled to institute new arbitral proceedings, if a court would set aside the decision. There is no time limit for rendering an award in disputes where one of the parties is a resident of a foreign state. Arbitration Act sec. 18. If there is an agreed time limit this question is problematic.

4.2 Transfer of the Object in Dispute

One may question if there are reasons to accept party substitution without the consent of the opposing party, provided that the assignment is not of a contractual nature, but aims at the procedural object of the dispute, i.e. res litigiosa. Westerling has stated that the rules in the Procedural Code chap. 13 sec. 7 (cited above p. 76) are of such a formal nature that they will not likely be applicable in arbitration. If the plaintiff transfers the object of the arbitral procedure the assignee will be a party to the dispute without anything further according to *Westerling*. He considers it obvious that the assignor will not be released from his cost liability to the opposing party and the arbitrators.[64] One could object that *Westerling* has not offered any real explanation for his opinion, e.g., why the assignee would be authorized to enter into the arbitral proceedings without the consent of the opposing party.

Hobér has taken a different view, which has been approved in the book *Arbitration in Sweden* in the following way : "In arbitral proceedings as well as in court proceedings there may exist various reasons why a party would want the assignor to remain party to the proceedings; of particular importance in this respect is the enforcement aspect. A contract including an arbitral clause may, e.g., be assigned to a company with no assets at all. An award against such a company would obviously not be of much use to the opposite party. The assignment of a contract which is the subject of arbitration proceedings should therefore reasonably be subject to some control by him, e.g., by requiring his consent. That such consent is required would seem to follow from the general principles of Swedish contract law, in particular from the rule stipulating that a debtor may not assign a debt without the consent of the creditor. Moreover, contractual stipulations which expressly permit assignment of an agreement as a whole would of course be given effect under Swedich law whether or not arbitration proceedings are in progress in respect thereof."[65]

This reasoning is entirely in compliance with what has been demonstrated in earlier parts of this essay. However, it only deals with one kind of party substitutions, viz., cases when the respondent had transferred his duties.

If the *plaintiff* transfers his *right to compensation* during an arbitration this

[64]Westerling 1 Svensk och internationell skiljedom 13 (1981). See also Herrlin, 1 Svensk och internationell skiljedom 31 (1981).

[65]Arbitration in Sweden 39. See also Hobér, 3 Svensk och Internationell Skiljedom 48 (1983).

does not mean that the position of the respondent will deteriorate. If the plaintiff undertakes the liability for costs jointly with the assignee, party succession may be accepted without the consent of the respondent. In opposition to this view, one may argue that perhaps the respondent does not have such personal confidence in the new plaintiff that party succession may be accepted without the respondent's consent. The danger of delaying tactics from the new plaintiff is, however, not at all significant, since he is supposed to be entitled to compensation and therefore is interested in obtaining an award as soon as possible. If the plaintiff's claim appears to be unfounded, e.g., when it is presented as a counter-claim, the risk of delaying tactics increases and has to be taken into consideration. For this reason it is not completely excluded that party succession by the claiming party's side ought to be accepted only with the consent of the opposing party in some cases, but not in other disputes where there is no risk that the plaintiff's position would deteriorate. This would mean that the arbitrators should be forced in every dispute to determine whether succession could be accepted without any consent due to the varying circumstances in the case.

5 Summary

If a party to a contract, *before an arbitral procedure* is commenced, transfers all of his rights and obligations according to a contract with an arbitral clause, a new arbitral agreement will be made between the assignee and the remaining party to the contract, provided that the latter has generally accepted transfers or accepts a specific transfer. If there is no such consent, it has been stated in the legal literature that the clause would be effective if the assignee was aware of the clause or ought to be. According to my view, one has thereby not taken into consideration the interest of the remaining party of not being involved in an arbitral dispute with a third party, an assignee, who he has not made an arbitral agreement with and who perhaps is not capable of paying the arbitrators' fees. From this point of view, disputes between an original seller and a third party in his capacity as the buyer's assignee would not be encompassed by the clause in the sales contract. If a purchase contract with an arbitral clause is made and the buyer has transferred the goods or a damage claim to a third party, the arbitral clause can not be expanded to be effective against the third party. An exception has to be made if the third party tries to claim compensation for a debt as a collecting agent or as a dummy for the buyer. If a promissory note with an arbitral clause is transferred it is quite possible to deem that a new arbitral agreement is entered into between the debtor and the the creditor's successor. If an assignee transfers all of his rights and duties or only some of them to a new assignee or back to the original contracting party, it is difficult to determine if a new arbitral agreement is made by the new transfer.

If a party *during arbitral proceedings* transfers all of his rights and duties according to a contract with an arbitral clause, the successor may not enter into the dispute if he alleges that a new arbitral agreement is established. If he, on the other hand, asserts that the the original arbitral agreement is effective even against him and in his favour, it is conceivable that party substitution may be accepted, provided that the arbitrators undertake to try the case after the amendments of the original claims and provided that there are guarantees that the fees will be paid. However it is questionable if the original arbitral agreement may be expanded to be operative against a third party in this way. If an object or damage claim is transferred during arbitral proceedings this does not mean that a new arbitral agreement is made between the remaining party and the third party, who desires to enter into the proceedings. In these cases party substitution is accepted only with the consent of the opposing party and the arbitrators. Probably this is true also in cases where the res litigiosa is transferred, perhaps except in disputes when a plaintiff transfers such an object in dispute which involves only rights and not obligations.

Court Assisted Testimony Taking in Arbitration*

1 Introduction

The procedure in arbitrations conducted pursuant to Swedish law is premised upon the principle that parties and witnesses shall be heard before the arbitrators in a flexible manner, without the threat of penalty and without the matter becoming public knowledge. During the past year, in some large Swedish and international arbitrations a large number of witnesses have been examined with court assistance. In these disputes, the outcome has been dependent upon how this testimony should be evaluated. The parties have considered that it was of great importance that the witnesses were compelled to carefully consider their testimony under the threat of penalty. In some cases, it appeared that one of the parties in the arbitration had attempted to withhold important information from the opposing party.

If the need for court assistance in evidence taking arises in arbitrations involving large sums or where the evidence issues are controversial, then the arbitrators and the parties should try to ensure that the flexible arbitration procedure does not become a slow formalized court proceeding, where the parties' and arbitrators' desires cannot be met by the courts. As shall be developed herein, to a certain extent there are possibilities for both the arbitrators and the parties to influence the manner of taking evidence. However, it is important that the arbitrators and the parties anticipate the potential problems so that they can devise solutions beforehand and thereby ensure that the needs of the arbitration are met by the court. The arbitrators should consider various issues regarding the form and the coordination of the court's assistance prior to granting permission for such evidence taking. The arbitrators also have the possibility to have informal communications, for example by telephone conversations, with the court to discuss the arrangements concerning the witness examination. A party which has obtained the arbitrators' permission to seek the court's assistance in evidence taking may, in its application to the court, raise various issues regarding the handling of the evidence taking.

Parties, witnesses, and experts can be heard before the arbitrators. In general, such evidence taking occurs at a final hearing. There is, however, no impediment to witnesses being heard at a preparatory hearing or the like, for example, if such evidence taking can promote the continuous and simplified handling of the case. This can occur if a party is prepared to waive a claim or defense in the event that the witness makes statements which dem-

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onstrate that the party's understanding of the basis of the claim or defense is unfounded. The procedural principle of immediacy is not applicable in arbitration.[1] This principle means that the judgement shall be based only upon material presented at a final hearing and not upon statements made during the preparatory hearings (pretrial matters) or documents which have not been presented as evidence during the final hearing. Code of Procedure chap. 17. sec. 2. Thus, the arbitral award can be based upon all of the written materials and upon what was presented in the oral proceedings. If a witness in a large commercial dispute can not appear during the final hearing then it is possible to hear the witness before the arbitrators another time. The arbitrators' opportunities to arrange such evidence taking are not restricted by the rules which are applicable to court procedures for taking evidence outside of the main hearing.

According to the Arbitration Act sec. 15 par. 1 the arbitrators may take "steps in order to promote the investigation of the matter". They may according to this provision, summon "a party or an expert or any other person to attend for examination, or call upon a party or any other person in possession of a written document or other object, which may be assumed to have significance as evidence, to produce the document or object." The arbitrators may, in this way, procure evidence on their own initative, but in practice this probably seldom occurs. An explanation is that the language in this provision probably gives expression to a legal principle which was made obsolete by the major revisions to the Code of Procedure in 1948. The adversarial nature of modern Swedish procedure will nearly always influence the evidence submission and presentation in arbitration proceedings, at least in domestic cases. The relevant provisions contained in the Code of Procedure, chap. 35 sec. 6, provide that it is the responsibility of the parties to arrange and present the evidence. Further, a court does not on its own initiative arrange the examination of witnesses. The adversarial nature of Swedish civil proceedings will characterize the procedure in modern arbitrations. The arbitrators should not ordinarily take evidence on their own initative, among other reasons because it could cause their impartiality to be called into question.[2] In the exceptional case, one can imagine that the arbitrators may want to procure expert evidence when they have difficulty interpreting the evidence presented. The arbitrators should then discuss the issue with the parties and seek to explain the importance of the required expense of procuring expert evidence. From the legislative history it is evident that the arbitrators can obtain expert reports and other costly evidence on their own initiative.[3] It is therefore considered possible for the arbitrators to obtain

[1]Cf. Arbitration in Sweden 120-1 (1984), Hassler, Skiljeförfarande 89 (1966), Westerling, 1 Svensk och Internationell Skiljedom 17 (1981).
[2]Arbitration in Sweden 117 (1984). Cf. Hassler, Skiljeförfarande 95 (1966).
[3]54 NJA II 38-9 (1929).

such evidence even if a party opposes it. Obviously, arbitrators should only arrange for such costly evidence taking if there is a strong need for it.

The Arbitration Act provides that "the arbitrators may not make orders on penalty of fine, nor use other means of constraint, nor may they administer oaths or truth affirmations."[4] Id., sec. 15 par. 1. The arbitrators, therefore, lack the authority to subpoena witnesses and to impose civil or criminal penalties against a recalcitrant or perjuring witness.[5] Nor can the arbitrators order that an uncooperative witness be brought before them in the custody of the police, (as Swedish courts may do pursuant to the Code of Procedure chap. 36 sec. 20). If there is a need to compel a witness to testify or to administer an oath, then the court must assist in the evidence taking. Such judicial assistance can be obtained only after the arbitrators have found that the prerequisites of section 15 of the Arbitration Act have been met. Further, it is required that the party, not the arbitrators or the opposing party, apply to the competent district court for the evidence taking permitted by the arbitrators. The arbitrators' determination is partly of a discretionary and partly of a statutory nature, while the court's is mainly of a statutory nature. The procedure consists first of a request to the arbitrators for permission to petition the court, and then a request to the court that the witness examination be held in accordance with the manner in which the arbitrators have granted their permission.

The law of arbitration is characterized to a large extent by the principle of party autonomy, that is to say, that the parties can reach an agreement on the procedural issues. It is stated in the Arbitration Act, sec. 13, that the arbitrators while in observance of the procedural provisions contained in sec. 14 – 19, shall apply what the parties have agreed upon. *This implies that the procedural requirements contained in the arbitration law are mandatory and that a party agreement deviating from the law only is binding when it is provided for in the said provisions that party agreements are allowed.* However, the principle of party autonomy is provided for in most of these provisions, for example sec. 15 provides at the outset, "Unless the parties otherwise provide,". From a public policy view it is, according to the legislative history, required that the law in a binding way indicates the prerequisites for obtaining judicial assistance from the courts.[6] The principle of party autonomy is not applicable in issues concerning the court's handling of its assistance in evidence taking. This implies that the parties cannot obtain judicial assistance in taking evidence in a manner which conflicts with the applicable Swedish Procedural Code provisions. Neither should the parties be allowed to obtain a court examination which is not in conformity with the Arbitration

[4]Cf. Bolding, Skiljedom 40-1 (1962).
[5]54 NJA II 36 (1929).
[6]54 NJA II 33 (1929).

Act provisions, for example, through an agreement that the arbitrators' consent for such judicial assistance is not necessary. Quite a different thing is that the arbitrators probably shall give their permission to court assistance if both parties agrees to this. The Arbitration Act and the Code of Procedure provisions on evidence taking should be interpreted and applied by the courts so that to a large extent one takes into consideration the parties' joint desires.[7]

2 The Arbitrators' Permission for Court Assisted Testimony Taking

Court assisted testimony taking can only occur if the arbitrators "have considered the measures needed" (nödig) according to the Arbitration Act, sec. 15 par. 2. The Swedish word "nödig" does not imply a requirement that the evidence taking is necessary. (For a futher discussion, see p. 139).[8] It must, however, be shown that there is a strong need for the court to take part in the evidence taking. An arbitral panel can refuse an application for such evidence taking if the requested court assistance concerns an issue which is irrelevant to the case or is "sufficiently proven" as it is expressed in the legislative history to the Act.[9] A court evidence hearing can hardly be permitted only because a party, prior to the final hearing, states that he desires to accord his own information or a witness's statement increased credibility. If both parties request court evidentiary hearing for this reason, there stands little to be gained by it, if the person giving testimony can be presumed to be trustworthy. Many times an arbitrator can make a relatively reliable evidence evaluation although the duty to tell the truth is not sanctioned by the threat of penalty. Cleverly conducted cross-examination can sometimes provide a guarantee for a sufficiently reliable evidence evaluation.[10] Then, there is no need for court assistance and the arbitrators may refuse to give their permission.

Often arbitrators can not or do not want to immediately allow a court evidence hearing without the witness first giving his testimony before them. Not until then can the parties and the arbitrators decide if there exists a strong need for that person to be heard under the threat of penalty before the court. The interest of the proceeding being carried out quickly entails that the arbitrators do not give prior permission, over a party's objections, for the court's assistance without there being concrete proof of the need for such evidence taking. On the other hand, the arbitration proceedings can be

[7]See also infra note 37, 54 and 57. Cf. Hunter, 1 Arb. Int. 95 (1985).
[8]Cf. Arbitration i Sweden 118 (1984) and Hassler,Skiljeförfarande 96 (1966). See also Maeland, Voldgift 156-9 (1988). Cf. concerning UNCITRAL Model Law Herrmann, 1 Arb. Int. 22 (1985) and concerning the Dutch Arbitration Law Sanders, 3 Arb. Int. 199 (1987).
[9]54 NJA II 37 (1929).
[10]Hagberg, 2 Swedish and International Arbitration 35-6 (1982).

delayed, if after the final hearing is already underway, it is realized that certain representatives and witnesses need to be heard before the court in the manner that the party claims. The final hearing can then be considerably delayed if the court evidentiary hearing is allowed. To some extent, this difficult practical problem can be solved through the arbitrators, on the parties' request, hearing certain controversial persons or key witnesses beforehand at a special hearing so that the need of the court's assistance can be analyzed in a relatively early stage.

If there is a reason to believe that a person giving testimony has made an untruthful statement concerning matters which are of vital importance for the case's outcome, it can justify the arbitrators' consent that the person should be heard under the threat of penalty. In this connection, the arbitrators must take into consideration that the award cannot be set aside because it is grounded on untruthful testimony.

A general principle, according to the Supreme Court, is that an arbitral award cannot become the subject of a new trial.[11] According to the Code of Procedure chap. 58 par. 1, relief for a substantive defect in a judgement may be granted:

1) If a member of the court rendered himself liable to criminal conduct.

2) If a document presented as proof was forged or if a party examined under truth affirmation, or a witness, or an expert gave false testimony and the document or such statements can be assumed to have affected the outcome.

3) If a circumstance or evidence that was not presented previously is asserted and a presentation of the matter asserted would probably have led to a different outcome.

4) If the application of law forming the basis of the judgement is obviously inconsistent with governing legislative provisions.

An arbitral award may thus not be challenged upon these grounds, since the Arbitration Act lacks corresponding grounds for vacating an award. Since the arbitral award cannot be nullified after a challenge that the award is based upon a false statement or false documentary evidence, there may be a special need to hear certain persons under the threat of penalty.[12] Such a need can exist although the arbitral award cannot be set aside on the grounds that untruthful testimony was given before the court in connection with the arbitration proceeding.

The legislative history to the Arbitration Act states that the need for engaging the court for holding an evidentiary hearing can be applicable if someone refuses to comply with the arbitrators' request for their appearance. It is futher stated that a hearing before the court can also be called for when it

[11]Gun M v. the State (NJA 1986 p. 620) and Heuman,31 NJM Del I 282 (1987).
[12]54 NJA II 36 (1929).

is considered necessary that the witness or the expert confirm their testimony under oath.[13] The need of compelling testimony and and the need for the testimony to be made under the threat of penalty is, however, dependent upon the different types of hearings which are demanded. One thereby has to separate between hearings of parties, witnesses, and experts.

According to the Code of Procedure chap. 37, *parties* may be examined under a truth affirmation, but not under oath as third party witnesses may be. A party giving false testimony before the court under such an affirmation is committing a crime, but is not to be punished as seriously as a perjurying witness. *Third parties* may be heard under oath before a court, according to the Code of Procedure chap. 36. Only such persons are denoted as witnesses in Swedish law. Representatives of a legal entity can only be examined in the same way as parties. Persons belonging to the management of a company without being authorized to represent the company, are treated as witnesses. An *expert* engaged by a party may be examined by the party under oath, according to the Code of Procedure chap. 40 sec. 19.

If a party wants the opposing party to be heard under *a truth affirmation* he can base his request on, for example, that one of the opposing party's representatives *completely or partly refuses to testify*. There is the possibility for the arbitrators to take into consideration these circumstances when evaluating the evidence.[14] This refusal to cooperate can perhaps cause more negative inferences to be drawn to a greater extent than would follow from a normal evidence evaluation. Such possible considerations for interpreting the evidence can be found in the rules in the Code of Procedure chap. 35 sec. 4. The arbitrators may consider the refusal to cooperate when evaluating the significance of the evidence. The arbitrators may therefore regard it unnecessary to arrange a court evidentiary hearing. Furthermore, the court can not force a party or a legal representative to testify or to take a truth affirmation, but it certainly can compel them appear before the court with threat of fine. In contrast to what is applicable for third party witnesses according to the Code of Procedure, chap. 36 sec. 21, the court can not compel testimony on penalty of fine and on penalty of detention against a party or a legal representative who refuses to take an affirmation or to testify.[15] If a legal representative refuses to take the affirmation, he can testify untruthfully and incompletely without sanction. A legal representative which has taken the affirmation, can incur sanction, if he gives incorrect or incomplete information, but not if he refuses to testify. The fact that his testimony is in certain parts incomplete and that he does not want to testify does not make him liable for perjury. The reason that the court cannot use means of compulsion against legal representatives and that sanctions cannot be allowed, is that the

[13]54 NJA II 36 (1929) and Arbitration i Sweden 118 (1984).
[14]Cf. Heuman, 52 Advokaten 50 (1986).
[15]Ekelöf, Rättegång IV 158 (1982) and prop. 1986/87:89 p. 184-5.

court can attach significance to the circumstances in evaluating the evidence.[16] If a party's legal representative refuses to testify in the arbitration, the arbitrators can thus consider that it is not necessary to permit court assisted testimony as the opposing party's interests can be met through the evidence evaluation.

In certain cases it is perhaps not possible to draw conclusions from a legal representative's refusal to testify.[17] This can be the case when he doesn't want to testfy about what was said during the extensive oral contract negotiations or what he knows about a complicated machine's functions. If the lack of such testimony cannot be compensated for through the arbitrators' evaluation of the evidence, perhaps the arbitrators should give their permission for the court hearing. Even if the legal representative can refuse to testify without sanction, the pressure to tell the truth may be increased and therefore the liklihood of obtaining greater information may be significantly improved. The court hearing can be strongly justified. The arbitrators have to decide in specific cases as to whether the court hearing can be appropriate for these reasons.

If a legal representative has provided information, which the opposing party strongly wants to call into question, this can be justification to allow a hearing under a truth affirmation to be held before the court. The evidence taking then can normally fulfill a function. The legal representative can then be forced under threat of penalty to thoroughly reconsider whether the statements given are correct and if some statements are exaggerated or "arranged". In certain arbitral disputes, the precise language of a party's statement can have great importance to the outcome of the case, e.g., when a dispute concerns an issue about what was orally agreed to in a transaction. In other cases perhaps the outcome is not appreciably influenced by the exactness of the given information. This can thus be a reason for the arbitrators to refuse to give their permission to the court assisted evidence taking.

When a party requests that the arbitrators give their permission for court assisted evidence taking regarding a *third party witness*, the arbitrators can justify the action with regard to the need of compelling a statement and with the need to administer an oath and the threat of perjury sanctions. If a witness refuses to testify on a decisive point this contumacy, pursuant to the Code of Procedure chap. 36 sec. 21, allows the use of means of compulsion with the purpose of inducing the third-party witnesses to take part in the evidence taking. Sometimes the arbitrators can draw far-reaching and decisive conclusions from the witness's recalcitrance when the third party witness has close connections or common interests with a party, e.g., an employee in a party's company. The court hearing with the third party witness in such a case may therefore not be needed.

[16]SOU 1938:44 p. 408-9.
[17]Heuman, 52 Advokaten 50-1 (1986).

When a party requests a hearing before the court regarding an *expert witness*, the procedural rules relating to private experts become applicable, and not the rules relating to official experts. The Code of Procedure distinguishes those situations where the court may retain an expert to assist it and where a party independently retains an expert. A party or the arbitrators can not have the court appoint an expert.[18] The testimony taking hearing with an expert on a party's request can only occur if the consulted expert is willing to accept the assignment from the party.[19] The Code of Procedure chap. 40 sec. 19 shall apply to such private experts. This means that the expert shall produce a written statement within a certain time directed by the court. If a party so requests then the expert shall normally be examined. If an expert shall be examined before the court then the rules concerning third party witnesses are applicable. However, a court may allow an expert opinion to be completely or partially read out loud. There are rules relating to the requirement of impartiality of an expert which are applicable to court appointed experts while there are no corresponding rules applicable to experts retained by the parties.

Private experts swear before the court not an expert oath, but rather a witness oath. This means that the expert is not liable for criminal penalities for the opinions which he has given but only for false statements of facts.[20] The arbitrators can, therefore, be justified in not giving their permission to a court hearing with an expert offered by a party, when the opposing party only wants the expert's opinion to be conscientously reconsidered by him at the court hearing. Such a hearing can, however, in practice fulfill a function, although the use of penalities and sanctions are limited. The arbitrators must, however, take into consideration the significance of the limited scope of the compulsion.

It happens that a party has acquired a *written expert opinion* which contains information which is unfavorable to the party. Of course he then would refrain from relying upon the opinion and may withhold it from the opposing party. If this party learns of the existence of the statement he can request the arbitrators to give their permission for the court hearing. The court through issuing a subpoena may order the party to produce the written document. The arbitrators must however, as must the court, determine if a valid legal obstacle exists for permitting the requested evidence taking. The issuing of the subpoena can only concern written evidence and not a private expert's opinion.

The Supreme Court has in a case, which did not concern arbitration proceedings, stated that expert evidence taking shall be conducted through the provisions contained in Code of Procedure chap. 40, and that circumvention

[18]SOU 1944:10 p. 440.
[19]Ekelöf, Rättegång IV 189 (1982).
[20]Ekelöf, Rättegång IV 190-1 (1982).

of the rules cannot be allowed to occur by utilization of the provisions of Chap. 38 sec. 2 of the Procedural Code. (Chapter 40 relates to experts, while Chapter 38 relates to documentary evidence.) According to the Court, these provisions on documentary evidence cannot be used to compel the production of a written expert opinion which is in the possession of a party or third person. The Supreme Court considered that in any case the regulations on subpoenas should not be allowed to be applied to experts. Otherwise one would take away the effect of the basic principle that experts as a rule are not obliged to give their opinions without having accepted an assignment to do so. In order that the expert's right to decline an assignment should not become illusory, the Supreme Court stated that the provisions of the chap. 38 sec. 2 of the Code of Procedure also should not be applicable if another person were in possession of an expert's opinion. The opinion may have been made under entirely different presumptions than that it would be presented before a court. Further, the Supreme Court pointed out the significance that a party which has taken advice of another person not solely upon this basis can be required in court to disclose what the advice contained, a situation which according to the Supreme Court reasonably could not be influenced by whether the advice was given orally or in writing.[21]

This case implies that the arbitrators should not allow a court hearing with an expert who will not allow himself to be heard before the arbitrators. It does not matter in this connection if the expert was earlier engaged by a party with regard to the present arbitration dispute. The written expert opinion which contains stated advice which he had given to the party, can not be brought to the opposing party's and the arbitrators' knowledge through the permission for the court to issue an subpoena. From the Supreme Court case one can conclude that a district court will not issue a subpoena even if the arbitrators wrongfully have given their permission for such evidence taking.

For a special case the Supreme Court considered an exception, however, needs to be made. The Supreme Court opined that another result could come into consideration only if the regular proof through experts for some reason was rendered impossible. That probably has reference to cases where a party obtains an expert opinion and the opposing party thereafter lacks the possibility to request an expert opinion by consulting another expert. Such can be the case if the actual facts underwent such a change that it no longer is possible to secure some evidence. However, there seems to be little likelihood that a court would issue a subpoena because it is impossible for a party to engage another expert, for example, when other experts can not be obtained or when available experts refuse to accept the assignment.

When the arbitrators consider if they should give their permission for the evidence taking at the court, they must consider other circumstances than

[21]Stockholms byggnadsmaterialaktiebolag v. Majlech Zuckerkopf (NJA 1963 p. 72).

only the need and the importance of the court's assistance, for example, the cost considerations and the interest that the proceedings are not delayed. If the arbitrators find that a party requests a court witness hearing for the purpose of obstruction, naturally the permission for the hearing should not be granted.[22] Even if some inappropriate purpose does not lie behind a party's request, perhaps a more or less extensive court hearing with many persons can not be managed within the time period for making the arbitral award. The arbitrators must then bring up the issue of extending the time period. If the parties consent to an extension of the time period, perhaps an application for the evidence taking can be allowed. If only the party who bears the burden of proof requests a court hearing, perhaps the opposing party will refuse to allow the extension of the time period, for the purpose of obstructing the taking of evidence. The arbitrators may then need to give their permission to the court hearing dependent upon the condition that the hearing be held no later than a certain day or that the court in domestic cases extends the time for making the arbitral award. (See the Arbitation Act sec.18 as to the time period for making an award.)

3 The Arbitrators' Right to Establish Conditions for Granting Permission for the Court Assisted Evidence Taking

The Arbitration Act does not state whether the arbitrators have the authority to make different conditions for giving permission for the evidence taking at the court. According to the new Netherlands Arbitration Act, Article 1041 (2), on a party's request, the arbitrators may allow a party *within a period of time decided by the arbitral tribunal* to petition the President of the District Court to appoint a judge before whom the examination of the witness shall take place, when a witness refuses to voluntarily appear before the arbitrators or having appeared, refuses to give evidence.

According to the text of the Arbitration Act, the arbitators shall not give their permission for the court assisted evidence taking, but only decide whether the hearing is needed. Herein may be the limits to the arbitrators' competence to make conditions for their permission for the hearing. One could consider that the requested hearing is either needed or unneeded. However, one can imagine that a court hearing in certain cases is only needed if certain conditions are met. While under other circumstances it only may promote an expeditious and effective handling of the case and not be relevant in connection with whether a hearing is more or less needed. The conditions of the first type must be considered permissible according to the

[22]Arbitration in Sweden 118 (1984).

law. However, it is more doubtful if the conditions of the last type can be accepted according to the mandatory provisions contained in the Arbitration Act, sec. 15 par. 2. One can interpret the provisions so that the arbitrators can never give their permission for a court hearing to a greater extent than as is provided for in the provisions, that is to say, that the hearing must be needed. However, one can also consider the issue that conditions which promote an effective and speedy handling are not regulated in the Arbitration Act, and that arbitrators therefore possess the freedom to set up such conditions. In support of this interpretation it can be claimed that the arbitrators then more easily can promote certain of the important goals of arbitration procedure, namely, a quick and effective handling of the case and a limitation of the possibility for obstruction.

However, a condition which aims at making the proceedings more effective, can lead to a party not having the court hearings completed, although the arbitrators consider them necessary, e.g., if the court cannot hold the hearing within the time period which is indicated in the arbitrators' permission. The given time period for the court hearing may have its basis in that the arbitral award must be made within a certain short time according to the Arbitration Act, sec.18, or according to the parties' agreement. The conditions then should be respected by the court. Certainly the party may lose the possibility to produce testimonial evidence in the more reliable form which the arbitrators found to be needed, which may involve the risk that a party can lose the case. However, the arbitral dispute can have an incorrect outcome for this reason, even if conditions were not made. If the court can not hold the hearing within a recommended (not ordered) time period, the arbitrators can be forced to decide the case without the court hearing being held. If a time condition is established by the arbitrators, the risk that the arbitral dispute will have an incorrect outcome is not caused by the existence of condition which would be impermissable, but rather, by the fact that the legal time period or agreed upon time period for making the arbitral award can restrict the parties' possibilities to produce evidence. *The condition should therefore be approved, when it is actually required due to a legal provision in the Arbitration Act or the parties' agreement.*

If there is no time period applicable for rendering the arbitral award, but the arbitrators want to expedite the proceedings through setting a restricted time period for the needed court hearing to be accomplished, perhaps the court can disregard the condition and and hold the witness hearing later than what the arbitrators have set out. The arbitrators should not normally establish a time period in this case. However, if a party had repeatedly requested to present new evidence, it is possible that the arbitrators considered themselves to have the right to order the party to specify his evidence through a type of *final* order. In conformity herewith, the arbitrators should also be able to order a party, who had engaged in culpable proceedures, to ensure

that the needed court hearing occurs by no later than a certain day. (Cf., Code of Procedure chap. 42 sec. 15 and provisions in the Arbitration Act concerning that a party shall have a sufficient opportuntiy to present his claim orally or in writing. See also infra. p. 136.)

When the arbitrators' *permission for a court hearing is conditional upon it being held, at the latest, a certain day* the court has, after informal contacts with the parties and the witnesses, to decide if a judge can arrange for the evidence taking within the given time limit. If one or more arbitrators state that they cannot attend at that time or on the alternative days that the court suggests, this does not represent an obstacle for the evidence taking. The conditional permission does not mean that one can imply a requirement that the arbitrators must be present. As will be shown below, it is pursuant to the law only required that the parties shall be summoned to the hearing and be given the opportunity to ask questions to the witnesses. If the arbitrators consider that they absolutely should attend the hearing and that they cannot evaluate the testimonial evidence only upon the written transcripts, then they should give their permission for the hearing upon the condition that the hearing shall take place at a time when they can attend. It is possible that they did not consider the court hearing needed unless they would have the opportunity to observe the witnesses during the questioning and also ask questions to them. It is important that the arbitrators beforehand clarify for the parties that the arbitral award can be based not only on the transcripts of the court witnesses hearing but also on the oral testimony and the witnesses' demeanor before the court.

On a party's request or on their own initiative the arbitrators can provide that a court hearing can be held only if the court allows an extension of the time period for the making of the arbitral award within a certain number of months. In domestic cases, the party which requested the court hearing should then immediately be able to apply for the evidence taking and also for the court to extend the time limit for the making of the arbitral award pursuant to the Arbitration Act sec.18. Such a solution is very compatible with one of the general principles of arbitral procedure, namely, to conduct the proceedings as quickly as possible. The proceedings can be concluded more expeditiously if the party has the right to immediately bring before one or more competent courts, both matters, so that different procedural measures can be taken at the same time in both matters. If the same court is competent in both matters, the opposing party may be given the opportunity to comment on both matters simultaneously. The court can then preliminarily consult with the arbitrators, parties, and witnesses and determine the day for the evidence taking.

It is important that the arbitrators clearly state if their permission contains conditions or only recommendations to the parties on how the hearing should be conducted. In a case the arbitrators had reminded a party that it was necessary that he immediately apply to the Stockholm district court for the witness hearing, if such a hearing was to be held.[23] The permission must be considered to be conditioned because the arbitrators stated that it was necessary to make an immediate application. The court should thus not allow the evidence taking if the party would have delayed a longer time than that which was allowed for. The time limit for the application was stated in an undetermined fashion through the requirement of an immediate application. In the arbitrators' decision it was added that in the application to the court, the party should state that according to the arbitrators' scheduling, the hearing should be held on certain given days approximately two months after the arbitrators made their decision. This part of the arbitrators' decision contained a recommendation, since the arbitrators only mentioned what the party should state. The court probably should have allowed an application for the evidence taking even in the case that it only could be held earlier than what the arbitrators had stated. However, the arbitrators' recommendation may represent an important fact for interpreting when one shall more precisely establish the meaning of the stated condition, (that is to say "immediate application"). The court should interpret the expression "immediate application" so that an application must be done in such time that it was possible for the district court to hold the hearing on one of the days which the arbitrators had recommended. The case shows that it is important that the arbitrators sufficiently clarify both what constitutes an imperative condition for the evidence taking, and what constitutes recommendations on how the hearing should be practically handled.

4 Challenging the Award on the Basis of the Arbitrators' Denial of Permission for the Court Assisted Evidence Taking

The arbitral award can seldom be successfully challenged and set aside based upon the refusal of the arbitrators to give their permission for the court hearing. The wronged party can certainly assert that he was not given the "requisite" opportunity to present his claim orally according to the Arbitration Act sec. 14. The arbitral award can, however, only be set aside according to the Arbitration Act sec.21 if several requirements are fullfilled. It is required that the arbitrators' refusal to give permission can be considered as a procedural irregularity, that the party is not at fault, that the irregularity may be

[23]Neste Oy v. Lonza S.A. (Stockholms tingsrätt Ä 6-206-88).

assumed to have influenced the decision, and that the party ought not to be considered as having waived the irregularity by taking part in the proceedings without objection or otherwise. Arbitration Act sec.21 par. 1 pt. 4 and sec.21 par. 2.

Often it can be asserted that a party's interests were sufficiently met through a hearing being held before the arbitrators and that a sufficiently sure evidence evaluation could be made according to the arbitrators' opinion if an examination and cross examination were effectively accomplished.[24] If a party negligently failed to examine a third-party witness of questionable credibility in a carefully prepared manner, it can be alleged that the arbitrators have not committed a procedural error and that it only can be considered an inadequate handling by the party. It can then be held that an action to challenge the award should be rejected, since the error has not occurred "through no fault of the party" in the manner which is required for a valid challenge pursuant to the Arbitration Act. Even if the party's handling of the case was not deficient, many times it can be held that the refusal to grant consent to the evidence taking does not result in a procedural irregularity with regard to the presented evidence. This can also be expressed as the arbitrators, when making their decision, had good reasons to believe that the requested court hearing was not sufficiently strongly justified. If in the later final hearing it is shown that the arbitrators' determination was wrong and that the third-party witness refused to testify or gave information which appeared to be untruthful, it can be required that the party renews his request that court assisted testimony take place. If a party fails to do so, the arbitrators must not on their own iniative make arrangements for the court's assistance. This refusal of the arbitrators to give permission for a court hearing is a fully correct procedure and not an error. Further it can be alleged that the party accepted the handling of the proceedings by not renewing the request for the court witness hearing, that is to say, that the right to challenge is waived pursuant to the provisions of the Arbitration Act sec.21 par. 2.

Sometimes, a request for a court hearing can appear to be well-founded when it is made, for example, when a witness declares that he does not want to cooperate or when he in a formal statement gives contradictory information which perhaps also appears to be untruthful against the background of other known facts. A refusal by the arbitrators to allow the court hearing on a party's application can then result in a clear procedural error. It is, however, conceivable that a challenge to the award nevertheless would be unsuccessful, because it cannot be demonstrated that if the witness would have

[24]Smålandsstenars vatten- och sanitära förening v. C.E. Fredriksson (NJA 1955 p. 224) ground 2 for the challenge action determined only by the dissenting judges and Gunnar Rejving v. AB Electrolux (NJA 1963 A 23) and Bertil N v. Sten A (RH 1987:121). See also Craig, Park and Paulsson, International Chamber of Commerce Arbitration 25.01 (1984). Se also Gunnar Jansson v. Oscar Janssons decendents'estate (NJA 1965 p. 384), especially 392 below.

testified under oath that he would have given such different information that the case would have had another outcome.

5 The Requesting Party

When the arbitrators give their consent to a court assisted evidentiary hearing, the arbitrators should indicate who requested the hearing as evidence. It is of importance that this is made clear so that the court can later decide which party shall conduct the main examination and which party can be allowed to pose leading questions in the cross examination.[25] The court cannot answer this question who is the invoking party by only doing an investigation of which party applied for the evidence taking. It is possible that a party requests the arbitrators to hear a person, and that the opposing party considers the potential testimony to be questionable and therefore wants the witness to testify under the threat of penalty for perjury and through asking leading questions in the cross examination be able to ascertain whether the testimony is reliable. If a party requests that an employee in the party's company shall testify before the arbitrators, the opposing party may want the employee to testify before the court. The arbitrators should then in their written consent state which party has requested the hearing before the arbitrators and which theme of the evidence the applicant wants to elucidate through the hearing.

It can occur that both parties want to have a person testify before the arbitrators and before the court. The arbitrators should state this in their decision when giving permission for the court hearing. This situation can be of significance not only for the issue of who shall conduct the direct examination and the cross examination, but also for the issue which may arise if one party unilaterally withdraws the request for the court hearing. The withdrawal does not become effective if the other party has also received the permission for the hearing.[26] If only one party obtained such permission he naturally does not need to follow through with his original intentions and present his application to the court. If he later learns that a person will testify in an unfavorable manner, then he can choose to not pursue his request for the court hearing. The other party can not cause the hearing to occur without obtaining the arbitrators' permission for it. If a party had obtained appropriate permission from the arbitrators and pursues his application, but then wants to interrupt the ongoing hearing before the court, the opposing party should have the right to conclude his questioning within the framework for the evidence theme. It is doubtful if a party can unilaterally impede the court hearing after he has presented his application to the court and the opposing

[25]SOU 1938:44 p. 402 and prop. 1986/87:89 p. 177.
[26]Cf. Maeland 150 (1988).

party has responded to the application. Cf., Code of Procedure, chap. 13 sec. 5 par. 1.

6 Theme of the Evidence

When a party requests the arbitrators' permission for court assisted evidence taking, it is not sufficient that he has identified the person that he would like to testify. He must also state what shall be proven with each witness hearing. Swedish procedural law has a general principle known as "evidence theme" (bevistema) which means that during the preparation of the case a party must present to the court an identification of all evidence which the party intends to rely upon together with a specification of what he intends to prove with each item of evidence. The arbitrators cannot decide if a hearing shall be allowed if the theme of the evidence is not stated. It occurs that the parties request that a large number of persons shall give sworn testimony at the court and that the different persons shall be heard regarding several unspecified topics. Such can be the case when it concerns a large commercial dispute where several persons have been involved in different oral negotiations. Then the arbitrators can not determine the need of the court's assistance, if the theme of the evidence is stated in a vague way, for example, with reference to that the hearing shall prove what occured during the negotiations when the concerned persons were present.

It may happen that a party requests to be allowed to specify the theme of the evidence after the arbitrators have given their consent or only after the court has decided that the evidence taking shall take place on a certain day. The arbitrators should require that the different themes of the witness hearings are reasonably well specified before permission is given for the evidence taking. Then, the court does not need to be faced with the problem if the requested court hearing concerns a specified theme which falls outside the scope of the arbitrators' permission for the hearing regarding a vague stated theme of the hearing. Sometimes different themes of evidence are stated, without clarifying which witnesses will testify on every specified theme. Neither can this be considered acceptable.

Even if different themes of evidence are formulated in a number of concise set out points, it can be required that a party furnish the arbitrators and the court further proof. Otherwise, later the court may consider that the requisite information is not available for conducting the examination according to the provision of the Arbitration Act, sec. 15 par. 2. In this connection, one can imagine that the arbitrators immediately consent to the evidence taking and that the party presents an application to the court and at the same time the arbitrators continue the arbitral proceedings by holding a prepatory meeting concerning among other things the question of the specification of the grounds, defenses and the theme of the evidence. The arbitrators should

be able to give their permisssion to the evidence taking in such cases and the court should have the right to decide thereon, although certain themes can be modified and specified again not until the proceeding when the witnesses are heard. The arbitration can be resolved more quickly if certain clarifications can be made in this way and the proceedings can go forward in two forums. The requirements of specifying the theme of the evidence should not be exaggerated. That certain simple questions asked by the counsellors will fall outside of the scope of the presented theme in the arbitrators' permission for the hearing, cannot be a reason for the court to forbid the questioning.[27]

7 Equal Treatment of the Parties

Sometimes it occurs that both parties request that a court examination shall take place with the same persons. In ruling on the issue of permission, the arbitrators must take into consideration that the arbitral proceedings must be handled impartially as is stated in the Arbitration Act sec. 13. According to the legislative history of the Act, the requirement of impartiality means that one party may not be refused an advantage which is granted to the other.[28] One could therefore consider that the arbitrators are required to give their consent to a party's request for a court examination if the opposing party had obtained such permission for an examination of another witness. If one interprets the provisions regarding impartial treatment such that the parties must be *treated formally the same*, the evidence taking by the court would then expand into several hearings which to some extent could concern less important facts. If, for example, a party requested a hearing with a person, the opposing party may respond with a demand for a hearing with another person with the intention to achieve a balance and obtain the opportunity to propound rebuttal evidence in the same form which was accorded to the other party. This party then would request a hearing with still another person, for example, because the other party expanded the theme of the evidence. Such successive escalation of the dispute should be avoided. The arbitrators should have the possibility to refuse a party's request concerning a less urgent hearing, even if the opposing party received permission to obtain the testimony of a crucial witness to be made under oath with the threat of penalty.

Such authority for the arbitrators to limit the court evidence taking to important witnesses' testimony can be approved if the requirement of impartiality is not considered from a purely formal point of view. One can consider that *the parties are treated alike if only important court hearings are permitted.*

[27]Cf. Hunter, 3 Arb. Int. 338 (1987).
[28]54 NJA II 33 (1929).

The application of this principle means that one party perhaps cannot obtain permission for as many hearings as the opposing party. It is reasonable to interpret the requirement of impartiality in this manner.[29] However, the arbitrators should to some extent ensure that the parties are handled equally in a formal regard, so that one party does not have the impression that the arbitrators have beforehand taken the side of the other party.

8 Legal Obstacles

According to the Arbitration Act, sec. 15 par. 2, the court shall determine whether there are any legal obstacles to the procedure. From the legislative history of the Act, it can be inferred that such a determination regarding the existence of any legal obstacles shall also be performed by the arbitrators; therefore, they shall not only determine the need for the hearing. Pursuant to the legislative history, the arbitrators can reject a party's allegations if a witness hearing is inadmissable due to disqualification or if there are other legal obstacles.[30] The disqualification challenge to witnesses was abolished when the Code of Procedure came into effect in 1948. Therefore, an application for a court hearing now can not be refused because a *witness has a substantial interest in the outcome of the case.* The need of the threat of penalty to enforce the obligation to testify truthfully can be especially apparent in such a case. The court assisted evidence taking can then be particularily justified. On the other hand, it is perhaps sufficient that the arbitrators take into consideration the common interests between the third-party witness and the party when they evaluate the evidence and thereby satisfy themselves with taking this into consideration after a hearing has occured before the arbitrators.

Pursuant to the provisions of the Code of Procedure chap. 36 sec. 5, it is not possible to call as a witness an opposing party's attorney. The Code of Procedure recognizes and protects a claim of priviledge against a party's attorney testifying against him. A provision of greater significance in practice is contained in the Code of Procedure, chap. 36 sec. 6, which provides that a third-party witness can refuse to give testimony if it would involve disclosure of trade secrets, unless there is extraordinary cause for examining the third-party witness on the matter. The exception to the rule principally is directed towards criminal cases, where it is of special importance that the presentation of proof is complete.[31] If a requested court hearing concerns a trade secret then there is generally a legal obstacle prohibiting the consent.[32] If a third-party witness has refused to testify before the arbitrators then such

[29]Cf. Hjejle, Voldgift 102-3 (1987).
[30]54 NJA II 37 (1929).
[31]SOU 1938:44 p. 394.
[32]Cf. Maeland 151 (1988).

refusal should not affect the evidence evaluation in a negative way, since otherwise the third-party witness's right to refuse to testify would be undermined.[33] The question of what constitutes a trade secret is determined by applicable Swedish regulations and not by the more or less extensive meaning this notion has in a commercial context or in other countries.[34] Legal obstacles can also exist if a third-party witness are a *close relation to a party*. The relationship with a legal representative of a company which is a party cannot release the witness of the obligation to testify before the court. Code of Procedure chap.36 sec. 3.

9 The Venue for the Court Hearing

According to the Arbitration Act sec. 15 par. 2, the application for a court hearing shall be presented to the court where the person who shall testify is present. One can therefore consider that the arbitrators and the parties do not have a reason to consider the issue of where the court hearing shall be held. Often a party requests court hearings with several persons. If they live in different places then the application must be submitted to different district courts. From a review of the witnesses' home addresses, the arbitrators may determine that the hearings must be held at a large number of different district courts. The arbitrators may then be concerned that the hearings shall become a too long, complicated, and expensive undertaking if both the parties and the arbitrators shall be present at all of the hearings. The arbitrators should then ensure that the persons shall be heard at the same district court on one occaision. (See discussion regarding conditions and recommendations, supra.) Herewith, arises the issue as to how types of consolidation of the different evidence taking shall be accomplished.

Assume that a party presents an application for a court hearing to the district court and that it may be concluded that the witnesses reside in different districts in Sweden. The court can not then approve the application and summon the witnesses to appear under the threat of penalty. One cannot carry out the hearing because the witnesses does not object that the court lacks competence to order the hearing. (Such a failure to object will give a court local jurisdiction in many civil cases according to the Code of Procedure chap. 10 sec. 18, but this rule is not applicable in court hearings conducted in connection with an arbitration.) There is no provision in the Arbitration Act which imposes on the witness an obligation to be active and make an objection. Often, the witness does not realize that he has the right to demand that the hearing be held in his own district. The position that the hearing shall occur where the witness resides, has support in the provisions which are

[33]Heuman, 52 Advokaten 46-8 (1986).
[34]Hagberg, 2 Swedish and International Arbitration 32-3 (1982).

applicable to the taking of evidence for preservation. In the Code of Procedure chap. 41 sec. 3, it states that no one is required to appear and give testimony as a third party witness or an expert for the purpose of preserving evidence in a court other than the one for the district in which he is domiciled. However, a district court should be competent to carry out a witness hearing with a person who resides or is domiciled in a distant district if he consents to it. This solution is in conformity with the possibility for parties in most civil cases to enter into a written choice of forum agreement. Code of Procedure chap. 10 sec. 16. Further, this solution exists in the Act Regarding Evidence Taking for Foreign Courts, sec. 2 par. 2. Therefore, it should be required that the person who shall testify give prior consent in writing to the testimony being taken at the given district court.[35] *When a party requests the arbitrators' permission for the hearing, he should present statements which demonstrate that the witnesses are willing to testify at a certain court.* If the party cannot produce such a statement, perhaps the arbitrators will not consider it worthwhile to give their permission to the evidence taking which may occur at a large number of district courts, especially in consideration of the time period in which the award must be made.

If a party requests a court hearing with a *person employed by the opposing party perhaps the employee will refuse to consent to being heard at a certain court*, perhaps due to delaying tactics. Then the arbitrators can likewise give their permission for the hearing to occur at different courts where the persons reside without having resolved this venue issue. If the arbitrators consent to the evidence taking at several courts, perhaps the witnesses discover that they might as well consent to being heard at a certain district court, when it is clear to them that the court in their district will compel them to testify. There is no obstacle to the arbitrators giving their permission to the court hearing, without the condition that the hearing shall be held at a certain court. After an unconditional permission has been obtained, a party can procure the witnesses' consent to be heard at a certain district court. Hereafter, this court has to arrange the hearings and summon the witnesses. A district court, however, cannot make a decision regarding the hearing concerning a witness who is resident outside of the court's jurisdiction unless the witness has previously consented in writing to allowing his testimony to be heard by the referred to court.

Sometimes the arbitrators want the court's hearing to constitute a part of the arbitral final hearing. The arbitrators have to decide a locale for the final hearing, if the parties were not able to agree upon it. According to the Arbitration Act, sec. 12 par. 2, the chairman shall determine a convenient place and time for the meeting, but normally the arbitrators try to have the parties and their representatives reach an agreement on the appropriate place and

[35]Cf. Maeland 151 and 153 (1988). Cf. also Heuman, 52 Advokaten 49 (1986).

time. In regards to the place for the evidence taking which shall occur in the final hearing, the arbitrators do not have the possibility to make a binding decision. This place is determined by the witnesses' given district of residence. Therefore, the arbitrators must beforehand try to secure the witnesses' consent to being heard by the court in the district where the arbitrators intend to hold the final hearing. The arbitrators thus can not neglect the forum problems and allow them to become an issue for the parties and the courts.

10 The District Court Hearing

Issues relating to evidence taking are regulated by the Act for the Handling of Judicial Matters, to the extent that the Arbitration Act does not contain special provisions which are at variance with the former. Pursuant to the Arbitration Act, Section 15, the provisions on evidence taking outside of the main hearing shall be applicable, that is to say, the Code of Procedure chap. 35 sec. 9-11. In conducting the hearing, the court shall apply the rules which are applicable in evidentiary matters, i.e., the Code of Procedure, chapter 37, which concerns a party or his legal representative testifying under truth affirmation, chapter 36 regarding the testimony of third party witnesses, and chapter 40, sec. 19, relating to expert testimony.

After the arbitrators have given approval for a court hearing, the party must specifically request the court to conduct the hearing. The application shall fulfill the requirements which are contained in the Act on the Handling of Judicial Matters, sec. 2 and 3. The application shall be submitted to the court where the witness resides. If the application is presented to another court then the applicant should attach a statement which shows that the witness is willing to appear at the court in question. Otherwise, the application will be dismissed.

Assume that persons who shall testify reside in different districts and refuse to appear at another court than each in his own district. Then one can imagine that a party who submitted the applications for hearings to different district courts may request first, that each court should decide about the evidence taking and second, that all of the courts concur that the hearings should be conducted by one given court, (for example, the Stockholm District Court). The Arbitration Act lacks a provision which allows such consolidation. The general provisions on evidence taking outside of the main hearing which are contained in the Code of Procedure chap. 35 sec. 8, mean that the procedural court can arrange that the evidence shall be taken by this court or another court according to the provisions in the chapter on the different evidentiary matters. According to the special provisions in the Arbitration Act, sec. 15 par. 2, it states however that "*the court shall arrrange for the examination*" if the arbitrators have determined that the procedure is

needed and the requiste information is made available. The wording is clear that the court where the application was submitted *shall* conduct the hearing and no other court. This special provision should be followed and an analogy should not be made with the provisions which allow a procedural court to arrange a court hearing with another court (the evidentiary court). Certainly, third party witnesses can be compelled to travel a long distance when they shall appear for a main hearing in a civil case or criminal case. With evidence taking in an arbitration and with evidence taken for preservation of proof, it should be required that the person shall testify where he resides and not in a distant court by the application of a legal analogy which would make the protection against distant hearings illusory.

According to the Arbitration Act, sec. 15 par. 2, a party shall include in his application the requisite information for the conduct of the hearing. As a rule no questions will be asked by the court at the hearing which can be explained by the hearing is not often conducted by an experienced judge, but by one of the younger judges. The conduct of the hearing is delegated completely to the parties. Often the arbitral dispute is so complicated that the court hardly has the possibility to ask questions.[36]

In the application a party can state when he considers that the hearing should take place. Generally, this matter should be settled with the court informally, e.g., through telephone calls. The hearing with different persons should occur the same day or week with the court and the party has to state a day or days which are suitable for all of the persons who shall testify.

A party can suggest in his application in which order the persons shall testify and the length of time the court should reserve for each witness's testimony. This can be especially significant if the hearing shall go on for several days. A party should further state if a person shall testify as a party, a third party witness, or an expert. The issue has special importance when an executive for a company shall testify. It must then be previously clarified if this is a legal representative and shall be heard under a truth affirmation. In contrast to what is applicable when a person belonging to the management is a third party witness, a legal representative has the right to be present during all of the hearings. Cf., Code of Procedure chap.36 sec. 9 par. 1 and chap. 37 sec. 3 par. 1. It can then be appropriate that the legal representative testify first and the other witnesses thereafter. If both parties request that the witnesses shall be present during all of the hearings so that they can comment on what the others have said, then this should be allowed. The provisions of the Code of Procedure chap.36 sec. 9 par. 2, allow such a hearing procedure, when special reason exist. With consideration that the court hearing shall occur for the purpose of an arbitration, the court should apply the provisions

[36]Cf. Maeland 157 (1988).

in a manner which allows the principle of party autonomy to influence the proceedings.[37]

Before the court submits the application to the opposing party for comment, it should determine if the applicant should complement his application. Act on the Handling of Judicial Matters sec. 3. If the permission from the arbitrators is lacking, the applicant should be requested to submit a statement which shows that the arbitrators have consented to the evidence taking. If the theme of the evidence is unclear then the applicant should be requested to clarify it. If the application fee has not been paid then the applicant should be instructed to pay it or otherwise the application should be dismissed. Id., sec. 3 par. 2. The court should deliver the applicant's petition to the opposing party prior to making its decision in the matter. The opposing party should have the opportunity to raise any objections to the proposed evidence taking and can bring up any requests regarding how the hearing should be conducted. When it applies to practical questions on the time and place, it can be simpler for the court to solve them through telephone conversations. The court should arrange the procedure quickly with consideration that the arbitral award must be made within a certain time period. The time limits for submitting responses should therefore be strictly limited.

After the opposing party of the applicant has commented upon the application, the court shall specially determine whether there exists any legal obstacles to the evidence taking. There can be justification for allowing the opposing party to make a response on the issue. If a valid arbitration agreement does not exist, the court should settle this issue within the framework of this inquiry. There can only be a summary proceeding as is the case when the court must determine if any obstacles exist for appointing an arbitrator in regard to the situation where the parties do not have a valid arbitration contract.[38] As a rule the problem only arises when the arbitration contract is not in writing. Generally the arbitrators try the issue concerning the validity of the arbitration agreement and the issue of whether the theme of the evidence is within the framework of the arbitration contract and the submission to arbitration. If the documents in the matter indicate that the hearing concerns a certain theme that should not be allowed, then the court can address the issue.

In a case a party made a set-off defense in the arbitration and the party in connection with his application for evidence taking became doubtful if the defense could be tried without a new submission to arbitration being made.[39] A conditional request for arbitration as to the set-off claim means that the

[37]Cf. Hagberg, 2 Swedish and International Arbitration 35 (1982) and SOU 1938: 44 p. 395 and Craig, Park and Paulsson 25.02. vii (1984).

[38]Cf. Skiljeförfarande, Hassler 135-6 (1966), Schütze, Tscherning und Wais, Handbuch des Schiedsverfahrens 242 (1985) and Maeland 158 (1988).

[39]Basta Byggnads- och armeringsstål AB v. Stena Stål AB (Stockholms tingsrätt Ä 871/85).

court must determine if the appointed arbitrators can try this defense without a new arbitration being commenced. If a new submission to arbitration is required, perhaps other arbitrators will be appointed and then they must give their consent to the evidence taking. If a set-off defense is made and the other party consents to it being tried by the appointed arbitrators, then there is no obstacle for the court to arrange the evidence taking.

Before the court allows the hearing to occur, it should try the issue whether any obstacles exist according to the provisions contained in the Code of Procedure concerning evidentiary matters. The application is not invalid if it arises that the hearing shall concern trade secrets. Often it is appropriate to decide this issue not until the parties and the holder of the document have commented on the issue at the session. If, for example, a witness alleges before the court that the hearing concerns a trade secret, it can be imagined that the party seeking the information will oppose this and plead factual and legal arguments in support of the proposition that the witness should not be allowed to withhold the information. If the witness gives incorrect information to support his claim for the right to refuse to testify, he may be liable for perjury provided that he has given his testimony under oath. He can also be penalized if he conceals important circumstances known to him which indicate that he should testify.[40]

The court shall not investigate if the court hearing is needed as stated in the arbitrators' permission. This judgement is to be made by the arbitrators alone.[41] If the need for the evidence taking should be eliminated on the basis of admissions which were made later or amendements to the claims to be arbitated, perhaps it is possible for the arbitrators to cancel their permission before the hearing has occurred. The decision in this procedural issue is not considered to have force of law and from this point of view the arbitrators should be able to cancel their permission. The court should, however, not refuse to hold a hearing with regard to the changed situation which has been commenced after the arbitrators have given their permission and the court has decided on the evidence taking.

Sometimes the applicant or both parties request that the evidence taking shall be held at an attorney's office or in another location which is not open to the public. The court can not grant such a request. The reason for this is that a proceeding pursuant to the Code of Procedure chap. 5 sec. 1, shall be public. This applies even in proceedings for the taking of evidence outside of a main hearing and for the perpetuation of proof for the future.[42] Certainly there is a possibility to hear a person who is very sick at the hospital[43],

[40] SOU 1938:44 p. 394-5.
[41] Schütze, Tscherning and Wais 242 (1985), Maeland 158 (1988), ICCA Congress Series No 2, UNCITRAL's Project for Model Law on International Commercial Arbitration 95 (1984).
[42] SOU 1938:44 p. 109.
[43] Prop. 1986/87:89 p. 181.

but a hearing in a private location cannot be allowed. Otherwise the general public and the press can not observe the administration of justice and examine how the proceedings are conducted. The principle of public access to official records must be upheld even in a court hearing conducted in support of an arbitral proceeding.[44] It has arisen in practice that the court allows a proceeding to be held in a private location as a part of the arbitral final hearing.[45] This procedure can not be accepted without a change in the law. The arbitrators instead may be present in court when the evidence is taken and then hold a private hearing in the remaining parts of the case in a nearby private location.

11 The Proceeding for the Evidence Taking

After a party's application has been sent to the opposing party for his comments, the court as a rule does not make a special decision that the evidence taking shall occur. If such a special decision has been made in an written order[46], for example in a complex matter, it is probable that the decision is considered to have such final character[47], which is required for it to be appealable, pursuant to the Act on the Handling of Judicial Matters sec. 9. As a rule, the court's permission is only expressed through an issued summons. The decision can then not be appealed pursuant to the Act on the Handling of Judicial Matters sec. 9. However, it is possible that the opposing party without some time limitations can appeal such a decision in the evidentiary matter[48], in reliance upon the Code of Procedure chap. 49 sec. 6, that is to say, with reference to the case being unnecessarily held up by the court's decision.[49] It is doubtful if this rule is applicable when the party only asserts that arbitral proceedings will be unduly delayed, and not court proceedings. If the decision is appealable, the Court of Appeal cannot, as the district court cannot, refuse to allow the evidence taking on the basis that this is unnecessary and that it will delay the arbitral proceedings.[50] In this respect the court must yeild to the judgement of the arbitrators. With an appeal pursuant to the Code of Procedure chap. 49 sec. 6, the district court should therefore carry out the hearing as decided.[51] Thus, the evidence taking will not be sab-

[44]Cf. prop. 1978/79:88 p. 9 and 1986/87:89 p. 130.
[45]Claes Hierton v. Laila och Ulf af Ekestenstam (Stockholms tingsrätt Ä 315/86) and Basta Byggnads- och armeringsstål AB v. Stena Stål AB (Stockholms tingsrätt 871/85).
[46]Cf. Welamson, Rättegång VI 15 note 4 and 25 note 33 (1978).
[47]Cf. Hassler, Specialprocess 148 (1972).
[48]Welamson, Rättegång VI 25 note 33 (1978).
[49]It is possible that a case may be appealed because a party states,not that the arbitral proceedings will be delayed, but only that the court proceedings regarding evidence taking will be delayed.
[50]See supra at note 41.
[51]SOU 1938:44 p. 228.

otaged or delayed by the applicant's opposing party through a more or less unwarranted appeal pursuant to the Code of Procedure chap. 49 sec. 6. It can be questioned if the law should be changed and a provision included which provides for a prohibition against appeal of the decisions of the district court. Certain other district court decisions are not appealable according to the Arbitration Act sec. 26 par. 3.[52]

The applicant as well as the opposing party shall, according to the Code of Procedure, chap. 35 sec. 9, be summoned to the proceedings for the evidence taking. It is thus not sufficient that the opposing party had earlier responded in the matter and that he will by called to a final hearing by the arbitrators, where the evidence taken before the court shall be presented. Certainly, the court hearing can be conducted according to the Code of Procedure chap. 35 sec. 9, although the party fails to appear, but it is required that the court has summoned the absent party.

The third party witness shall be summoned to appear at the proceedings on threat of fine. Pursuant to the Code of Procedure, chap. 36 sec. 7 par. 2, the summons shall provide required information about the parties and the case together with a brief statement of what the hearing concerns. The theme of the hearing can be described in accordance with what the applicant has submitted. In complicated cases a more concise summary can be made. The information in the summons to the third party witness does not have preclusive legal effect and does not limit the hearing to the factual circumstances indicated in the summons. It is another thing that perhaps a third party witness can not answer questions which he has not had a reason to anticipate and prepare himself for. *The court can, however, according to the Code of Procedure chap. 36 sec. 8 par. 1, instruct the third party witness, before his appearance to testify, to refresh his memory on the subject of his testimony by examining accessible account-books, notes or other documents or by inspecting a place or an object if this can be done without considerable inconvenience to the third party witness.*[53] In complicated arbitration cases it can be advantageous if the third party witness prepares himself in different respects and studies certain documents. However, the court should not issue an order for example, against a witness employed by the opposing party, without the applicant specifically requesting it.

If a third party witness shall testify regarding rather complicated circumstances, the court hearing can be conducted more expeditously if the third-party witness sufficiently prepares himself and drafts a written statement. The court can not order a third party witness to make such a statement (affidavit) and have him confirm the information after going through a supplementary hearing.[54] Even if both parties request such a procedure for the pur-

[52]Cf. 54 NJA II 60-1 (1929), Hassler,Skiljeförfarande 135-6 (1966) and Maeland 158-9 (1988).
[53]Cf. Maeland 158 (1988).
[54]Cf. the Execution Act chap. 4 sec. 14.

pose of simplifying the proceedings, the court can not deviate from the Code of Procedure's mandatory provisions. The limitations of the court's evidence taking authority is premised upon the principle that party autonomy can not dominate when a witness hearing is being held before the district court in support of an arbitral proceeding. The principle of orality in civil cases has to be upheld, which means that persons shall be examined in court and that affidavits are in principle not allowed.

In the summons the third party witness shall, among other things, be given notice that the witness has the right to receive in advance compensation for his travelling and living expenses. Code of Procedure chap. 36 sec. 24 and 25. Upon the claim of a third party witness or another person who shall testify, the court can, through an enforceable and appealable decision, order the applicant to pay compensation for the appearance costs.[55]

The court does not need to call the arbitrators to the hearing. It can occur that they are present at the hearing. They should then clarify for the parties if the oral evidence shall be considered substantive evidence or if only the transcripts shall be the basis for their award. There is no rule which allows the arbitrators to question the witnesses.[56] However, the arbitrators should be able to ask questions to the witnesses after the parties have concluded their examinations of the witnesses. Another point, is that the arbitrators at such a hearing, as with other meetings, should be careful in utilizing the right to question the witness so that they do not give the impression of having favored a party.

It can arise that *a party or both parties indicate their willingness at the court hearing to undertake the responsibility for a matter which must be taken care of by the court*, but which is in arbitral proceedings of such a type that the arbitrators can allow the parties to take care of it. In one case, the district court indicated in the minutes of the proceedings, that the parties had agreed to arrange for a tape recording and transcription of the witnesses' testimony and to have it delivered to the arbitrators within one week.[57] Such an arrangement *does not abrogate the court's obligation to have the testimony recorded in the phonetic manner and upon a party's request have the transcript provided pursuant to the prescribed fee*. Cf., Code of Procedure chap. 6 sec. 6 and 9. There is nothing which prevents the parties from arranging a tape recording in addition to the phonetic record which the court must make arrangements for.[58] If a party or both parties arrange a tape recording and transcription of the testimony, it can be imagined that a party considers that the testimony was recorded incorrectly or incompletely on the basis of a tech-

[55]SOU 1938:44 p. 385. Cf. concerning questioning of witnesses before the arbitrators Hassler, Skiljeförfarande 96 note 3 (1966) and Bolding, 43 SvJT 75 (1958).
[56]Cf. Schütze, Tscherning und Wais 243 (1985).
[57]Ogilvy & Mather Group AB v. Eva Nockhauff AB (Stockholms tingsrätt Ä 6-474-87).
[58]Prop.1979/80:87 p. 8-11.

nical fault or other reason. The court must then be able to furnish the party and the arbitrators with correct evidence. Furthermore, it is always the court which has the responsibility for ensuring that the testimony is properly documented.

In one international arbitration case, a party submitted a document to the court stating that an interpreter would be provided through the arbitrators or the parties' arrangements.[59] However, the court has the responsibility to ensure that a competent interpreter is engaged. A criminal case demonstrates that it can be judicial error to depend upon an interpreter who lacks sufficient qualifications and an erroneous translation can constitute grounds for ordering a new trial.[60] In a court hearing conducted in support of an arbitral proceeding, the court must ensure that the interpreter has the requisite qualifications. This must be arranged in the manner set out in the Code of Procedure chap. 5 sec. 6 par. 2. An arbrital award can not be set aside on the basis of an erroneous translation, since the provisions on new trials can not be applied by analogy.[61] It is therefore of importance that the court ensures that a competent interpreter is appointed. According to the Ombudsman (justitie ombudsmannen), it is an integral part of the court's duty to conduct the proceedings to make certain that the interpretation is properly accomplished.[62] An arbitral award should only be challenged pursuant to the Arbitration Act, sec. 21 par. 1 pt. 4, if the court approved a clearly incompetent interpreter or failed to intervene to prevent a serious mistake.

Even upon the parties' joint request, the court can not allow a hearing to be conducted in one or more foreign languages without a translation being made to Swedish.[63] The procedure in an international arbitral dispute can become complicated if an interpreter must be participating in the court hearing. The principle of party autonomy can not be adhered to by the Swedish court as concerns the parties' agreement relating to the choice of language.

12 Court Evidentiary Hearings Involving Nonresident Witnesses

If a person who lives abroad indicates that he is prepared to voluntarily appear before a certain Swedish court, then it is clear that the hearing can be conducted. However, the court should consider if the person shall be called without the threat of fine.[64]

[59]Neste Oy v. Lonza S.A. (Stockholms tingsrätt Ä 6-206-88). Eighteen person were to be questioned before the court.
[60]Public prosecutor v. Petros Makrigiannis (NJA 1974 p. 221) and Welamson, 67 SvJT 175 (1982).
[61]See supra case mentioned in note 11.
[62]JO 1968 p. 48.
[63]Ekelöf, Rättegång I 130-1 (1980).
[64]Prop. 1983/84:78 p. 59-60.

If a person is not willing to appear before an arbitral tribunal in Sweden, the question arises if a party can compel an appearance before a foreign court. A possibility can be that a type of two step procedure could be resorted to: on the party's request the Swedish court decides about the evidence taking by a foreign court in accordance with arbitrators' permission, after which the foreign court determines whether any legal obstacles exist which prevent the evidence taking. According to the Law on Evidence Taking By a Foreign Court, sec. 1, the court may order that the taking of evidence through witnesses, experts inspections, or parties being heard under truth affirmation or written evidence may be conducted by a foreign court. A prerequisite for this is that the court's order is given "in a case or matter which is pending before the Swedish court". The text is chiefly directed towards that the substantive issue in dispute shall be pending at the court. An arbitral dispute is not being heard by a Swedish court. Thus, the court can not therefore order the evidence taking to be conducted by a foreign court. A party therefore has to investigate whether the evidence taking can be accomplished by directly addressing the foreign court and there obtain permission for the evidence taking in support of the arbitral proceedings being conducted in Sweden.[65]

With the arbitrators' permission, the court hearing can take place with witnesses which are residing in Sweden, according to the Arbitration Act sec. 15 par. 2. This can happen independent of whether the arbitral proceedings are being conducted in Sweden or another country, according to the Swedish Act Concerning Foreign Arbitration Agreements and Awards sec. 4 and 12.[66] The provisions in the Code of Procedure, chap. 41, on the taking of evidence for the perpetuation of proof for the future are not applicable if the arbitral proceedings have commenced.[67] However, evidence taking pursuant to chap. 41 sec. 1, may be compelled as to a person domiciled in Sweden if the procedure is utilized prior to the commencement of arbitration. It requires, however, that a risk exists that the evidence may be lost or only with difficulty could otherwise be obtained. (See infra. p. 117).

13 Reform Issues

Many practical problems can arise in an arbitration when court witness hearings must be conducted which involve several witnesses. The proceedings can be delayed if the witnesses will be heard by different district courts. Sev-

[65] Fisher-Zernin and Junker, 4 J. Int. Arb. No. 2 28-9 (1987), Schütze, Tscherning und Wais 327-8 (1985) and Maeland 159 (1988).

[66] 54 NJA II 88-9 and 98 (1929), Arbitration in Sweden 119 (1984) and ICCA Congress Series No 2 95 (1984).

[67] JO 1953 p. 42 et seq. Cf. Hassler,Skiljeförfarande 97 note 7 (1966).

eral practical problems could be solved if the arbitrators had the right to hear third party witnesses and other witnesses under oath.[68] Such a system should be able to function in Sweden. However, one of the arbitrators should be a legally trained judge or attorney to allow the administration of an oath to occur. If the arbitrators are only non attorneys, for example, engineers, then adequate safeguards may be lacking to ensure that the hearing is conducted pursuant to the provisions of Chapter 36 of the Code of Procedure, some of which are important in light of the sanctions for perjury. Therefore, one also must retain the provisions of the Arbitration Act, sec. 15 par. 2, regarding court hearings. For these cases a rule should be introduced which requires the district court to call the arbitrators to the hearing when the witness shall testify. Furthermore, the arbitrators should be given the express right to ask the witness questions. One should take into consideration if perhaps the witness should be able to be ordered to appear at one certain district court (where one or the other party has his residence or where the arbitral proceedings are taking place) regardless of where the witness resides. With todays modern communications one should, likewise in a civil dispute, be able to demand that the witness appear at a distant situated district court, among other things with consideration of the witness's right to compensation and an advance for costs. It is doubtful if the proceedings should be able to occur in camera. In any case, this issue should be considered in a large context, when one should analyze whether other court matters related to an arbitration should be capable of being decided without some publicity.

[68]Mustill and Boyd, The Law and Practice of Commercial Arbitration in England 351-2 (1989) and Craig, Park and Paulsson, 25.01 (1984).

Discovery*

1 Introduction

When a large and complicated arbitral dispute arises, one of the parties to the contract can need at an early stage to obtain access to different documents which are in the possession of the opposing party or a third party. A party may desire to have the possibility to review the correspondence and other documents in order to decide if he should commence an arbitration and to determine which claims and grounds which he should present in an eventual dispute. If he is very familar with the factual circumstances, perhaps he is able to draft his claims without obtaining prior documentation from the opposing party, but he may later need to obtain invoices, correspondence, and other similar documentary evidentiary material in order to support his claims.

Often the opposing party and third parties are unwilling to produce documents which reveal information regarding internal business matters and client relationships. Then the issue arises as to under which conditions the party to a contract can compel the opposing party and third parties to produce the documents and which convincing objections can be raised to safeguard different interests. The answer to this question can often be decisive for the outcome of the dispute or for a party's readiness to commence an arbitration.

Within the civil law countries, to which Sweden is considered to belong, there often exists *different limitations on a party's right to compel the production of different documents*.[1] From Swedish judicial practice it might be concluded that the restrictive attitude is explained by the principle that a party cannot obtain a more or less unlimited view into the opposing party's affairs without substantial justification. The limitations can be manifested in the requirement that the documents be identified, that their evidentiary value or relevance to the case be sufficiently related to the stated grounds, and the requirement that the requesting party beforehand shall have made his substantive claims more or less likely.

Swedish law is based upon the general concept that evidence taking cannot occur at the pre-trial stage (preparatory stage), but rather should occur at the main hearing when the grounds and objections have become known and the court has thoroughly reviewed in what manner the proof is unnecessary because of admissions and stipulations which were made. Certain possi-

*Printed in 1 JT 233–69 (1989-90).

[1]Ekelöf, Rättegång IV 179 (1982) och Heuman 1 JT 6-36 (1989-90).

bilities to preserve evidence prior to commencing a dispute exist, however, according to the Code of Procedure, chap. 41.

In common law countries often a party can, at an earlier stage, have an almost unlimited access to the opposing party's documents. The purpose of the discovery system is that the parties shall have access to the written materials in order to investigate their claims and defenses and to further develop them, in part because a party may initiate litigation on rather broad and vague claims. In order to guarantee to the largest possible extent that the outcome of the case is correct, it is considered important that the parties and others are forced to produce complete written evidentiary material. One may also want to prevent a party from with holding important material prior to the commencement of proceedings: trial by ambush is a procedural tactic which one attempts to avoid.[2]

In an international arbitration between parties, which are from a civil and a common law country, there is a need to bridge the built in contrasts between restrictive and extensive access to the opposing party's and third parties' documents. According to the Arbitration Act sec. 15, the arbitrators have a less defined right, first, to request parties or third parties to produce documents, and second, to give their permission for a party to request the district court to issue a subpoena ducas tecum. (This essay is concerned with the discovery of documents, and accordingly the discussion is concerned with subpoenas ducas tecum - subpoenas for documents – however, for convenience, hereinafter the term "subpoena" will be used with the meaning that it refers to subpoenas ducas tecum.) The arbitrators cannot use means of compulsion for the purpose of sanctioning an order. With regard to this, the party has the right to obtain a santionable subpoena at the district court, but only if the arbitrators have found it to be needed.

One can question if the court only can issue a discovery order with the limitations which are valid for ordinary civil cases. Issues regarding subpoenas shall be determined by the courts according to the provisions in Chapter 38 of the Procedural Code in civil cases as well as in arbitration cases. However, it is possible that the order can be issued by the courts to a considerably larger extent in connection with arbitrations than in connection with civil suits. The reason for this is that the arbitrators can judge the issue of the need and appropriateness of the subpoena more freely and this judgement should be respected by the court in the matter when the arbitrators give extensive permission for a party to obtain a subpoena from the court. In this way the arbitrators can overcome the differences in an international arbitration between civil law countries' concepts and common law countries' far-reaching possibilities to allow discovery. A solution of compromise can also be chosen. In a Swedish dispute the arbitrators perhaps can adopt the Swe-

[2]Mustill and Boyd, The Law and Pratice of Commercial Arbitration in England 322-26 (1989).

dish restrictive court practice, but also allow a more extensive review of the opposing party's business documents, if this is justified by the type of dispute or specific legal arbitration considerations. The following examination will demonstrate if the arbitrators' determination of the need for discovery gives them sufficient opportunities to bind the courts with a restrictive or extensive application of the provisions relating to subpoenas. It is important that the courts' strict legal procedures do not deprive the arbitrators of the possibilities of flexible solutions for issues involving the evidence taking.

In certain respects, conformity exists between the different legal systems with regard to the concept of priviledge. It is generally considered that a party should not be compelled to reveal trade secrets or to produce correspondence with his attorney which concerns the dispute. However, there may also exist certain differences. The concept of trade secrets can be given a more or less extensive definition. It shall be examined if the Swedish civil procedural legal concepts must pervade the proceedings concerning questions of subpoenas in arbitral matters.

The legislative history to the Arbitration Act sec. 15 par. 2, includes certain statements which illustrate in what way a hearing on subpoena issues involved in an arbitral matter are strictly controlled by the Code of Procedure's provisions in chap. 38. The provisions on evidence taking in the Arbitration Act sec. 15, par. 2, were modified when the new Code of Procedure came into effect. The legislative history states that the provisions in the Code of Procedure chap. 38 are applicable if a party makes a request to the court to order someone to furnish written documents. Pursuant to the legislative history, whether such an obligation exists should be judged according to the same principles which shall be applied if the dispute was a matter before the court.[3] It is not explicitly expressed that the Code of Procedure chap. 38 shall be strictly applied. The issues regarding subpoenas need not be resolved in the same way in both arbitration and litigation. The mentioned statements in the legislative history are not entirely clear regarding the issue if the obligation to apply the Code of Procedure chap. 38 or the underlying principles are applicable to the arbitrators' determination regarding the issue of permission for the evidence taking as well as the court's determination of the issue of whether the subpoena should be given.

In Swedish procedural law one must distinguish between procedural discovery, substantive discovery and an order to perpetuate proof for the future. *Procedural discovery* may only be required after litigation is initiated. The main rule concerning this type of evidence taking in the Code of Procedure chap. 38 sec. 2 par. 1 reads as follows: "Anyone possessing a document that can be assumed to be of significance as proof is obliged to produce it; however, in criminal cases, such an obligation is not imposed upon the sus-

[3]SOU 1944:10 p. 440-1.

pect or any person related to him as stated in chapter 36 sec. 3."

A party may also be entitled to obtain a document from another person due to a *contractual obligation or a legal relationship established between the parties,* e.g., because the claimant is the owner of the document handed over to somebody else as an auditor. In this essay on arbitration only a contractual obligation to produce a document is of importance. The applicable rule in the Code of Procedure chap. 38 sec. 3 provides: "If a possessor of a document, based upon a legal relationship between himself and a party, or as otherwise prescribed by the law, is obliged to surrender the document or to allow another to inspect it, this obligation shall apply also to the production of the document in a pending action." This rule, however, does not prevent a party from filing an action in order to obtain the document without any connection to a dispute.

Finally, discovery may refer to a situation when a person or a company which is not involved in a dispute wants to *perpetuate proof for the future.* The Code of Procedure, chap. 41 sec. 1, which is applicable to witnesses or other types of proof, provides: "If there is a risk that proof concerning a circumstance of significance to a person's legal right may be lost, or difficult to obtain, and no action concerning the right is pending, a lower court may take and perpetuate for the future proof in the form of witness testimony, expert opinions, views, or documentary evidence. However, proof may not be taken pursuant to this chapter for the purpose of investigation a crime."

The following examination shall first deal with the issue regarding whether a party can obtain from a court a subpoena prior to the commencement of an arbitration. Thereafter, this essay shall analyze the ways in which the arbitrators during the proceedings may issue an unsanctionable order to parties and third persons to produce documents. Further, it shall discuss a party's right, with the arbitrators' consent, to obtain an enforceable decision on the obligation to produce documents. Then a special problem will be dealt with concerning discovery based upon a right to obtain documents which is granted in a contract which contains an arbitral clause. In closing, there shall be an analysis of whether a party can be ordered or compelled to produce an arbitral award to someone who is a party in another civil or arbitral case.

The following discussion concerns primarily the issue regarding the interpretation and application of the provisions of the Arbitration Act sec. 15. The provisions of the first paragraph regulate the issue regarding the arbitrators' right to make arrangements for evidence taking on their own initative. The second paragraph states the prerequisites for seeking a court order.

"Unless the parties otherwise provide, the arbitrators may take steps in order to promote the investigation of the matter, such as summoning a party or an expert or any other person to attend for examination, or call upon a party in

possession of a written document or other object, which may be assumed to have significance as evidence, to produce the document or object. The arbitrators may not make orders on penalty of a fine, nor use other means of constraint, nor may they administer oaths or truth affirmations."

"If a party wishes that a witness or an expert should be heard in court or that a party should be examined there on truth affirmation or that an order should be made for a party or any other person to produce as evidence a written document or an object, he shall apply to the District court in whose area the person is present who is to be heard or is otherwise affected. If the arbitrators have considered the procedure needed, and if the requisite information is made available, the court shall arrange for the examination or issue an order, provided that there is no legal obstacle to such procedure. The rules on evidence taken otherwise than at the trial in an ordinary action, shall to the extent relevant, apply to the procedures referred to above."

2 Court Ordered Preservation of Evidence

If there is a risk that proof concerning facts which are significant to a person's legal rights may be lost or difficult to obtain and no action concerning the rights is pending, a lower court may take and perpetuate for the future proof in the form of witness testimony, expert opinions, views, or documentary evidence. According to this provision in the Code of Procedure chap. 41 sec. 1, such evidence can be taken provided that there is no action pending which concerns the same legal rights. *This provision cannot be applied if an arbitration has been commenced.*[4]

A party in an arbitration cannot circumvent the provisions of the Arbitration Act, sec. 15 par. 2 and have the court order evidence taking without the arbitrators having first determined that the measures were needed. (See infra. for a discussion of said provision.) If the court should allow the preservation of evidence without the opposing party's knowledge, then the court should normally hold the witness hearing or make a determination on the subpoena without hearing the opposing party. It appears from the provisions in the Code of Procedure chap. 41 sec. 3, that special cause must exist for someone other than the applicant to be called to the proceedings for the taking of the evidence. A party in an arbitral proceeding can, of course, not be given the opportunity to eliminate the right to be heard. During the arbitral proceedings a party may seek to circumvent the provisions of the Arbitration Act sec. 15 par. 2, and to arrange evidence taking without the arbitrators' and the opposing party's knowledge. He may do this by pleading that the requested *evidence taking is important for another dispute than that which is*

[4]JO 42-72 (1953) and Hassler, Skiljeförfarande 97 note 7 (1966).

actually involved in the arbitration. The party can, for example, state that he needs to obtain documents from third persons in order to secure proof with regard to a dispute with a person other than the opposing party in the arbitration. If the court suspects that a party has requested evidence taking primarily to strengthen his case in the arbitration, then the court should investigate this and reject the application if the suspicion proves to be valid.[5]

There is a possibility to preserve evidence prior to the initiation of an arbitration. One can imagine that a party may want to obtain documents from a third party in order to enable him to decide if commencing arbitration is appropriate and to assist him in formulating his claims. The purpose can also be to obtain such information that the party can secure further information from a third person, without the opposing party having knowledge of this and having the possibility to interfere with the proceedings to secure the evidence. A court should, however, only issue a subpoena if the requested *documents are of probative value for the applicant's legal rights* in the meaning that they can prove relevant ultimate facts or evidentiary facts . Thus, the court should not compel someone to produce *documents which can only tend to lead to the discovery of relevant evidentiary documents*.[6] (With the expres-

[5]JO 63, 66 and 70-2 (1953). Cf. SOU 1938:44 p. 426 as to the statement on damages in criminal cases and Ekelöf, Rättegång IV 204 (1982).

[6]Heuman 1 JT 25 (1989-90). It is reasonable to interpret the expression "proof concerning a circumstance of significance to a person's legal right" in the Code of Procedure chap. 41 sec. 1 in the same way as the expression "written documents, which can be assumed to be of significance as proof" in the Code of Procedure chap. 38 sec. 2. It would be unreasonable if a person before a litigation, but not after a claim has been raised, would be able to obtain a subpoena concerning documents which only gave information as to how evidentiary relevant documents could be traced or about how a claim and the grounds thereto should be formed, without the documents having evidentiary significance. In the below referred to case, Svante Björk, (NJA 1971 p. 521), the Supreme Court, however, stated that a person's interest in obtaining proof for support of his position to determine 1)*whether he has justification for raising a claim* or 2) *which claims in such a case he should present* cannot be met through evidence taken for perpetuation of proof in the future, if there does not exist a risk that the evidence concerning facts, which are of significance for someone's legal rights, in the future shall be lost or may only be obtained with difficulty. At first glance, one may get the impression that a subpoena concerning these documents would be able to be granted if the requirement of a risk were fulfilled. However, the requirement of a risk means a qualifying of documents referred to in the two items mentioned above; the existing evidence affected by the risk shall not merely give general information about whether a claim should be brought or which claims should be presented. The danger shall concern "evidence concerning facts which are of significance for a person's legal rights", which probably relates to documents with evidentiary relevance. Further, it can be said that documents which can be utilized for the position of whether a claim will be brought often concerns just documents with evidentiary relevance and not other documents which can give information about the existence of evidentiary relevant documents. If a document can give information about which claims can be presented, then it also can be thought to concern merely relevant documents. By the case of Linda Margareta v. Vingresor/Club 33 AB, (NJA 1982 p. 650) and PAB Parkeringskontroll AB v. Inter Rent Biluthyrning AB, (NJA 1984 p. 47) it is evident that requests for subpoenas for establishing a party's identity cannot be allowed if the documents do not also have evidentiary significance for a future dispute. It follows that documents of significance for the issue of whether the claim should be brought and the issue of how the claims and grounds therefore shall be formed can only be the object of a subpoena according to the Code of Procedure chap. 41 sec. 1, provided the documents also can have evidentiary significance in a future civil case.

sions of "evidentiary relevant documents" or "documents having probative value" or "documents having evidentiary significance", it is considered to be documents which have evidentiary value regarding the cause(s) of action, grounds thereto, defenses, and the presented evidence in the case.) However, a Supreme Court case indicates that the applicant has a very low burden of proof with regard to the requirement that the documents will include information of evidentiary significance. The above cited distinction between documents with and without evidentiary value cannot then be maintained in practice. In a paternity case a request for a subpoena was sustained since it "could not be excluded" that the documents could be of some significance for the applicant's legal rights.[7] This extremely low requirement of the probative value or the absence of such a requirement may be explained by the type of case which was involved. It may also be justified because the applicant generally must have had difficulty in demonstrating the significance of the evidence in proceedings to preserve the evidence as compared to an already commenced civil case where the issues are specified in the summons application and in the defendant's answer and through the parties' statements in the pre-trial matters.

Although the possibility to obtain subpoenas for preserving evidence is hardly substantially limited by the requirement that the evidence have probative value, it is limited to a large extent by the requirement of a risk of difficulty to obtain the evidence. The following case illustrates that the evidence taking may only occur, acccording to the Code of Procedure chap. 41 sec. 1, if there exists a risk that the evidence shall be lost or only could be obtained with difficulty.

Svante Björk v. HSB i Kungsbacka Bostadsrättsförening, (NJA 1971 p. 521). Pursuant to a contract, HSB was obligated to provide a house for the account of Björk. HSB contracted with a builder to construct the house. Björk requested that the district court, by virtue of the Code of Procedure chap. 41 sec. 1, order HSB to produce the building contract and the invoices which the contractor had issued for the work performed outside of the contract. Björk wanted to obtain the documents in order to clarify if the purchase money had exceeded HSB's own costs. If this was the case, he intended to bring a claim against HSB. Björk considered that the building contract was of essential significance for a clarification of whether the purchase money had exceeded the costs.

Before the Supreme Court, HSB stated that the documents would be filed in a safe manner with HSB and the contractor for a long period of time and at least during such time as the Bookkeeping Act prescribes. HSB considered that the risk of the documents being destroyed, for example by fire, was particularily low. Further, HSB maintained that Björk could submit the dispute to arbitration. HSB contested the undue intrusion into its documents which were later filed in a bank.

Björk alleged that the legal requirement of the risk that the documents might be destroyed was very low. Further, he considered himself to be in a weaker position than HSB from an economic standpoint. Therefore, he asserted that it was important that he be able to determine whether it was advisable to bring a claim. He stated that this was even more important since the arbitral clause in the contract would lead to

[7]Linda Margareta v. Vingresor Club/33 AB (NJA 1982 p. 650).

a more expensive dispute resolution process than would court proceedings. If the arbitrators later would determine an issue of discovery pursuant to the Arbitration Act, sec. 15, he considered that HSB would make such objections which could result in a loss of time and a danger that the documents would be destroyed.

The Supreme Court stated that a person's interest in obtaining evidence to determine whether he has a basis for bringing a claim or which claims in such a case he should bring, cannot be met through statutory provisions relating to preservation of evidence unless there exists a risk that the evidence concerns facts, which are of importance for someone's legal rights, and may be lost or only with difficulty will be able to be obtained. The Supreme Court found that it was not alleged that Björk would be obliged to postpone bringing his claim for a long time. Further, the Supreme Court considered that no special circumstances were presented which were of a nature which meant an actual risk that the documents in question would be destroyed or lost or that Björk's possibility to present them as evidence in the court case or the arbitral proceedings was not frustrated or made worse . The Supreme Court further stated that Björk therefore could not be considered to have reason to assert that such a risk existed as is required in the Code of Procedure chap. 41 sec. 1. The Supreme Court added that depositing of the documents in the bank in any case did not lessen Björk's possibility to use the documents in the above stated way.

This case indicates that prior to a future arbitration, a party cannot obtain the production of documents from an opposing party with less stringent requirements than what is required before the court. A reason for less stringent requirements is a party's special interest in avoiding an unnecessary arbitration and the high costs which are incurred as arbitrators' fees. Neither can a party obtain documents more easily because the parties have an interest in an expedited proceeding and a completion of the dispute before the time period for the making of the award has expired. The set out requirements in chapter 41 section 1 of the Code of Procedure do not allow for the consideration of these factors alone, although they may be otherwise important.[8] It is incumbent upon the applicant to present the evidence which demonstrates that the requested documents will be destroyed or will be lost before the applicant can initiate an arbitration. A theoretical possibility, but a slight risk, that the documents will disappear is not, according to this case, a sufficient basis for obtaining a subpoena.[9]

The applicant can improve his possibilities to obtain a subpoena in several ways. He can establish different factors which make it difficult for him to commence arbitration within the immediate future.[10] He can assert that gathering of other material, for example, foreign documents and analysis of them, can take such a long time that the requested documents can then become lost or difficult to trace. He can also try to show that the opposing party can without penalty destroy the documents and that this constitutes a circumstance which can contribute to the existence of a risk that the evidence

[8]Cf. Ekelöf, Rättegång IV 203 (1982) and Welamson 62 SvJT 37 (1977).
[9]Ekelöf, Rättegång IV 202 (1982).
[10]Cf. Skandinaviska Enskilda Banken v. Åke B (NJA 1982 p. 372) and Linda Margareta v. Vingresor Club/33 AB (NJA 1982 p. 650).

will be destroyed. Although the Board of Accountants' regulations impose the obligation to retain bookkeeping material for ten years,[11] there are exceptions which can make it possible that certain documents can be removed. In other cases it can be imagined that the documents can be lost or misplaced during storage.[12] The time consuming and complicated work for the party obliged to produce documents to sort through them some years later to produce the relevant documents, can mean such a delay of the award of a future arbitration that the presentation of proof can only with difficulty be accomplished within the time period for making the award. The applicant must, however, also demonstrate that he cannot commence the arbitration within a certain time and that relevant documents then will be difficult to obtain. In this situation an opposing party can find it necessary to deposit the documents in the bank for the purpose of preventing the issuance of a subpoena.

In certain cases deposits perhaps may be advantageous to the applicant, even if his request for a subpoena becomes moot. If he does not need the documents to be able to formulate his claims and grounds in a future arbitration, then he can beforehand force the opposing party to assemble a quantity of different documents which are spread out between different departments or employees and cause the opposing party to deposit them with a third person, for example, a bank. Such forced depositing of documents can also be useful when the opposing party is a large company, which for business reasons wants to let possession of the documents pass to a subsidiary or purchaser in the future. If the parent company has not initially deposited the documents, then the party who seeks to subpoena the documents in the future may find it difficult to discover which legal entity has possession of the documents. An obvious risk that the gathering of documents shall be impaired in the future and that the depositing of the collected documents shall not happen within a short time, can justify the issuance of a subpoena for the preservation of the evidence. As a valid principal rule, however, a party cannot compel the opposing party to produce documents according to the Code of Procedure chap. 41 sec. 1, with regard to an imminent arbitration.

It is in practice simpler for a party to obtain permission for oral evidence taking according to the Code of Procedure chap. 41 than to obtain the issuance of a subpoena. This is because the applicant can more easily demonstrate that the requirement of "risk" is fulfilled when requesting that a witness testify before the court. The risk is considered to exist if it is possible that the evidence can only be obtained with difficulty in the future.[13] Such can be the case if it can be feared that a witness may forget important facts

[11]Bokföringsnämndens praxis 1976-1986 41 (1987).

[12]Cf. on one hand Linda Margareta and the objection of the company made before the Court of Appeal and on the other hand PAB Parkeringskontroll AB v.Inter Rent Biluthyrning AB (NJA 1984 p. 47).

[13]Ekelöf, Rättegång IV 202 (1982).

or in the future may have difficulty describing exact details in a course of events which can have decisive significance in a future dispute. The content of a document cannot for such reasons be changed or lost. If in regard to the requirement of "risk", a party realizes that he cannot successfully obtain a subpoena against a company, perhaps he can convince the court to order witness hearings with the empolyees for the purpose of obtaining information regarding which documents may exist and information regarding their contents. The court should allow such a hearing regarding documents for the purpose of *identifying* evidentiary relevant documents which are in storage, since the oral testimony cannot be replaced with a later issued subpoena. A party may not be able to later produce a sufficiently detailed request for a subpoena if the witnesses can no longer remember which relevant documents exist. Therefore it may not be feasible for them to testify at a later hearing arranged in order to make it possible to formulate a sufficiently specified request for production of documents having evidentiary significance. In this situation the documentary hearing should be allowed to preserve evidence for the future even if it is long before a party can initiate an arbitration. (See Heuman 1 JT 16-22 (1989-90) for a discussion on documentary hearings according to the Code of Procedure, chap. 38 sec. 4, based on that rule together with chap. 41 sec. 1.)

3 An Arbitral Order for Production of Documents

3.1 General Considerations Concerning a Request for the Production of Documents

If a party to an arbitration wants to obtain documents from the opposing party or from a third person, he can directly request to have access to them. He can also request the arbitrators to order those who are in possession of the documents to produce them. The arbitrators may not use sanctions against those who refuse to produce the documents, but they may draw evidentiary inferences from this failure to cooperate. It is possible that the arbitrators do not want to attach evidentiary value to such a refusal, if a person failed to produce the documents on a party's informal request. The party's demand may have been made in such an unclear way that the other party did not have a reason to deliver the documents, without having received an unconditional and specific request. If a party cannot persuade the opposing party to voluntarily produce the documents after informal discussions, then it can be important that the party requests the arbitrators to make a written order to the opposing party to produce the requested copies. If the opposing party is unwilling to give up the documents after an informal discussion with the other party, sometimes he can decide to present them after the arbitra-

tors have ordered him to produce the documents to the other party. This is due to the risk that otherwise negative probative value will be attached to his failure to comply with an order.

If a party or a third person refuses to produce documents, after the arbitrators have ordered the production, the party seeking the documents can obtain a court order compelling the production of the documents which order is enforceble by a penalty of a fine. It is clear in the Arbitration Act sec. 15 par. 1, that the arbitrators themselves cannot use any means of compulsion or penalty and neither can they arrange for testimony to be taken under oath concerning the documents. However, pursuant to the Arbitration Act sec. 15 par. 2, a party can apply to the court for an order compelling a person to make written documents available as evidence.[14] A district court cannot approve such an application if the arbitrators have not "determined that the measures were needed" in the manner which is provided for in the Arbitration Act sec. 15 par. 2. In the following discussion the somewhat simplified terms "permission" and "consent" shall be used to indicate the decision through which the arbitrators determine that the measures were needed. Before a party applies to the court, he should obtain the arbitrators' consent that the measures sought are needed. If the arbitrators give such consent, the possessor of the documents may choose to cooperate in the matter. The party seeking the documents may, however, not be satisfied with an informal representation by the possessor of the documents that he will produce them when he has the time to go through his accounts and correspondence. It can be necessary that the party expeditously apply to the court to pressure the person with the documents and to prevent him from delaying the proceedings.

It was stated above that the arbitrators may not use means of compulsion or sanctions. However, when the arbitrators issue an order to produce documents, they should have the authority to state, on the applicant's request, that the court can order the concerned person to produce the documents with the threat of sanction for a refusal to do so. The arbitrators can also give notice that the court can arrange that the documents be made available with the assistance of the execution authority (kronofogdemyndigheten). C.f., Code of Procedure chap. 38 sec. 5. The arbitrators should only make a reminder regarding the court's right to use means of compulsion if they know beforehand that they will give their permission to the court's assistance. Otherwise such a reminder can be misleading and could bind the arbitrators beforehand in an inappropriate way. It would be a suprise if the arbitrators refused to give their consent to a later made proper application for their permission for the court's assistance. Additionally, perhaps the arbitrators

[14] According to the Arbitration Act an application shall be submitted to the district court in whose area where the possessor of the document is present,i.e. usually where he is domiciled or, when it is a legal entity, where the board has its seat.

would find it difficult to repudiate the statement which they made as a reminder if after a later formal application for their consent they were inclined to consider the court assistance as not needed. From this point of view, arbitrators should not remind the possessor of the document as to the right of the courts to use sanctions, unless the party in his application for the arbitrators' consent has made a special request for such a reminder.

According to the Arbitration Act sec. 15 par. 1, the arbitrators have the ability to obtain proof on their own initiative. According to the Law Council, there is insufficient reason to deny the arbitrators' right to order, without a party's request, those who possess documentary evidence to make it available to the arbitrators, at least not when it is directed to a party. The Law Council considered that the parties could not incur significant expenses through such a measure.[15] This provision and the statements of the Council express an outdated legal concept. Since the new Procedural Code took effect the arbitrators should not now obtain evidence on their own initiative.[16] Such action would also easily be in contradiction to the provisions of section 13 of the Arbitration Act which provides that the arbitrators shall handle the matter impartially. Considering modern complicated arbitrations, one cannot agree with the Law Council's statement that an order to produce documents would not result in significant costs. The expenses and inconvenience which a party can incur are justification for the arbitrators to refrain from issuing a document production order which was not initiated by a party's request and which can therefore be unnecessary. If the arbitrators consider that the documents in question are of great importance, then their absence will have repercussions on the party who was negligent in his presentation of the evidence. The arbitrators should, however, be at liberty to bring up the question of a document production order through their guidance of the proceedings, when they find it is appropriate, for example, in regard to the principle of the best evidence rule. However, it is possible that the arbitrators should restrict their control of the proceedings with regard to the requirement of an impartial handling of the proceedings and the risk that the dispute may become expanded. This should be avoided since one especially strives for an expeditious procedure in arbitrations.

3.2 The Scope of the Document Production Order

When one is determining whether the arbitrators can issue a more extensive document production order than a court can issue through a subpoena, one must take into consideration the provisions of the Arbitration Act sec. 15 par. 2. This allows the court to issue a subpoena which is enforced with sanctions, after the arbitrators have given their permission thereto. One could

[15]54 NJA II 38-9 (1929).
[16]Arbitration in Sweden 117 (1984) and infra p. xx.

think that the arbitrators should not be able to make a more extensive order to a party to produce documents than what the court may order. Such conformity between the arbitrators' and the courts' authority does not exist. In certain respects the arbitrators can order a party to produce documents to greater extent than the court can with a subpoena. This point shall be further developed.

In regards to *the requirement of identification* of the requested documents, *Hagberg* has stated: "It should be observed that it is not sufficient simply to ask for the production of unspecified documents which may be of importance for the case. Each and every document must be identified and specified. This is a disadvantage in comparison with the Anglo-Saxon discovery of documents which has no direct equivalent in Swedish law."[17] *Hagberg* cites no support for his statement. Probably his viewpoint is based upon what *Ekelöf* has stated.[18] In an essay on discovery in civil court proceedings, I have demonstrated that *Ekelöf's* interpretation of a Supreme Court case,[19] does not give support for the position which *Hagberg* has taken. On the contrary, Swedish court practice demonstrates that a party can obtain a subpoena covering different categories of documents, which can be identified with reference to a type of goods, the signature on the document, or sometimes with reference to a more specific evidence theme.[20]

One can wonder whether the arbitrators can issue a document production order which does not fill this relatively low requirement that the documents be identified, for example, when it is considered necessary to obtain access to a more indefinite number of documents. In some cases perhaps the arbitrators would find that it will be misleading to the applicant and the opposing party to make a vague order themselves, when the arbitrators beforehand considered that they would never give their permission for the applicant to obtain the court's assistance, because of the stricter requirements of specification of the documents. There is, however, no absolute legal obstacle to the arbitrators ordering a party or another to produce documents in such an extensive and vague manner as a court would not be able to do because the order would be too indefinite. In order to promote an expeditious procedure the arbitrators may want to refrain from permitting a court subpoena hearing for which the only purpose is to identify which documents have evidentiary relevance. Instead the arbitrators can immediately direct the ordered party to produce more vaguely described documents which have significance to the case. This should be possible if a party can generally understand what the order is directed to. However, limitations must be established for how vague such a document production order can be. If a party does not compre-

[17]Hagberg 2 Swedish and International Arbitration 32 (1982).
[18]Ekelöf, Rättegång IV 179 (1982).
[19]Florence Stephens v. Olof Malmquist and Esaias Westborg (NJA 1959 p. 230).
[20]Heuman 1 JT 12-15 (1989-90).

hend in important considerations which documents are intended, perhaps a future arbitral award can be challenged on the basis that a procedural error has been committed. The applicant can claim that the arbitrators' ambiguous order gave the other party the opportunity to withhold important documents in the arbitration so that the outcome of the case was probably influenced. As a rule, however, a challenge to the award will be unsuccessful since the applicant, according to the Arbitration Act sec. 21 par. 2, would be considered to have consented to the proceedings if he had not expressly protested at the proper time.

It can happen, especially in international arbitration cases with parties from anglo-saxon countries, that a party requests to obtain several different groups of documents which have been specified in the most precise way possible under a very large number of items in a written request which can encompass dozens of pages. If the arbitrators only want to partially grant the request, then it should be done in a clear and unequivocal way. If the arbitrators want, for example, to only order a person to produce directly relevant documents, the request can be relatively easily answered in a precise way through a reference to the different numbered items. It is inappropriate to allow a partially granted order to be expressed in a brief and vague form. Then, the ordered party can not decide with certainty which documents he should produce. The arbitrators in practice rely upon the party to interpret the order without any possibility for supervision by the party seeking the discovery who may lack insight in the document gathering. The applicant can later make a request for an order and maintain either that the arbitrators did not take a position on all of his earlier presented requests or that a new request is presented. If the arbitrators allow the matter to rest undetermined during the entire proceeding without explaining the scope of their vague decision then a procedural error may exist. A challenge to the award can, however, only be successful according to the Arbitration Act sec. 21 par. 1 pt. 4, if a specific and more extensive document production order would have been able to affect the outcome of the case.

The arbitrators may order a party or a third person to produce such *documents which can elucidate the dispute, without having evidentiary significance*. In the Arbitration Act sec. 15 it is stated that the arbitrators may take steps in order to promote the investigation of the matter such as ordering a party or another person, who possesses written documents which can be assumed to be of significance as evidence, to make the documents available. In the statutory provisions it is said by way of introduction that the arbitrators may take steps to promote the investigation of the matter. There is no requirement that the measures must in all respects result in procurring relevant evidence. In the legislative history it is stated that the arbitrators have the right undertake such measures as are called for in the investigation of the matter. This is considered to follow from the principle that the arbitrators

are free to arrange the procedure in the manner which they find suitable to the extent that they are not bound by mandatory provisions of the Act or by the parties' agreements.[21] (Principle that "the arbitrators are the masters of the procedure" and the arbitrators have the right to conduct the dispute in a flexible and discretionary manner.) Even if the arbitrators should not spontaneously procure evidence, the quoted statements from the legislative history can be interpreted such that the arbitrators can order a person to produce documents which are not directly relevant which they have a need to have access to, for example, to understand the background of a complicated matter in an entangled business dispute. The later part of the provisions of sec. 15 par. 1 of the Arbitration Act, which specifically considers production of document orders, means that the arbitrators can only direct someone to produce documents which have evidentiary significance. This, however, is only concerned with a specific example of the general investigation authority of the arbitrators. It can therefore be maintained that the arbitrators' general investigation authority is not reduced through the enumerated available measures. Arbitrators should therefore have the right to order the production of documents which do not have evidentiary significance. In contrast to this, one could object that the enumerated measures would have precedence over the general provision of the arbitrators' right to investigate a case, when interpreting the Act, even if by no means there exists a case where "lex specialis" shall be given priority over the "lex generalis".

A reasonable compromise of these points of view can lead to an interpretation that the arbitrators only restrictively should request someone to produce documents which lack evidentiary significance, and only can illuminate the dispute or otherwise be of value to the applicant. In this regard, it can be important if the party seeking the order can state the reasons why the documents are of great significance, for example, the way in which they will contribute information on evidence regarding decisive issues. The arbitrators should also consider the interests of the possessor of the documents in not producing the documents, for example, when they concern internal sensitive matters. Within the framework for their *right to a discretionary determination* the arbitrators are to some extent free when they decide if they shall order someone to produce documents which have a lesser value as evidence, documents which only shed some light on the dispute, documents which make it easier for a party to formulate and make his claims, and documents whose contents and probative value the arbitrators cannot judge beforehand. *The rules relating to challenges of the award pursuant to the Arbitration Act sec. 21 par. 1 pt. 4, set out, however, the outer limits for the arbitrators' right to refuse to issue a discovery order.* According to this provision, the arbitral award can be set aside if through no fault of the party a procedural

[21]54 NJA II 36, 33 and 38-9 (1929).

error has occurred which can be assumed to have affected the outcome of the case. A Supreme Court case is illustrative.

Gunnar Rejving v. Aktiebolaget Electrolux, (NJA 1963 A 23) An engineer, Rejving, who was employed by a company had an arbitration with the company, Electrolux, and claimed compensation because the company had profited from his inventions. The arbitrators found no reason to take any measures with regard to Rejving's request that the company should be ordered to make certain documents available. The arbitrators' decision seemed to be motivated in part by that they had obtained the company's consent for the plaintiff to review the file for an application for a patent and in part by that the remaining files concerning the relevant patent applications at hand were public. Since Rejving had challenged the award which dismissed his case, the company admitted that the files did not contain the documents which the plaintiff had stated he was interested in.

Through a witness hearing the district court found that it was proved that the documents were of importance for Rejving for formulating his claim before the arbitrators and that the arbitrators should have realized this. The court considered that the arbitrators' refusal to assist Rejving to obtain the documents must be considered to be a serious error in the handling of the proceedings in the arbitral matter. Through a witness hearing with one arbitrator, the court found it was proved that the error with probablility could be assumed to have influenced the outcome of the case.

The Court of Appeal found no reason to modify the ruling of the court. A dissenting judge emphasized that an arbitrator in his testimony had stated that he believed that the access to the documents would have made it easier for the arbitrators to form an opinion about Rejving's position, but that he had not known what the documents contained. Even with consideration of the special nature of the error in the conduct of the arbitral proceedings, the dissent could not find that the Rejving to a reasonable extent had demonstrated that the error with probability could be assumed to have influenced the outcome of the case.

Before the Supreme Court the company alleged that it was incumbent upon the arbitrators to make a discretionary determination of whether a person on a party's claim shall be ordered to provide the arbitrators documents which can be of significance as evidence for clearly stated and controverted facts. Even if the arbitrators had an *obligation* to request a party to make documents available, the company considered that such an obligation could not exist in all situations. The company considered that one must first analyze which facts were alleged by each side before the arbitrators took a position on whether the documents should be required. The company considered that Rejving did not make a clear allegation as to what would constitute a patentable invention and that it was therefore meaningless to request a production of documents. With regard to the issue of whether a potential error had influenced the outcome of the case, the company considered that it was not evident from the arbitrator's testimony that he would have arrived at another conclusion in the case or that the other arbitrators would have judged the case in another way than that which occurred.

The Supreme Court found that in the case such circumstance was not proved, on the basis of which it could be considered that the arbitrators, by not taking measures for obtaining certain of Rejving's requested documents, had committed an error in regards to the conduct of the arbitration matter.

The Supreme Court held that the arbitrators did not commit an error by their refusal to order the company to produce the documents. The Court's opinion was not based on that the arbitrators had committed an error but that the error did not influence the outcome of the case.

This case is not regarded as precedence, but only as a case of "secondary" value. (Swedish court cases are reported in such a manner that the "secon-

dary" cases are contained in a special portion of the case reports located at the end of each reporting volume.) The case, which has only slight value as a precedent, must be interpreted with regard to that Rejvin, who was not assisted by counsel before the arbitrators, drafted his claim in an unclear manner. The case can be construed so that an error which can be challenged has not occurred if the arbitrators refuse to order someone to produce *documents, which can make it easier for the party seeking the documents to formulate and draft his claims.*

In contrast, it can be objected that the Supreme Court stated that *no circumstance which included an error was proved.* It can be thought to be unnecessary to refer to a rule of the burden of proof, if the court as a matter of law regarding the presumptive error wants to classify the failure as a non-challengeable irregularity. However, the arbitrators' refusal to direct a document production order to the company can be judged as an error in many aspects, thus not only with regard to Rejving's need for the documents in order to be able to formulate his claim. The documents would also have evidentiary significance. In this respect the Supreme Court may have considered that it *was not proved that the documents, according to the basis of the arbitrators' judgement, could have evidentiary significance.* As may be concluded from the Court of Appeal dissent's opinion, it was certainly difficult for the arbitrators to have an opinion if the documents could have evidentiary significance. The arbitrators' failure to assist in the procurring of the documents, about whose evidentiary value one could not know, would thus not comprise a demonstrable error.

However, this can hardly be correct if the documents concern an important evidence theme and the arbitrators beforehand do not know anything about their contents and thus can not conclude that they have evidentiary significance. In such cases the possessor of the documents should be ordered to produce them, whereafter it can be demonstrated before the arbitrators if they have probative value as evidence. The outcome in the *Rejving* case can be explained that the documents, whose contents were not thoroughly known to the arbitrators, only could illuminate or prove *themes of the evidence of less importance.* This interpretation was adopted by the Supreme Court in its opinion in the *Gunner Jansson* case, which will be discussed later.

One can question if the scope of the rule relating to challenges was restricted by the Supreme Court's method of applying the law, namely, in the way that the documents' evidentiary significance only was considered against the prerequisite "other procedural irregularities" and not against the prerequisite of "affecting the outcome of the case". According to the Supreme Court's opinion the plaintiff in a suit to challenge the award must prove the first noted prerequisite, (procedural error), but pursuant to the legal text as regards the second prerequisite he must demonstrate that the error can be

assumed with probability to have affected the outcome of the case. It can be maintained that it is easier for the plaintiff in an action challenging the award to meet the obligation to present proof in the latter case, since the standard of proof is not as strict as with the procedural error prerequisite. As a general rule, a court should reject a claim with regard to the prerequisite which permits the surest and simplest judgement. Purposes of procedural economy can thus sometimes make it adviseable that the court reject the challenge claim with the justification that the stricter proof requirement was not met. The court's determination can be facilitated if it concentrates on the existence of the procedural error prerequisite. The court does not then need to determine the correctness of the matter after the parties in a challenge action have presented all the extensive evidence which they presented before the arbitrators. In the challenge action the court can limit itself to the determination of whether the requested documents from the basis of the arbitrators' knowledge lacked evidentiary value. This right of the court to reject the claim in the most easily determined basis hardly opens possibilities to achieve procedural economies during the challenge action's proceedings. At the main hearing the parties as a rule must present their case and evidence concerning both prerequisities, thus even concerning the second issue, i.e., if the outcome was affected by an error, something which can require an extensive presentation. The prerequisites are connected in such a way in disputable parts that an interlocutory judgement can not be given over the prerequisite of the presumptive procedural error. Further this error is only a part of a complex ultimate fact, (three prerequisites for vacating the award according to the Arbitration Act sec. 21 par. 1 pt. 4). An interlocutory judgement cannot be given over such a fact, but only over an ultimate fact. See the Code of Procedure chap. 17 sec. 5 par. 2.

What has been said above concerning the possibilities for a court to reject a challenge to the award on the most simply determined basis means that the scope of the above referred to rules relating to challenges would be restricted. One can question if this in turn creates the right for the arbitrators, without the risk of a challenge, to refuse to make a document production order concerning documents containing unknown contents. I have above asserted that the arbitrators thereby only have the right to disallow written material in the dispute if it concerns a theme of little importance. A procedural error would thus exist if the requested documents with unkown contents concerned an important theme. If one considers that the *Rejving* case stands for the proposition that the arbitrators can, without challenge consequences, refuse a request for production of documents with unknown contents independent of the importance of the theme, one may often arrive at the conclusion that the arbitral award nonetheless can be successfully attacked. The reason for this follows. If the arbitrators consider themselves to have the right to refuse a request for production of documents concerning documents which from

their own evidentiary material have completely unknown contents and therefore appear to be lacking evidentiary significance, it becomes important that the party seeking the documents presents proof beforehand as to what the documents may contain. The party seeking the documents hereby is considered to have fulfilled his burden to present evidence, (not burden of proof) if he has made reasonable efforts to explain what the unknown documents may contain and if the opposing party in no way chooses to give information concerning their general contents. The opposing party's passivity or contumacy can many times be thought of as confirmation that the documents have evidentiary value and that a production order is justified. A procedural error then would exist if the arbitrators refused the request for the order to produce the documents even if the theme is less important.

If the arbitrators have reason to believe that the documents which are sought have probative value, they cannot refuse to order the possessor of the documents to produce them without risk of a challenge to the award. The *Rejving* case cannot be construed such that the requested documents according to the arbitrators' understanding probably had essential evidentiary significance and that they, purusant to their right to discretionary control over the proceedings, can refuse to issue a document production order without thereby committing a procedural error which can be challenged.

Assume, finally, that *sought after documents according to the arbitrators' understanding probably only can have a certain minimal evidentiary significance*, but that the documents according to the arbitrators' opinion *perhaps can contain information of decisive significance*. The possibilities for the arbitrators in such a case to limit the extent of the discovery would become too large if the arbitrators could, without risk of challenge, refuse to order the opposing party to produce documents known to have probative value which have in many respects unknown contents. It cannot according to my opinion be permitted that the arbitrators dismiss relevant evidence in the belief or hope that it, in light of the remaining known proof in the case, shall not have any decisive significance to the outcome of the arbitration, when it later can be proven that the dismissed evidence probably could have affected the outcome. This means that the provisions relating to challenges should be interpreted such that *proven procedural error exists if the arbitrators omitted to issue a document production order concerning documents with certain evidentiary significance according to the arbitrators' understanding*. The challenge to the award however would only be successful if the plaintiff in the challenge action can make it likely that the exclusion of the written evidence in the arbitration can be assumed with probability to have affected the outcome of the case. This later requirement expressly set forth in the Arbitration Act, limits the possibilities to succeed in a challenge action and the primary focus in such an action will be dominated by the proof of this requirement.

A later decided case, which however concerned a hearing with a party

under a truth affirmation, perhaps indicates that the arbitrators have a somewhat more extensive obligation to assist in the obtaining of proof when it concerns documents with unknown contents.

Gunnar Jansson v. Estate of Oscar Jansson, (NJA 1965 p. 384). In an arbitration, Jansson had claimed that his deceased brother's estate should be ordered to pay a certain sum because the brother had fraudulently withheld a considerable amount of money belonging to the brothers' company. The estate raised the defense of the statute of limitations. Jansson considered that the statute of limitations was tolled by two events. The first time it had occurred when he made an oral reminder in 1955 and he had reserved the right to further claims than those which he had according to what had arisen during an audit of the company. He further considered that a clause in the 1956 contract between the parties should be interpreted as representing a tolling of the statute of limitations. In this clause it was stated that an adjustment of the parties' agreement should occur provided in the company's accounting a further error should be shown to exist. The arbitrators rejected a request from Jansson for permission to a hearing with him under the truth affirmation at the district court. Neither did he get the opportunity to be heard orally before the arbitrators.

The Supreme Court stated: "Regarding the proceedings which preceded the award which is dated 4 April it should be noted, that Jansson, after the estate raised the objection of the statute of limitations, requested that a hearing under the truth affirmation should occur with him as proof that the estate lacked a basis for its defense. Although this request was made in the meeting dated 23 February as well as in the writing dated 10 March, Jansson did not get the opportunity to give further details about what had happened when he, as he states, during 1955 reminded the estate about certain claims and of the circumstances around the origin of his alleged reservation in the 1956 contract. The evidence, which Jansson wanted to present through a hearing conducted with him, has involved facts of essential significance to the determination of the issue regarding the statute of limitations and were especially required for a comprehensive elucidation of the question relating to the significance regarding the statute of limitation reservations above-mentioned. In view of this and that the evidentiary value of the information which Jansson might have presented could not with certainty have been judged beforehand, and without the information being compared with what otherwise was presented in the case this leads to the conclusion that he should have been allowed to testify before the arbitrators." On this and other bases the Court considered that Jansson did not get the required opportunity (according to the Arbitration Act sec. 14) to present his claim. The arbitral award was set aside.

Although the evidentiary value of the information could not be foreseen, the Supreme Court considered that the party should have been heard regarding the facts when they had important significance, that is to say, concerning important evidence themes. One could think that the possibility that *the evidence themes' substantial importance to an ultimate facts should create an obligation for the arbitrators to assist in the production of evidence even if it had a low evidentiary value.* It can be difficult for the arbitrators to judge beforehand the information's evidentiary value and its significance in light of other evidence. There is a reason for the arbitrators to enlarge the perspective when they consider rejecting certain evidence because the arbitrators believe that it does not contain any appreciable evidentiary significance. Viewing the content of the documents sought against a background of other decisive proof, perhaps the documents can give a compeletely different per-

spective. The details in the documents sought may demonstrate that the presented proof is contradictory in a small but decisive part or that this proof does not permit the assumed conclusion. The matter can be expressed such that "little strokes often fell great oaks".

From some points of view there is reason to differentiate between the situation in the case regarding a party hearing and the situation in the *Rejving* case regarding subpoenas. The law of arbitration should, as in civil procedural law, build upon the principle that a party on a request shall have the opportunity to make an oral statement in all issues of importance in a dispute regardless of the opinion the judging authority can have regarding the insignificant value of such a hearing.[22] The arbitrators should not deprive a party of the right to present the oral information which he considers relevant. When a party makes a request to obtain documents from the opposing party this right to be heard will be fulfilled. The refusal of a request to order the opposing party to produce documents does not violate this right.

One can think that a document production order should be issued regarding documents with unknown contents when the evidentiary value cannot be determined with certainty beforehand in the manner which the Supreme Court judged the situation in the *Jansson* case. However, it appears that another prerequisite given in the *Jansson* case was not fulfilled in the *Rejving* case regarding subpoenas. In *Revjing*, the evidence theme was so ambiguous and the party's general handling of the case so deficient that one can not say that it concerned essential facts in the way the Supreme Court emphasized in the *Jansson* case. If Rejving had been able to specify his evidence theme as well as the party did regarding the two statute of limitation reservations, perhaps a document production order should have been issued by the arbitrators.

With a comparison of both cases there remains however the general impression that one is in an area in which the limits are difficult to judge when the arbitrators consider to refuse the issuance of a document production order concerning documents having unknown contents and with presumed low evidentiary value. This ambiguity in the law is troublesome with regard to the risk that an arbitral award can be set aside if the arbitrators refuse evidence. The refusal of evidence can be justified from the point of view that the evidentiary material should be limited in a reasonable manner in large arbitrations. The risk of a later challenge should caution arbitrators to be careful.

In an essay on discovery in civil proceedings, I have demonstrated that there is a strong requirement on the party seeking the subpoena, when he shall state the civil legal grounds and the requested *documents' legal relevance and probative value precisely in relationship to these grounds*. Overly

[22]Calavros, Das UNCITRAL- Modellgesetz über die internationale Handelsschiedsgerichtbarkeit 114-5 (1988).

broad formulations can cause the request to be rejected.[23] The arbitrators have somewhat greater liberty in this respect. Before the claims, grounds, and defenses become sufficiently precise, the arbitrators can at an early stage request the party or a third person to produce groups of documents which can have significance for a vaguely described theme or for different generally defined dispute issues. In this way the proceedings can be expedited. An order at this early stage can naturally result in it being shown that a party has been forced to produce documents which did not have evidentiary significance. Even according to Swedish arbitration law therefore *document production orders in practice can come to encompass documents which only have significance for a party's opportunity to discover evidentiary relevant documents*. Herewith one approaches the system in Common Law countries. In many cases Swedish arbitrators probably will want to avoid the risk for document production orders encompassing documents which lack evidentiary significance with regard to how the parties later allege their grounds and defenses. This means that orders should not be given merely based upon vaguely described submissions to arbitration, but rather after the parties have submitted their ultimate issues of fact.

One may question if the arbitrators, as distinguished from the courts, can order a person to produce documents which *he has under his control, but he does not have the right of disposition*. For example, if it is unknown if the parent company or the subsidiary possesses a document, the applicant may desire that the arbitrators order the parent company in its own capacity as the opposing party to produce the document independent of whether they are in the parent or subsidiary company's archives. It can be hazardous to issue such an order even if the arbitrators consider that the parent company has such authority over the subsidiary company that it in practice can quickly obtain access to the documents. There is always the possibility that the subsidiary company's directors for some reason do not want to cooperate voluntarily, something which the arbitrators cannot normally have a certain understanding of, without having questioned the directors thereon. It cannot be required of the parent company that it shall ensure that a new board of directors for the subsidiary company be appointed in order that the directive shall be obeyed or that the parent company shall ensure that the subsidiary hold an extraordinary shareholders' meeting which gives the parent company the opportunity in its capacity as a majority shareholder to compel the subsidiary to produce the documents to the parent company. The applicant should instead be referred to directing his claim to both of the legal entities.

In very large arbitrations there is a need to attempt to limit the evidence. It is clear from the Code of Procedure, chap. 35 sec. 7, that a court can reject evidence which is without legal relevance or probative value. Further the

[23]Heuman 1 JT 23-36 (1989-90).

court can prohibit offered evidence if it is not required or its disclosure would be ineffective. This provision is applied in a restrictive manner.[24] The reason for this is principally that it is difficult to make a judgement beforehand as to whether the evidence is unnecessary. One can question if arbitrators can be satisfied with their right to make discretionary determinations and refuse evidence to a greater extent than the court. In large arbitrations there is often justification for refusing proffered evidence, which cannot have effectiveness with regard to the parties have plead all of the essential evidence which has decisive significance to the outcome of the case. The provisions in the Code of Procedure, chap. 35 sec. 7, probably offer in this respect a fairly well considered solution even for purposes of arbitrations. Only evidence which clearly is without effectiveness should be rejected. In order to be able to determine if evidence is unnecessary for purposes of issuing a document production order, the arbitrators must attempt to familarize themselves with the contents of the documents. If the arbitrators are not able to do so, there is a risk that the award will be challenged if they refuse to make a production of documents order. A certain hesitancy can, however, exist on how strictly the evidentiary requirements should be directed against the persons who alleges that the evidence is unnecessary. With regard to written evidence which the arbitrators consider rejecting with reference to its very minimal evidentiary value, it is in practice of great importance if the arbitrators beforehand can assume that a party will meet his evidentiary obligations with little margin.[25] In such a case although the documents have only slight evidentiary significance, they can become decisive for the outcome of the dispute. The arbitrators should then order the possessor of the documents to produce them.

It is of great importance that the arbitration can be decided quickly. It is therefore a special need to have the possibility to reject evidence which is proffered at a late stage in a large complicated dispute. This is particularily applicable to domestic arbitral disputes which must be decided within the time period provided for in the Arbitration Act sec. 18. If new evidence is first offered at the final hearing which perhaps must then be postponed to a future date if the evidence taking shall be allowed by the arbitrators, then the arbitrators may wish to reject the offered new evidence in order to be able to make the award within the prescribed time period. The courts can reject evidence if they find that it was offered to delay, surprise, or to accomplish some other improper purpose. Code of Procedure chap. 43 sec. 10. Further, the court is entitled to require a party to finally state his claims and supporting evidence and preclude him from thereafter, without valid excuse, presenting any new claims or evidence, if he has engaged in improper tactics.

[24]Heuman 1 JT 24 (1989-90).

[25]Cf. Welamson, Rättegång VI 219 (1978) and Heuman, Reklamationsnämnder och försäkringsnämnder 172-4 (1980).

Code of Procedure chap. 42 sec. 15. The Arbitration Act lacks any corresponding provision to these rules. This is a deficiency which should be remedied through legislative measures. For the present the legal position within the arbitration law is somewhat unclear.

According to my opinion, however *the arbitrators should have a certain right to refuse new evidence and new pleadings which are presented at a late stage*. However, a prerequisite for this should be that the party's handling of the procedure can be described as culpable and that he does not have any valid excuse for his pleading of new evidence at such a late stage. The arbitrators should investigate whether the evidence taking can be allowed without a considerable delay of the proceedings. If such is the case then there are many times reasons for allowing the evidence taking. Assume that a party brings a request for a document production order at a late stage in the final hearing and that the arbitrators do not want to comply with this demand with regard to the time that it will take to procure the written material and to present it at the final hearing. If the arbitrators base their decision denying the request upon the applicant's intentional or seriously negligent delay of presenting his request, then the later made arbital award can probably not be set aside even if the outcome might have been different if they had issued the document production order. The reason for this is that the arbitrators' conduct of the proceedings is acceptable and that no procedural error has been committed. In order to prevent challenges in such cases, the arbitrators should expressly justify their denial with that the applicant was earlier given a reasonable opportunity to present his claims according to the Arbitration Act sec. 14 and that he therefore has forfeited the right to obtain a document production order. If a decision with preclusive effect cannot be justified with reference to culpable procedures, then the arbitrators lack the right to refuse to order the production of a document which have minimal evidentiary significance, if it would be able to affect the outcome of the case. The decision denying the document production order could then result in a challenge to the award. Herein lies the boundaries for how far the arbitrators can go when they consider the refusal of issuing a document production order.

If a party brings a request for a document production order before a court, then the judge must as soon as possible take a position regarding the request. The court can not postpone the matter to the future and declare that it shall take up the issue later if then the available evidence is insufficient. In a very large arbitration the written documents can be remarkably extensive. In the beginning of the case it is difficult to determine if the different categories of documents will come to have evidentiary significance in all respects. *The arbitrators can hereby proceed from successive decisions* in order to limit the evidentiary material and hereby perhaps also expedite the proceedings. The arbitrators can thus order a party to produce only certain more important groups of documents among the large quantity of documents which the ap-

plicant has requested be produced. When the applicant has studied and analyzed the produced documents he can have a better idea as to which further documents he desires to see and he can then perhaps state more precisely in what manner the said documents shall have probative value. After the party seeking production has put forward a new and more well-grounded request, the arbitrators can decide if further documents should be produced, for example, further correspondence, contractual and accounting documents. With such successive decisions the arbitrators can balance between the interests of the party seeking extensive discovery and the opposing party's interests in limiting the intrusion into his business activities. Further, there is the possibility to minimize the costs and expedite the proceedings through limiting the written documents in the most practical way.

If the arbitrators utilize the method of successive decisions regarding the production of documents, it is important that they clarify if the remaining parts of the request are refused or are postponed for a future determination. If the latter is the case then the arbitrators must state when the request shall again be taken up for determination. The arbitrators cannot refuse to take a position on certain production requests during the entire proceedings, when it is considered to have been postponed for future determination. Further, the decision must be so formulated so that no interpretation problems can arise.

When a party makes a request to obtain a great quantity of documents from the opposing party then the opposing party may state that he will voluntarily produce serveral but not all of the documents. The arbitrators then can be inclined to be satisfied to allow the party to obtain only those documents which the opposing party is prepared to produce. After the party has studied them perhaps he will then make a new more specified request for further production. If the opposing party once more only partially agrees to the request, perhaps the arbitrators will not find it appropriate to impose upon the opposing party a more extensive obligation to produce documents than what he has stated that he is willing to produce voluntarily. A risk with this arrangement is that the party after a long time gets access to the documents on the opposing party's conditions, but that he does not obtain the few documents which have decisive significance to the outcome of the case. A procedure with several successive document production orders can often not be in the interest of the party seeking production, since the partially granted decisions are formed by the opposing party's conditions and are not grounded upon the applicant's and the arbitrators' judgement of the significance of the evidence.

Certain conditions for a document production order are established through prerequisites which do not allow wide room for the arbitrators' discretionary determination. In these respects the arbitrators' determinations should be conducted in the same strict manner as are done in civil procedure.

Two such cases shall be discussed below.

In civil court cases according to the Supreme Court, a party cannot get the opposing party to produce a *private expert opinion* through a document production order.[26] The provisions concerning experts shall be applicable not those regarding discovery. The applicant shall not circumvent the prerequisites on expert evidence and be able to compel the opposing party's expert to contribute to the evidence. A private expert is only obligated to assist in the presentation of proof if he voluntarily consents thereto. Further, a party seeking documents shall not be able to obtain information which has the character of a consulting opinion which the expert gave to the opposing party with the thought of an imminent or commenced court case. Neither the courts nor the arbitrators should order a party to produce a private expert opinion. The arbitrators should not draw negative evidentiary inferences when a party refuses to comply with the request of the opposing party regarding the production of such an opinion.

If the possessor of a document alleges that it includes information concerning *trade secrets*, the arbitrators should not interpret this concept especially extensively or restrictively with the purpose of arriving at an appropriate result in an individual case. The arbitrators should thus not consider the concept extremely narrowly and give an order with the justification that the information does not need to come to outsider's knowledge, since the arbitral procedure is surrounded with secrecy. The concept should be interpreted in the same manner as in court practice. However, according to the Code of Procedure chap. 38 sec. 2, a subpoena can be issued even regarding documents concerning trade secrets if extraordinary reasons exist. This last mentioned condition requires a balancing of interests. Here the arbitrators can relatively freely utilize their discretionary authority and take into consideration that the arbitral proceedings are secret. It should however be considered that the secrecy is not absolute. The matter can be brought to public knowledge through an application for court assistance and through a later challenge to the arbitral award. The parties do not have, as distinguished from the arbitrators, any contractual obligation of secrecy. A party's attorney is not, according to the ethical rules, prevented from revealing the contents of an arbitral award provided that it is called for by the client's interests.[27] An attorney who is a member of the Swedish Bar Association may be disciplined for violating the ethical rules.

[26]See about Stockholms Byggnadsmaterialaktiebolag supra p. 90-1.
[27]39 TSA 164-5 (1973).

4 Subpoenas Issued by the Court

4.1 Introduction

If a party or a third person refuses to voluntarily produce certain documents pursuant to another party's request, means of compulsion can be needed to be used to obtain compliance with the document production order. Arbitrators have no authority to use measures of constraint pursuant to the Aribtration Act sec. 15 par. 1. This legal right is only possessed by the court. The party who desires to obtain a decision enforceable with sanctions must first approach the arbitrators and obtain their permission to the court's assistance. Hereafter the court can, on the party's request, issue an order which is enforceable with sanctions. When a party seeking a document production order, as a first step, seeks to obtain *the arbitrators' consent to the court's assistance*, the arbitrators shall determine if the measures are needed ("nödig"). In the legislative history it is stated regarding oral evidence that it is for the arbitrators to determine the need and appropriateness of the court hearing. It is added that the arbitrators have the freedom, as they otherwise have, to use their discretion in judging the parties' requests.[28] What has now been said regarding hearings should also be applicable to document production orders.

According to the legislative history, the arbitrators shall *determine if there exists any legal obstacles to allowing court assistance*.[29] The courts are also to consider whether there are any legal obstacles to the court assisted evidence taking earlier permitted by the arbitrators. Arbitration Act sec. 15 par. 2. In the following it must be noticed *which conditions for the document production order the arbitrators can judge discretionarily* and which shall be judged more strictly according to a legal determination. Further, it shall be discussed if the *determination of the existence of legal obstacles shall be double* in the context that both the arbitrators and the court shall oversee certain requirements, e.g., that the documents do not contain information regarding trade secrets. One can also imagine that the legal determination shall be completely perfomed by the court.

4.2 The Arbitrators' Determination of Their Consent

The arbitrators only have to give their permission to the evidence taking at the court if they consider it to be needed ("nödigt"). The Swedish word "nödigt" which is used in the statute is archaic and is ambiguous. The word can mean that the requested evidence taking must be necessary or that it shall be needed or required.[30] It should be clarified through legislation what is in

[28]54 NJA II 37 (1929).
[29]54 NJA II 37 (1929) and supra p. 100.
[30]Svenska akademiens ordbok N 1255 2).

fact the requirement for the arbitrators' permission to be given. It has earlier been stated that there must be a strong need for the measures to be taken in order that they shall be considered needed.[31] With an interpretation which considers the legislative purposes, it can be presumed that the arbitrators should give their permission to the evidence taking if it is required. If the fundamental requirements of due process should be fulfilled one can hardly approve that the arbitrators refuse required or needed evidence. On the other side, perhaps there can sometimes be a reason for the arbitrators to not give their permission to the taking of evidence which is required but which is not strongly needed. The arbitrators therefore probably have a certain freedom to decide from case to case if the requested evidence taking is needed to such an extent that their consent should be given. This determination of need does not mean that the arbitrators, after a free *determination of appropriateness* in all respects, can decide if the court's assistance shall be allowed. In judging the issue of whether the requested documents have *legal relevance and probative value* the arbitrators shall, however, carry out a determination of appropriateness. This is binding on the court in such a way that the application for evidence taking can not be accepted without the arbitrators having given their consent. If the arbitrators' have given their permission to the evidence taking, the court cannot refuse a request for a subpoena with the justification that the evidence lacks relevance or evidentiary significance in the arbitration.

If the arbitrators consider that the evidence taking is needed, they may not refuse a party's request for permission after a determination of the appropriateness when *other factors than the need of the evidence* have decisive importance. Within the framework of arbitration law an established objective is that the proceedings shall be conducted quickly and inexpensively in a flexible manner without the matter becoming generally known. The arbitrators may not with regard to these principles refuse a request for evidence taking which they consider needed. The arbitrators may not, for example, refuse a well-grounded request for court assistance with the justification that the sanctionable court order would cause great expenses to be incurred, that the conduct of the proceedings would be delayed, or that the arbitral matters may become public knowledge if court assistance was allowed. However, these considerations can have marginal significance in cases where the arbitrators have doubts about whether the evidence taking is needed. If the arbitrators are not convinced about that the documents are of substantial significance to the determination of the case, they can consider that a quicker handling of the case can occur if they have access to them, so that at an early stage they can familarize themselves with a complicated business matter. If such a determination of economy of procedure lies behind the arbitrators'

[31]See supra p. 86.

decision to give their consent, the court should be bound by this determination of the appropriateness of the court's assistance. The court thus should not refuse to accept an application for a subpoena, because it considers that the subpoena proceedings will cause the arbitration to become delayed to an unacceptable degree. The parties must thus ensure that such arguments are raised before the arbitrators.

In a case the arbitrators assumed that a party's request for evidence taking through the court's assistance was in no part needed at that present time.[32] At an early stage in the case, the arbitrators can want to avoid complications with the court becoming involved in the dispute, when it is possible that the need of the evidence can be satisfied later, e.g., through other forms of proof or through admissions and stipulations. However, the arbitrators cannot refuse a request for permission if they at an early stage consider that the evidence really is needed. Assume that the arbitrators would refuse to give their permission in such a case in the hope that later presented evidence will be sufficient. If the party who had sought the evidence does not bring the issue up later, there exists a challengeable procedural error, if it through a witness hearing with the arbitrators or otherwise can be demonstrated that they in fact considered the court's assistance was needed.

If a request for the arbitrators' consent has been incorrectly rejected, the party may perhaps forfeit his right to challenge the award pursuant to the Arbitration Act sec. 21 par. 2, if he does not later renew his request for the permission, when this is justified by the change in the state of the evidence. The failure to request the permission, which at this stage obviously would be granted, can due to the circumstances be interpreted as a waiver of the right to challenge the arbitrators' original decision to refuse their permission. In other cases perhaps the state of the evidence has not substantially changed and it then can seem meaningless for the applicant to make a renewed request for the permission. Due to these circumstances it can normally not be required that the applicant once again appeal to the arbitrators in order that they thereby will notice that he has protested against their earlier decision to refuse. It must be sufficient that the party protested or expressed his dissatisfaction with the arbitrators' decision either immediately after the first decision or previously by the way in which he expressed his opinion in the question of the document production order.[33]

In the above mentioned case the problem was solved later in a flexible way through a party agreement, by which an authorized accountant was assigned to verify and describe certain bookkeeping transactions. The accountant submitted a memorandum.[34] The party seeking the documents did not have uncontrolled access to the company's internal matters. If a party's need

[32]See an arbitral award rendered 1987 06 12 p 3 and 4, aktbil. 11 Ö 871/87:6 Svea hovrätt.
[33]Cf. Hassler, Skiljeförfarande 121 (1966) and Nordenson 62 SvJT 717 (1977).
[34]See the award mentioned above. Cf. also SOU 1984:85 p. 125.

for written evidence cannot be met later in such a case he can clearly not be prevented from once again requesting that the arbitrators issue a document production order or give their permission for the court's assistance.

Within arbitration law it is considered important that the dispute be decided quickly and that the award be *final and enforceable*. The advantage of a quick procedure can be changed into a disadvantage if a long drawn out challenge to the award procedure follows the arbitration. If the arbitrators refuse to give their permission to an application for a subpoena from the court, a party can allege that a procedural error has been committed by the arbitrators. According to the Arbitration Act sec. 21 par. 1 pt. 4, the court can, however, only set aside an award if "through no fault of the party, any other irregularity of procedure has occurred, which in probability may be assumed to have influenced the decision." This provision regarding challenges can in practice be applied to a larger extent in cases where the arbitrators refused to give their permission directed to a third person than when they refuse to give their permission to a subpoena directed to a party or another person who demonstrably was closely associated with a party. This applies only under the condition that the *arbitrators had earlier ordered the concerned persons to produce the documents*. This shall be developed.

If a third person has failed to produce documents on the order of the arbitrators, no conclusions as regards the evidence may be drawn. The third person normally does not want to obstruct the party seeking the documents from winning the arbitration. The possessor of the documents perhaps only wants to safeguard his own interests and obstruct others from obtaining access into his affairs. The arbitrators therefore cannot draw any conclusions in regards to the evidence by a third person's unwillingness to produce documents. The refusal of the arbitrators in such a case to give their consent to a sanctionable court order can cause an arbitral award to become challenged, if the requested documents have such significance that the case's outcome was probably affected. Assume on the contrary that the *arbitrators have considered that a court's subpoena directed to a party was not needed, since sufficiently substantial negative evidentiary inferences* would be drawn from the party's failure to comply with the arbitrators' order. If the arbitrators in their award have attached substantial evidentiary value to the party's failure it can be hard for the other party who requested the documents to make it likely that the case probably would have had another outcome, if the documents would have been presented as evidence. For this reason it follows that the arbitrators, who for example want to expedite the proceedings, can forbid the court's involvement, when sufficiently decisive and far-reaching conclusions can be drawn regarding the evidence from the party's failure or contumacy. Many times it is difficult for the arbitrators to draw such different decisive conclusions, when the documents have extensive contents about which the arbitrators and the applicant have no knowledge.

If the party seeking the documents, as a later loser in the arbitration, did not know about the contents of the documents which the opposing party refused to produce, then he can commence a challenge action. In this court case he can obtain a subpoena from the court regarding the requested documents in order to be able to decide if the arbitration's outcome was influenced by the documents not being presented as evidence. If several different decisive conclusions could be drawn from the documents by the arbitrators, then the plaintiff in the challenge action can allege that the arbitrators' general opinion regarding the evidentiary value of the opposing party's failure to produce the documents could by no means in terms of the evaluation of the evidence be compensated for the conclusions the arbitrators could have drawn from the documents to the disadvantage of the recalcitrant party. If the court finds that the case's outcome was influenced in such a case the award should be set aside. According to my opinion, this error does not constitute merely an error of an improper evidence evaluation by the arbitrators, a type of negligence which is not a basis for a challenge. The arbitrators should be considered to have drawn the correct conclusions on the basis of an incomplete presentation of proof. This incompleteness in the evidentiary material, which the arbitrators are responsible for, should cause the award to be set aside.

When the arbitrators consider if they shall give their permission to the court issuing a sanctionable subpoena, they must determine whether the *requested documents are sufficiently identified*. In this respect the arbitrators should not make a more liberal determination of the appropriateness of the measures, e.g., against the background of the difficulty of identifying or describing the documents and of the substantial need for access to the documents. Such consideration can to a certain extent be of significance when the arbitrators shall determine if they should issue a document production order.[35] Even if an absolute obstacle does not exist to prevent the arbitrators from giving their permission with the reason that the request for documents is so indecisive that it can never be sanctioned by the court, the arbitrators should not give their permission thereto. A permission would be meaningless and only cause a delay of the arbitration, if the applicant was compelled to return to the arbitrators in order to obtain a new permission for a more specified request for documents. If the applicant's opposing party or a third person does not want to produce sufficient information in order to facilitate the forming of a decisive document request which the arbitrators can approve in their consent determination, there is the possibility for the applicant with the arbitrators' permission to request a subpoena hearing at the court for the purpose of compelling information which identifies the evidentiary

[35]See supra p. 125.

relevant documents.[36] After a hearing the applicant should be able to make such a decisive request for identified documents that the arbitrators will give their consent to the court assistance.

At the determination of the arbitrators' consent, the arbitrators must consider that the court later shall be able to issue a subpoena in accordance with the document production request which was presented to the arbitrators. This request must be so specified that the ordered party will know which documents he must produce. Further, a court must be able to determine if a fine can be imposed if the ordered party refuses to comply with a somewhat indecisive order. If the court according to the Code of Procedure chap. 38 sec. 5 pt. 3, finds it appropriate to provide that the documents shall be made available through the execution authority, the order must also then be so decisive that the authority's civil servant can decide which documents shall be produced, e.g., in a situation where such a civil servant considers that the party obligated to produce documents has only partially fulfilled his obligation. The exact meaning of the order cannot be established by the execution authority with the help of instructions from the applicant or the arbitrators' supplements. However, the execution authority should be able to solve certain simpler interpretation questions with the support of the documents in the subpoena matter, e.g., such documents which in addition to the arbitrators' consent were attached to the application to the court to fulfill the requirement in the Arbitration Act sec. 15 par. 2 of "the requisite information". The order must, however, be so decisive that there is no risk for someone to be ordered to produce documents over and above what follows from the district court's decision.[37] If the arbitrators' permission is too vague, the court should request the applicant to procure a specified consent from the arbitrators. If this request is not complied with, the court can be compelled to dismiss the application on the ground that the requested decision would be too indecisive.

When the party seeking the documents requests the arbitrators' consent he should not state if execution shall be compelled with a fine or with the execution authority's assistance. If the permission would nevertheless contain information regarding the form of the execution, the court would probably not order another form if the arbitrators did not permit the form of execution in their consent. For the party seeking the documents it can many times be advantageous to request at the court for execution through the ex-

[36]In the matter of Malmö TR Ä 429/83 the district court decided that a witness hearing should be held with a company executive and an employee concerning which written documents a company or another person had in their possession regarding the company's purchase of a printing press and the transfer of the same and which annual accounts and accounting documents existed in the company for certain financial years. The decision of the district court in this regard was only documented in the summons to the witnesses and not in special appealable decisions.

[37]Walin, Gregow and Löfmarck, Utsökningsbalken 90 note 3 (1987).

ecution authority's assistance. The party obligated to produce documents can otherwise find it compatible with his interests to completely or partially defy a sanction of a fine, e.g., with regard to a fine of a relatively minor amount[38] when the value of the dispute is substantial. This form of execution can be less effective if a party appeals the ordered fine or if it is necessary to obtain further court assistance to enforce an uncomplied with order, or to obtain an increased fine. The court should, according to the Code of Procedure chap. 17 sec.14 par. 3, have the authority to allow the execution authority to immediately execute a subpoena, even if the arbitrators in their consent did not mention this.

Above it has been stated that the arbitrators as a rule should not order a person to produce documents which he only has influence over, without having them in his possession with the right to dispose of them.[39] Such a subpoena can under no circumstances be sanctioned by the court. The arbitrators should therefore conduct the same strict determination as a court with the purpose of expediting the proceedings and avoiding such meaningless permission.

If the opposing party objects before the arbitrators in the permission determination that the documents include trade secrets, the arbitrators can be faced with two problems: the question of whether it concerns *trade secrets* and if this issue can be answered affirmatively, the question whether the arbitrators after a balancing of the interests consider that there exists extraordinary reasons to order that the documents should be produced. The concept of trade secrets should be interpreted in the same way as in court practice. This should also be applicable in an international arbitration, since the court shall apply lex fori. The arbitrators should not make a more extensive interpretation of the concept of trade secrets, since the court after determining whether there are any legal obstacles can reject such a determination made by the arbitrators and refuse to issue a subpoena. The arbitrators can sometimes, e.g., in an international dispute, want to give the concept of trade secrets a more extensive scope than what is given in Swedish court practice, when this corresponds to the agreement, with the intentions of the parties and the contract's construction or when it is compatible with the law which shall be applied in the substantive matters in the arbitration.

If the arbitrators would refuse to give their permission to a sanctionable court decision, one could think that such a decision could never be made by a court. However, this depends on how the arbitrators formulate their denial. To be very correct the arbitrators shall not, according to the legal text, give a formal decision on their permission, but only state if they have determined that the requested measures are needed. If the arbitrators expressly

[38]Cf. prop. 1986/87:89 p. 126.
[39]See supra p. 134.

explained that a sanctionable court decision was needed, the court can probably decide regarding the subpoena, even if the arbitrators explained that the permission was not given because it concerned a trade secret. A condition for this is that the court finds that the arbitrators have wrongfully considered that the documents contained information regarding a trade secret. If the arbitrators decision of denial is however more concise perhaps it is not clear why they had refused to give their consent. If it is only expressed that the arbitrators did not consider that the requested measures were needed, the court assistance cannot be granted. The applicant may not presumably obtain a clarification of the arbitrators' decision denying the requested court assistance through a supplementary statement from them. For example, the applicant may desire to demonstrate that the denial of his request was not due to a lack of need for the court assistance, but rather was because the arbitrators believed that sensitive information might be revealed. However, there is no obstacle to the court issuing a subpoena if the arbitrators did make such a statement which clearly demonstrated that they have improperly applied the concept of trade secrets, thereby denying their permission although they admit that the evidence would otherwise be needed. If the party chose not to pursue the application for court assistance, then the award could later be challenged due to a procedural error.

When the arbitrators balance the interests to determine if the documents concerning trade secrets shall be produced, this is a discretionary determination which concerns the need for a sanctionable court decision. The arbitrators are relatively free in this regard. If the arbitrators refuse to give their permission, the court should be considered prevented from granting the applicant's request. In the same way the court should lack the right to refuse a request for documents concerning trade secrets which the arbitrators, after a balancing of the interests, have given their consent to court assistance. If the arbitrators are prepared to give their permission for the requested measures with regard that the documents will not become public in an arbitration, they should emphasize that the documents should be given to the arbitrators and not to the court.[40] Otherwise the documents can by oversight easily become public on the basis that they were given to the court. Generally, documents submitted for a court will be public.

4.3 Court Hearings

A court can only issue a subpoena after an application by a party. The arbitrators cannot compel such a decision. The matter shall be handled by the court according to the provisions on the Act on the Handling of Judicial Matters and according to the provisions of the Code of Procedure chap. 35 secs. 9-11, which follows from the Arbitration Act sec. 15 sec. 2.[41] Further, it is

[40]Cf. SOU 1938:44 p 415 and SOU 1944:10 p. 441.
[41]Heuman 1 JT 44 (1989-90).

clear that the provisons of the Code of Procedure chap. 38 must be observed. If the application is submitted without the arbitrators' consent having been procurred, then the court shall order the applicant to supplement his application, according to the Act on the Handling of Judicial Matters sec. 3. The one against whom the application is directed should be given an opportunity to respond in writing. If the applicant requests to obtain documents from a third person, the opposing party in the arbitration should still be given an opportunity to comment upon the application. If it is found to be of extreme importance that while awaiting a decision in the matter, property should be under the administration of a trustee or another measure should be taken to secure the claim of the applicant, then the court has the right to so order. If there is a risk in a delay then such an order can be given immediately without first allowing the opposing party an opportunity to respond. Act on the Handling of Judicial Matters sec. 4 par. 3. The provisions give the party seeking the documents the right to demand interim security measures in connection with his request for a subpoena, e.g., in case he demonstrates that it is probable that the documents will be transferred to another and may be destroyed. It is possible that it is unnecessary to request such security measures, since the opposing party can be penalized for suppression of documents if he makes the documents inaccessible after the issue of the subpoena is brought up through the arbitrators' permission.[42] The party seeking the documents can remind the party who is to produce them of this. The court's final decision in the subpoena matter can be immediately appealed through an appeal by the applicant as well as by the person against whom the claim was directed provided it is the losing party who appeals.[43] The applicant should demand that the district court shall order that a decision granting the application shall be immediately executed upon.

After the arbitrators through the determination of the need for the documents have found that it is needed that the court issue a subpoena, there is *no reason for the court to retry the arbitrators' determination of the need for the measures. Objections that the documents lack legal relevance or probative value should be rejected* by the court with reference to the arbitrators' position.

Trelleborgs TR (Ä 21/89). In a matter concerning a subpoena in connection with an arbitration regarding the redemption of stocks pursuant to the Companies Act chap. 14 sec. 9, the redeeming parent company considered that the stocks would be valued from the day when the redemption was requested, January 16, 1988. The trustee which represented the absentee minority shareholders considered that the point in time for valuing the stock was May 26. After the parent company's majority shareholders through a contract sold their shares to a third company, the trustee claimed that this company should produce the transfer of shares contract. He explained that the parent company's primary assets were the shares in the subsidiary company. He considered that through the sale to the outsider corporation a price was set on the shares

[42]Heuman 1 JT 23 (1989-90).

[43]Hassler, Specialprocess 147 (1972) and Heuman 1 JT 44 (1989-90).

which was significantly more correct and nearer to the real value than what a theoretical calculation could ever be. The parent company objected that the outsider company was bound by the sellers to not reveal or produce information about the contract's terms. Further, it was objected that the contract lacked significance for the determination of the dispute, since the redemption amount would be established with regard to the shares' value in January of 1988, while the outsider company's acquisition of the shares in the parent company occured as late as October.

The arbitrators initially noted the provisions of the Code of Procedure chap. 35 sec. 7 and *Hassler's* opinion that the arbitrators can refuse a party's proposal if they find that the requested evidence taking concerns a fact, which lacks relevance or is sufficiently proved. Further they considered that the concept of needed evidence should be interpreted extensively and that it did not matter if the request for a document production order was directed towards a party or another person. The determination of the protection which the share purchasing company could enjoy for trade secrets was not to be decided by the arbitrators according to their opinion. The arbitrators considered that it could not be excluded that the contract between the purchasing company and the majority shareholders in the parent company had significance for the determination of the question of the real value of the shares in the subsidiary company whether the point in time for the valuation was January 16 or May 26. The arbitrators found the requested measure for obtaining evidence was needed.

After the parent company neglected to make a response before the district court in connection with the trustee's application, the district court established without further examination that the arbitrators had determined that the measure was needed and that there were no reasons to presume that any legal obstacles existed to the issuance of the subpoena.

One can question if the arbitrators' understanding of the concept of needed evidence should be interpreted extensively, irrespective of whether the claim for the evidence is directed to a party or a third person. With the purpose of expediting the arbitration it can be justifiable to refrain from allowing a court sanctioned subpoena to be issued, when the arbitrators can arrive at a sufficiently certain result through other forms of evidence, e.g., accountants. In all events an extensive application of the concept "needed" should be avoided if the order shall be directed against a party and the possibility exists that in the evidence evaluation negative inferences may be drawn from a refusal to make documents available. It seems reasonable that the contract would have certain minor significance for the determination of the valuation issue since the sale of the shares occurred more than four months after the point in time for the valuation which the trustee alleged was correct. It is completely correct that the district court did not in any way question the arbitrators' determination of the need for the evidence. The question of whether the documents contained trade secrets cannot be considered to be merely a question of law regarding the meaning of the concept of trade secrets. As mentioned above, a question of the balancing of the interests must be taken into consideration before the arbitrators give their consent. The arbitrators should have taken a position on this, in order that the court did not unnecessarily become involved in the case when it clearly could have been stated by the arbitrators that they considered that the documents contained trade secrets. The arbitrators should however, presumably only set out required balancing of interests if the applicant requested this after the posses-

sor of the documents has stated before the arbitrators that the documents should not be produced due to their inclusion of trade secrets. If such a balancing of interests is made by the arbitrators it is binding on the court.

A court must sufficiently determine the issue if a *request for a subpoena is sufficiently decisive* in order to base an execution decision upon it. If the arbitrators have shown their opinion as regards the requirement of identification of the documents, the court must retry the arbitrators' determination and ensure that there does not exist any legal obstacles for the execution of the granted request. According to court practice in civil cases it is not required that the applicant describe and particularize every document which he wants produced. The applicant can to a certain extent make the request in a form which sets out categories of documents which can be identified with reference to type of goods, the signature on the document, or with reference to a specified evidence theme.[44] This practice should be followed by the court when trying a subpoena matter in connection with an arbitration. There is no obstacle to the court only partially granting the request for a subpoena with regard to such documents which are described with sufficient decisiveness. In relationship to a vague application, the court probably only to a limited extent (through a simple amendment) can specify the documents which shall be produced in order to be able to grant the request. If the court establishes complicated and far-reaching limitations on the subpoena obligation in relationship to a vague request, the applicant's opposing party in a later challenge action can allege with good reason that a procedural error was committed by the court going beyond the request and thereby depriving the party of the possibility to safeguard his interests in the subpoena matter.[45]

According to the text in the Arbitration Act sec. 21 par. 1 pt. 4, the grounds for challenge have reference to other irregularities in consideration of the handling of the matter. It does not say only the arbitrators' procedural errors shall be able to cause the arbitral award to be set aside. The court's procedural error in the application matter can influence the outcome of the case in just as a decisive manner as can the arbitrators' procedural mistakes. With regard to this even improper court decisions can be a basis for setting aside the award. In support of this it can be mentioned that a violation of the provisions of the Arbitration Act sec. 21 par. 1 pt. 3, may be a basis to set aside the award in cases where the district court did not appoint the arbitrator in a proper manner.[46]

[44]Heuman 1 JT 12-15 (1989-90).
[45]Arbitration in Sweden 148 (1984) and Bolding, Skiljedom 158-9 (1962). Cf. Westberg, Domstols officialprövning 130 et seq and 363 et seq (1988).
[46]Hassler and Cars, Skiljeförfarande 140 (1989).

5. Subpoenas Relating to Contracts Containing an Arbitral Clause

In a business contract with an arbitration clause it is sometimes provided that a party on request shall have access to certain documents which can have been created by the opposing party. It can concern designs, blue prints, or invoices concerning goods. Sometimes it is stated in the contract that a party shall be able to inspect the opposing party's office for the purpose of studying different documents concerning the parties' business matters. If an arbitration arises and *a party demands the production of documents based upon a clause in the contract*, then the opposing party can make several objections, e.g., an allegation that such documents do not exist or are not covered by the clause. Further, the party in the arbitration can allege that this issue should be settled by an arbitral award. In this regard he can state that the submission to arbitration, which involved, e.g., improper delivery, cannot encompass an issue regarding the liability to produce documents. The document production order issue should then only be decided in a special arbitral proceeding with the delay which will follow with the appointment of a new panel of arbitrators and the completion of the procedure of this dispute within the dispute. If the arbitrators consider that the submission to arbitration concerning the substantive issue also covered a request for a document production order or that the submission was allowed to be expanded to cover this issue, then the arbitrators can issue a partial award on this request. See, the Arbitration Act sec. 19 regarding partial awards.

The party seeking the documents can choose to base his request *by pleading the provisions regarding a procedural document production obligation* instead of the provisions relating to a document production obligation based upon a contract. He has the right to make such a choice. The clause in the contract which gives him the right to obtain the documents cannot be interpreted such that it precludes the procedural right to a document production order. In this regard it is required that the contract's clause be clear in order for the clause to be considered to have such an excluding effect. This means that the arbitrators can order a party to produce documents in an award and that the court can issue a subpoena during the arbitration by virtue of the Arbitration Act sec. 15 par. 2, if the arbitrators have considered this to be needed. The applicant's opposing party may, however, object that the conditions in the purchase contract mean that the procedural document production obligation was precluded or restricted. Even if this objection shall be rejected the opposing party is entitled to have his objection determined by the arbitrators. He would then be able to demand that this *issue regarding the objection shall be first tried by an arbitral panel through the arbitral award before the exisiting arbitrators have jurisdiction to decide on the issue of a procedural obligation to produce documents*. When determining this question

an earlier reported Supreme Court case, *Nykvarn*, is of importance.[47] When the plaintiff's claim is outside of the contract with the arbitration clause, but the defendant's objections are based upon the contract, the Supreme Court stated that it is incumbent upon the plaintiff to ensure that the objections put forward in the issue first must be decided by an arbitral award before the court takes up the matter again after a stay of the proceedings.

If the present subpoena problem can be solved in this way, a defendent could delay proceedings regarding the issue of the subpoena in an unjustifiable way for a considerable period of time. In the case the Supreme Court, however, emphasized that the defendant's claim regarding the contact could not in any way be considered unwarranted. The Supreme Court considered that the arbitral clause therefore could not be denied to have significance in the case. It probably then follows on the contrary that *an evidently unfounded objection which is based upon a contract with an arbitration clause cannot result in a stay of the proceedings*, when the plaintiff's grounds lie outside of the contract and are based upon statutory provisions. The arbitrators should therefore directly be able to assist in ordering the opposing party to produce documents in the case, when the ojection that the issue shall be tried by a special arbitral proceeding evidently must be considered to lack authority because the terms in the contract did not expressly exclude the procedural document production obligation.

It should be emphasized that the contractual document production obligation gives a party the right to obtain documents without regard to whether they have evidentiary significance, unless it is otherwise provided for in the contract. If a party's request is only based upon the procedural document production obligation he can only obtain evidentiary relevant documents and this is independent of whether they are covered by the contract clause regarding the document production obligation.

6 Subpoenas Concerning Arbitral Awards

After two parties have had a dispute resolved through an arbitration, a third person who is drawn into a civil case, may request the court to order one of the parties to the arbitration to produce the arbitral award. There is hardly a reason for the third person to propose such a request other than if there is a connection between the arbitral matter and the court matter, e.g., that the arbitral award could be evidence in the civil case or includes a report concerning evidence having relevance even for the judgement of the civil matter. If a third person is drawn into an arbitral dispute he can request the arbitrators to order one of the parties in another arbitration to produce the award. If the requested party refuses to do so, then the applicant can request the

[47]See p. 68.

court to order with penalty of fine that the arbitral award be produced, if the arbitrators find such a measure to be needed. In the following, first the situations will be discussed where a third person wants to obtain an arbitral award because he has become involved in a civil court case.

6.1 Subpoena Obligation for a Party to an Arbitral Award in a Subsequent Civil Court Case

If a party claims in a court case that a party to an arbitral award should be ordered to produce an arbitral award, the latter can allege that the arbitral proceedings are confidential and that he therefore is not obligated to produce the award. A contract providing that the information shall be kept secret cannot be considered legally effective for the case when someone requests that the information shall be presented to the court as evidence.[48] In this respect it does not matter if the contracted confidentiality is given orally or documented in writing or if someone denies the witness or subpoena obligation. The interest of the administration of justice that the evidence be as complete as possible has priority over the stated desire to maintain secrecy. That the interests of the party to the arbitral award cannot supersede the interests of the party seeking discovery, has support by reference to several statutory priviledges of secrecy which can be overcome by witness and subpoena obligations, e.g., the priviledge of secrecy of a banker.[49] Evidentiary relevant information can only be kept secret in the cases which are specifically stated in the Code of Procedure. A request for a subpoena can, for example, be refused if the court finds that the award concerns trade secrets in the manner which the party to the arbitral award has alleged before the court. Even in such a case the court can grant the subpoena after weighing the competing interests, according to the Code of Procedure chap. 38 sec. 2 par. 2. It is also possible for the court according to the Code of Procedure chap. 38 sec. 1 par. 2, to order the party to the arbitral award to produce excerpts from the award and thereby arrange that the information concerning trade secrets is not encompassed by the subpoena obligation.

In the arbitral award the arbitrators may report the parties' presentation of the case, oral testimony, contents of written evidence, expert opinions, and their own positions which were taken regarding legal and factual issues. The party to the arbitral award can demand that the subpoena request shall be specially judged on each section of the award.[50] In support for this position, he can plead the provisions of the Code of Procedure chap. 38 sec. 1 par. 2, which provides that excerpts from the documents may be produced if the contents of these include even such matters which according to sec. 2 the

[48]Heuman 1 JT 10 (1989-90).
[49]Prop 1979/80:2 Del A p. 397 et seq., Ekelöf, Rättegång IV 139 (1982) and Nial, Banksekretess 45 and 69 (1987).
[50]Cf. Heuman, Reklamationsnämnder och försäkringsnämnder 768-74 (1980).

possessor of the document is not entitled or obliged to disclose. According to the legislative history, the provision can be applied to documents containing matters which lack significance in the case.[51] The parts of an arbitral award which lack evidentiary significance in the civil court case would consequently be excluded from the subpoena obligation by excerpting them. Difficulties can obviously arise in making the demarcation of the parts of an award which are not necessary to be produced, when evidentiary relevant and irrelevant information is mixed together in the award.

A party to the arbitral award can allege that *the recorded witness testimony* has a character of attestation by a witness (affidavits) and therefore should not be considered as written evidence. The prohibition in the Code of Procedure chap. 35 sec. 14 against presentation of written statements for the purpose of an imminent or commenced litigation encompasses only statements given outside of court. Party and witness testimony given before the court may in a higher court be presented as evidence through statements. Generally, witness testimony which was earlier recorded in court cannot be presented as evidence according to the provisions of the Code of Procedure chap. 36 sec. 16 par. 2. In the Code of Procedure a record made by a court is not designated as affidavits but as an official record. See e.g., Code of Procedure chap. 35 sec. 13 par. 3. One can therefore question if a subpoena should be able to concern testimony which was recorded in an award. The answer to this question must depend upon the provisions of the Code of Procedure chap. 38 sec. 1, c.f., with chap. 35 sec. 14 which can be interpreted so that the written evidence is placed on equal footing with official recording. If so, it must be determined if testimony recorded by the arbitrators is equivalent to testimony which is recorded by the courts. There are sometimes reasons to answer this last question affirmatively. The arbitrators in a large case are often highly qualified lawyers, which have the qualifications to record testimony with the same accuracy as the courts and to ask such questions that misunderstandings are avoided.

When one shall judge the question if a subpoena shall be issued, decisive importance should be attached to the reason for the prohibition in Swedish procedural law against the presentation of witness statements. The prohibition is based upon that the principal of orality shall be maintained and that the evaluation of the evidence is more reliable if the court has the opportunity to directly observe the witnesses during the hearing and ask questions to them. A witness hearing should, therefore, as a rule not be replaced by the presentation of statements recorded in an arbitral award. Thus, it can be alleged that the statements lack evidentiary significance if the witness shall be heard. However, there often naturally is a risk that the witness and in particular the parties' statements may be self-serving to suit their interests in

[51]SOU 1938:44 p. 412.

the dispute. In this connection it can be thought that the parties to the arbitral award or a witness who was an employee of such a party testified in such a way in the arbitration in order that they could obtain a certain outcome. In the civil court case, where the parties to the action are different, perhaps the parties to the arbitral award and witnesses may "adjust" their information or attempt to avoid sensitive matters which were very important to them in the arbitration. According to the Code of Procedure it is allowed to present out of court recorded statements, when the witness orally testifies differently from the statement or when he explains that he cannot or will not testify. See Code of Procedure chap. 36 sec. 16 par. 2. The statement recorded by the arbitrators can have evidentiary value to the extent that it includes information on the points where the witness in the court case gives other information or claims that he has forgotten what he earlier stated. With an interpretation which considers the purpose of the Code of Procedure chap. 38 sec. 1 and the concept of written evidence, a subpoena obligation with regard to such information can be justified because that is in compliance with the best evidence rule that this recorded information is made accessible to the disputing parties. The statements in the arbitral award in certain parts can give the court more reliable information than the oral testimony.

It can be difficult for the court to judge if the witness statements in the arbitral award can differ or include more extensive information in evidentiary relevant parts with a comparison with the statement which the witness will give at the main hearing. Since an oral hearing must be held with a witness in the court case and the witness is obligated to testify truthfully and completely, the party seeking the subpoena has, under all circumstances, the demand that he shall learn about what the witness knows. The parties to the arbitral award can therefore hardly be prejudiced by the recorded statements becoming known to the party seeking the subpoena. This supports the argument that a requested subpoena should be granted if it is probable that the recorded statements may have certain evidentiary significance in the court case. This is a consequence of the anticipation that the witness may testify incompletely or avoid giving information at the final hearing.

Assume that a party to an arbitral award is ordered by the Court to present a part of an arbitral award including evidentiary relevant parts of witness statements. If there is a doubt concerning the excerpts' completeness then it can be conluded from the legislative history to the Code of Procedure that the court is justified to hear the concerned person as a witness or as a party under an affirmation of truth.[52] If it is then found that the person who testified in the arbitration stated something different or more than what was stated in the presented portions of the award, then the party to the arbitral award can be ordered to produce this part of the award concerning informa-

[52]SOU 1938:44 p. 412.

tion which may have evidentiary significance in the case.

Above it has been stated that the court cannot order someone to produce a *private expert opinion* which the possessor of the opinion did not ever present in a court case.[53] From the *Stockholms byggnadsmaterial aktiebolag* case, (NJA 1963 p. 72), it is evident that proof through experts shall be presented according to the provisions of the Code of Procedure chap. 40 and that it cannot be allowed to circumvent these provisions by relying upon the Code of Procedure chap. 38 sec. 2 concerning written evidence, to compel the production of the written expert opinion which is possessed by a party or a third person. Even if it is not expressly stated by the Supreme Court that the expert opinion is not written evidence, this conclusion is easily implied. In the first place, the Supreme Court wanted to prevent circumvention, about which more will be stated later.

Some examples of the difficulties in drawing the boundaries between written evidence and expert opinions were mentioned by *Ekelöf*, among others, that in another case an expert gave an opinion concerning a similar issue. If such a document would be presented in the court case, then it should be considered as written evidence, according to *Ekelöf*. He opines that it is uncertain to what extent the document's possessor can be under a subpoena obligation. He considers this is a possibility when factual circumstances have significance for the case and cannot be proven in another manner. This last statement, according to my opinion, is supported by the Supreme Court decision in the *Stockholms byggnadsmaterial aktiebolag* case. If the party seeking the subpoena wants to present an opinion regarding the significance of factual circumstances, *Ekelöf* seems to consider that the applicant should not have the possibility without payment to have access to the opinion and that his needs are met with the possibility to retain another expert.[54]

If one studies the *Stockholms byggnadsmaterial aktiebolag* case, there were generally two reasons presented in support for not allowing the circumvention of the provisions concerning expert evidence. The rules relating to a subpoena obligation should not, according to the Court, be applied against an expert himself and should, if his right to reject such an assignment shall not become illusory, apply even if another possesses the written opinion made by him, perhaps given under completely different conditions than that it might be presented in a court case. With regard to the expert, therefore, a party to an arbitral award should not be compelled to produce an opinion which the expert perhaps made with the intention that it might be submitted in an arbitral proceeding, which is confidential. The fact that the expert has received full payment for his work is not a reason for the opinion to be given to the party in a court case. The requirement of consideration to the interests of the expert is not concerned solely with economic matters.

[53]See supra p. 138.
[54]Ekelöf, Rättegång IV 193-4 (1982).

In the Supreme Court case it was further stated that merely because a party obtained the advice of another was not reason for obligating him to testify in a court case about what the advice contained, a fact which should not reasonably be influenced by whether the advice was given orally or in writing. It seems completely reasonable that a party who retains a lawyer or another expert in confidence, shall not be required to reveal the contents of the advice. If, however, the party finds that an expert opinion or advice is advantageous and that it therefore shall be presented in a court case, other persons are at liberty to present the opinion as evidence in the other cases. This follows from the principle of public access to public records. A party to an arbitration can allege that experts' advice and opinion, however, have been given in the proceedings with the understanding that they would be kept secret, since arbitral proceedings are not public.

The above demonstrates that both parties to the arbitral award and the expert have grounds for opposing a request for a subpoena concerning expert opinions for the reason that the arbitral procedure was confidential. The conclusion that a request for a subpoena should therefore be rejected is perhaps arguing in a circle which shall be demonstrated. One starts by raising the question if the arbitral proceedings' confidential nature can be breached by the provisons regarding subpoena obligations. One answers this question by considering that the subpoena obligation does not exist, since the arbitral proceedings are confidential, that is to say, one begins from the point that an exception shall not be made in the manner which the question is posed. One can very well allege that the parties' to the arbitral award and the expert's interests can be met if they beforehand know that an expert opinion can become public through a subpoena, if it is submitted to the arbitrators. The situation becomes similar with the one when the expert and the person who retained him have to contend that an advantageous written opinion will become public and accessible to anyone as soon as it is presented in a court matter. The judgement of the issues regarding the subpoena obligation of a party to the arbital award can be traced back to the fundamental principle that evidence cannot be kept secret in a court case merely because the parties have made a contract which so provides. For this reason it is not excluded that the subpoena obligation should encompass an expert opinion reported in an arbitral award. It is also possible that the opinion only is available by subpoena if the opinion had become public for some reason, e.g., in a challenge procedure. This position seems to be preferable. One reason for this is that an expert opinion given before or during a litigation will not become available because it is *possible* that the party will present it; the opinion will only be accessible if it in fact later will be presented as evidence in the court case.

If one presumes that the confidential nature of arbitral proceedings do not constitute an obstacle for a subpoena to be issued, then *a party to an*

arbitral award should be obligated to produce an award in the portions which he and his opposing party specified their positions in the case through claims, admissions, stipulations, and other statements in the presentation of the case. However, the party to the arbitral award can claim, e.g., that certain admissions were made only in connection with the arbitration and were dependent upon considerations of procedural economy and that conclusions therefore cannot be drawn from them in another case. If the court considers that for this reason, the party information in an arbitral award has no significance in a civil court case, then it can obviously refuse to issue a subpoena.[55]

The parties to a court dispute may want to obtain the arbitral award to present *the arbitrators' own positions regarding the award's findings.* In this portion the award probably can have significance in a court case since in a Swedish civil procedure it is accepted that a judgement of a court may have probative value. In some cases a party to the arbitral award may object to a requested subpoena on the basis that the arbitrators have judged questions of law and fact in a summary fashion. If this is the case, it can be thought that the award has such minimal evidentiary value in a court case that a subpoena should not be issued. The court however can probably not make such a determination without having access to the award.

Finally, it is possible that a party in a court case wants to have access to the *actual ultimate order in the arbitral award*, when it establishes a legal relationship of significance for the court case. A subpoena should then be allowed. Strong reasons often support that the ultimate order shall not be isolated out of its context and that the subpoena obligation should not be limited to merely a portion of the award.[56] Often it can probably be considered that the court wants to have the possibility to study the award in its entirety or its principal parts, if it concerns legal circumstances of importance in the case.

If a party in a court case claims that the arbitrators through an award have solved in his favor certain issues which are relevant to the court case, then he should be considered obligated by a subpoena to produce the award if he possess it. A party however should not be considered obligated by a subpoena if he completely withdraws his statements concerning the arbitral award's relevance in the case.[57]

6.2 Subpoena Obligation for a Party to an Arbitral Award in a Subsequent Arbitration

If a party in an arbitration requests that the arbitrators shall order the opposing party or a third person to produce an earlier made arbitral award, then the arbitrators must, as a court in the corresponding situation, determine if

[55]Cf. Heuman 1 JT 27-8 (1989-90).
[56]Cf. Heuman 1 JT 43 (1989-90).
[57]Heuman 1 JT 42 (1989-90).

the arbitral award in its entirety or partially can have probative value in the present dispute. When the arbitrators determine if an order shall be directed to the possessor of the award, they are able to exercise greater discretion than the court. Perhaps they consider that one shall respect the confidentiality of an arbitral proceeding to the extent which is possible and that the request for the document production order should be avoided as much as is practicable. In the manner which was presented in section 4 above, such a consideration may not lead to a refusal to issue the order if the arbitrators consider that the arbitral award has significance in the arbitration.

On one point there is an important distinction in the relationship to the determination which a court shall make when considering a subpoena in a civil case. Within arbitration law the principle of orality is not established. Statements of witnesses (affidavits) are allowed. There is nothing which prevents the arbitrators from ordering a party to an arbitral award to produce the award in such parts where witness and party statements are recorded. The arbitrators can consider that such an order should be issued when the information in the award seems more reliable than that which may be given orally in the dispute, e.g., with regard to the testifying person's interest in the present dispute's outcome or with regard to the long time which has passed since the matter in question occurred. In international disputes perhaps the arbitrators consider that considerable expense can be spared if a witness who resides far away does not have to be called to testify in the present dispute regarding similar matters.

If the party to the award refuses to follow the arbitrators' order, then the party seeking the award can apply for the arbitrators' permission for the court to issue a subpoena. If one disregards the issues of trade secrets, the arbitrators have principally to determine the issue of the evidentiary significance of the award. If the arbitrators have determined that the requested court subpoena is needed, the court should not retry the arbitrators' position in this regard. If the court finds that the award in some part is not written evidence in the legal meaning of this expression, then the court shall refuse to issue an order in these respects.

The above means that the party to an arbitral award can be ordered by the arbitrators and by the court to produce an arbitral award to a third person who is involved in an arbitration. This does not mean that the party to the arbitral award should nearly always anticipate that he shall be compelled to produce an arbitral award to an outsider. The obligation imposed by a subpoena exists only in the case where a third person is involved in a dispute which has such a connection with another arbitral dispute that the award can have evidentiary significance. Herein lies the essential limits to the possibility to obtain a subpoena.

If two or more arbitral disputes concern the same common issues so that a subpoena can be allowed, this can result in an effective procedural techni-

que in cases of multi-party arbitration. When three or more parties are involved in a dispute which can not be consolidated on the grounds that one of the parties will not consent to it, the procedure can be simplified if a party in a proceeding can have access to an arbitral award made in another arbitration or access to the presented written evidence in this dispute if it has not yet been decided through an award. The obligation of a subpoena can even promote a party's willingness to accept a consolidation when he initially objected to a consolidation only for the reason that he wanted to obstruct the third party from gaining insight into the evidence which would have been presented in the dispute which he is involved in.

7 Summary

One must distinguish between an unsanctionable document production order which can be issued by the arbitrators and the sanctionable decision which can be made by the court after the arbitrators have determined that such a measure is needed.

The notion that the arbitrators cannot order someone to produce unspecified documents lacks authority to support it. The arbitrators may order someone to produce categories of documents which have been described in such a way that the concerned persons really should understand which documents are referred to. Such somewhat indecisive orders can expedite the proceedings and time is not needed to be spent in the procedure of identifying all of the documents. A hearing on a subpoena at the court for the purpose of identifying documents can then be dispensed with in certain cases. The arbitrators shall decide if the requested documents have legal relevance and probative value and if an order should be issued to a party or third person. The arbitrators may not refuse to make an order if the written documents have clear evidentiary significance. The arbitrators, however, do not need to make such a precise and formal determination as the court does in this situation, something which can simplify the parties' arguments in the issue. If the arbitrators want to make a more formal determination, they should inform the parties of this. Then the parties have the opportunity to expect if the hearing shall be conducted in a simplified and discretionary manner or if it shall be in a strict manner as in court practice. In the beginning of a dispute the arbitrators can sometimes have the right to refuse a request for a document production order when there is a reason to assume that the need of the evidence can be met in another way. By a request for a document production order which concerns a large quantity of documents, the arbitrators can in certain cases also utilize successive decisions and in the beginning issue a more limited order. After these documents have been produced it can been seen if the applicant can be satisfied with a more limited number of documents or if he can better specify a new document request. It

is important whether the request for a document production order is directed against a party or a person who apparently has similar interests as the party. If such a person or party refuses to comply with the order, then the arbitrators can attach to this failure more or less evidentiary significance to the disadvantage of the applicant's opposing party in the arbitration. This evidence evaluation can not result in grounds for a later challenge of the arbitral award, if a recalcitrant party loses a dispute principally because the arbitrators according to his viewpoint have made far-reaching conclusions from his refusal to comply with the order.

The arbitrators' possibility to refuse a request for a document production order concerning documents of less significance or with completely unknown contents has an outer limit established by the provisions relating to challenges contained in the Arbitration Act sec. 21 par. 1 pt. 4. A court can set aside the award if the arbitrators have refused to order someone to produce documents, which later are demonstrated to have included information which is likely to have probably resulted in another outcome of the dispute.

If someone refuses to comply with a document production order there can be a need to obtain a subpoena from the court. When the court shall determine if a subpoena request shall be granted, it is not required to make such a strict legal determination which in civil procedure is applicable in the requirement that the documents shall have legal relevance and probative value for a sufficiently described substantive legal ground. The issue of need for the production of written documents shall be decided by the aribitrators. If they have determined that the measures are needed, the court shall respect their judgement in this regard. The court must however determine if the request for the documents are sufficiently well described so that a granted request shall be a basis for execution. In court practice in civil cases it is clear, however, that somewhat indecisive requests can be accepted and that a person can be ordered to produce categories of documents, which are identified with reference to type of goods, the signature on the document, or sometimes through the evidence themes.

Sometimes it is provided in a contract with an arbitral clause that a party shall have the right to obtain certain documents. If a party claims such a contract right for an obligation to produce documents, the opposing party can through an arbitral award be ordered to produce the documents. If the party wants to obtain the documents in order to present them as evidence in an arbitral dispute which concerns the contract, then he can base his claim on the provisions regarding a procedural obligation to produce the documents. The opposing party can be ordered by the arbitrators or finally by a court to produce the documents, but only to the extent that they have legal relevance and evidentiary significance in the dispute. These last two mentioned requirements do not limit the possibility for the party to commence a special arbitration to obtain the documents pursuant to a claim based upon the contractual obligation to produce them.

There is a possibility for a *party in a civil court case* to obtain a subpoena regarding an arbitral award which was issued in a dispute which has such connection with the present case that the award can have some evidentiary significance in the case. The order can be limited to only evidentiary relevant portions of the award. Recorded witness statements can be excepted from the subpoena obligation, if the applicant's interests can be met by requesting a hearing with the witness. The *arbitrators* can likewise order a party in another arbitration to produce an arbitral award in evidentiary relevant portions. The arbitrators can also give their permission to the court issuing a subpoena. In this connection the court should approve the arbitrators' judgement in the question of whether the arbitral award has such relevance that it needs to be presented as evidence in the present arbitration. A party in an arbitration should also be able to obtain written documents in another ongoing arbitration under the above mentioned conditions.

This essay demonstrates that the arbitrators in many respects can contribute to the production of a large number of documents by both parties and third persons. The arbitrators have a right to make discretionary determinations which in a few situations are limited by the requirement of a strict legal determination. This freedom gives the arbitrators a certain possibility in a domestic dispute to limit the document production order to a reasonable extent as is done in Swedish civil procedure. In international arbitrations which are conducted with the application of Swedish arbitration law the arbitrators can utilize their right to a discretionary determination so that in a more or less restrictive way they approve the request. If a party has his business located in a civil-law country and the other party in a common-law country, the large contrast between the countries' legislation regarding subpoenas can be overcome by the arbitrators through a compromise solution. This can be done because the Swedish arbitration legislation many times can fulfill the different requirements which the parties can present in an international dispute.

Judicial Control of Arbitration*

1 Introduction

There is a need for judicial control of arbitration during the proceedings whether one denotes such activities as court assistance or court intervention. Perhaps the last expression indicates that the supervision should be limited in order to avoid inappropriate interference, while court assistance seems to be a positive activity which ought to be accepted. The problem to what extent it is appopriate to authorize the courts to intervene or support arbitration can not be solved simply by emphazising the somewhat different meaning of the two expressions. The problem of the advisability of court intervention or assistance has to be solved in each case considering mainly the risk of delaying tactics, the increased costs, and the need for different ancillary proceedings. It ought to be stressed that not all kinds of such proceedings have significance as court control of the arbitration. Some interim measures taken during an arbitration do not have the purpose to create certain safeguards in order to prevent irregularities and obstruction during the arbitration.

Even after the arbitral proceedings, court control may be exercised. A party is entitled to request the court to do this by challenging the award or by trying to convince the authorities to refuse enforcement. Although this control takes place after the arbitration it has a great impact on the proceedings, since the arbitrators and the parties must consider the future possibilities to have the award set aside.

When parties to a contract agree that future disputes shall be decided by arbitrators, and not by courts, they often do so in order to obtain a speedy, flexible, inexpensive, confidential and final dispute resolution by persons with expert knowledge and in whom the parties have confidence. Arbitration, which is a kind of private dispute resolution, is an accepted exception from the State monopoly on adjudication. The different national arbitration acts contain provisions providing for enforcement of arbitral awards by government authorities. Further, it is generally prescribed in the laws that the court, on a party's application, may intervene and support the arbitration in order to secure that the proceedings can be implemented in an effective way, e.g., when a recalcitrant party fails to appoint an arbitrator or a designated arbitrator refuses to fulfil his duties. According to Swedish law, court assis-

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tance is accepted only by virtue of the Arbitration Act. During an arbitration a district court, for example, lacks competence to decide whether an arbitrator is disqualified. (Of course an arbitral award can be set aside from this reason, unless the applying party has accepted the arbitrator because the party was aware of the facts disqualifying him.)

It is a general *government interest* that some basic legal safeguards are upheld during the arbitration, because the State would not otherwise sanction this private dispute resolution.[1] But also the *losing party* in a dispute may demand that an arbitral award shall be set aside by the government courts, when the arbitrators have made serious mistakes.[2] If the award could not be set aside in these cases, contracting parties in general would avoid arbitral clauses in contracts even though arbitration may have several advantages. This would result in an increased workload for the courts regarding complex commercial disputes, which in the long run would be negative for taxpayers. This viewpoint speaks in favour of judicial review to some extent. On the other hand it is quite evident that the ground for challenging an award must be limited, if the speedy, flexible and inexpensive nature of the arbitration shall be preserved.

In contrast to this view of court control, one may consider a more modern basic view, based upon the idea that there is no need for judicial control, since there is a freedom to contract and the parties therefore are empowered to resolve disputes as they find appropriate. (The problem on the validity of agreement whereby the parties contract out future challenge actions in international arbitration will be dealt with infra. p. 209.) From this point of view the legal grounds for setting aside an award at least ought to be strictly limited.[3] However, arbitration would be discredited if irregularities became frequent and at the same time the awards could not be set aside from these reasons. If the arbitrators were aware that their awards could not be controlled by courts, some of them perhaps would be less careful and accurate, at least unconsciously. It is not acceptable that arbitration will lose its credibility and no longer be an attractive alternative to court proceedings which would result in the abandomment of this kind of private dispute resolution.[4]

The State has an interest in creating an effective and attractive court procedure for the business disputes. Privately resolved arbitral disputes prevent certain business issues from being considered by the courts. There is some need to increase the number of Swedish precedents to further develop legal principles applicable in commercial disputes in some areas. The state has recognized the desirability of increasing the number of precedents from the

[1]54 NJA II 5 (1929), SOU 1972:22 p. 50 Lindboe, Privat rettergang 129 (1944) and Heuman 6 Svensk och internationell skiljedom 6 and 7 (1986).
[2]Lindboe 127-8 (1944).
[3]Cf. Wetter, 2 J. Int. Arb. No 2 31 (1985).
[4]Cf. Id. 33-4 och SOU 1972:22 p. 56.

Supreme Court in this field of the civil law.[5] But the overloaded courts, which have been severely burdened by budget cutbacks probably could not cope with the substantially increased workload, which would occur if a great number of large and complex disputes were transferred to the courts. If such a development would occur in Sweden, the government would perhaps require that the businessmen should contribute to the costs of the government adjudication. This may be because those costs would be deemed as a natural part and a necessary consequence of the business activities and therefore should not be transferred upon the taxpayers.[6] This demonstrates that the Government has an interest in a well-functioning arbitral dispute resolution system and that judicial control is needed for upholding this system. Trade and industry can also benefit from a well-functioning arbitral procedure which presupposes judicial control.

Another trend which is developing in the field of arbitration supports the idea of court control. During the last decade freedom of contract has been limited in different ways. Permits or licences from government authorities are sometimes required according to the law as a condition for the sale of certain goods or for building certain industrial sites or for export. The laws concerning licensing arise from the public interest and the citizens' demands to be protected against measures which substantially jeopardize health, safety or the economy. Laws concerning such permits or licensing limits the freedom of contract. This may involve that the disputes, which are about invalidation of such contracts, may not be arbitrated. The parties, however, are at liberty to arbitrate disputes regarding only pecuniary claims, since there as a rule is no public interest in such dispute resolution.[7]

[5]SOU 1986:1 p. 126-9. The parties to an arbitral dispute may not by an agreement refer an issue of law to the Supreme Court to establish a precedent. The parties to a district court procedure are entitled to do so, provided that they have undertaken to not appeal. Prop 1988/89:78 64-7.

[6]Cf. SOU 1986:1 p. 98 and 142.

[7]Earlier it has been questioned whether disputes concerning the invalidation of patents were arbitrable. In Rejving v. Electrolux AB (NJA 1963 A 23) the plaintiff maintained, inter alia, in the arbitral proceedings that he was entitled to compensation in different respects because the respondent had unlawfully utilized inventions which could be patented. After those claims were rejected by the arbitrators the plaintiff commenced an action in order to have the award declared void according to the Arbitration Act sec. 20 par. 1 pt. 1. In this rule it is provided that an award is invalid to the extent the arbitrators have rendered a decision in a question which by law cannot be submitted to arbitration. The district court held that the the arbitrators' opinion of the possibilities to patent the inventions which the respondent should have utilized unlawfully, only formed a part of the findings of the award (not the ultimate order) for deciding the plaintiffs' pecuniary claims. The Supreme Court held that there was no basis for the allegation of the plaintiff that the arbitrators had decided an issue which according to the law could not be referred to arbitrators. As to arbitrability in patent disputes see Karnell Festskrift till Sveriges advokatsamfund 1887–1987 p. 285.

It is not entirely clear that the requirement of arbitrability is fulfilled if a permit is granted before the request of arbitration or during the arbitration or also even after the award is made but before the award is challenged.[8] Further, it is questionable if the competent authority otherwise may make a dispute arbitrable by declaring at different points in time in a binding way that there is no governmental interest to be protected in the arbitration. Probably one should not force a respondent to participate in an arbitration, when there only is a possibility that it later may be arbitral. Perhaps the anticipated permit may not be granted by the authority which will then make the dispute inarbitral. The risk that the party will be forced to pay costs for an arbitration which later must be terminated due to a rejected permit is a good reason to require that the dispute must be arbitral when the plaintiff requests arbitration.

Disputes concerning the validity of these contracts may be inarbitral in order to prevent parties from creating a situation, which is not acceptable from the public's point of view. As an example, one may mention that a party according to mandatory provisions of law is not authorized to buy an apartment house unless the local tenant authority has found that he is an acceptable administrator of the house. The purpose is to protect the tenants from speculative purchases which could result in that the buyer failing to repair and maintain the apartments. Issues on the validity or rescission of a

[8]A similar question of arbitrability arises in labour and consumer law. According to many Acts in this field, it is provided that some rules are mandatory. The meaning of the concept manadatory in this respect is that the weaker party, protected by the law, may dispose of his legal rights after a dispute has arisen and he knew what the dispute concerned. Ekelöf, Supplement till Rättegång I – V 36-7 (1990) and 40 NJA II 340 (1915). That is why labour and consumer disputes are amenable to settlement even if the disputes concern manadatory provisions. However, before the disputes have arisen the weaker party ought to be prevented from disposing of his legal protection by entering into an arbitral agreement. Although the Vacation Act contains mandatory provisions, the Supreme Court held that a dispute concerning pecuniary claims was arbitrable. This however was explained by the fact that the plaintiff had based his claim on an employee contractual relationship, while the respondent asserted that an older agency contract with an arbitral clause still was in effect. It was indisputable that the plaintiffs' activities for the benefit of the respondent company were based on the agency contract. As the plaintiffs' allegation did not indicate how and when the change in the contractual situation should have taken place or what it should involve, the Supreme Court held that the issue whether the plaintiff was entitled to vacancy compensation in the way he had maintained had such a connection with the agency contract that the arbitral clause of this contract was applicable. Arvold v. Kjellbergs Successors AB (NJA 1973 p. 620). Perhaps this case decided before Nykvarn, mentioned on p. 68, is in conflict with the principles established in the last-mentioned case. It is also possible that the principle in Nykvarn cannnot be upheld, if it is almost impossibile to draw a borderline between the arbitral and non-arbitral issues of the plaintiff's claim and the respondent's defense. Under all circumstances Arvold does not expressly contradict the notion that labour and consumer contracts regarding manadatory issues cannot have binding arbitral clauses. After a dispute has arisen the parties are at liberty to agree to arbitrate.

such sales contract are probably not arbitral.[9] Disputes concerning such contracts seem to be arbitral if the seller or buyer only claims pecuniary compensation, since an award would not have any direct impact on the tenants' situations. It is thus quite possible that an arbitral clause in such a contract is effective in some types of disputes but not in others. The clause will probably not be wholly inoperative because it is ineffective in some kinds of disputes. Of course here is a new need for judicial control.

One could object that the judicial review would not encompass the arbitrators' determination of the substantive matter in a certain case, since a dispute is arbitral or not arbitral irrespetive of whether the arbitrators have made a reasonable ruling as to the mandatory issues. A judgement of the Labour Court however, demonstrates that the need for control may be expanded even so far as to widen the scope of the arbitrability. The Labour Court held that the Act of Judicial Procedure in labour disputes did not bar the parties from referring disputes concerning mandatory provisions to arbitrators. The Labour Court however added that the parties cannot bind the arbitrators to apply contractual rules deviating from mandatory provisions in the law. Such contractual rules are void according to the Act of Employee Protection sec. 3 and the arbitrators must, according to the court, in their application of the law disregard contractual rules to the extent that they are void.[10]

According to the Arbitration Act sec. 1 a dispute is arbitrable if it is an issue of a civil matter which may be compromised by agreement or, as it is expressed in the Code of Procedure, if it is amenable to an out of court settlement. In the labour dispute it is possible that the parties had freedom to settle the case, although they could not with binding effect give contractual substantive instructions to the arbitrators on how to solve the dispute. Perhaps the dispute is not arbitrable because the arbitrators as well as the parties cannot deviate from mandatory rules. However, the Labour Court considered the dispute to be arbitrable, provided that the arbitrators disregarded instructions which conflicted with the mandatory rules. This case seems to indicate that a dispute may be arbitrable even if it concerns a matter of public interest which the parties cannot resolve, provided that the arbitrators do not violate the public interests. The problem of arbitrability then depends upon the parties' capability of appointing competent arbitrators which will consider the public interest in an acceptable way. Further, one may ask if it

[9]In Armerade Betong Vägförbättringar AB v. Bergmark,Sahlström and Sahlström & Bergmark the district court upheld an award in such a situation because the tenant board, a Government authority, had approved the buyer as an acceptable administrator by a binding decision. Subsequently, the district court held that there was no public interest which could exclude the parties' freedom to dispose of the issue. The plaintiff has appealed. Stocholms tingsrätt T-6-346-87,DT 94/89.

[10]Svenska Skorstensfejareförbundet v. Sveriges Skorstensmästares Riksförbund and Börjesson (AD 1978:62). Cf. Jarvin, 71 Sv JT 162 and 164 (1986) regarding the Mitsubishi case.

should be required that the arbitrators in fact had considered the public interest during the arbitration and in their award. This can only be decided in a challenge procedure. Before the arbitration has been commenced and during the proceedings, the question of arbitrability will be unclear and will depend of the arbitrators' future activities. It would be preferable if one could decide the issue of arbitrability clearly before the arbitration starts. The need for widening the scope of arbitrability results in judicial control which is not desirable from the point of view that it is based upon facts not forseeable when the parties made the arbitral agreement and when the arbitral proceedings were instituted.

The possibilities to arbitrate different disputes may increase if the award is only binding on the parties, not on governmental authorities charged with supervising public interests which are affected by the award. If a buyer of real estate finds that the tax effects are not as advantageous as the contracting parties had presumed, arbitrators are competent to decide on the rescission of the purchase. If the buyer and the seller are two cooperating companies which merely want to change an unfavorable business transaction there is a risk that the parties may try to avoid paying taxes relating to the transaction by obtaining a binding arbitral award ordering the transfer. They may think that by establishing an award which orders rescission of the contract they can avoid a sale and resale situation which requires a stamp tax (conveyence tax) to be paid twice. It is obvious that an agreement between parties not to pay taxes is not binding on the tax authorities. This does not mean that issues on rescission of sales are not arbitral. The award has no res judicata effect on the tax authorities and the tax courts may try the issues of rescission and resolve them differently than the arbitrators.[11] A reason for the tax court to decide such an issue in a different way could be that the arbitrators, unlike the court, are bound by admissions and concessions, but it is also quite possible that the two forums will evaluate the evidence differently. In this case there is no court control in so far as the award cannot be declared void due to lack of arbitrability.[12] But there exists judicial review in a different context, when a tax court must determine if a conclusive contractual issue shall be decided contrary to the arbitrators' ruling. Arbitrators have authority to issue an award which contains conditional orders, when a certain issue in

[11]Järavallen Fritidscentrum AB v Bostadsrättsföreningen Ljungbacken arbitral award 1981 12 16, Regeringsrättens beslut i mål no 1041-1983 and especially kammarrättens i Göteborg dom i mål 1176-1982 p. 3 and 4. See also regarding patent disputes Karnell, Festskrift till Sveriges Advokatsamfund 1887 -1987 296-303 (1987).

[12]Parties have no power to bind the tax authorities as to the question of who is obliged to pay value added tax (VAT) or who is entitled to deduction. If a party claims compensation from a contract party due to wrongfully paid VAT such a dispute is arbitrable. In one case, arbitrators had declared that some claims were to be ranked in the same category as damages claims and that because of this there were no reasons to order the party to pay compensation for VAT. The Court of Appeal held that this issue was arbitrable. Certererario was not granted. Gösta Johansson v. Bengt Carlsson (Göta hovrätt T 234/73).

dispute is not covered by the arbitral agreement.[13] Therefore, it also seems possible that arbitrators, as is the case in Norway, are entitled to resolve a dispute provided that a government authority later grants a certain permit.[14] Even if the public interest may be safeguarded separately in special procedures, it is quite obvious that the parties to the arbitral dispute are entitled to challenge the award for other ordinary reasons due to procedural irregularities.

Many of the advantages of arbitration would be lost if one could introduce extensive powers for the parties to challenge the award. Under such circumstances a party could delay a final and enforceable resolution of the dispute by applying for judicial review. Further, the challenge procedure could result in harmful publicity for the party who prevailed in the arbitral proceedings even if the award was upheld by the state courts. The existence of extensive grounds for setting aside arbitral awards may, during the proceedings, impede arbitrators from utilizing such flexible and speedy procedural mechanisms which the parties in fact wanted to obtain by choosing arbitration and appointing certain persons as arbitrators.

This demonstrates that the grounds for challenging an arbitral award ought to be limited. However, it is difficult to indicate how one should weigh the arguments for and against a party's right to have an award set aside. In the international arbitration there appears to be a tendency to limit the legal basis for challinging an award. Often commentators stress the importance that the award shall be a final and enforceable resolution of the dispute and that this is in conformity with the parties' intentions.[15] However, one may object that it cannot be in accordance with both parties' intentions that the award shall be final if it is based upon serious irregularities.

A type of *risk argument* may have contributed to the aspirations to make the arbitral awards final. If a company enters into a great number of business contracts the mangement has to take into account many problems resulting in economic losses in the future, e.g., due to increased costs, incorrect calculations, technical problems and breaches of the contract. It is important that the *transaction costs and the administrative expenses of the company will be reduced* as much as possible in the long run, including the costs for dispute resolutions. If a company will be involved in several disputes in some cases it may gain economically, and in others lose, if "wrongful awards" cannot be set aside because the grounds for challenging the awards are strictly limited. In the long perspective it is an advantage if the costs of challenge proceedings

[13]See supra p. 68–71.

[14]Intressentskapet Cappelengården v. J.W. Cappelens Forlag (Rt 1961 p. 439) and Peder Møller v. Alf Otto Haug (Rt 1983 p. 461).

[15]Schmitoff, Finalty of Arbitral Awards and Judicial Review, Contemporary Problems in International Arbitration 237 (1986) and Craig, Park and Paulsson,International Chamber of Commerce Arbitration V § 32.08 (1984).

can be avoided and at the same time the disputes can be finally resolved more expeditiously.[16] Profits achieved by certain companies may, to some extent, benefit other contracting parties, e.g., consumers by reduced prices. However this reasoning in support of strictly limited grounds for setting aside awards is not valid in cases when a party will be involved in a complex arbitration only once. If the outcome of such a dispute is of fundamental importance for the survival of a company, it has an interest in not being substantially deprived of the right to have an award set aside due to procedural irregularities.

2 Possibilities to Avoid Mistakes during the Arbitration

As far as possbile it should be provided that procedural irregularities will not occur during the arbitration and that the award is not based upon incorrect determinations of the substantive issues. Errors ought to be corrected during the arbitration, if possible. It is often much more costly to correct mistakes by having the state courts set aside an award after a protracted arbitral dispute has been decided. The legislators, the arbitrators and the parties ought to have a certain responsibility to ensure that different types of faults, if possible, will be avoided at an early stage in order to exclude or limit future time-consuming challenge procedures.

Through legislation a party or an arbitral tribunal may be empowered to have a complex problem regarding the conduct of the arbitration decided in a binding way by a court.[17] However, there are reasons to restrict a party's legal ability to compel a court to decide such procedural and substantive issues which may arise during the arbitration. A party must not have an opportunity to delay the arbitration by requesting court intervention during the proceedings regarding several issues.[18] Even if the arbitrators would be entitled to continue to conduct the proceedings, and thus were at liberty to refuse to stay the proceedings, a party could cause an opposing party substantial costs and cause him inconvenience if the party was entitled to commence court proceedings regarding a great number of issues, e.g., as to the arbitrators' duty to take or reject evidence. The fear that a party may attempt to obstruct the proceedings by unjustified requests for court intervention would normally mean that the arbitral proceeding has to be continued. Even with extensive grounds for challinging an award, one would be forced to accept that the court control had to take place after the arbitration. Quite a diffe-

[16]Cf. Samuel 2 J. Int. Arb. no 4 75 (1985).

[17]The not accepted proposal to empower arbitrators to obtain a declaration from the Supreme Court in an issue appropriate for a precedent encompassed not only substantive matters but also procedural questions. SOU 1986:1 p 141-2. See supra note 5.

[18]Cf. as to the English case stated procedure before 1979, Samuel, 2 J. Int. Arb. no 4 54-6 (1985).

rent solution is that an issue would be referred to a court if both parties agreed. As an example, the proposal that the Supreme Court, after granting review dispensation, would be authorized to decide in a binding way issues of principle importance if the arbitrators and the parties agreed to this procedure.[19]

It may be difficult to determine if a party's request for court intervention is unfounded and made in order to delay the arbitration. It is quite possible that a party's application for court assistance is justified and that both the parties and the arbitrators will benefit from a binding court decision in order to exclude the possibility for the parties to challenge a future award. One could imagine that court assistance may only exist with the consent of the court[20] or of the arbitrators, e.g., in cases of taking evidence.[21] Normally, it seems inapporpriate to empower only the court, which has limited familiarity with the arbitration, to decide if the court intervention is unfounded and inappropriate.

Before determining if the power to challenge an award on a certain basis should be legislatively allowed, one must clarify whether a binding court decision will actually exclude the possibilities to set aside the award on this basis. If a party is entitled to force a court to decide, during an arbitration, whether an arbitrator is disqualified then a difficulty arises. One must still take into account that an award may be challenged because the party has not been informed about the basis for the disqualification until the award was made. This is true even if a court, in a binding way, would have established that another ground for disqualification did not prevent the arbitrator from participating in the resolution of the dispute. This demonstrates that it always should be taken into consideration that after the award is made that a party may challenge the award because he was not aware of errors made by the arbitrators until then. Therefore, one can not always exclude a party's ability to challenge an award based upon certain kind of procedural irregula-

[19]SOU 1986:1 p 126-42 and prop 1988/89:78 p 67. See also note 5 and 17.

[20]Some Court of Appeal judgements can only be appealed with the consent of the Court. Prop. 1988/89:78 p. 32–39. Some prodedural decisions of the district court during the proceedings can only be appealed immediatly with the consent of that court. If such leave is not granted the decision can be appealed after the judgement is rendered. In the Code of Procedure chap. 49 sec. 3 it is provided: "If a district court in an order rendered in the course of the proceedings, has rejected an application for disqualification of a judge or has overruled an objection based upon procedural hindrance, a party desiring to appeal from the order must give a formal notice of exception. Such a notice must be given immediately if the order is pronounced at a hearing and otherwise within a week of service of ther order upon him. If a party fails to take exception within the time prescribed, he forfeits his right to appellate review of the order. If a timely exception is taken, the court shall decide, with reference to the particular circumstances involved, whether an appeal shall be taken separately or only in conjunction with an appeal from the judgement or final order in the case. An appeal taken separately shall be brougt by limited appeal." This rule is applicable if a district court refuses to dismiss a case on the request of a party invoking an arbitral clause. See also note 12 the eassay Is It Possible to Exclude Indisputable Claims from Arbitration.

[21]Arbitration Act sec. 15 par. 2.

rities and by providing that these may only be decided by a court during the arbitral proceedings.

The arbitrators are responsible for the proper conduct of the arbitral proceeding and a proper resolution of the dispute, at least to such an extent that challenge actions should be unnecessary. The grounds for setting aside arbitral awards should therefore be expressed in such a way that the arbitrators may easily determine how they shall proceed. Not only must they comply with the explicit rules contained in the Arbitration Act, but they also must comply with the procedural principles which are derived from the provisions relating to challenges of awards (Sec. 20 and 21) and the consequent case law. The basis for challenging an award should be formulated such that it is fairly simple for the arbitrators and parties to determine during the arbitration in which respects the procedural rules are supplemented by principles derived by the rules relating to challenges. If these sections of the Act are ambiguous and their meaning may only be established by the guidance of judicial precedents, it may be difficult for the arbitrators to know whether complicated precedents exist which restrict the principle of party autonomy and limit the arbitrators' freedom to conduct the arbitral proceedings in a flexible way according to their discretion. The arbitrators' difficulties increase if it is unclear whether their intended conduct of the proceedings will result in a void or challengable award. This fundamental problem is illustrated by some cases concerning the arbitrators' duty to ask questions and remind the parties in order to remedy an unclear or incomplete statement. The Swedish courts have such an obligation to guide the parties, but the Arbitration Act lacks any corresponding rules.

TBB Tekniska Byggnadsbyrån bankruptcy estate v. the State (NJA 1973 p. 740). When deciding the arbitral dispute the arbitrators seemed to have applied a certain principle of interpretation of contracts, namely the principle "contra stipulatorum". In so doing, the arbitrators presumed that one of the parties was the drafter of the contract, which was incorrect because both parties had contributed to the wording of the contract. The Supreme Court held that it is an "open question" as to what extent an award may be set aside due to the arbitrators' inadequate guidance of the parties. The Supreme Court maintained that it was clear in the present case that the arbitrators' presumption as to the draftsmanship of the contract was part of their evaluation of the evidence on the basis of the available material and was relevant to the substantive matter. In these circumstances the Supreme Court held that the arbitrators had no reason to ascertain the draftmanship of the contract by asking questions to the parties.[22]

[22]This case is reported in Arbitration in Sweden, but the translation of the expression "bristande processledning" (shortcomings in conducting the proceeding) is perhaps not fully accurate. The duty of the district court to guide the parties is prescribed in the following way in the Procedural Code chap. 42 sec 8 as in force 1973: During the preparation the court shall attempt to ensure that the parties specify everything they wish to cite in the case and, by questions and reminders, shall attempt to remedy an unclear or incomplete statement of parties. See Arbitration in Sweden 151-2 (1984).

One could ask whether the arbitrators' omissions to ascertain obscure statements by parties or witnesses will make the award challengeable provided that the errors are not just an incorrect evaluation of the evidence but are also a procedural error. So could be the case if the arbitrators are aware of the ambiguity of important statements, but do not try to find out the real meaning and thereby instead decide the case by guessing or in their own discretion. Perhaps then it is not actually proved that the mistake in interpreting the statement is only a part of the evaluation of evidence. Perhaps the award would be vacated on the losing party's application. On the other hand the procedural situation may often be different if experienced arbitrators decide not to ask questions of the parties regarding important statements of an unclear or equivocal nature. The arbitrators may prefer to conduct the arbitration in a strictly neutral manner without guiding the parties in any way and *rely on the principle of the burden of proof, if statements are difficult to interpret*. Then it seems that the arbitrators have chosen an acceptable procedural solution to the problem of construction, namely no questions or guidance but the application of the principle regarding the burden of proof. Even if the arbitrators improperly apply the burden of proof obligations to the parties, it would not be a basis for setting aside the award, since this involves an incorrect determination of a substantive issue, not a procedural issue. However, it seems doubtful, as has been said earlier, that it is an acceptable solution not to ask questions regarding unclear and important issues and rely upon guessing or uncontrolled discretion.

The Supreme Court itself has indicated that the omission to guide parties may be a basis for a challenge by declaring that it is an open question as *to what extent* awards could be set aside. On the other hand it seems clear that the mistake is *not primarily of a procedural nature* if the arbitrators did not observe that some statements were obscure and ambiguous to such an extent that a normal construction was not possible without asking questions. In such cases the arbitrators' error is primarily an incorrect evaluation of the evidence made during the arbitration, which may have caused a *secondary procedural mistake*, namely the omission to ask questions.[23] It can be difficult to determine whether an error is only or primarily of a procedural nature or whether some fundamental omissions to discover obscurities may be deemed as primarily procedural errors which may result in vacating the award. The Supreme Court case does not rule out that an award may be set aside if the arbitrators omit to ask neutral but decisive questions to the parties. This is not contradicted by *Arbitration in Sweden* in the statement that the Court thinks that it is not a procedural error if arbitrators abstain from attempting to resolve every ambiguity which arises in a proceeding in which the parties

[23]Cf. Bolding, Skiljeförfarande och rättegång 218 (1956) and Bertil N v. Sten A (RH 1987:121) dissenting opinion in the Court of Appeal.

are adequately represented.[24] Since the arbitrators cannot be certain that the award may be vacated due to the omission to ascertain obscurities of great importance, they may prefer to do so in order to avoid the risk of challenge proceedings.

If the arbitrators misinterpret, not the presented evidence such as statements of the witnesses and parties, but rather the parties' procedural activities such as the claims, the cause of action, the admissions, or their withdrawal, it is quite clear that the award can be vacated. A misinterpretation can mean that the arbitrators have exceeded the scope of the matters submitted to them. This is a basis for challenge according to the Arbitration Act sec. 21 par. 1 pt. 1. It is also possible that the arbitrators have not tried the case in all respects due to an incorrect interpretation. During such circumstances the award may be set aside by virtue of the Arbitration Act sec. 21 par. 1 pt. 4.

In a case, one of the parties in an arbitral dispute had, according to the Supreme Court, made a vague counter-claim. The Court criticized the arbitrators' failure to ensure that a party, sufficiently prior to the final hearing, specify the set-off claims which the party wanted to assert, and thereby failed to give the opposing party an adequate opportunity to defend himself. The court stated that this demonstrated that the dispute was not sufficiently prepared for being decided at a final hearing.[25] The award was vacated for several reasons. However it seems that an award could be set aside due to the failure to clarify obscure claims and grounds, when the opposing party's possibility to defend himself is thereby substantially impaired. This error would amount to a violation of Section 14 in the Arbitration Act providing that the arbitrators shall give each party a sufficient opportunity to present his case orally or in writing. Furthermore, it is stated that in the event that a party fails without valid excuse to avail himself of such opportunity, the arbitrators may decide the case on the existing material. It is difficult to determine whether a party's failure to realize the obscurity and to request a clarification would entitle the arbitrators to decide the case provided that no misinterpretation would be made. Even if such error was made it is possible that the award can not be set aside. First, one has to consider cases when the construction was too restrictive. One reason for not vacating the award could be that the party had waived his right to guidance from the arbitrators by proceeding without making a protest. Another reason could be that the applicable challenge rule in the Arbitration Act sec. 21 par. 1. pt. 4 requires that a procedural error be commited without the party's fault. Of course one may argue that the claiming party has been negligent, but the same may be asser-

[24]Arbitration in Sweden 152 (1984). The authors of this book also state that the Court perhaps also gave an indication that even if the actions of the arbitrators could not be completely characterized as considerations of the case, the arbitrators might still have been justified in not inquiring as to the draftsmanship of the agreement.

[25] Gunnar Jansson v.Jansson decedents' estate (NJA 1965 p.384).

ted against the challenging party who did not ask the arbitrators or the other party to clarify the meaning of the obscure statements. If the misinterpretation was too extensive the award may be set aside because the arbitrators have exceeded their authority. This can be so even if the challenging party has acted negligently by not requesting a clarification during the arbitration. This is due to the fact that Arbitration Act sec. 21 par. 1 pt. 1 lacks a prerequiste corresponding to the "no fault" prerequisite in sec. 21 par. 1 pt. 4. However a tacitly made waiver to invoke the arbitrators' error in failing to guide the parties is a valid ground for upholding the award according to the Arbitration Act sec. 21 par. 2.

Another Supreme Court case demonstrates that a misconstruction of a procedural statement will lead to the vacation of the arbitrators' decision. The chairman of the arbitral board had tried to convince the plaintiff to agree to a prolongation of the time period for rendering an award. The case was terminated by the arbitrators who considered that some statements made by the plaintiff amounted to a withdrawal. The decision was challenged. The chairman of the arbitral tribunal stated that the plaintiff had never used the word "withdrawal", but that his statements were construed as a withdrawal of the request for arbitration. With reference to Section 18 of the Arbitration Act providing that the arbitration agreement shall terminate if no award is made within a time limit agreed to by the parties, the district court held that the plaintiff's statements could not be construed other than as a desire that the time period should expire. This opinion was confirmed by the Supreme Court.[26] This case demonstrates that a party's procedural statements ought to be strictly interpreted according to the language, at least as long as such a construction has a reasonable meaning according to the alternatives offered by the law. The arbitrators have no wide discretion to construe such statements. They cannot expect that their determination shall be respected by the courts as is the case when the construction is a part of the evaluation of the evidence. Since the risk of a misinterpretation of statements in procedural issues will entitle each party to challenge an award, the arbitrators may prefer to persuade a party to clarify the meaning of his claims, grounds, admissions or confessions. The arbitrators cannot avoid the danger of challenge proceedings by construing the statements in favour of one of the parties. Whichever party they would favour, the opposing one may always attack the award.

Arbitrators shall attempt to avoid conducting the disputes in a way which involves a substantial risk of vacating the award. If a party tries to delay the proceedings or to present his case in an ambiguous way or to amend his claims several times, the danger of challengable errors increases. The arbit-

[26]Paul Jansson v. Reprotype AB (NJA 1975 p 536). See also p. 79 and Arbitration in Sweden 152 (1984).

rators may, for example, be tempted to limit a recalcitrant party's right to present his case after having granted him several postponements. Even an arbitral clause or a request for arbitration which is vague or obscure will increase the risk that the arbitrators will go beyond their authority. Unfortunately, the need for forceful measures against recalcitrant parties often adds to the danger of challengeable errors.

For reasons of costs and efficiency, arbitrators sometimes will be forced to conduct the arbitration in such a way that the possibilities to attack the award will be increased. During such circumstances the arbitrators ought to prevent future challenge procedures by attempting to obtain the parties' consent to proceed in the suggested manner. A party normally is entitled to refrain from asserting a known concrete ground for challenging the award, when the corresponding legal ground is upheld in the parties' interests and not in the public interest. (Arbitration Act sec. 21 par. 2.) Many countries' national arbitration acts often provide that a party will be precluded from challenging the award if he presents his case without objecting to a procedural error which has been committed. In such circumstances there is no need for the arbitrators to attempt to obtain the parties' approval of the conduct. However, before proceeding in a perhaps objectionable way, the arbitrators cannot know whether a party will object without undue delay. Thus, it is required that the parties beforehand accept a carefully described proposal as to how the arbitration shall be conducted.

According to the Arbitration Act sec. 20 par. 1 pt. 1 an award is void if there is no valid arbitration agreement. A party will not be precluded from attacking an award on this basis if during the arbitration he fails to object that there is no valid arbitration agreement. The rule concerning waiver in section 21 par. 2 in the Arbitration Act regarding challenge grounds has no corresponding provision in section 20 on void awards. Criticism has been made against this legislation, which in theory gives a party the power to attack the award without any time limit.[27] However, the arbitrators may minimize the parties' possibilities to have the award declared void. After the parties' claims and grounds finally have been stated and recorded in the minutes with any amendments made by the parties, the arbitrators may require that the parties accept that the dispute will be tried as the parties themselves have described the issues in dispute.[28] If the parties accept this then an arbitral agreement is made before the arbitrators. They are entitled to do so according to the Arbitration Act sec. 11 par 2. It is not required that this arbitral

[27]Bolding, Skiljedom 187 (1962) and Lindboe, Privat Rettergang 131 ( )

[28]An unclear acceptance must be avoided, e.g., when a party accepts the arbitrators' competence with contradicting statements or an obscure reference to an earlier made protest. Cf. Western Tankers AB v.Boliden Chemtrade Services AG (RH 1986: 162). If a valid new arbitral agreement is made a party cannot later make the agreement inoperative by repeating an earlier made protest.

agreement be signed by the parties. However, the arbitrators have to check that the powers of attorney specifically authorize the representatives to enter into arbitral agreements. An ordinary power of attorney will not entitle a lawyer to make an arbitral agreement.[29] If the arbitrators have not required the parties' personal signatures on a document representing the new arbitral agreement, it may be too late to establish such a new agreement if the parties are not present during the final hearing.

If a new arbitral agreement is made according to the arbitrators' proposal and any amendments made by the parties, then the award cannot be vacated because there is no valid arbitral agreement as to the decided issues. Furthermore the parties will be deprived of the possibility of having the award set aside wholly or partly because the arbitrators would have gone beyond their submission, e.g., when the original arbitral agreement has only partially covered the decided issues. If the parties have not expressly accepted an enlarged submission for the arbitrators and they proceed to try issues not covered by the arbitral agreement, a new arbitral agreement may only be made in exceptional cases by the parties' procedural activities and failure to protest. In a Supreme Court case where the arbitral issues were complex and both parties had requested arbitration as to substantially the same issues, and subsequently presented their case and evidence, the Court held that a new arbitral agreement was made before the arbitrators.[30] A new agreement will not be made if one party requests arbitration and the other defends himself without objecting against the lack of a valid arbitral agreement. This would involve an application by analogy of sec. 21 par. 2 concerning waiver, which is only applicable as to actions based upon a challenge.

It is important that the arbitrators try to avoid conducting the arbitration in such a way that only one party, but not the other, is given an opportunity to challenge the award. There is no balance between the parties if one party is able to have the award set aside in the future if he should lose the case,

[29]Hassler, Skiljeförfarande 21 (1966). In a case where a party had requested arbitration and applied to the district court for appointment of an arbitrator on the respondent's behalf, the respondent objected that the arbitration was not properly commenced since the respondent's counsellor had not been empowered to receive the request for arbitration. According to the power of attorney the lawyer, inter alia, was entitled to enter into arbitral agreements and request for arbitration, but not to receive a request for arbitration. The Court of Appeal found that the respondent's counsellor before the receipt of the request for arbitration had acted in a way which gave the plaintiff's counsellor the impression that the former had a general power to represent the respondent including receipt of a request. These activities were not sufficient according to the Court that the respondent's counsellor should be deemed to have represented the respondent. The Court referred to Grönfors, Avtalslagen 91-2 (1984) and NJA 1973 p 725 and 1974 p 706). The court found that there was a bar to appointing an arbitrator since no arbitration was properly commenced. The Supreme Court denied review. Hults Tryckeri AB v. Åby System i Stockholm AB (Svea hovrätt Ö 1805/88, H D Ö 1778/88).

[30]Persson v. Intresseföreningen Friluftsstaden upa (NJA 1963 p.658). See also about this case Heuman, Advokatsamfundets skiljedomsprövning av arvodestvister mellan advokater och klienter 47 (1986).

while the other would lack such a possibility in the event that his adverse party would prevail. If possible, a party should not be given the benefit of speculating in the outcome of the dispute. If, for example, a party challenges an arbitrator appointed by the opposing party after substantial costs have been incurred in the dispute, the party may be forced to appoint a new arbitrator because of the danger that the award will be vacated.[31] The arbitrators shall not attempt to influence the party to retain an arbitrator who probably is not disqualified, because only one of the parties may make a challenge. It would be unfair to the other in the event that the arbitrator was in fact disqualified. By influencing one party the arbitrators can create a situation where the parties will not be in an equal position. If the issues regarding challenges of arbitrators may be decided in a binding manner during the arbitration by an arbitral institute, or a court according to some foreign law, it may be appropriate to use this possibility in order to prevent one party from obtaining a benefit which the other lacks. During other circumstances it is difficult or impossible for the arbitrators to avoid a situation where only one party has a right to challenge the award. If one party, for example, has waived his right to challenge an award due to the failure to protest in a written pleading, the other may do so later after having been given an opportunity to respond to the arbitrators. The parties' should consider carefully whether a protest must be made when they are ordered to present their case in writing at different points in time. If one party does not detect the arbitrators' error he may be put in an undesirable position. This problem would not arise if a fault is commited during an hearing. Both parties should protest at the same time during the proceedings.

The parties should have some responsibility for ensuring that irregularities are avoided. According to the Arbitration Act sec. 21 par. 1 pt. 4 an award may only be vacated due to an error committed by the arbitrators if it was not caused by the party's negligence. Assume that a party's statements have caused the arbitrators to decide procedural issues in an incorrect manner. If the party later points the error out to the arbitrators one could maintain that he is precluded from having the award set aside, when the error was occasioned by him. However, in some cases the arbitrators should change their decision after such a notification, if neither the parties nor the arbitrators will be caused undue inconvenience. Then perhaps it cannot any longer be considered that the party has caused the error by his negligence, since the arbitrators' omission to change their decision is not reasonable.

If a party had a legal excuse for his absence during a hearing then this is not a reason for having the award set aside in the event that the party had been able to notify the arbitral tribunal of this excuse. A party deprived of

[31]Cf. Lindskog, 6 Svensk och internationell skiljedom 19 (1986) and Nordenson, 6 Svensk och internationell skiljedom 10-11 (1986).

his right to present his case has under these circumstances caused the arbitrators' error according to the legislative history of the Arbitration Act.[32] If a party deliberately or negligently has made incorrect statements and thereby occasioned a procedural error, he may be deprived of his right to have the award vacated. Therefore it is important that a party as soon as possible correct his statements, since the arbitrators may often exclude the undesirable consequences of the orignal error by changing their first decision.[33] From this party's perspective, it is important that he correct such erroneous statements when he has caused an error and is deprived of challenging the award unlike the opposing party which otherwise will be given the benefit of awaiting the outcome of the dispute, and then possibly attacking the award.

3 Possibilities to Correct Procedural Errors after the Arbitration

If a party commences an action in order to have an arbitral award declared void or set aside, the court has no competence to decide the substantive issues. The court may only reverse or uphold the award. According to Swedish law, courts are not authorized to remit the case to the arbitrators, e.g., in order to have minor issues decided again in conformity with the court's directives as to committed procedural faults.[34] The Arbitration Acts also lack a rule corresponding to the one in the Procedural Code chap. 17 sec. 15 entitling the court to correct a judgement or an order because of an error in the transcription, calculation or any other similar oversight. However, it has been held that the arbitrators would be entitled to do so by an analogous application of the rule in the Code of Procedure.[35] It seems somewhat unclear to what extent the arbitrators are empowered to correct the award without going beyond the submission and thereby create a basis for a challenge action. If an award contains complex calculations of amounts and the arbitrators finally round off an exact sum to a higher or lower sum, e.g., to whole millions, there is no miscalculation or procedural error committed. The method of rounding off is a part of the substantive matter and not even unreaso-

[32]54 NJA II 34-5 (1929).

[33]This would also be possible if the decision is only a confirmation of a *party agreement*, probably based upon one of the party's incorrect understanding of the facts. It is true that a party agreement in procedural issues as a rule can not be changed by the arbitrators nor by one party's desire to retire from the agreement. See cases at note 56 and 57. However, if the agreement is caused by fraud it can be declared void according to the Contracts Act sec. 31 (by analogy since the act encompasses only legal acts in the field of property) law. However the deceived party may oppose a change of such an agreement in a procedural issue which he finds favourable.

[34]Cf Mustill and Boyd 546-568 (1989).

[35]Bolding, Skiljedom 17 (1962), Hassler, Skiljeförfarande 103 (1966), SOU 1972:22 p. 92 and Arbitration in Sweden 77 and 138 (1984).

nable estimations can be attacked by challenging the award.[36] If the arbitrators would have corrected such an estimation, the "corrected" award may be set aside to the extent that an amendment is made.

The Arbitration Act also lacks, unlike the UNCITRAL Model Law, a provision authorizing the arbitrators to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitrators intentionally make a partial or interlocutory award they of course have authority to make a further award dealing with the remaining issues according to *Arbitration in Sweden*.[37] The arbitrators are competent to render a separate award on one of several claims according to the Arbitration Act sec. 19. However they probably are not competent to make an interlocutory award over one party's objection. Such an interlocutory award might determine one issue (liability) but leave another issue dependent on the first, e.g., the amount of damages for later determination.[38] If the arbitrators have intentionally made such an award then they have committed an error and a court may vacate this award according to the Arbitration Act sec 21 par. 1 pt. 4, provided that the outcome had been influenced by the fault.[39] This incorrect separation of the issues in dispute means that it could also be an error to decide the remaining issues in an separate award. It may be a disadvantage to the objecting party to be precluded from presenting all the evidence in one hearing and to be forced to call some witnesses long after the first award is made when the witnesses may have forgotten what they experienced as to some complex business transactions in dispute. As the submission to the arbitrators did not specifically entail two separate awards, perhaps they have *exceeded* the submission according to the Arbitration Act sec. 21 par. 1 pt. 1. If this argument was accepted by the courts, the awards could be set aside even if the irregularities had not influenced the outcome. This prerequisite is only included in the Arbitration Act sec 21 par. 1 pt. 4 regarding other procedural errors. If the arbitrators negligently omit to decide a claim or an issue, then this seems to be a challengable fault, at least according to the Arbitration Act sec 21. par. 1 pt. 4.[40] But perhaps by making such an award and then later an additional award, the arbitrators could also be considered to have exceeded the submission.

A losing party may also request legal review, after the prevailing party has applied for enforcement. The ground for refusal of enforcement in domestic cases coincides with the grounds for declaring an award void or set aside according to the Arbitration Act. The execution authority, Kronofogdemyn-

[36]Mc Clendon & Everard Goodman, International Commercial Arbitration in New York 134 fotenote 73 (1986).
[37]Arbitration in Sweden 138 (1984).
[38]Arbitration in Sweden 128-9 (1984).
[39]Cf. Bolding, Skiljedom 177 (1962).
[40]Bolding ,Skiljedom 178 (1962).

digheten, first has to decide if the award is enforceable, a legal or judicial determination, and then has to carry out the execution. Even at this later stage when it comes to execution, some objections can be made by the respondent, e.g., that the ordered amount has been paid or that set-off claims will prevent the execution. These issues will be dealt with later in the essay regarding enforcement of foreign arbitral awards.

According to the Execution Act chap. 3 sec. 15 (2) the award may be declared enforceable if there exists no ground which renders the award void even if no action is filed against the award. This means that the enforcement authority on its own behalf has to consider the various grounds for declaring the award void according to the Arbitration Act sec. 20. Further the award may be declared enforceable according to the mentioned provision (3) in the Execution Act if it is not made probable that the award may be set aside according to the Arbitration Act sec. 21. This means that the respondent has a burden of proof and that he must specifically invoke the grounds supporting the claim that the award shall be vacated. It is formally not required that the award has be challenged by the respondent as a prerequisite for refusal of declaring it enforceable. However, it has earlier been mentioned that an award must be challenged within sixty days after the party received the award, while there is no time limit at all for commencing an action for having the award declared void. In order to deprive the losing party of his right to invoke challenge grounds in an enforcement case, the prevailing party may delay his application for enforcement until the time period for challenging the award has expired. The losing party will then be precluded from relying on challenge grounds, e.g. that the arbitrators exceeded the submission, disqualification, the fact that the arbitration should have taken place in a foreign country, or other procedural errors, which in probability may be assumed to have influenced the outcome of the dispute. The losing party may under those circumstances rely on a few serious errors which make the award void, e.g., the invalidation of the arbitral agreement, the nonarbitrability or that the award was not properly signed by the arbitrators.

This means that the losing party has to predict the consequences of an enforcement application made just after the expiration of the time period for challenging the award. If he believes that the award may be set aside according to the Arbitration Act sec. 21 he has to foresee that the prevailing party may attempt execution and thus he must challenge the award within sixty days after the award was served on him. Probably after this time period

he cannot amend his action and add new challenge grounds.[41] For example if the respondent has filed an action for having the award declared void, four months after the award was made, it seems unreasonable to entitle him to amend his action after one year and add, for example, two or three new grounds for challenging the award. According to the legislative history of the Act, the time limit shall give the party sufficient time for investigating whether there exists challenge grounds and to determine if it is appropriate to rely on this basis for an action against the award. Further, it was stated that a new time limit does not start to run, if a party later will be aware of a basis for challenging the award.[42] Therefore, it seems unreasonable that a losing party, perhaps without investigating the challenging grounds, who had filed an action for setting aside the award relying on an unfounded ground, would be entitled after a year or more to add two or three new grounds before the district court. If such a power would be given to the losing party, one would invite obstruction tactics, which would contradict the desire to make awards final, binding, and enforceable as soon as possible. If a new challenge ground may not be invoked in proceedings for setting aside an award, then no such grounds for refusal of enforcement may be invoked after the expiration of the time period. This means that a losing party who wants to obtain a legal review of the award in a domestic case should not wait to do so until after the time period has expired and rely upon control by the enforcement authority instead of judicial review by courts.

After the prevailing party has applied for an enforcement declaration the losing party may ask for a stay of enforcement according to the Execution Act chap. 3 sec. 18. Only a court has jurisdiction to grant such a stay and can do this only after the party has commenced an action for having the award declared void or set aside. It is appropriate to include a demand for stay of enforcement in the summons application, whereby a challenge procedure will be instituted. The court has to decide on that issue in a rather short

[41]Hassler, Skiljeförfarande 122 with fotenote 32 (1966). Different opinion Bolding, Skiljedom 225 (1962). Quite a different problem is that a party may be prevented from relying on new grounds due to provisions in the Procedural Code, e.g., due to the rule in chap, 50 sec. 25 as to Court of Appeal proceedings. After the award is made a party may waive his right to invoke grounds for making the award void or being set aside. If a party has relied upon a challenge ground he may after the time period modify this, by adding new evidentiary facts as long as he is not relying on a new independent ground. If he ,e.g., has relied upon a certain relationship between the opposing party and an arbitrator as a ground for disqualification he may not after the time period invoke earlier unknown extensive advising activities by the arbitrator towards the adverse party as a reason for disqualification. This would be deemed as a new independent ground.

[42]54 NJA II 50 (1929).

time.[43] If an enforcement declaration is issued then this decision may be appealed to the Court of Appeal and then to the Supreme Court. Execution of the award may be implemented after enforcement is granted by the execution authority and regardless of appeal. Enforcement Act chap. 3 sec. 17 and 18 and chap. 2 sec. 19.[44] After the issue of an enforcement declaration has been tried by perhaps three different forums, although rather speedily due to priority, then the district court, the Court of Appeal and the Supreme Court may also try the same issues as were involved in the refusal of enforcement in the proceeding for having the award declared void or set aside. This kind of *double control*, which may exist in complex cases, will cause the prevailing party to incur substantial costs, even if he is entitled to apply for execution as soon as the enforcement authority has issued an enforcement declaration (apart from those cases when a court has stayed the enforcement).

If an award is found by the enforcement authority to be so obscure as to make enforcement impossible, the existence of such an award shall not, according to the Arbitration Act sec. 22, prevent a party from commencing an action in court concerning the question so decided by the arbitrators. If the ultimate order of the award does not seem to be supported by reasons or even is contradicted, this is not a basis for refusing enforcement. This provision does not entitle the losing party to attack the award because the substantive matter has been determined in such a way that the ultimate order seems to be incorrect. Wrongfully made calculations may, however, as has been mentioned earlier, be corrected by the arbitral tribunal if they are evident. Even if the ultimate order is somewhat unclear the enforcement authority may establish the meaning by interpreting the award provided that the result may not be reasonably questioned.[45] According to *Bolding* the applying party may supply the enforcement authority with supplementary material in order to make it possible for the authority to establish the meaning of the award, however without giving the authority the power to reconsider the orders of the arbitrators.[46] In a Court of Appeal case, two parties had in an

[43]In a district court case Karlson v. Bostadsföreningen Stuckatörens hus (Stockholms tingsrätt T 6-289-89) the district court decided to stay the enforcement without giving the other party an opportunity to defend himself, as the losing party in the arbitration has especially applied for. It seems that a court has such a right only if it is expressly provided in the law, that an exception may be made from the principle of the adversarial procedure. Cf, e.g., the Code of Procedure chap. 15 sec. 5 par 3 as to interim measures. A court is empowered to decide on only the applicant's reasons if it is provided that the court may determine the issue "immediately" (cf the Code of Procedure chap. 50 sec. 8), but the Execution Act chap. 3 sec. 18 lacks such an authorization. Further, there seems to be no strong need for such a speedy stay of enforcement, since the execution of the award may not be started until the respondent has given a reply in the enforcement proceedings and the enforcement authority has granted enforcement.

[44]Walin, Gregow and Löfmarck, Utsökningsbalken 86 and 55 (1987).

[45]Walin, Gregow and Löfmarck, Utsökningsbalken 91-2 fotenote 3 (1987).

[46]Bolding, Skiljedom 18 (1962).

award been ordered to pay a sum but were not expressly directed to do so with joint and several liability. After one of the losing parties had paid approximately one half of the sum, the execution authority refused to declare the award enforceable. The Court of Appeal reversed this decision and held that it was certain that the ultimate order aimed at joint and several liability due to the circumstances. Another reason for the Court's decision was an anology to sec. 2 of the Promissory Note Act which provides for such responsibility as to debtors if nothing to the contrary has been expressly indicated.[47]

If the enforcement declaration has been refused by the competent authority, the applying party is at liberty to choose between commencing a new arbitration or a litigation according to *Arbitration in Sweden* and *Hassler.*[48] Courts are competent to construe judicial judgements, and therefore the courts also should be competent to establish the meaning of an unclear order contained in an arbitral award.[49]

An issue decided in the ulimate order of an award sometimes will be of immediate significance as a preliminary issue in a later commenced litigation or arbitral proceedings. According to general principles of res judicata and the binding effect of judgements the arbitrators' determination will be binding in the later dispute. Evidence offered regarding such an issue ought to be rejected. If the award is challenged sometimes there are reasons to stay the later commenced dispute until the challenge action is decided in a legally binding judgement. If this action seems to be unfounded a stay of the subsequent dispute seems to be inappropriate to the prevailing party. In some cases there is a special need for an urgent determination in the later dispute and one cannot await the outcome of a challenge procedure. Assume that a party has been awarded a substantial amount of money and that he has relied upon the award in an application for having the losing party declared bankrupt by the district court. If the losing party, i.e., the debtor, objects that the award is void or challengable and that he therefore must not be declared bankrupt, his defence has to be tried quickly as a preliminary issue in the bankruptcy case. This case has to be determined in a few days or weeks. The district court then is forced to decide whether the award will probably be vacated and if so, whether the creditor in fact is entitled to payment.[50] The district court thus has a duty to try the debt's validity, probably in a type of summary proceeding, provided that the court finds that there is a strong

[47]Tage Israelsson Byggnads AB v. Kent Forschner-Hell and Mona Danielsson (Svea hovrätt Ö 2040/81). In this case the Court did not refuse to declare the award enforceable due to some unclear questions regarding the interest calculation and the question if all or only some claims concerning the construction were decided by the award.

[48]Hassler, Skiljeförfarande 125 (1966) and Arbitration in Sweden 34 and 140 (1984).

[49]Ekelöf, Rättegång III 122-3 (1988) and Bolding, Skiljedom 51 fotenote 82 (1962).

[50]Karl S. Bergh v. Konkursrekvirenten v/ Seva Bygg and Utstyr and Karl S Berghs Konkursbo (Rt 1966 p 1320).

likelihood that the award will be vacated.[51] This determination of the substantive matter in bankruptcy cases is not a procedure to set aside the award, although the court may require that the losing party commence an action for having the award vacated as a condition for trying whether the debt created by the award may in fact be rejected.[52]

4 Judicial Review Limiting the Arbitrators' Competence to Change Their Procedural Decisions

The principle of party autonomy must not be confused with the principle that the arbitrators control the procedure, i.e. that the arbitrators are empowered to conduct the proceedings in a flexible way according to their discretion in the absence of special rules governing the procedure. The provisions in the Arbitration Act are mandatory on the parties and the arbitrators according to the legislative history. When a rule may be made ineffective by an agreement, the Act indicates whether an agreement between the parties is sufficient or whether the arbitrators' consent is required.[53] These statements from the legislative history, however, have to be modified to some extent as the problems are rather complex. These issues will not be discussed.[54]

The above statement more simply expressed, is that the arbitrators are

[51]In a case a party had applied for having a debtor declared bunkrupt after the debtor had been ordered by the creditor to pay an indisputable and matured debt. An omission to pay such debt is a presumtion for insolvency according to the Bankruptcy Act chap. 3 sec. 9. The debtor invoked an arbitral clause. The Court of Appeal held that the district court had to try whether the claim in fact was indisputable and that the district court could not omit to try this issue in the bankruptcy case. If this determination would demonstrate that the claim was disputable then there was no basis for the presumption of insolvency. Lyfotherm AB bankruptcy estate v. Sydsvenska Energisystem Nilsson och Viberg AB (Hovrätten över Skåne och Blekinge Ö 29/88). One could comment on this by stating that the need for a very speedy dispute resolution as to the indisputable nature of the claim would make it necessary to try the issue in the bankruptcy proceedings. If the application would be rejected due to the disputable nature of the claim, the indisputable nature of the claim of course could be demonstrated later by an arbitral award. Cf. also regarding determination in bankruptcy cases the signifcance of judgements in tax cases, Kronofogdemyndigheten i Uppsala v. Osman C (NJA 1983 p. 685) and Heuman, Specialprocess, Utsökning och Konkurs 159 (1987).

[52]Cf. Götaverken Arendal AB v. General National Maritime Transport Company (NJA 1979 p. 527) including the dissenting judge in the Supreme Court and van den Berg 354 (1981).

[53]54 NJA II 8 (1929).

[54]Cf. Arbitration in Sweden 6 with note 3 (1984). One example may illustrate that some exceptions have to be made. The Arbitration Act sec. 5 reads as follows. "If the parties do not agree on the choice of arbitrators and have made no agreement as to thier number and the mode of thier appointment, there shall be three arbitrators, one appointed by each party and the third by the arbitrators so appointed." According to the language, the parties have complete freedom to agree on the mode of the appointment of arbitrators. From a Supreme Court Case one, however, can conclude that a clause authorizing one party to appoint the majority of the arbitrators is not accepted. This principle limits the freedom, but as long as it is not violated it seems like the parties are empowered to agree on the appointment of arbitrators as they desire. See below on p. 235 and Heuman, Specialprocess Utsökning och Konkurs 24-5 (1987).

first bound by the mandatory rules, second, by the parties' agreements, and third, by non-mandatory rules which are not ineffective due to party agreements. In the absence of such rules and party agreements the arbitrators may decide how to conduct the arbitration. If the arbitrators utilize this freedom or the freedom offered by vague requirements in the law and decide to proceed in a certain mannner, they may later change their decisions if they consider it to be appropriate, e.g., due to new circumstances or renewed considerations. Decisions of procedural issues made during the proceedings have as a rule no res judicata effect and may be replaced by new orders.[55] From this perspective, the arbitrators are not prevented from amending procedural directives, e.g., as to the evidence-taking, when those decisions are based upon an application of a certain section in the Arbitration Act. However, it could be strongly recommended that the arbitrators do not change their decisions whithout the parties' permission and not over one party's objections without having sufficiently good reasons. If the arbitrators substantially amend the basis of a party's intended procedural activities this would amount to a violation of the principle of due process. However, there may exist cases when the arbitrators find that a new directive would be the most appropriate measure in order to safeguard the due process, e.g., in order to prevent one party from benefiting unduly from an inappropriate decision perhaps leading to an incorrect outcome of the dispute. If the parties are given sufficient time to prepare and present their case after new orders have been issued, it seems acceptable or even reasonable to replace a decision with a new one.

When the arbitrators determine whether they are authorized to amend an order, they should carefully consider that *party agreements must not be changed without the parties' consent, while the arbitrators' orders may be changed.* A party is not in any way entitled to cancel his promise to comply with a party agreement, unless the other party has breached this contract. In a Supreme Court case where a party had challenged an award, the Court found that the parties had stated before the arbitrators that issues relating to the statute of limitations should be decided separately, before an award on the remaining issues was made. The Court held that the parties thereby had entered into an agreement which the arbitrators had to follow. In spite of this the plaintiff later requested that the arbitral dispute should be decided in its entirety in one award. The Court held that the arbitrators were competent to determine the issue of the statute of limitation bar separately and render an award thereon. The Court found that no procedural error was committed.[56] In another Supreme Court case, certain issues had been submitted to arbitration. Later a party unilaterally withdrew his claims regar-

[55]Fitger, Rättegångsbalken 17:61 (1986). Cf also Lindblom, Processhinder 125-34 (1974).
[56]Gunnar Jansson v. Oscar Jansson decedents' estate (NJA 1965 p. 384).

ding these issues. The Supreme Court held that this had not resulted in a change of the arbitrators' jurisdiction based upon the parties' agreement. The Court held that the arbitrators had not gone beyond the submission.[57]

The possibility to make the procedure flexible and to change orders due to the varying circumstances will sometimes be lost if the parties at an early stage enter into agreements on procedural issues. Later it may be difficult for the arbitrators to persuade both parties to accept, for example, a new time schedule. For this reason the arbitrators should refrain from contributing to detailed and extensive party agreements. Often the arbitrators make suggestions as to the future conduct and ask the parties if they could accept the proposals. If they do so, a party agreement is made and the arbitrators cannot later change an inappropriate order, although it originally mainly emanated from the arbitrators. If they want to retain the privilege to amend what was intended to be merely a proposal and later a decision made by the arbitrators, they must reserve the right to change the party agreement confirmed in their written decision. This cannot be done against both parties' desires, since a common and clear party instruction to the arbitrators will be a party agreement. In order to create powers to amend directives the arbitrators may try to avoid creating a party agreement, by not asking the parties to accept a proposal, but merely to present some points of view regarding the proposal and other appropriate solutions.

Sometimes a party may attempt to persuade the other party to accept a proposal which would give the parties different procedural rights, e.g., one party more time to present or prove his case than the other. According to the Arbitration Act sec. 13 the arbitrators shall deal with the case in an impartial way. Therefore it seems appropriate that the arbitrators may ask the parties whether they really want to agree upon substantially different conditions. If one party would require the other to consent to a binding time schedule, with a unilateral right for him to rescind the agreement, it seems appropriate for the arbitrators to remind the other party of the effect of the suggested contract. If such a contract nonetheless is made, it is not excluded that it could be set aside according to the Contracts Act sec. 36, provided that it violates the principle of due process. If the arbitrators wrongfully consider the party agreement void, they have committed a challengable error just as in cases where they amend a party agreement without the consent of both parties.

[57]Persson v. Intresseföreningen Friluftsstaden upa (NJA 1963 p. 658).

5 Judicial Review Caused by the Arbitrators' Refusal to Accept a Revocation of a Party's Procedural Action

A party often makes procedural statements which are binding and advantageous to the other party. A party may admit facts, e.g., if he considers that it would not be meaningful to contest them. Such an admission is binding. A court and an arbitral tribunal may not rule contrary to the admitted facts. This would be misleading to a party, who had refrained from presenting evidence, in the belief that there was no such need. The award may be set aside if the outcome has been influenced. The arbitrators' error is not primarily an improper evaluation of the evidence, since no such action should have taken place. It is an error which can be challenged and which was committed by the arbitrators. Therefore, it is important that the arbitrators carefully document admissions. Evidence offered regarding admitted facts shall be dismissed as unnecessary.[58] Further, a stipulated order for a part or all of a prayer for relief, e.g., a payment claim, is binding on the arbitrators.[59] They may not reject the claim, even if persuasive evidence exists for such an opinion. A violation of this principle would amount to a challengable error which would always influence the outcome to some extent.

A party to an arbitration may often simplify the proccedings by admissions and stipulations and thereby make the arbitration speedier and less expensive. For this reason it is important that the parties are not discouraged from making admissions and stipulations. Thus, they should be entitled to revoke these statements, although the Arbitration Act is silent on this point. The Code of Procedure, chap. 35 sec. 3 provides that in the event that a party withdraws his admissions of facts, the court shall determine, in view of the reasons for the withdrawal and other circumstances, the probative effect of the admissions. A party is entitled to revoke his admissions even at a late stage in the proceedings and before the higher courts. According to some Supreme Court cases, stipulations may be withdrawn before the court where it was made, but probably not generally in a higher court.[60] The Arbitration Act lacks provisions on the withdrawal of these types of statements and no cases are reported in this field. Usually a party should be authorized to withdraw such statements originally made in the opposing party's favour. However, if a revocation is made at a late stage of the final hearing and there is a time limit for rendering the award, it does not seem to be out of the question that the arbitrators would be entitled to refuse to accept a withdrawal provided that the party in no way may present a valid excuse. The principle that the arbitrators control the procedings will, however, not entitle them to unlimited power to refuse a party's revocation of a statement. Thus,

[58]See p. 135.
[59]See Arbitration in Sweden 97-8 and 115 (1984).
[60]Ekelöf, Rättegång IV 68 (1982).

it is possible that such erroneously made decisions by the arbitrators will make the award challengeable.

6 Judicial Review Based upon Violation of the Rule that Advance Costs Shall Be Paid Equally by the Parties

The possibilities for a party to have an award vacated is not only determined by the rules as to void and challengeable awards. The arbitrators' violation of more or less precise procedural provisions in the Act may create possibilities to attack the award. This is due to the fact that rules on void and challengeable awards may to some extent be worded in such a way that they refer to the procedural provisions in sec. 11 to 19 of the Arbiration Act. According to the Act sec. 21 par. 1 pt. 4 an award shall be set aside by the court if, through no fault of the party, any other irregularity of procedure has occurred, which in probability may be assumed to have influenced the outcome of the dispute. To the extent that legislation contains unusual or detailed provisions on the conduct of the arbitration, extensive and even surprising possibilities for attacking the award may be an undesirable result of the legislation. An obligation for the arbitrators to state the reasons for their opinion may give a party a right to have an award set aside due to an incomplete or incorrect determination of the substantive issues. The Arbitration Act lacks such a rule and there is no duty to report dissenting opinions or to keep them secret from the parties. However, there is another special unusual rule of practical significance which should be commented upon.

The Arbitration Act section 23 par 1, reads as follows:

An arbitrator must not accept or stipulate compensation from one party unless the same benefit is due to him from the other party. An agreement to the contrary shall be void; and an arbitrator shall be bound to return what he has improperly received.

This provision expresses a principle that the arbitrators shall be compensated equally by the parties. According to the legislative history, the freedom of contract must be limited to the extent that contracts between arbitrators and parties are not valid unless each party has the same obligation to the same arbitrator.[61] According to the Arbitration Act sec. 5 par. 1 pt. 3 an arbitrator is disqualified if he has accepted or stipulated compensation in violation of sec. 23. It seems clear that the purpose of this rule is to create safeguards that the arbitrators are not biased and inclined to favour a party who

[61]54 NJA II 55 (1929).

had remunerated them before the award was made.[62] On the other hand, there is a need for the arbitrators to claim and receive compensation from one party in some situations in order for the arbitrators to be willing to carry out their duties without risk of losing the right to be compensated after they have made the award. From this point of view, the principle of equality should not be construed too extensively. But one cannot simply ignore the rule.[63] However, sec. 23 par. 1 does not prevent the arbitrators from requesting and receiving *security for costs*.[64] Under such circumstances they are not receiving or claiming *compensation*. The reasons for considering the arbitrators biased are weaker than in cases when one party has to pay his own and the other party's share of the fees as advance costs for the arbitrators' future or earlier work. This argument allows one party to deposit security on behalf of both parties when forced to do so by the other party's omission to fulfil his duty.

According to the aforementioned rule, contracts violating the principle of equal treatment of the parties are void. The parties shall according to the Arbitration Act sec. 23 par. 2 jointly and severally pay reasonable compensation to the arbitrators for their work and expenses. Unless otherwise agreed the arbitrators may state in the final award, the amount of the compensation due to each arbitrator and order the parties to pay it. Usually the losing party will be ordered to ultimately pay the arbitrators' fees. This means that one party will ultimately remunerate the arbitrators. This duty is not a result from a contract and thus there are no reasons to object to such an award. Such a decision in the award does not mean that the arbitrators are unacceptably biased, because their decision is a result of their determination of the subject matter after the hearing has been terminated. The parties' duty to remunerate the arbitrators to the same extent according to sec. 23 par. 1 has bearing only on contracts made before and during the arbitration in order to avoid making the arbitrators biased during the arbitration.[65]

There is a need for entitling one party to compensate the arbitrators alone. As the condition for performing arbitral duties, the arbitrators may require that the parties shall pay advance costs. As a rule they try to obtain the same sum from each party. If one refuses to pay such cost, the other, usually the plaintiff pays both his and the opposing party's share. This is forbidden as an arbitrator may not receive compensation from one party unless the same amount is paid by the other. On the other hand only such *contracts*

[62]Hassler, Skiljeförfarande 126 (1966) and Heuman 31 NJM I 278 and II 479 (1987). Cf. the Arbitration Act sec. 5 (3) and the disqualification ground that the arbitrator is in reciept of a salary or financial support from either party.

[63]Cf. Welamson 74 SvJT 639 (1989).

[64]Cf. Westerling 31 NJM II 472 (1987). Cf. also 480.

[65]Heuman, Advokatsamfundets skiljedomsprövning av arvodestvister mellan advokater och klienter 38 (1986).

are void, not other types of legal unilateral transactions, according to the text of sec. 23 par. 1 sentence 2. One may state that the arbitrators in some cases have been compensated only by one party due to the other's omission to pay advance costs. One may consider that the plaintiff has been forced by the arbitrators, and their original conditions for acting as arbitrators, to pay the costs for both parties. The recalcitrant party's omission to pay advance costs may be construed as a tacit acceptance that the arbitrators perhaps may not be fully neutral, even if they try to be. Then, the reason for upholding the principle of equality is waived. Even if the party is not obstructing the arbitration, but is merely incapable of paying the advance costs, one may consider that the arbitration agreement was a commitment to pay such costs in the future and that he will *waive his right to equal treatment* if he does not pay the advance costs as his adverse party has done. Further, one may argue that the party paying all of the claimed advance costs is not creating a final situation whereby the parties will compensate the arbitrators differently. The plaintiff and the arbitrators intend that the respondent will remain liable to pay his share. It is not intended to create a situation, much less a contract between the plaintiff and the arbitrators, where the arbitrators shall not be compensated by the respondent when he is capable to do so.

It seems that *the arbitrators cannot be ordered to pay back advance costs* received from one party after the other has refused to pay his share. The prohibition against contracts whereby one party pays more than the other would principally only refer to situations when one party comes to an agreement with an arbitrator to pay more than the other party, whether this contract is secret or known to the opposing party. *Hassler* has stated that both parties have to pay advance costs at one-half each and that an arbitrator is entitled to resign if a party does not pay such demanded costs.[66] *Bolding* seems to have accepted that one party may pay all the advance costs if the other party refuses to pay.[67] However, this is not in compliance with the general prohibition of unequal payment in the first sentence in the mentioned paragraph, which is not limited to contracts. However, this general prohibition may be construed restrictively in accordance with the meaning of the next sentence of the section relating to void contracts. This presented restrictive construction of the Act is questionable, but there is clearly a need for upholding it in practice. If the arbitrators want to be certain that no error will be committed when a party refuses to pay advance costs, they may require only security from one party.

In the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, rule. 13 it is provided that each party shall as a rule contribute half of the sums of monies as are referred to in the preceding paragraph. It

[66]Hassler, Skiljeförfarande 126-7 (1966).
[67]Bolding 43 SvJT 71-2 (1958). See also Weslien, 52 SvJT 198 (1967).

is added that one party may pay the entire sum. In the event that a party fails to make a required payment, it is provided that the Institute shall afford the other party an opportunity to do so. If, notwithstanding this, the required payment is not made, the case shall be wholly or partly dismissed or stayed.[68] These rules confirm the practice that one party may pay more than the other upon a refusal to pay. These rules may also be explained by the fact that formally there is not a contract between the arbitrator and the party. However, in reality the advance costs shall be used to pay the arbitrators' fee.

Jon Warmland v. Pro Racing AB (Svea hovrätt Ö 3300/89). In a case where the Institute had dismissed a request for arbitration after one party had failed to pay advance costs on the other's behalf, the plaintiff commenced litigation. The Court of Appeal however, dismissed his action. The Court found that the arbitral agreement was not rescinded as having been breached by the respondent's failure to pay advance costs. The Court continued and declared that a party according to rule 13 of the Institute's rules is entitled to pay all of the advance costs and that a party shall be allowed to do so if the other fails to pay his share. From the rules one could, according to the Court, conclude that a party does not have an unconditional duty to pay his share of the costs and that it is incumbent upon the other party to decide whether an arbitration shall take place. The omission to pay such costs was not a breach of contract. The case was dismissed by the Court of Appeal.

One dissenting judge considered that the plaintiffs' failure to pay half of the costs not reasonably could lead to that he should be prevented to assert his rights both in arbitration and litigation. According to the underlying principle of Section 3 of the Arbitration Act he held that the respondent through its failure to contribute to arbitration and at the same time request for dismissal of the court action had lost its right to rely on the arbitral clause as bar to court proceedings.

The plaintiff has applied for certiorari and the case has not yet been finally decided.

This case means that the plaintiff had to request arbitration again and advance all of the costs, if he wanted to have the dispute resolved. The principle of equality as it is worded in the Arbitration Act sec. 23 par. 1 would not bar this, even if the parties according to the main rule of the Institute shall pay the same sum. The case also shows that a party is obliged to pay all the advance costs from the very beginning when he requests arbitration, as litigation is not an alternative.[69]. However the dissenting opinion may be accepted by the Supreme Court. See p. 27.

There is a second situation where there is a need for entitling one party to initially pay costs to a larger extent than the other party, namely when the latter is a weaker party and an arbitral agreement may be declared void by

[68]Wetter, 4 World Arbitration Reporter 5371 (1989) and Spector, 7 Svensk och internationell skiljedom 17-8 (1987).

[69]If no arbitral award is made before the expiration of the time limit laid down in section 26 of the Rules (one year) then the arbitration agreement would terminate according to the Arbitration Act sec. 18 and the plaintiff is at liberty to commence an action without being forced to pay high advance costs for both parties. However the plaintiff seems to be incapable of having the time limit elapse, since it cannot start to run. According to the Rules sec. 15 a case may not be referred to the arbitrators by the Institute before the security has been provided. Cf. Bolding, 43 SvJT 72-3 (1958).

virtue of the Contracts Act concerning unfair contract terms.[70] An arbitral agreement may be set aside due to the fact that a weaker party with limited financial resourses may be forced to sacrifice his rights if he has no capacity to bear advance costs and the arbitrators' fees. The stronger party, a large company, which wants to include an arbitration clause in a contract, may undertake to defray the arbitrators' fees wholly or substantially in order to avoid the effect that the arbitral clause will be declared void according to the Contracts Act sec. 36 in the event of a future dispute. The stronger party may enter into such a costs commitment agreement with the weaker party or with the arbitrators. Of course, both contracts may be established, which means that the obligation would be effective both against the weaker party and the arbitrators. A costs commitment agreement between the parties is not in conflict with the Arbitration Act sec. 23, but such a contract between an arbitrator and a party is void.

Costs commitment agreements are rather frequent in Swedish employment contracts between a company and person in the management of the enterprise, e.g., a managing director. The company is often entitled to dismiss such a leading employee, but often there is substantial compensation for termination. Costcommitment are needed especially if the company has an interest in having disputes with the management resolved confidentially by arbitrators. An appropriate way of making the arbitral agreement valid would be to include a costs commitment addendum, which would be binding only between the parties and thereby not violate the principle of equal remuneration of the arbitrators. It has been held that such a contract between the parties is valid.[71] However, all the problems in this context are not solved in this way. First, a Supreme Court case of significance should be discussed.

Jan and Inger H v. AB Ekebybyggen (NJA 1983 p 510). A man and his wife had entered into an agreement with a company in order to have a small house built. The buyers filed an action in order to have the purchase sum reduced. The respondent requested that the court dismiss the case with reference to an arbitral clause. The clause contained an additional provision providing that the company had to defray the fees and other costs of the arbitrators except in cases where the buyer wholly or partially lost the dispute. In such an event it was prescribed that the buyer would be directed to pay not more than 10 % of the arbitrators' costs, however, in no case more than a certain sum. Finally, it was provided that the parties each on his own account was responsible for the mentioned costs which they may be ordered to pay. The plaintiffs stated that the arbitral clause was unfair as they were consumers and the weaker party and that an arbitration – even with the limited costs responsibility stipulated in the clause – would lead to substantial costs, as those costs could not be covered by legal aid or insurance.

The Supreme Court stated: The meaning of the clause appeared to be that it limited the buyer's responsibility not only between the parties but also in relationship to the arbitrators. When the arbitrators undertake an arbitration and are aware of the content of the clause, it is considered that they have accepted that the buyer may not be directed to pay more of the arbitrators' costs than that which follows from the limiting rule. From the text of the clause it was evident that the limiting rule is a

[70]Se supra p. 36 and the Supreme Court case Carleric Göranzon.
[71]Peyron, 54 Advokaten 23 (1988) and Welamson, 74 SvJT 639 (1989).

maximum rule; within the scope of this rule usual costs provisions were to be applied. With this construction of the clause it appeared from the buyer's view as a considerable improvement compared with the ordinary arbitral clauses. By the limiting rule there was laid down a proportionately low ceiling for the buyer's responsibility for the costs and it was possible for him to estimate beforehand with a rather high certainty the maximum costs which he might incur. The Supreme Court held that such special circumstances had not been demonstrated in the case at hand that in spite of the above mentioned, an application of the clause would lead to results which could not reasonably be accepted. The existing clause was not considered to be unfair.

One must consider that the Supreme Court made a remarkable oversight by not even mentioning the prohibition against contracts whereby one party shall pay costs to the arbitrators to a larger extent than the other. This case does not explain why this rule should be inapplicable. The contract seems to clearly violate the principle of equallity.[72] Since the contract is void in the relationship between the consumer and the arbitrators, not between the parties, the consumers may be ordered by the arbitators to pay all the fees. This follows from the Arbitration Act sec. 23 par. 2 providing that the parties have to pay the fees jointly and severally. If the company would refuse to pay the fees or if the arbitrators decided to force the consumers to pay them, the consumers would be put in a difficult and unforeseeable financial situation. Merely for such reasons an arbitral clause normally will be declared void according to the Contracts Act sec. 36, but of course not in cases when the parties have an equal position. This means that the arbitral clause may only be effective if the costs limiting rule is binding only between the parties and not on the arbitrators. But even under those circumstances problems may arise which will be discussed later.

One may question whether it really is correct to consider an arbitrator to be bound by all types of terms included in the arbitral clause. The Supreme Court held that this was the case when the arbitrators accepted the assignment and were aware of the clause. However, one of the arbitrators later stated that he had accepted the assignment without having been informed of the content of the limiting rule. Not until the arbitral tribunal was composed and the request for arbitration had been completed was it clear to him that the parties had agreed – possibly with effect on the arbitrators – on the arbitrators' costs. He questions whether the arbitrators by fulfilling the assignment would be deemed to have accepted the clause with the result that the joint and several liability could not be ordered against the parties. He stresses that there is no formal provision providing that the arbitrator has to be informed of the arbitral agreement. He considers that an arbitrator accepting an assignment without having studied the terms in the clause may accept these. He adds that an arbitrator may have a valid excuse for resignation.[73]

[72]Heuman, Advokatsamfundets skiljedomsprövning av arvodestvister mellan advokater och klienter 40 (1986), Peyron, 54 Advokaten 23 (1989) and Welamson 74 SvJT 639 (1989).
[73]Peyron, 54 Advokaten 23 (1988).

On one point an objection may be made against this reasoning. An arbitrator accepting an assignment without requesting detailed information as to the scope, the time schedule and so on, has to accept normal terms in the clause. It is quite clear that many disputes will be more complex than the arbitrators could conclude from the request for arbitration. However, they should fulfil their assignment even if the parties would like to amend their claims and present new issues, thereby delaying the proceedings. Such a situation is quite normal and there is no valid ground for resignation. However, if the arbitral agreement contains a provision which is void according to the law or other terms quite surprising to the arbitrator, it is not at all evident that he must accept the terms if the party had failed to inform the arbitrator of them when engaging him.

In order to make a costs limiting rule in the arbitral agreement valid it is necessary that it is worded so that it is expressly not applicable to the arbitrators. Even if an arbitrator would study the terms of the clause before he accepted an assignment, it would be clear that the rule was not applicable against him. He would thus be entitled to claim advance costs from each party in the same amount which may be a considerable amount of money. In the contract between the parties it is therefore necessary to indicate that the weaker party is entitled to compensation from the other party as soon as the arbitrators request payment either in an award or at an earlier stage as advance costs. If the weaker party could be forced to pay a considerable sum in advance costs as a condition for being able to commence an arbitration, the other party could prevent him from having the proceedings concluded by refusing to pay compensation to the weaker party. The arbitrators might resign if the advance costs were not paid. It is possible that no arbitrator would accept an assignment if no such costs were paid. Assume that the weaker party claimed that the other party should defray advance costs for an arbitrator appointed by him. Perhaps the stronger party would refuse to do so. A dispute concerning this duty seemed to be encompassed by the arbitral clause, as the costs limiting rule forms a part of the main contract and all disputes regarding the contract shall be decided by arbitrators. This means that the duty to pay the advance costs cannot be finally decided until an award is rendered either only concerning this duty or also concerning the main dispute. In both cases an arbitral clause may be set aside by virtue of the Contracts Act sec. 36, because an arbitration will be too expensive for the weaker party. This means that the arbitral clause will only be valid if it is shown that the stronger party has in fact paid the requested advance costs to the weaker party without undue delay. By merely refusing to do so the stronger party may force the weaker to choose litigation. Such an optional right for the stronger party to choose between arbitration and litigation while the weaker party has no such right may be a reason for declaring the arbitral

clause void according to the provision on unfair contract terms.[74]

Perhaps this is not a sufficient cause for making the clause invalid, but if this optional right and the effects of the clause have not been explained or were not foreseeable to an inexperienced weaker party, e. g., a small business man, and the clause was not obvious, there is a risk that the arbitral clause may be ineffective. In order to avoid this situation it is possible to provide in the costs limiting provision that a deposit shall be paid to the arbitrators on their request, if an arbitration has been instituted. One may not object that this solution is unfavorable to the stronger party, as the other may commence an unfounded and expensive arbitration. A normal costs limiting rule can always be abused by the weaker party. It is hardly appropriate to restrict the limiting costs rule to cases where an arbitrator has declared that the weaker party's claims are well-founded, since the rule could not afford him a sufficient protection under such circumstances.

[74]See the Supreme Court case Göranzon reported supra p. 36.

Ex officio Right of Arbitration Tribunals to Award Interest on Party's Compensation for Costs

An arbitral tribunal cannot award interest on claimed principal amounts unless specifically requested to do so by a party. Should an arbitral tribunal, in the absence of such a request, award a party interest on arrears, or contracted interest, then the tribunal has gone beyond the matters submitted to it. The part of the award dealing with interest can thereafter be challenged and set aside.[1] In international disputes, where interest can be calculated in different ways during various periods, it is important that the parties be given an opportunity to present their views on these various issues before interest is awarded. It is thus important that requests for interest and their supporting grounds be specifically stated.[2]

There is some doubt in Swedish arbitration practice as to whether interest on compensation for costs can be awarded *ex officio* through an analogous application of the Code of Procedure, chap. 18 sec. 8 par. 2. This provision allows interest to be awarded on compensation for litigation expenses pursuant to the Interest Act sec. 6. The interest is calculated from the date of the judgement. The applicable interest rate in Sweden is quite high by international standards, although it varies from time to time. In March of 1990 it was even high by Swedish standards, i.e., 20 %, the prime rate calculated by the Central Bank of Sweden, which was 12 % in March 1990, plus 8 %.

In a Supreme Court case concerning the enforceability of an arbitral award, the Court held that it was possible to award interest through an analogy to the Code of Procedure.[3] The case dealt with the application of a statutory rule which prescribes that an arbitral award may be enforced unless it is probable that the award may be set aside. Execution Act chap. 3 sec. 15 par. 1 pt. 3. An award cannot be enforced if the arbitrators have exceeded the submission to arbitration and the award is challenged within the sixty day time limit. Arbitration Act sec. 21 pt. 1. An award may not be executed upon by the execution authority if it is demonstrated that the award is likely to be set aside. Execution Act chap. 3 sec. 15. If a court sets aside an award after the execution authority has commenced execution, then the execution must be immediately suspended. Restoration of the assets which have been executed upon will only occur if the court has specifically so ordered. The prevailing party may be liable to repay such sums which he received as the result

[1]Bolding, Skiljedom 156 (1962).
[2]Hjerner, 5 Swedish and International Arbitration 29-37 (1985) and Hunter and Triebel, 6 J. Int. Arb. No. 1 7-23 (1989).
[3]Bertil B v. AB Bonnierföretagen (NJA 1989 p. 247).

of the execution based upon the pecuniary amounts awarded in the arbitration award which has been set aside. The execution authority will assist in the repayment of such amounts if the prevailing party refuses to do so voluntarily. Execution Act chap. 3 sec. 22 par. 2. The losing party may also be entitled to damages which were incurred in the execution. Id.[4]

The Supreme Court did not address the question of whether an arbitral tribunal can, on its own accord, order a losing party to pay interest on the arbitral fees which the other party has paid or will be forced to pay. Some arbitral awards declare that one party will ultimately be liable for the payment of the arbitral fees, although the parties are initially jointly and severally liable. Such a decision can hardly constitute the basis for execution, since no duty to perform has been imposed upon the party. Nor is it likely that such an enforceable obligation can be considered to be established if the arbitrators have merely decided that a party shall "answer for" or be "responsible for" a particular amount of compensation for the arbitrators.[5]

In the above mentioned case the Court of Appeal considered it correct to assume that the arbitrators analogously applied the Code of Procedure Chap. 18 sec. 8 and sec. 14. In deciding the question as to whether the arbitrators had gone beyond the matters submitted to them, the point of departure was, according to the Court of Appeal, that the arbitrators must limit themselves to the requests and grounds which have been referred to their determination under the arbitration agreement. The Court of Appeal considered that the substance of the arbitral award was not permitted to encompass more than what the parties had introduced into the proceeding. The Court of Appeal added that it is the arbitrators' right to apply rules of procedure – in the absence of specific instructions from the parties – and to decide the conduct of the arbitration under the limitations implied by the Arbitration Act. In those cases, according to the Court of Appeal, it is not uncommon that the Code of Procedure is applied by analogy. The Court of Appeal found that since interest had not been specifically requested, the arbitrators had gone beyond the matters submitted to them. The Court of Appeal considered that the defendant in the enforcement action had demonstrated that this particular part of the arbitral award probably could be set aside.

The Supreme Court was of a different view. In the following quotation from the Supreme Court's opinion, italics have been added to emphasize the Supreme Court's underlying rationale, which will later be criticized.

Under sec. 24 of the Arbitration Act, unless otherwise agreed between the parties, the arbitrators may, at the request of either party, determine

[4]See Walin, Gregow and Löfmarck, Utsökningsbalken 101-105 (1987) and Bolding, Skiljedom 203-216 (1962).

[5]Per A v. Raija M (RH 111:82) and Heuman, Advokatsamfundets skiljedomsprövning av arvodestvister mellan advokater och klienter 28 (1986).

whether and to what extent the opposite party should reimburse the party his costs in the arbitration proceedings. If the parties have not entered into any agreement on apportionment of the costs, it is natural that the arbitrators seek the guidance of the provisions of Chap. 18 of the Code of Procedure on civil trial costs. There cannot *therefore* be considered to be any obstacle to the arbitrators - even in the absence of a specific request – ordering that interest be awarded to a party for compensation of costs (cf. the Code of Procedure, chap. 18, sec. 8, second paragraph and sec. 14). Based on the foregoing, it cannot be considered to be demonstrated probable that the arbitral award in question can be set aside under sec. 21 of the Arbitration Act with respect to the order on interest. There is thus no obstacle to enforcement of this part of the arbitral award .

There are several grounds for criticism of the Supreme Court's rationale. Sec. 24 of the Arbitration Act *expressly states that the arbitrators, at the request of a party*, may determine whether and to what extent a party should reimburse the other party for actual payment of arbitrators' fees and expenses. The Arbitration Act, unlike the Code of Procedure, contains no rules on the *ex officio* right of the arbitrators to award interest on compensation for costs. It is therefore difficult to understand how the Supreme Court can have succeeded in bypassing these provisions' differences.

The case presents the reader with difficulties as to *general questions of interpretation of precedents*. As with many other cases, this case contains a legal principle and its rationale. If a generally formulated legal principle can only be justified by the Supreme Court's rationale for certain more limited cases, it appears rather doubtful that the principle can be applied completely. If the Supreme Court's stated rationale indicates that the legal principle should not be applied in certain types of situations, i.e., that the legal principle is too broad, one must count on the possibility that the Supreme Court will limit the scope of the principle in later precedents. This reasoning is of significance for the interpretation of the case in the following manner.

The arbitrators' *ex officio* right to award interest on "costs" is justified by the Supreme Court in its statement that "it may be natural that the arbitrators seek guidance from the provisions of Chap. 18 of the Code of Procedure on civil trial costs." The question may be posed as to whether this legal principle should really be upheld where the arbitrators do not actually seek guidance from the provisions of the Code of Procedure. Shall the arbitrators, on their own accord, be permitted to award interest on costs, e.g., when – after a liberal assessment of reasonableness – they have awarded one of the parties adjusted compensation instead of applying the rule in chap. 18 sec. 1, providing that the losing party shall reimburse all the costs of the prevailing party. In such cases, the legal principle established by the Supreme Court is not justified in the manner that the Court had assumed. This principle could however be applied for other reasons. Where Swedish parties are in-

volved, whose legal counsel do not usually request interest in court proceedings, it is thus not unreasonable to award interest *ex officio*. The decision as to costs will thus not come as any real surprise to the parties' legal counsel.

The legal principle also lacks justification in cases where the interest concerns compensation for types of costs which fall outside the scope of Chap. 18, sec. 8 of the Code of Procedure. It is thus likely that the arbitrators may not on their own accord oblige a party to reimburse the opposite party for interest on the payments this party has made to the arbitrators.

As to foreign parties, the rationale of the Supreme Court case does not justify the application of the Supreme Court's legal principle. Good reasons can also be cited for why that principle should not be applied. If, for example, the English language is used and the parties are only represented by foreign counsel, a decision as to interest would certainly come as a surprise to them. It cannot be gleaned from the Arbitration Act that such decisions can be taken *ex officio*. On the contrary, the Act indicates that anything of that sort is not permitted. Furthermore, the interest rate of 8% plus the official discount rate of the Bank of Sweden is a Swedish phenomenon. In other countries, lower interest rates usually apply. Considering this, it is not out of the question that the Supreme Court, in a new precedent that concerns an international dispute, could limit the scope of the principle on the *ex officio* right of arbitrators to award interest. After this, doubt may arise as to how cases should be determined when Swedish parties, through the arbitral award's language or witness examinations with the arbitrators, can present evidence that the cost apportionment decision is not based on the Code of Procedure's principles, e.g., because the arbitrators are under the impression that the parties have probably not wanted it that way, i.e., a situation closely akin to the one where the parties have specifically agreed that the costs are to be apportioned according to certain principles deviating from the Code of Procedure.

The case raises the classical *question of whether the Code of Procedure can be applied by analogy* in situations where the Arbitration Act does not offer any solution.[6] A dissenting judge of the Court of Appeal considered that the relevant provisions of the Code of Procedure should be applied by analogy except in cases where the Arbitration Act states otherwise or the parties have specifically provided for some other rule. This member of the bench considered that under the Code of Procedure Chap. 18, sec. 8, second paragraph and sec. 14, that the arbitral award could, without further support, be enforced, when the Arbitration Act did not constitute an obstacle and the parties had not provided otherwise. The Supreme Court did not accept this

[6]Cf. Westerling, 1 Svensk och internationell skiljedom 11-18 (1981), Nordenson, 6 Svensk och internationell skiljedom 10-15 and TBB Tekniska byggnadsbyrån bankruptcy estate v. the State (NJA 1973 p. 740) reported supra , but not the lower courts opinions on analogous application of the Code of Procedure chap. 43 sec. 4 par. 2.

reasoning and I wish to resolutely advise arbitrators against resolving problems in this highly simplistic and erroneous fashion.

Differences between arbitration proceedings and civil court proceedings are substantial. It must be determined in every respect whether these differences constitute an obstacle to analogous solutions. The arbitration proceeding, unlike the trial proceeding, is not based on the principles of orality, immediacy and concentration. The principle of orality means that witnesses and other persons shall be questioned before the court. Affidavits are, pursuant to the Code of Procedure, only accepted in exceptional cases. Under the principle of immediacy, a judgement may only be based upon evidence presented directly before the court at the main hearing. What has been stated during the pre-trial hearings must thus be repeated at the main hearings and documents relied upon as evidence shall be presented at the main hearing. The principle of concentration means that the final hearing shall proceed without long interruptions. This is to ensure that the judges have a fresh recollection of all the evidence presented to them. Otherwise, they could easily evaluate evidence incorrectly, if it had been presented too long before a final hearing.

In arbitral proceedings, however, written and oral proceedings can be mixed and all material presented may be used in support of the award. Witness affidavits may be used in arbitration. The Code of Procedure is based on detailed regulation of the proceedings, whereas the Arbitration Act provides the arbitrators with great freedom to tailor the proceedings to the particular case. The parties' possibility of reaching stipulations in procedural matters is limited in civil court cases, whereas the principle of party autonomy is one of the pillars of arbitration law. The power to determine arbitratal disputes rests on a contractual foundation and not on a constitutional one – as is the case with the judicial system. The Arbitration Act encompasses few procedural rules, but these must often be carefully observed, since the legislature has found them to be of such importance as to have codified them. For example, the rule in sec. 13 of the Arbitration Act states that arbitrators shall deal with the case impartially and sec. 14 of the Act states that each party shall be given sufficient opportunity to present his case. When the parties choose one arbitrator each and those two appoint a chairman, the established methods of administering justice found in the courts will not always be guaranteed. It will thus be important that both of the aforementioned arbitration law rules be observed, namely, that the arbitrators are strictly neutral and do not embark upon the determination of questions which have not clearly been referred to them. Against that background, it appears objectionable to automatically consider the arbitrators competent to *ex officio* award interest on costs of the proceedings. The losing party is not in that case provided with the opportunity to state his position on the question. Such a measure taken by the arbitrators can also create the

impression that they favor the winning party and that they have not conducted the case in an impartial manner. This circumstance and others can be used in support of a claim that the arbitrators have been biased.

The Supreme Court appears to have applied a different type of analogous reasoning than the dissenting judge in the Court of Appeal. If the arbitrators have analogously applied the rules in the Code of Procedure chap. 18, on apportionment of liability for costs between the parties, then another set of cost compensation rules in this chapter ought to be analogously applied, namely, the provisions which state whether compensation can only be awarded upon request. There is no such close connection between these two rule groups that an analogous application of the apportionment rules requires or justifies analogous application of Chap. 18, sec. 8, second paragraph and sec. 14 of the Code of Procedure. Before considering application of the rule on awarding interest without a request in sec. 8, it may be appropriate to determine whether the last-mentioned main rule in sec. 14, providing for a request for costs compensation, is entirely suitable for arbitration proceedings. In international arbitration practice, parties are sometimes granted the right to present requests for compensation for costs at some point after the final hearing. Even if the parties have not stipulated this right in an international dispute that has been heard in Sweden between foreign parties, it appears possible for the arbitrators to receive pleadings with requests for cost compensation at such a late stage, even though a court, under Chap. 18 sec. 14 of the Code of Procedure should not be allowed to do so. The reason that this rule is not entirely suitable is that arbitration proceedings are not based on the principle of immediacy or a strict division between the main hearing and the rest of the proceedings (preliminary proceedings).

How shall the arbitrators in practice deal with questions on interest on compensation for costs? The precedent must be respected, even if one is inclined to agree with the criticism presented here. The case implies that the arbitrators have an *ex officio* right, but not obligation, to award interest. Should they do so, that component of the award will withstand a challenge. Should the arbitrators omit to on their own accord analogously apply Chap. 18, sec. 8, second paragraph, this will not constitute challengeable error. In this context, there is a significant difference between court proceedings and arbitration disputes: courts must always award interest, whereas arbitral tribunals can, without the risk of challenge, choose between awarding interest or refraining from doing so. The failure of the precedent to provide instructions as to whether it establishes a firm practice in one direction or the other constitutes a significant problem for disputing parties. Even two different practices are conceivable in domestic and international cases. The question arises as to whether the arbitrators should in practice resolve the problem through their guidance of the parties during the proceedings. If only one party in a domestic dispute has requested interest on compensation for costs,

perhaps the arbitrators will not be prepared to award interest to the other party, except on request. If the arbitrators, through a simple question to legal counsel, seek to determine whether he intends to waive the right to interest, the legal counsel will naturally request such interest. Such assistance may be considered by the opposite party to be improper and to constitute an example of bias in conducting the case.[7]

For this reason, the arbitrators may refrain from asking any questions. The same can be said if neither of the parties have presented their requests for interest because of oversight, e.g., because the courts always issue such orders on their own accord. In such cases as well, questions directed to both parties will favor one of the parties, namely, the one who will win the case. The arbitrators will sometimes after summation at the final hearing have a rather good idea of who is going to win the case. If both parties are asked whether they claim interest on the requested compensation for costs, the question may appear to be a non-neutral form of help.

The foregoing demonstrates that arbitrators should not, in many cases, raise the question of interest as part of their conduct of the proceedings and that they should not award such compensation on their own accord. In international arbitration disputes conducted in Sweden under the Arbitration Act, it is conceivable that an arbitral award can be set aside with respect to the portion in which the arbitrators have *ex officio* awarded interest on compensation for costs granted to a party. It is an open question whether arbitrators in an international dispute consider themselves at all obliged to award interest upon the request of a party and, if so, whether such interest should be at the high rate stipulated in Chap. 18, sec. 8, second paragraph of the Code of Procedure.[8]

[7]Cf. prop. 1986/87:89 p. 105-108 and TBB Tekniska byggnadsbyrån bankruptcy estate, mentioned in note 6.

[8]Cf. Hjerner, 5 Swedish and International Arbitration 32-3 (1985).

Swedish Jurisdiction and Agreements which Exclude Judicial Review of Arbitral Awards

1 Introduction

If a party is dissatisfied with an arbitral award, he will not be able to appeal on substantive grounds, e.g., where he considers that the award is based on an erroneous contractual interpretation, an unacceptable application of the law or an incorrect assessment of the evidence. Under the Arbitration Act, an arbitral award can in principle only be attacked by an action to set aside an arbitral award. According to Swedish law, one has to distinguish between void and challengeable awards.[1]

An action to *void or nullify* an arbitral award need not be brought within a particular time-limit under sec. 20 of the Arbitration Act. The grounds for such an action can, *inter alia*, be that there is no valid arbitration agreement or that the dispute concerns an issue which may not be submitted to arbitration (non-arbitrable issues).

Under sec. 21 of the Arbitration Act, an action to *challenge* an arbitral award must be instituted within sixty days from the time the award is rendered. Examples of grounds for challenge are where the arbitrators have gone beyond the matters submitted to them (exceeded the arbitration agreement, the request for arbitration, prayers for relief or the grounds thereof) or when an arbitrator has been biased or not been appointed in the proper manner. Yet another ground for challenge is encompassed by sec. 21, through a sort of blanket clause, according to which an arbitral award can be set aside if, through no fault of the party, any other irregularity of procedure has occurred, which in probability may be assumed to have influenced the decision. Under sec. 21, second paragraph of the Arbitration Act, procedural errors that constitute the grounds for challenge cannot be raised by a party if, during the course of the proceedings, he had accepted the irregularity expressly or by proceeding further without objection. This rule on waiver is not applicable to actions to nullify the award.

In a Supreme Court case between Ugandan and Israeli parties, the Ugandan party requested first that the award be *declared void* due to the absence of a valid arbitration agreement, since the agreement had terminated under sec. 8, second paragraph of the Arbitration Act. (National Housing and Construction Corp. of Uganda v. Solel Boneh International Ltd., *et al*, NJA 1989 p. 143). Under that provision, the arbitration agreement shall terminate if an arbitrator is to be appointed by an institution and it fails within a

[1]See supra p. 163-96.

reasonable time to make the appointment. The chairman of the FIDIC in London had refused to appoint an arbitrator in the manner stipulated in the agreement. The dispute was decided by an arbitrator appointed by the ICC. The Ugandan party second *challenged* the arbitral award and requested that it be set aside. The challenge was based on the claim that the arbitrator had not been appointed in the proper manner. It was also claimed that the plaintiff had failed to first refer the matter to "the Engineer," as stipulated in the agreement. Sec. 21 par. 1 point 3 of the Arbitration Act was claimed to be applicable.

The Israeli party claimed that the challenge should be rejected on account of procedural hindrance. As to the Ugandan party's action to *void* the award, the Israeli party claimed that Sweden was not the proper forum. That party also claimed that the *challenge* should be rejected because the ICC rules encompassed a clause which constituted an exclusion agreement, i.e., an agreement excluding the jurisdiction of the Swedish courts. Under the ICC rules applicable at that time, Art. 29 stated that the arbitral award constitutes a final determination of the arbitration matter and that the parties agreed – to the extent legally possible – to refrain from appealing the arbitral award.

2 Swedish Jurisdiction

The Supreme Court stated that the Arbitration Act, as concerns actions to challenge arbitral awards, contains specific provisions on forum in sec. 26, which states that the District Court of Stockholm is competent to try the case where that section does not specify some other court. The Court continued: "When both parties lack a connection with Sweden, this provision on so-called reserve forum cannot in itself be deemed a sufficient basis for Swedish jurisdiction. However, this particular case encompasses a Swedish arbitral award. Thus, Swedish jurisdiction is deemed to exist concerning the action to challenge the award."

As to *jurisdiction of the action to void an arbitral award*, the Supreme Court stated that the Arbitration Act contains no forum provision, unlike the case with the action to challenge an award. The Supreme Court considered however that it was justified, with respect to the *action to void, to apply the forum rule on challenge action under sec. 26, first paragraph of the Arbitration Act by analogy*. In support of this view, it was stated that the New York Convention contains provisions allowing the enforcement of an arbitral award to be refused where the party against whom the arbitral award is invoked furnishes proof that the arbitral award has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. The Supreme Court considered that this

strongly indicated that it ought to be possible to obtain court review in a special proceeding in Sweden of both the grounds for the action to challenge and the action to void the award. The Court added that there existed no completely clear border between the circumstances that can be cited in support of an action to challenge an award and such circumstance that makes the arbitral award void under sec. 20, par. 1 point 1, cited by the Ugandan party.

The actions to challenge and to void an arbitral award can be heard by the District Court of Stockholm in international disputes, provided that the arbitral award is Swedish. Sec. 5 of the Act Concerning Foreign Arbitral Agreements and Awards indicates *e contrario* that the arbitral award is deemed Swedish if rendered in Sweden or, if proof of this is lacking, that the arbitration proceedings took place there.[2] Arbitration agreements between foreign parties occasionally stipulate that the proceedings are to take place in Stockholm. A future arbitral award will in such cases be Swedish and the actions to void and to challenge an award can be instituted in the District Court of Stockholm. The arbitral award will not lose its character as a Swedish award if the arbitrators have held some part of the proceedings in another country.[3] If the place of the arbitration proceedings and the arbitral award's issuance has not been specified and the proceedings have taken place in separate countries, it may be difficult to determine whether the award is Swedish. If the award is to be deemed foreign, the Supreme Court decision will not support a claim of Swedish jurisdiction.

The Supreme Court's pronouncement on Swedish jurisdiction applies to Swedish arbitral awards encompassing parties "without a connection to Sweden." If *a foreign party seeks to bring an action to void or challenge an arbitral award against a Swedish party*, the action to challenge an award shall, under the Arbitration Act, sec. 26, par. 1, be brought in the district court which has civil jurisdiction over his person. An older *en banc* Supreme Court case and the legislative history of the Act indicate that this venue rule excludes other jurisdiction rules otherwise applicable and that the action cannot be instituted in an alternative venue under chap. 10 of the Code of Procedure.[4] The foregoing case does not answer the question of whether an action to void an arbitral award can be instituted in such alternative venue or whether the analogous application of sec. 26 of the Arbitration Act is exclusive. This question was not dealt with in the Supreme Court case. The prevailing party's interest in not being brought before separate courts in actions to challenge and to void an award indicates however that the action to

[2]54 NJA II 79 (1929) and Arbitration in Sweden 160 (1984). In the Act concerning Foreign Arbitration Agreements and Awards sec. 5 it is provided: "An arbitral award shall be considered as 'foreign' if it was given abroad. In applying this Act, an arbitral award shall be considered as given in the State where the arbitration proceedings have taken place."

[3]Blessing, 5 J. Int. No 2 Arb. 22-3 (1988) and 13 Yearbook of Commercial Arbitration 162 (1988).

[4]Johansson v. Johnsson (NJA 1925 p. 100) and 54 NJA II 60 (1929).

void must be instituted in the same exclusive forum as the action to challenge.[5]

If a *losing Swedish party to an arbitration seeks to institute the action against a foreign party*, the Supreme Court case does not appear to provide any direct guidance, since the Court has stated that the reserve venue provision cannot in itself be deemed to suffice as the basis for Swedish jurisdiction, "when both parties lack any connection with Sweden." (This designated venue only applies when there is no other competent district court according to the ordinary rules.) The Supreme Court decision appears however to rest on the principle that *Swedish jurisdiction exists when the arbitral award is Swedish*. Since the domicile rule excludes other venue, but is not applicable to a foreign defendant, and the Code of Procedure's alternative venue rules cannot support jurisdiction, there is every reason to consider that Swedish jurisdiction exists under the reserve venue rule, which makes the District Court of Stockholm the proper venue.

Against the foregoing, one could raise the objection that a Swedish court is not competent to try a case simply because Swedish jurisdiction exists. An additional requirement is that a particular district court has local jurisdiction in Sweden. Under Chap. 10, sec. 16 of the Code of Procedure, a contractual stipulation on jurisdiction can only be enforced if it is set forth that a particular court can or shall decide the case. In a Supreme Court case, the Court considered however a jurisdiction clause to be enforceable even though no particular district court had been specified; the agreement had merely stated that the case was to be decided by the Swedish court concerned. The Supreme Court stated that in disputes with an international connection, the specific identification of a court could not be deemed a prerequisite for the validity of a jurisdiction clause. In the absence of such specificity, jurisdiction would, according to the Supreme Court, be determined on the basis of the agreement's contents as established through general rules of interpretation and supplementation. In cases where a party to the agreement has his domicile in Sweden, the Supreme Court considered it natural that the competence of this party's domicile forum should be applicable, unless the agreement can be deemed to indicate otherwise.[6] If jurisdiction exists in actions to void arbitral awards in disputes between a Swedish and a foreign party, the venue question should be resolvable through interpretation in a manner corresponding to the one employed in the Supreme Court case. A statutory interpretation based on an analogous application of sec. 26 of the Arbitration Act can thus be justified. A Swedish party can be sued in the venue of his domicile and the foreign party in the District Court of Stockholm.

[5]Lindblom, Processhinder 131 (1974) and SOU 1983:7 p. 205. See p. 49 note 22.
[6]Foodco AG and Interpomme S.A. v. Alfa-Laval AB (NJA 1980 p. 188). See also Pålsson, Svensk rättspraxis i internationell processrätt 49-51 and 103-5 (1989).

3 Exclusion Agreements

An important purpose of the arbitration proceeding is to speedily obtain an enforceable award, without opening the gate to protracted proceedings occasioned by appeals. Most national arbitration laws limit the right to challenge arbitral awards to cases involving serious errors of a procedural nature. In international arbitration proceedings, parties from different countries, who have agreed to hold arbitration in a third country, may seek to completely or partially exclude the possibility of subsequent actions for setting aside the award in the foreign state. The reason for this could be that the parties wish by all means to avoid judicial review of the arbitral award or that they desire to exclude the right to set aside the award because the third country's arbitration act allows much too extensive possibilities of reviewing and nullifying the award. The solution of excluding the right to such actions in the agreement may benefit the prevailing party. Waiver of the right to have the award set aside when the arbitrators have committed serious errors could normally not spell disaster for the losing party. Under the New York Convention, he can raise his objections at the enforcement stage. If the prevailing party seeks enforcement of the award in several states where the losing party has assets, then the latter will be compelled to appear in several enforcement proceedings, possibly at a greater cost. If, on the other hand, the losing party has had the arbitral award set aside by a court in the country where the award was rendered, this constitutes in principle a hinderance to enforcement in all the states where the prevailing party seeks enforcement. Cf. Act on Foreign Arbitration Agreements and Arbitral Awards, sec. 7, par. 1, point 5 which corresponds to the New York Convention V (1) e.[7]

An issue under debate in modern arbitration law is whether parties are at all entitled to enter into prior agreements which exclude court review. Switzerland's and England's laws permit this in international disputes, i.e., when the parties are foreign.[8] The Swedish Supreme Court case sheds light on this question.

The Israeli party claimed that the case should be dismissed because the Ugandan party had *waived the right to bring the case before a court.* A provision was cited from the previous ICC rules according to which the parties undertake – to the extent legally possible – to refrain from bringing actions against arbitral awards. It was also stated by the Israeli party that the parties, after the dispute arose, signed a document containing Terms of Reference which incorporated the aforementioned rules.

The Supreme Court explained that Swedish law assumes that a party to an arbitration proceeding is not entitled to appeal the arbitral award on the merits and that the Arbitration Act is based on this approach. It was added

[7]See Jarvin, 9 Svensk och internationell skiljedom 27-8 (1989).
[8]See about English law Jarvin id. 34-5.

that a party has the right to challenge the award on account of certain serious errors of a formal nature. The Court stated thereafter: "The case concerns parties lacking a connection with Sweden. For such parties, it should be considered possible – even before a dispute has arisen – to enter into an agreement which limits a party's right to challenge an arbitral award in a Swedish court on account of formal defects. The Ugandan party's objection notwithstanding, it cannot be considered to have been demonstrated in the present case through reference to the conciliation and arbitration rules or in any other manner that such a limitation has been agreed upon that excludes the challenge action against the award which the Ugandan party has brought." The same assessment was made with respect to the action to void the arbitral award. The Israeli party requested that that action be dismissed on the ground that the parties had waived the right to bring any proceedings against the arbitral award by signing the Terms of Reference.

3.1 Interpretation Alternatives

It is somewhat unclear whether the Supreme Court's decision should be interpreted to mean that the parties:

1. can completely exclude by agreement the right to bring an action to challenge or to void an arbitral award
2. can limit the possibilities of such actions to the extent that the bases for such actions have been specifically set forth and the waiver satisfies an important need or is acceptable from the standpoint of due process or
3. can only exclude by agreement certain grounds for such actions, even though the wording of the agreement represents an attempt to exclude all possibilities of bringing actions to set aside an award.

Further discussion of the interpretation alternatives is called for due to the linguistic expressions in the Supreme Court's decision and on the basis of legal literature, where the distinctions between the various solutions are dealt with to some extent.

The decision of the Court states that it should be possible for parties lacking a connection with Sweden to enter into agreements to *limit* a party's right to set aside an arbitral award in a Swedish court on account of formal errors. It is not stated that the parties can exclude the right to bring an action to void or to challenge an award. The Supreme Court also states that it was *not demonstrated* that the parties in the instant case, through their reference to the ICC rules, agreed on a limitation that excludes the *action to challenge the award* brought by the Ugandan party. That statement can be interpreted to mean that it was not demonstrated that the party had waived its right to bring an action to set aside the award on the specific ground that the arbitrators had not been appointed in the proper manner. The foregoing indicates that interpretation alternative 1 cannot be accepted and hardly 3 either, however 2 can be. This would imply that the parties must specify the grounds for chal-

lenge to be excluded from review in court. Art. 29 of the ICC rules indicates however an attempt to generally exclude the right to institute an action. Thus, doubt can only prevail as to whether the parties have waived only the right to court review of the merits or also every other possibility of attacking the arbitral award through the actions to void or to challenge an arbitral award. The Supreme Court decision would, according to such an interpretation, thus mean that certain specific grounds for challenge can be excluded by prior agreement, but that this cannot be accomplished through a general clause that seeks to exclude every possibility of judicial review. The case would thus not provide any answer to the question of which particular grounds for challenge can be excluded by agreement and which conditions must be fulfilled beyond the requirement of specificity.

An examination of Swedish legal literature supports the view that the right to bring actions to void or to challenge an award cannot be completely excluded by agreement. In *Arbitration in Sweden,* it is stated that the parties are at liberty to agree in advance on waiver of specific grounds for disqualification as long as such agreement is made with full knowledge of all relevant circumstances. The authors consider however that such a waiver may not be so general as to encompass section 21 of the Arbitration Act in its entirety. The authors are also of the view that the parties cannot deprive the Swedish courts of the competence to hear cases under the challenge rule by delegating all of the powers of these courts under that section to an institution or a non-Swedish court. They do not share *Hjerner's* view that a waiver of recourse to Swedish courts under section 21 is valid as between a Swedish and a foreign party if they have expressly agreed upon the jurisdiction of some other court or particular arbitral body and if the challenging party is a Swedish resident.[9]

Wetter and *Kadelburger* have not in their commentary to the case expressly stated that the Supreme Court has only approved "limitation agreements," but not agreements in which the parties waive the right to *all* review by the courts. They state that "parties may ... agree to limit jurisdiction of Swedish courts to entertain challenge actions" and add that "thus, exclusion agreements have become recognized in principle." The latter expression "exclusion agreement" may indicate that they mean that parties can, through prior agreement, entirely exclude the right of actions under sections 20 and 21 of the Arbitration Act. They also state – not as an argument for interpretation but more as a general assessment of propriety – that it does not appear advisable for the parties to completely exclude application of the provisions governing the arbitrators' appointment and the proceedings by excluding by agreement every possibility to proceed against the kinds of flagrant violations of these provisions that can be committed by the arbitrators

[9]Arbitration in Sweden 66 and 6 with note 3 (1984).

or institutes that appoint them. *Wetter* and *Kadelburger* add that the new Swiss law prescribes that all possibilities of bringing actions to set aside and to void an arbitral award can be excluded by agreement. The authors consider that the more cautious view accepted by the Supreme Court is probably dictated by analytical considerations.[10]

It appears that *Wetter* and *Kadelburger* consider that the Supreme Court decision only supports the proposition that the right to bring a court action can only be excluded by agreement on specified grounds. *Hobér,* on the other hand, considers that the Supreme Court has given an affirmative answer to the question of whether the parties, consistent with the principle of party autonomy, can themselves decide whether the arbitral award shall be reviewed by a court. *Hobér* mentions that the question has also been solved in this way in Belgium, England and Switzerland and adds that the Supreme Court, through its decision, has established a principle before the legislature had a chance to deal with the question.[11]

Jarvin has stated that countries whose legislation limits the parties' possibilities of setting aside the arbitral award will be attractive places in future international commercial disputes. He adds in his essay by way of conclusion that Sweden may come to join this group, since foreign parties will hereafter be able to exclude the action to set aside an award in Sweden. He refers to the Supreme Court decision.[12] No further reason for these views is provided by the two last-mentioned authors and the distinction between exclusion agreements and limitation agreements has not been made by *Jarvin.*

I, for my part, consider on the basis of my interpretation of the Supreme Court's decision and the above-mentioned doctrinal pronouncements that the decision only supports the proposition that the right to institute actions for setting aside an award can be *limited* in advance but not completely excluded. The decision may be said to indicate that this must be done in a clear manner. Otherwise, a party will not be able to satisfy the burden of proof imposed upon him according to the Supreme Court. The unequivocal content of the ICC clause was in this case known to the Supreme Court. It may therefore appear that the question was mainly one of contractual interpretation and not one of the burden of proof as to whether the right to bring an action for court review had been excluded concerning claims that an arbitrator was not appointed in the proper manner. The Supreme Court does not state which grounds of challenge can be excluded through the limitation agreements or the conditions therefor. It appears most likely that the possibilities of challenge on account of disqualification of the arbitrator can be excluded by agreement, if the question of disqualification can be determined by a well-reputed arbitration institute.[13]

[10]Wetter and Kadelburger, International Arbitration Report Vol 4, Issue 5 25-6 (1989).
[11]Hobér,9 Svensk och internationell skiljedom 21 and 23 (1989).
[12]Jarvin, 9 Svensk och internationell skiljedom 37 (1989).
[13]Cf. Heuman, 31 NJM Del I 272 and Del II 487 (1987) and Möller, 31 NJM Del II 463 (1987).

According to the interpretation that has been made of the decision, it cannot be claimed that the Supreme Court has taken a significant step towards joining Sweden with other states having modern arbitration legislation. Many commentators in international arbitration law presently consider that foreign parties should have the option of completely excluding by agreement the right of national courts to review arbitral awards. A waiver of legal protection in this fashion need in no way mean drastic consequences for the losing party, since he can raise objections at the enforcement stage, which can in practice mainly take place in the losing party's home country where he has assets accessible for execution.

One can however wonder whether the Supreme Court decision represents a clear rejection of agreements through which the parties exclude *all* judicial review of the arbitrators' determinations. *The Supreme Court might later accept very far-reaching limitation agreements and the court may thereby approach a system by which it approves general "exclusion agreements."* It should be mentioned in this context that the Supreme Court has already expressly accepted limitation agreements governing grounds for voiding the award, i.e., concerning defects of a serious nature, which are not waivable by a party to a Swedish proceeding (Arbitration Act, sec. 21, second paragraph *e contrario*).

An indication that such a legal development would be possible follows from the principle that *precedents shall not be construed e contrario*. The Supreme Court has only stated that limitation agreements can achieve the intended legal effect, but made no statement as to the validity or invalidity of general exclusion agreements. The Supreme Court may have considered it unnecessary to make such a statement for reasons related to the burden of proof, i.e., that it has not been demonstrated that the ICC Article can mean more than a waiver of the right to institute an action against an arbitral award on the merits.

3.2 Is the Validity of Exclusion Agreements an Open Question?

I must however confess that my interpretation that the question of the exclusion agreements' validity is left open by the Supreme Court is not completely incontrovertible. The interpretation of the Supreme Court decision is complicated by the fact that it contains a certain contradiction. In the Supreme Court case, an ICC clause is cited which must be deemed to mean an attempt to generally exclude the right to bring an action for court review, not just to limit that right in specified situations. When the Supreme Court states that the limitation agreements are acceptable, but only if they are clear, this provides no answer to the question that the defendant may be considered to have asked, namely, the question of whether general exclusion agreements are valid. It is difficult to see how the Supreme Court has been able to ignore this question, when an acceptable limitation agreement was not deemed to

exist. Since *e contrario* interpretations of cases should be avoided, it cannot at all be taken for granted that the Supreme Court has indirectly rejected exclusion agreements.

There may be reasons for future acceptance of general exclusion agreements considering the factors that led to amendment of the civil procedure provision in chap. 49, sec. 1 of the Code of Procedure, an amendment which the Supreme Court has surely been aware of and taken into account. According to the rule that applied until 1 July 1989, the parties could not, prior to the emergence of the dispute, enter into binding agreements excluding the right of appeal. The previous rule was supported by the Law Council for the reason that stipulations should not be accepted which have, due to lack of wisdom, been reached before a dispute has arisen and thus before it is possible to judge the scope of the stipulation.[14]

With passage of the amendment, that argument was not considered to constitute an obstacle to agreements excluding the appeals that had been entered into prior to the dispute. Limitations were only introduced in the realm of consumer law, which is hardly of interest in this context.[15] The trial law committee stated the importance of the trial costs being limited; it did not believe that the determinations of district courts would be of lower quality because appeals were excluded. On the contrary, the committee believed that the judge would take an especially large responsibility and invest special effort in the case. It was also claimed that the lack of the possibility of appeal could in itself lead to the proceedings in the district court being somewhat more extensive.[16] If this new outlook is applied to international arbitration disputes, the lack of possibilities for court review can result in an especially close scrutiny of the case and a more thorough representation by legal counsel. Under chap. 49, sec. 1, par. 2 of the Code of Procedure, parties can, prior to a dispute, agree not to appeal. Thus, in accordance with the rationale of this rule, it should today be possible for foreign parties, before the emergence of the dispute, to waive the right to bring an action to void or challenge an arbitral award, even though they are not in a position, prior to the emergence and hearing of the dispute, to form an opinion of the gravity of procedural errors that may arise. The parties to an international commercial agreement should possess such knowledge of arbitration law that they realize that the consequences of such errors can only be raised at the enforcement stage. In my opinion, this reasoning is correct, even if the comparison with agreements prohibiting appeals is invalid, since parties to these agreements do not waive the right to attack legally binding judgements due to grave procedural errors according to the Code of Procedure, Chap. 59, sec. 1. The idea that the agreement entered into prior to the dispute shall be

[14]68 NJA II 611-2 (1943) and Bolding, Skiljeförfarande och rättegång 62-72 (1956).
[15]Prop 1988/89:78 p. 40-4.
[16]SOU 1986:1 p. 105.

given the intended legal effect is supported by the Code and the idea can be accepted regardless of the object of the waiver.

If the foregoing discussion of interpretation of the Supreme Court's decision is substantially correct, it must be submitted that the precedent has not at all created the desired clarity. For foreign parties to an arbitration, it is hardly of value to know that limitation agreements are acceptable in Swedish law, when no indication has been given as to which grounds of challenge can be excluded by agreement and which special conditions must be fulfilled. It is clearly problematic for them not to know whether the right to bring an action to void or to set aside an arbitral award can be completely excluded by agreement.

Assume that foreign parties can completely exclude the right to both the action to challenge and the action to void an award. In interpreting various general exclusion agreements, it may be difficult to determine whether the parties have provided a sufficiently clear indication of their intent to exclude the right to institute such actions. An agreement interpreted as a waiver by the parties of the right to have the award reviewed on the merits cannot be given a broader interpretation and also be interpreted as a waiver of the right to bring an action to challenge or to void the award. Article 24 (2) of the present ICC rules can perhaps be given such a broad construction. Under that article, the parties shall be deemed to have waived their right to any form of appeal insofar as such waiver can validly be made. In the previous rules, the matter was expressed in a similar fashion, although it was not indicated that a party refrains from *every* action or any form of appeal but rather that a party refrains from actions against the arbitral award. The latter addition "any form of appeal" would possibly, but by no means certainly, mean that the parties waive the right to bring an action to challenge or to void the award.[17] In English law, the ICC clause has been considered to encompass an "exclusion agreement" in international disputes.[18] Foreign contractual parties, who have provided an agreement with an arbitration clause that stipulates an ICC proceeding in Sweden, can under no circumstances be certain to achieve the desired effect of excluding by agreement all possibilities of court review in Sweden, since it was not expressly added that the right to "an action to void or to challenge an arbitral award" is to be excluded. It is naturally problematic that such explanatory additions to the ICC Article must be made in certain cases and not in others, depending on which country's arbitration act is to be applied. A uniform international interpretation of the ICC Article is desirable, but it cannot be said that Swedish and English law take the same position.

[17]Cf. Hjerner, Internationella Handelskammarens förliknings- och skiljedomsregler 101 (1981).
[18]Jarvin 69 SvJT 1008-9 (1984) and Redfern and Hunter, Law and Practice of International Commercial Arbitration 317-8 (1986).

4 Can Swedish Parties Waive the Right to Bring an Action to Void or to Challenge an Arbitral Award?

The Supreme Court case does not deal with the question of whether *Swedish contracting parties* can agree to exclude the right to bring an action to void or to challenge an arbitral award, when future disputes are to be determined in Sweden under the Arbitration Act.

4.1 Function of Exclusion Agreements in Domestic Cases

It can be asked what *utility* such a clause could have if it were valid. In international disputes, parties may desire to avoid court review and are satisfied with the possibility of being able to object to enforcement applications in different countries. In cases where a Swedish arbitral award is involved, the execution authority shall, under chap. 3, sec. 15 of the Execution Act, determine whether there exists any impediment to an enforcement declaration. The impediments in question correspond to the grounds for voiding and challenging awards set forth in the Arbitration Act, secs. 20 and 21. If the parties waive the right in advance to institute actions to void or to challenge an arbitral award, the waiver clause would hardly fulfill any meaningful purpose in the case of arbitral awards that order a party to perform a particular duty. Within the framework of the enforceability proceedings, the reasons for voiding or challenging the award could be raised. These proceedings before the execution authority would perhaps provide somewhat less legal security than in civil disputes, since oral hearings are not as common as in civil disputes. This could possibly mean more rapid determination of the questions of nullification and challenge when they are heard in cases dealing with enforcement declarations and not in civil cases dealing with invalidity and challenge.

If the arbitration dispute is completely or partially determined through a declaratory judgement, it will not be enforceable. The losing party will not in such cases even be able to raise grounds for voiding or challenging the award in an enforcement action. If the arbitrators have declared that the defendant is liable for payment, the award would thus be directly legally binding. The losing party would not in any way be able to challenge it where serious procedural errors have been committed, since no enforcement proceedings could take place as to an unenforceable declaratory award. This would also apply to those cases where a plaintiff, on the basis of the binding declaratory award, later secures an award ordering performance determining the amount to be paid. If the plaintiff seeks enforcement on the basis of the latter arbitral award, procedural errors related to the first unenforceable declaratory award may not be made. If, on the other hand, an arbitral award, because of both declaratory and performance claims concerning the same legal transaction, contains pronouncements of both a performance and

a declaratory character, the losing party would probably not be able in an enforcement action to claim formal errors that referred exclusively to the determination of the declaratory claim. When the procedural errors mainly concern the declaratory judgement, but deal superficially with the performance judgement, significant problems of delimitation arise when the execution authority, in its consideration of the enforcement of the performance judgement, shall assess whether the consideration of impediments may occur.

4.2 Are Exclusion Agreements Void in Domestic Cases?

It can be stated by way of summary that the type of clause discussed above hardly fulfills any important function for the prevailing party in arbitration disputes between Swedish parties and that the clause can give rise to significant problems of legal application when both the declaratory and performance claims have been upheld. Reasons of legal policy call for consideration of these clauses as void.

In my opinion, Swedish parties ought to be *deemed to lack the right to make prior agreements to exclude all possibilities of raising grounds for challenging and voiding arbitral awards in both the court and the execution authority.* This shall be developed below.

If an arbitration agreement contains a clause stipulating that a majority of arbitrators shall be appointed by one of the parties, the arbitral agreement cannot be accepted as a procedural hindrance under a Supreme Court case.[19] The merits of the dispute can thus be determined by a court, notwithstanding that a party requests dismissal relying upon such an arbitral clause. Should an arbitration tribunal nevertheless have determined such a dispute, the Supreme Court case must mean that a party, through acceptance of the clause on the arbitration tribunal's composition, has not made a valid waiver of the right to claim that the arbitral award is invalid because the composition clause makes the arbitration agreement invalid. It also appears difficult to accept an invalid arbitration agreement as being unquestionably valid because both parties have waived the right to claim the invalidity of the agreement. This would apply regardless of whether the invalid arbitration agreement has been fraudulently provided with one of the parties' signatures or the agreement has been signed by someone lacking authority to do so. An arbitration agreement cannot be enforced by a party in good faith against the other party, when it has been signed for him by an unauthorized agent. This defect cannot be remedied by the unauthorized agent by an exclusion clause prohibiting the party the right to raise the invalidity of the arbitration agreement by voiding an arbitral award with an action under sec. 20 of the

[19]Rita Urhelyi v. Arbetsmarknadens försäkringsaktiebolag (NJA 1974 p. 573). See also p. 235

Arbitration Act or by presenting an objection under chap. 3, sec. 15, second paragraph of the Execution Act.

It is difficult to envision that an arbitral award concerning non-arbitral issues could be upheld and that the parties prior to the emergence of the dispute or after the rendering of the award would be able to waive the right to raise grounds of invalidity. In order to avoid a legal situation which infringes upon important public interests, a party should always be able to institute an action to void the award. Another matter is that the scope of arbitrability should be broadened in modern arbitration law in such a manner that the parties will be permitted to have disputes determined by arbitrators even where important official interests are at stake.[20] The public interest should, to the greatest extent possible, be protected through the arbitral awards not being allowed to bind public authorities, e.g., the Ombudsman for Freedom of Commerce when the arbitral award has been rendered in a civil law dispute encompassing competition law questions. An arbitral award that has a detrimental effect on competition should not prevent the Ombudsman from intervening and ultimately securing a decision from the Market Court which compels changes in the substance of the arbitral award.

Nor should a party be able to waive the right to raise all the grounds for challenge. If such a prior agreement were valid, a party, who has not received notice of a final hearing, would not be able to have the arbitral award set aside, even though he has not been given the opportunity to conduct his case in the manner prescribed by sec. 14 of the Arbitration Act. The procedural rule in this provision is, according to the legislative history, mandatory. The provision should not be allowed to be circumvented by the parties excluding the grounds for challenge generally and in advance.

As to arbitration disputes between Swedish parties, it is mainly of *practical interest to examine whether there is a need and possibility to exclude specific grounds to set aside and void arbitral awards* or to limit the scope of such actions through agreements between the parties or through arbitration rules which contain acceptable procedural provisions which indirectly limit the parties' right to attack the arbitral award. One example is the question of the validity of a provision that states that an arbitration institute can decide questions of disqualification with final and binding effect for the parties. The question can also be asked whether the scope of the rule in sec. 20, second paragraph of the Arbitration Act can be limited. The Act provides that the absence of an arbitrator's signature on the award shall not make the award void if a majority have verified that the absent arbitrator took part in the decision. It is conceivable that a provision in arbitration rules prescribes that the chairman alone can sign an arbitral award if he certifies that both of the other arbitrators have taken part in the determination. Such a provision may

[20]See p. 168.

perform a certain function in international disputes where, after the completion of deliberations, it may be difficult to obtain, within a reasonable time, the signatures of remotely residing arbitrators on an award that has been signed by the chairman. In Swedish arbitration disputes where the arbitrators can relatively quickly exchange correspondence, it is not especially important to accept a provision that the chairman's signature suffices. Legal security can otherwise be jeopardized, e.g., if the arbitrators after the rendering of the award have different views of what they have agreed to during the oral deliberations. The risk of misunderstanding increases when all or some of the arbitrators lack legal education and experience of arbitration proceedings.

Arbitrators may occasionally ask the parties whether they wish the *arbitrators to provide an oral account of the probable outcome of the dispute*. With the consent of the parties, such an advance notice of the decision can be given, e.g., after the taking of evidence. There is no obstacle to the arbitrators indicating their preliminary view of the dispute at an earlier stage if the parties agree to this. The purpose of such advance notice is often procedural economy. The costs can be limited if the proceedings do not have to be concluded and if the arbitrators do not need to put a lot of work into drafting an award. If the parties accept the arbitrators' proposal, they can request that the arbitrators render an award confirming a settlement in accordance with the terms of the arbitrators' preliminary ruling. Everything has then worked out well.

The arbitrators must count on the possibility that one of the parties can consider the preliminary ruling unfavorable and that he requests that the proceedings be finalized in the hope that a written award will encompass a different result. If the award closely resembles the preliminary ruling, the losing party may seek to challenge the award on the basis of disqualification. He may be of the view that the arbitrators have lost their ability to impartially judge in the dispute, since they have allowed themselves to be bound by their preliminary ruling. To prevent such a challenge, the arbitrators should, *as a condition for rendering a preliminary ruling, require that the parties waive challenge of a subsequently rendered arbitral award* on the ground that the arbitrators had been disqualified to decide the dispute after a preliminary ruling had been rejected.[21] The rule in sec. 21, paragraph 2 of the Arbitration Act on waiver of the right to raise procedural errors is not applicable to abstract grounds for challenge, i.e., concerning specific grounds for challenge that have not as yet arisen. The foregoing rule states that a party forfeits the right to raise challengeable errors where he appears without protest in the proceedings or otherwise should be deemed to have waived his right to object to the error. When the parties waive the right to challenge an arbitral

[21]Cf. Grönfors, Festskrift till Lars Welamson 228 and 230 (1987).

award on the ground of disqualification before a preliminary ruling is issued, they do not know in what way or to what extent the arbitrators' preliminary positions will make them partial in the subsequent conduct of the proceedings. The parties do not waive the right to raise an already known concrete ground for challenge, but rather enter into a prior agreement. The decision in the Ugandan case does not clarify whether this particular type of prior agreement can be given the intended legal effect, but does demonstrate that some type of specific agreements can be accepted. Considering that this type of specific prior agreement performs a lawful function of procedural economy and that valid objections cannot be made from the viewpoint of legal security, I consider that a court should reject an action to set aside the award where a party claims that the arbitrators have disqualified themselves through their rendering of a preliminary ruling.

The Supreme Court decision does not in any way contribute clarity as concerns the right of Swedish parties to directly or indirectly exclude specified grounds for challenging or voiding the arbitral award.

Enforcement of Foreign Arbitral Awards

1 Introduction

One of the main purposes of the New York Arbitration Convention of 1958 (cited the Convention) is to promote the effectiveness of international commercial arbitration by ensuring a speedy enforcement procedure of foreign arbitral awards in the contracting states.[1] For that reason, it was considered important to eliminate the double exequatur request, which was established under the Geneva Convention of 1927.[2] A prevailing party may thus have an application for enforcement granted without first having obtained a leave for enforcement in the country where the award was made. This does not however mean that an award can be executed after the completion of merely one type of procedure in a contracting state where the respondent has assets. After a court or other governmental authority has declared the award enforceable under the Convention, the prevailing party has to apply for execution. The most common type of execution in Sweden is garnishment (utmätning) based upon a judgement or an award ordering the payment of money. Even if no special application for garnishment has to be made in some states, a distinction must be made between, on the one hand, the legal procedure whereby enforcement may be refused according to the Convention mainly upon the limited grounds mentioned in Article V and, on the other hand, the completion of the execution according to the national enforcement acts. Those laws prescribe how the execution is to be carried out physically, e.g, how to proceed when taking assets from the debtor and to what extent the authorities must investigate whether the debtor is in possession of assets available for garnishment. The national enforcement acts often prescribe how the debtor's goods may be sold and whether the debtor is entitled to prevent execution by leaving security. It is quite clear that the losing party to an arbitral dispute is entitled to make some objections during the execution procedure against an award declared enforceable under the Convention. It is obvious that no measures for execution shall be carried out if the respondent proves that he has paid the awarded sum. The Swedish Execution Act empowers the respondent to impede the execution by some other legal objections which may presumably be relied upon according to many other national laws. In a final part of this essay some arbitral cases

[1]van den Berg, The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation, 4 (1981).
[2]van den Berg, 7, 9, 267 and 333-4 (1981).

concerning these objections will be dealt with. But first the applicability of the Convention in Sweden will be discussed.

This essay is mainly based upon an investigation of unpublished cases regarding enforcement of foreign awards in Sweden according to the Convention and cases regarding execution on awards already declared enforceable. As to the first category of cases, two earlier reported cases will not be discussed, namely, Götaverken v. GNMT, *inter alia*, concerning the Convention Article VI[3] and Folksocialistiska Lybiska Arabrepubliken v. Libyan American Oil Company, where the Court of Appeal held that state immunity was waived.[4] The unpublished Swedish cases on the convention raise only two main questions of interest, namely, on the composition of the arbitral tribunals and on notifications. After those problems have been dealt with, some cases and problems will be discussed regarding execution of awards declared enforceable. However, first some general problems on the procedure of enforcement of foreign awards will be discussed and second interim measures in such cases.

2 Procedure for Enforcement of Foreign Awards

The Convention is implemented in Sweden by incorporation into the Act Concerning Foreign Arbitration Agreements and Awards, contained in the appendix thereto.[5] An application for leave to enforce a foreign arbitral award shall be submitted to the Svea Court of Appeal in Stockholm. After a limited appeal, an enforcement case may be tried by the Supreme Court. The appealing party need not obtain leave to appeal, which is normally a condition for having a case decided by the Supreme Court.[6] The respondent cannot however delay the execution by merely lodging a limited appeal. Pursuant to the aforementioned Act sec. 9 par. 3, the arbitration award, declared enforceable by the Court of Appeal, shall be executed in the same manner as a final judgement of a Swedish court. This means that garnishment may be completed and that the debtor cannot impede the execution by requesting security from the applicant or by offering security himself.[7] The Act Concerning Foreign Arbitration Agreements and Awards provides in sec. 9 that the Supreme Court may grant a stay of execution. The respondent must apply for such an order; the Court will not try this issue on its own initiative.

[3]See, for example, van den Berg 354 (1981) and Arbitration in Sweden 166-7 (1984).
[4]Nilsson, 2 Swedish and International Arbitration 41-49 (1982) and Arbitration in Sweden 15 note 13 (1984).
[5]van den Berg 236-7 (1981).
[6]Code of Procedure chap. 54 sec. 9 and 10.
[7]The Execution Act chap. 3 sec. 3. See also Walin, Gregow and Löfmarck, Utsökningsbalken 72-3 and 86 (1987).

According to the Convention Article III, there shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which the Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards. This does not mean that the prevailing party may request that notice to the respondent of his application for enforcement can be dispensed with. On the contrary, the Convention Article V presupposes that the respondent be offered an opportunity to prove grounds for refusal of enforcement.[8] The aforementioned Swedish Act sec. 9 provides that an application may not be granted unless the other party has been given an opportunity to comment.

Between 1971 and 1989, nineteen applications for enforcement of foreign arbitral awards were made to the Svea Court of Appeal. In no case was enforcement refused.[9] The time for deciding the cases generally varied between three and eight months, even in some of the few cases where the respondent lodged a limited appeal to the Supreme Court which declared the awards enforceable. No significant conclusions can be drawn from the statistics. An analysis of the individual cases will result in some important observations as to the enforcement procedure. It is obvious that the applicant may in some cases have managed to shorten the time for this procedure.

If the *respondent is a Swedish company*, there are often no reasons to request that the Court serve the application on the respondent in a particular manner. The court, given its experience from civil and criminal cases, is accustomed to handling issues of service and will try to ensure that this task is carried out as quickly as possible by the simplest and most economical means, which often implies notification by post. If a respondent does not return a certificate of service to the court after having received the application by post, the court will try to notify the respondent in some other efficient manner. Where the prevailing party knows that the respondent is recalcitrant, he may have the court serve the application by bailiff.

When the *respondent is a foreign company with assets in Sweden but the application shall be served under an address in a foreign country*, the enforcement procedure may be expedited by the prevailing party even if the respondent has no legal representative in Sweden who can be designated as authorized to receive service. According to the Swedish Service Act sec. 2 par. 2. a court may, at a party's request, allow him to carry out the service procedure when it can be done without undue inconvenience. In such a case, the court shall order him to send a certificate of service to the court within a certain time limit.[10] If a court desires to conduct service itself, it can send a letter to the respondent or, if the party does not acknowledge service, a court

[8]van den Berg 239 (1981).

[9]Four cases were dimissed.

[10]If no such certificate is sent to the court in due time, the court shall carry out the service procedure without undue delay.

can request assistance with service from the Swedish Ministry of Foreign Affairs, a time-consuming procedure.[11] Service can often be completed much faster if the prevailing party obtains permission to conduct service itself and thereafter engages a lawyer in the country where the respondent company is located and asks him to ensure that the application be served on the respondent. It must be done according to the wording of the order issued by the Court of Appeal and pursuant to the law of the country where service is to take place.[12] If the respondent company, e.g., is located in a distant country, service of the application may be very difficult and time consuming. In the end, the proven impossibility of completing service will prevent a declaration of enforceability. A Supreme Court case also demonstrates that the legal impossibility of serving the application on the respondent will have the same effect as if the respondent had proved a ground for refusal of enforcement.

Rederi AB Gustaf Eriksson v. Rederi AB Thule (NJA 1988 C 28). After an award was rendered in England, the prevailing Finnish party applied for enforcement against Thule, a Swedish company. It was later shown that the company had been declared bankrupt. The applicant asserted that the opposing party, the bankrupt company, should be deemed to be represented by the last-registered board.

The Supreme Court stated: An application for enforcement may not be granted pursuant to the Act Concerning Foreign Arbitral Agreements and Awards sec. 9 par. 1 unless the adverse party had been given an opportunity to comment thereon. The opposing party may prove such deficiencies regarding, *inter alia*, the conduct of the arbitration, which, according to the Act sec. 7 (corresponding to the Convention Article V), may mean that the award is invalid and thus unenforceable in Sweden. Pursuant to the award Rederi AB Thule is the party opposing the applicant. Thule was, according to the Companies Act chap. 13 sec. 19 par. 1, dissolved after bankruptcy under a section of the earlier version of the Bankruptcy Act. The fact that Thule has been dissolved means that the award is not enforceable against the company and that Thule can not act as the opposing party in this enforcement case. The application is dismissed.

According to the aforementioned section of the Companies Act, a company is dissolved if the *bankruptcy procedure is terminated without a surplus*. It would seem meaningless to apply for enforcement when the bankrupt company has no assets. *Before the bankruptcy procedure is terminated*, the bankruptcy estate, a legal entity, is represented by the official receiver (normally a member of the bar association) appointed by the district court. The Svea Court of Appeal may, at a party's request, declare an award enforceable against the respondent's bankruptcy estate, but it cannot later be executed.[13]

[11]In Compania Dapo S.A. v. Arimar Lines Ltd (Svea hovrätt Ö 707/77) a foreign respondent failed to send a receipt to the court although ordered to do so by letter. As this service procedure failed, the court asked the applicant to indicate the respondent's present address. After having done so, the respondent was ordered in vain to admit receipt of the application. It was probably for these reasons that the application was withdrawn.

[12]In Mightious Navigation Inc. v. Cast Trading Ltd (Svea hovrätt Ö 1688/84) the court order was drafted in English. See infra as to translations.

[13]See infra p. 231 Victrix Steamship Co. S.A.

It is normally futile for the prevailing party to attempt to enforce the award against the bankruptcy estate and to thereby assert that the receiver may be competent to act on the respondent's behalf. The reason for this as provided for in the Bankruptcy Act chap. 3 sec. 7, is that no assets belonging to the bankruptcy estate may be garnished once a debtor has been adjudged bankrupt. If this should occur anyway, the measures are without legal effect pursuant to the law. This means that the prevailing party merely ought to inform the receiver of his claim established in the award and request distribution of the bankruptcy assets. The receiver may inform the foreign creditor whether it is necessary to notify the district court of the claim in order to be entitled to distribution to the extent that this is possible.

In many of the nineteen cases, the applicant could have expedited the procedure by ensuring that all needed documents were properly submitted to the court from the very beginning. A court order to complete the application will always delay the procedure, especially if a Swedish lawyer representing the prevailing party is obliged to obtain the documents from a foreign party. The Swedish language shall be utilized in all court proceedings in Sweden. According to the Code of Procedure chap. 33 sec. 9 par. 1, the court may, if required, ensure that writings sent to or from the court are translated. Pursuant to the Act concerning Foreign Arbitration Agreements and Awards sec. 8 par. 2, there shall be attached to the application the original or a certified copy of the arbitral award and a certified translation into the Swedish language. If no such translation is attached, the court will not serve the application on the respondent. The applicant also has to attach a power of attorney and a certificate showing who is competent to represent the parties. An application fee has to be paid. It appears to follow from the Code of Procedure that the court should defray the expenses for translations of party writings and other documents submitted after the application. However, the court will probably consider it unnecessary to translate the documents, since the parties ought to be able to furnish duly certified translations themselves. If the applicant submits pleadings in a foreign language, the proceedings will probably be delayed.[14]

The application can be formulated very succinctly. The applicant may be awarded legal expenses for the enforcement procedure if he so demands and the award is enforceable. Costs for the arbitration can only be adjudged if the award contains such an order; such costs may not be included in the costs for the enforcement proceeding, which the applicant may be compensated for.[15] Post-award interest probably cannot be adjudged by the Court of Appeal in enforcement proceedings, if the operative part of the award lacks such a directive.[16] Issues concerning currency shall not be dealt with in the

[14]See prop 1986/87:89 142-3 and 169-70.
[15]Uranus Maritime Company S.A. v. Borgo Export & Import AB (Svea hovrätt Ö 1843/78).
[16]Cf. van den Berg, 14 Y.B. Com. Arb. 577 (1989).

application, since the Court of Appeal will only declare the award enforceable, without adding orders for the execution.[17] When the applicant later requests execution, problems of currency may be raised.

3 Security Measures

Once an application for enforcement is made, several months may pass before the Svea Court of Appeal is able to decide the case. After enforcement is granted the prevailing party is empowered to force the execution authority (kronofogdemyndigheten) to take those measures required to secure the applicant's claim. A garnishment order gives a right of priority, but, in the event of the debtor's bankruptcy, this will be automatically ineffective if the priority was created less than three month before the bankruptcy application.[18]

It is obvious that the prevailing party often needs to obtain security measures shortly after the award was rendered and to maintain those measures until enforcement can be secured by execution. If the losing party refuses to pay the adjudged sum voluntarily and the prevailing party is thereby forced to apply for enforcement, then there is a danger that the losing party will attempt to withhold the assets. If the losing party is a foreign company with resources in Sweden, it is not unlikely that those will be transferred to a foreign country in secrecy, before the Svea Court of Appeal has declared the award enforceable. The prevailing party will then have to apply for enforcement in another state, if he knows were the losing party has assets. To secure execution, the prevailing party must apply for security measures before or simultaneously with his request for a declaration of enforceability. It can be questioned whether this can be done by an application for interim measures 1) in proceedings for enforcement in the Svea Court of Appeal, 2) in special district court proceedings or 3) in a district court challenge procedure instituted by the losing party. One has to consider problems of jurisdiction when the losing party is a foreign company. If the award is rendered against a Swedish company, there are no problems of jurisdiction.

It is clear that the Svea court of Appeal has jurisdiction to order that the award is enforceable upon the request of the prevailing party.The applicant is not required to demonstrate that the respondent has assets in Sweden. *However, the Act concerning Foreign Arbitral Agreements and Awards lacks provisions authorizing the Svea Court of Appeal to order attachment.* Nor does the Convention have any provision on post-award attachments; such

[17]Victrix Steamship Co. S.A. v. Salén Dry Cargo AB bankruptcy estate (Svea hovrätt Ö 3782/85).

[18]Bankruptcy Act chap. 4 sec. 13. In some cases the time limit for the annulment of the priority will be as long as two years.

measures are not however incompatible with the Convention.[19] The competence of the courts to issue post-award attachments depends on the competence provided for in the national laws. A Supreme Court case indicates that the Svea Court of Appeal has no jurisdiction to issue such an order, since there is no support in the law.

Gert H v. Per Olof S (NJA 1983 p. 814). A judgement of a court in a foreign state cannot be enforced in Sweden unless there is a treaty providing such jurisdiction. Sweden has entered into a treaty on enforcement of court judgements with Switzerland and later with Austria – in addition to the Nordic countries. According to the law, a party has to apply for enforcement in the Svea Court of Appeal if he seeks to have a judgement rendered in Switzerland declared enforceable. Gert H requested that the Court declare a judgement rendered in Switzerland enforceable. He also applied for an order of provisional attachment. When a measure of attachment or the like has been granted, the claimant shall, within one month of the order, bring an action before the court or request arbitration if he has not previously commenced litigation or arbitration (Code of Procedure chap. 15 sec. 7). The purpose of this rule is to protect the debtor by preventing the court from upholding an interim measure for an extended period of time, since there is a danger that the plaintiff has an unfounded claim which will be demonstrated later in a judgement. In this case, the question arose as to whether the request to bring a suit within one month would be satisfied if a litigation was instituted in a foreign country and not in Sweden.

The Supreme Court stated: It follows from the provision in the Code of Procedure on attachment that an interim measure may be issued even if a claim shall be tried by a foreign court, provided that the judgement of the court is enforceable in Sweden. This means that a party asserting such a claim is entitled to obtain an attachment before he has filed an action and that the prerequisite for commencing litigation is fulfilled if an action is filed with the foreign court. Under such circumstances, there is no bar to granting such security measures after a judgement is made in the foreign litigation, but before it can be enforced. As to jurisdiction, the Code of Procedure chap. 15 sec. 5 par. 1, third sentence is applicable.

The Supreme Court continued: Gert H has asserted that the Svea Court of Appeal may order provisional attachment in the case at hand concerning enforcement of a judgement made in Switzerland. The law contains no provision authorizing the Court in such a case to issue such orders unlike the law regarding enforcement of judgements made in Austria. There is no other support for the assumption that attachment orders may be issued in cases of the present nature. The general provisions (on attachment in chapter 15) of the Code of Procedure, including the aforementioned provision on jurisdiction, shall therefore be applied.

This case means that the prevailing party may apply for security measures at the district court, but not at the Svea Court of Appeal in connection with an application for enforcement. The same principle ought to be upheld in cases of enforcement of foreign arbitral awards. In the event that a district court has granted attachment, e.g., before an enforcement application has been filed with the Svea Court of Appeal, it seems that the applicant, pursuant to the Code of Procedure chap. 15 sec. 7, is obliged to apply for enforcement within one month.[20]

The prevailing party may apply for attachment before the competent district court with the support of the Code of Procedure chap. 15 sec. 1. It is true that

[19]van den Berg 139-44 (1981).
[20]Cf. prop 1982/83:117 p. 28.

court judgements in which a party is ordered to pay a certain sum do not as a rule entitle the prevailing party to attachment. The reason for this is that the prevailing party may have the execution carried out and that his claim may be already secured after an appealable judgement is rendered. In such a case, there is no need for attachment. If a foreign award is rendered, the execution may not be initiated by the execution authority until the Svea Court of Appeal has held the award enforceable, a procedure which often takes several months. During that period, there may be a need for attachment.[21] If there is a *need for attachment due to the legal impossibility of obtaining execution immediately, such an interim measure may be granted.*[22] This constitutes an exception from the main rule that such attachment will not be granted after a payment order is issued by a court. Therefore, it seems clear that a district court can order provisional attachment before and during the enforcement procedure at the Svea Court of Appeal. Once this Court has granted enforcement, an application for attachment cannot be granted. The prevailing party may at that stage secure his claim by applying for execution. The principle of need for attachment is also applicable in cases of enforcement of domestic arbitral awards. This means that the prevailing party may be granted attachment before and during the somewhat time-consuming judicial enforcement procedure before the execution authority. When this authority has declared the award enforceable, the execution may commence unless the Court of Appeal decides to stay the enforcement. Execution Act chap. 3 sec. 18 (see appendix).

If a person has shown probable grounds for possession of a claim which is or may be presumed to be the subject of legal proceedings or adjudication in another similar form, and it can reasonably be expected that the adverse party, by absconding, removing property or by other means, will evade payment of the debt, a court may, pursuant to the Code of Procedure chap. 15 sec. 1, order provisional attachment of so much of the adversary's property that the claim may be assumed to be covered in the event of execution. A measure will only be granted if the claimant deposits security with the court to recompense the adverse party for the loss he may suffer, in the event that the granted measure is set aside by the court, e.g., if the plaintiff's claim is rejected in the judgement. If attachment is granted by the district court, the claimant has to apply for enforcement of this order at the execution authority. If an action was not filed when the claimant obtained an attachment order, he shall, according to the Code of Procedure chap. 15 sec. 7, within one month of the order bring an action or, if the claim is to be entertained in another form, in accordance with the provisions pertaining thereto. This means that in cases of pre-award attachment, the claimant has to request arbit-

[21]Hellners, 64 SvJT 137-42 (1979), Ekelöf, Rättegång III 11 (1988) and X v. Y (RH 10:1985).
[22]Hassler, Utsökningsrätt 214 note 50 and 374 (1960) and SOU 1973:22 p. 490-1.

ration within one month; in cases of post-award attachment, the claimant has to apply for an enforcement declaration within the same time frame. Otherwise the effect of the interim measure will be automatically inoperative.

If the prevailing party wishes to apply for an attachment order against a Swedish company, he shall do so at the district court where the company's board has its permanent seat or, if there is no such seat or board, at the place where the company's administration is carried out. Normally, there is no jurisdictional problem when the respondent is a Swedish company. *A district court has competence to try an application for attachment as to pecuniary claims against a foreign company if it has property within the jurisdiction of the court.* (Code of Procedure chap. 10 sec. 3.) A foreign company may sometimes attempt to hide its assets or avoid giving any information as to where property is located in Sweden. The respondent may even remove his assets from the country to forestall enforcement. A claimant commencing a court action against a foreign respondent has a rather heavy burden of proof regarding his claim that the respondent has property over which a Swedish district court can apply jurisdiction. This is stated in a Supreme Court opinion. However, it may be difficult for a plaintiff to fulfill this rather heavy burden of proof, if his preliminary investigations merely demonstrate that the respondent is likely to have assets in a certain place in Sweden, e.g, a bank account or a pecuniary claim against a Swedish company. According to the Supreme Court case, the burden of proof may be reduced when an application for attachment is made and when a delay would entail a risk. If the claimant requests the ordering of an interim measure without giving the opposing party an opportunity to respond pursuant to the Code of Procedure chap. 15 sec. 5 par. 3, a further reduction of the standard of proof may be made. Otherwise, according to the Court, it would be too difficult for a creditor to obtain an interim measure in time.[23]

It may sometimes be effective for a prevailing party to an arbitral dispute to commence an application for attachment requesting that the respondent not be given an opportunity to respond. Further, the claimant has to state in his application that the respondent has certain assets situated within the jurisdiction of the district court. In such cases, the claimant is not required to present substantial evidence in support of his statement as to where the assets are located. The value of the assets does not have to amount to the sum sought in order to render the court competent. If the attachment order is issued without giving the respondent an opportunity to respond, the claimant ought to apply for execution immediately. If the execution authority has made investigations demonstrating that the respondent has assets in Sweden

[23]Arbuthnot Latham Bank v. Göran D (NJA 1987 p. 790).

outside the jurisdiction of the court,[24] the claimant may later apply for attachment at the competent district court where the property is located. Such an application may be dismissed on grounds of *litis pendens*, as long as the first provisional attachment granted is not terminated by a binding decision.[25]

In a *Swedish challenge to the award procedure*, the prevailing party to the arbitral dispute may, in his capacity as respondent in the litigation, request that the court grant attachment to ensure the enforcement of the award.[26] However, it cannot be automatically assumed that there exists a risk that the losing party will sabotage the future enforcement just because this party has filed an action to have the award set aside. Such a risk is required by the Code of Procedure. The Supreme Court seems to be of the opinion that there is no such risk if the respondent in an ordinary litigation merely defends himself in a normal manner.[27] This means that the prevailing party to the arbitral dispute, as respondent in a challenge procedure, has to demonstrate special reasons why the opposing party will prevent or obstruct the execution of the award. Otherwise, an order for an interim measure cannot be granted. An order cannot be issued merely because the challenge action seems to be unfounded.

4 The Composition of the Arbitral Tribunal

4.1 General Remarks on the Convention

An arbitral tribunal can be composed in many different ways with respect to the number of arbitrators and the mode of their appointment. The rules of the national laws can vary. Party agreements and rules of arbitration institutes regarding the composition of the arbitral panel may differ substantially. This means that an arbitral tribunal which has rendered an award in one country may have been composed in a way which is unknown, unfamiliar or even unacceptable in another state where the prevailing party has applied for enforcement. According to the main rule of the Convention Article V (1) d, these circumstances are not grounds for refusing enforcement. This provision states:

[24]The execution authority may to some extent limit its investigations of the existence of assets outside its local jurisdictional area. If the creditor specifically indicates that certain presumptive assets are perhaps located outside this area, it seems that the authority cannot ignore such an indication and fail to investigate or to seek the assistance of other authorities in order to investigate whether the assets exist in a certain place. Cf. Walin, Gregow and Löfmarck, Utsökningsbalken 128 (1987) and Gregow, Utsökningsrätt 32 (1983).

[25]Cf. Anitha R v. Göte O (RH 1984:86).

[26]Hydro-Lift AB v. Nordquist & Berg (NJA 1979 p. 698).

[27]The State v. Ångfartygs AB Strömma kanal (NJA 1986 p. 450 and Ekelöf Rättegång III 10 (1988) and Westberg 1 Juridisk Tidskrift 349 (1989-90).

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;

This rule means that the arbitrators are correctly appointed – even if the composition of the board violates provisions in the arbitration law of the state where enforcement is sought – as long as the designation of the arbitrators complies with a party agreement, e.g., in the applicable rules of an arbitral institute, or, failing such agreement, the provisions of the law in the country where the arbitration took place.[28] The losing party cannot bar enforcement by demonstrating that the law of the state where enforcement is sought provides for a different composition of the panel than the law where the award was made. If the arbitrators were properly appointed according to a party agreement, enforcement cannot be refused pursuant to this rule because the composition of the panel was irregular under the law where the arbitration took place. This is even true when the party agreement violates mandatory provisions of that law.[29] One of the main purposes of the Convention was to reduce the role of this law in order to promote enforcement of arbitral awards. Therefore, the Convention is not based upon the principle that the composition of the arbitral tribunal shall be in accordance with both a party agreement and the national law of the country where the award is rendered.[30]

In the event that mandatory provisions on the composition of the arbitral panel in the state where the arbitration took place have been infringed, the losing party may file an action to have the award set aside in that state. If the award is vacated, this will constitute a ground for refusal of enforcement pursuant to the Convention Article V (1) e. This is a time-consuming procedure for the losing party. He cannot bar enforcement by merely commencing litigation to have the award set aside.[31] The Convention contains no provision regarding grounds for setting aside awards. The national laws may contain more limited or more extensive grounds for vacating awards compared with the grounds for refusal of enforcement set forth in the Convention.[32] If the composition of the arbitral panel complies with the law of the state where the arbitration took place, it seems highly unlikely that the award rendered

[28]van den Berg 325-26 (1981).
[29]van den Berg 327 (1981).
[30]van den Berg 323 and 326-7 (1981).
[31]van den Berg 350 (1981).
[32]van den Berg 355 (1981).

according to that law could be set aside merely because the appointment of the arbitrators violated mandatory provisions in the state where enforcement proceedings have been instituted. The national laws for setting aside awards of the country where the award is rendered presumably do not provide that an award may be vacated because the composition of the arbitral tribunal was in conflict with mandatory rules in a country where the prevailing party has applied for enforcement or intended to do so. The Swedish Arbitration Act does not have such a strange rule for setting aside awards.

If the arbitrators have been properly appointed according to a party agreement, or, failing such agreement, the law where the arbitration took place, there seems to be only one possibility for the losing party to impede enforcement in extreme cases because of the undue composition of the tribunal, namely, by invoking the provision on *ordre public*. Article V (2) b of the Convention provides:

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
(b) The Recognition or enforcement of the award would be contrary to the public policy of that country.

A court may refuse enforcement on its own initiative if enforcement would violate the public policy of the country where enforcement is sought. This provision is applicable to breaches of principles of due process, even though such irregularities are also covered by Article V (1) b. Public policy may vary from country to country. Therefore, it is not out of the question that an acceptable conduct of the arbitration according to the law of the country where the arbitration took place may be considered a violation of public policy in the state where enforcement is sought.[33] Such situations will certainly be very rare.

Irregular composition of an arbitral tribunal is considered an infringement of the principle of due process. Violations of this principle may lead to the application of Article V (1) b or V (2) b. If the parties had reached an agreement on the appointment of the arbitrators, one may ask if the applicability of the latter provision on public policy is excluded by the supremacy of a party agreement expressed in Article V (1) d. *van den Berg* has stated that the generally accepted interpretation is, however, that notwithstanding the supremacy of the parties' agreement under Article V (1) d, the composition of the arbitral tribunal and the arbitral procedure are still subject to the fundamental requirements of due process. Thus, if the agreement of the parties provides that only one party may nominate the arbitrator(s) or does not grant the respondent the opportunity to present his case, and this actually

[33]van den Berg 376 (1981).

occurs, enforcement of the award may be refused by virtue of Article V (1) b or Article V (2) b according to van den Berg.[34] This means that enforcement may be refused according to the provision on public policy, even if the composition of the arbitral tribunal complies with a party agreement.[35] A prerequisite for refusal of enforcement seems to be that the agreement violates fundamental requirements of due process, i.e., requirements considered so important that they have been embodied in mandatory principles. This does not mean that any infringement of mandatory rules or case law principles on the composition of the arbitral award according to the law of the state where enforcement is sought will amount to a violation of public policy.[36] This seems to be true especially as violation of public policy in domestic case law will not always be encompassed by the more narrow concept of international public policy. The scope of the rule on public policy in the Convention is limited.[37]

Later, van den Berg recommends that mandatory rules of the arbitration law of the place of arbitration ought to override an agreement of the parties on the composition of the arbitral tribunal under Article V (1) (d). This statement is made with reference to a special situation where parties have submitted to arbitration in London and agreed that each party is to appoint one arbitrator and that the two so appointed are to choose a third arbitrator. Notwithstanding such an agreement on the composition of the arbitral tribunal, the claimant may, according to English law, appoint his nominee as sole arbitrator if the respondent fails to appoint an arbitrator. Some courts have refused enforcement under V (1) d, since an award made by a sole arbitrator is not rendered by a tribunal composed according to the parties' agreement. This view, based upon a literal interpretation of the Convention, would lead to the vacating of the award if it is made by a sole arbitrator contrary to the party agreement. If the award was made by three arbitrators contrary to the mandatory provisions of English law, the losing party would be able to have the award set aside and thereby also create a bar to enforcement pursuant to the Convention V (1) e. *van den Berg* is of the opinion that this is an unsat-

[34]van den Berg 324 (1981).

[35]In this respect, certain statements in Arbitration in Sweden do not explain the situation fully correctly. It is stated: "This means that if the parties have made an agreement on these matters the alleged irregularities are to be judged under that agreement alone. Consequently, the law of the jurisdiction where the arbitration took place comes into play only if no agreement exists or to the extent that matters are not covered by the agreement. It also means that if the mandatory provisions of the law of jurisdiction where the arbitration took place have been violated, such circumstance is not in itself a sufficient ground for refusal of recognition of the award under Swedish law." The lack of a reservation for cases where the conduct of the arbitration or the composition of the arbitral tribunal is contrary to public policy may be explained by the fact that this issue has not been observed by the authors in the short part where they deal with the Convention Article V (2). Arbitration in Sweden 164 and 167-8 (1984).

[36]van den Berg 365 (1981).

[37]van den Berg 360 and 382 (1981).

isfactory result at odds with the system and purpose of the Convention. He stresses that those results will not ensue if one accepts another solution taken by some courts referring to English arbitration law, whereby the mandatory provisions of the arbitration law of the place of the arbitration also prevail over an agreement of the parties on the composition of the arbitral tribunal. When the parties and the arbitrators observe these mandatory provisions, which deviate from the parties' agreement, enforcement will not, according to van den Berg's interpretation, be frustrated in other countries under Article V (1) d of the Convention.[38]

This interpretation of the significance of mandatory provisions on the composition of arbitral awards has no relevance to the Swedish enforcement cases to be discussed infra. The reasons for this are twofold.

First, in these Swedish cases the respondent may assert that the arbitral tribunal, which has rendered an award abroad, has not been composed according to fundamental and mandatory principles upheld in Sweden, i.e., according to the law of the state where the enforcement proceedings will take place. *van den Berg* discusses cases where mandatory provisions in the country where the award was rendered will be violated if the party agreement is followed when composing the arbitral award. If those provisions will be infringed, the award can be set aside, but this is normally not the case if the composition of the tribunal only violates principles in the states where the enforcement proceedings will take place. This means that the unsatisfactory situation of non-enforcement, no matter how the board is composed, will not arise, i.e., either the agreement is followed or the Swedish principles are applied. If a party agreement on the composition of the arbitral tribunal is compatible with the law of the place of arbitration, there is no reason to designate the arbitrators in a way deviating from the agreement because this is prescribed according to mandatory provisions of the laws of some states where enforcement can be sought in the future.

Second, the mandatory provisions do not often provide for an alternative composition to the party agreement, but only stipulate that the party agreement is unacceptable. The arbitration agreement may, according to the applicable national arbitration law, be declared void in its entirety because the arbitral tribunal cannot be composed in the manner the parties have agreed to. Pursuant to the Convention Article V (1) a, an invalid arbitral agreement is a ground for refusal of enforcement. When determining this issue, the enforcement authority has to apply the law of the country where the award is rendered, unless the parties have designated the law applicable to the arbitration agreement. This means that there is normally no reason to declare the arbitral agreement invalid, if it does not violate provisions of the composition of the arbitral law of the state where the award is made, but only in-

[38]van den Berg, 5 Arb. Int. 8-10 (1989).

fringes such mandatory Swedish provisions or principles, i.e., provisions of the state where enforcement is sought. Exception must be made for the rare situations where the parties have designated Swedish law to be applied to the arbitral agreement, even though the arbitration will take place abroad.

The following section of this essay will examine some domestic award cases decided by the Swedish Supreme Court concerning the question of the composition of arbitral tribunals. The cases express fundamental mandatory principles on the composition of arbitral tribunals. A subsequent section on enforcement cases will discuss whether these principles could lead to the refusal of enforcement of arbitral awards due to the composition of the arbitral tribunals. Article V (2) b of the Convention on public policy is of primary interest.

4.2 Mandatory Principles on the Composition of Arbitral Tribunals according to Domestic Swedish Cases

Section 6 of the Arbitration Act seems to indicate that the parties have complete freedom to contract on the composition of the arbitral board. This section provides:

If the parties do not agree on the choice of arbitrators and have made no agreement as to their number and the mode of their appointment, there shall be three arbitrators, one appointed by each party and the third by the two arbitrators so appointed.

According to Swedish law, however, party autonomy is somewhat limited in a way that probably corresponds to the arbitration laws of many other countries. No binding effect may be given to an agreement, whereby one of the parties has been allowed to appoint all the arbitrators or a majority of them. It has been said that the law cannot recognize a system authorizing one party to unilaterally make a binding judgement himself or by representatives chosen by him.[39] In the Supreme Court case of Rita Urhelyi v. Arbetsmarknadens försäkringsaktiebolag, an insurance contract provided that disputes should be decided by a special board, without expressly stating that arbitration was intended. Even if the contract had expressed an unambiguous intention to have disputes decided by arbitrators, the Court held that a dispute resolution procedure could not be accepted as a bar to court proceedings, when one of the parties to the insurance relationship was free to appoint a majority of the arbitrators.[40]

[39]Bolding, Skiljedom 82, 86 and 146-7 (1962). Cf. Hov 95 TfR 191, 199 and 208-10 (1982).

[40]Rita Urhelyi v. Arbetsmarknadens försäkringsaktiebolag (NJA 1974 p. 573). The insurance policy provided that some types of disputes should be decided by an advisory board appointed by the insurance company, a board which should be supplemented by the president of the Insurance Court or an expert appointed by the president in cases where the members of the advisory board could not agree on the construction of the insurance.

Ingela C v. Kommunernas försäkringsaktiebolag (NJA 1981 p. 1205). An employer, a local authority, had signed a group life insurance policy for an employee, who later died. According to the policy, disputes should be decided by a permanent arbitral tribunal. This tribunal rejected pecuniary claims made by the daughter of the deceased employee. She filed an action and claimed that the court should declare the award void. She stated that the arbitral clause ought to be set aside pursuant to section 36 of the Contracts Act regarding unfair contract terms. In support of this view, the plaintiff argued that the arbitral tribunal was permanent and that a majority of arbitrators had in reality been appointed by one party, the insurer. The plaintiff asserted that she should have been entitled to appoint an arbitrator.

The Supreme Court established that the arbitrators, according to the agreement, were appointed partly by trade unions and partly by organizations linked to the local authorities. The chairman of the tribunal, the seventh arbitrator, was appointed by the six arbitrators designated by the trade unions and the employer-organizations. The manner in which the arbitrators were appointed could not, according to the Supreme Court, be supposed to indicate that the arbitral tribunal was dominated by interests opposed to the insured's. The Court stressed that a balance of interest was created because an equal number of arbitrators were to be appointed on the employer side and the employee side. The court held that there was no reason to declare the award void under the Arbitration Act sec. 20. The award was however vacated, since one of the arbitrators was disqualified in the present case.

Even if a party agreement empowering one party to appoint a majority of the arbitrators is not binding, this case shows that nothing prevents the parties from contracting out one party's personal privilege to appoint an arbitrator. If the appointing authority is an institution according to a party agreement and this institution is neutral, the composition of the arbitral tribunal is acceptable. Assume on the other hand that the parties have agreed that some arbitrators shall be chosen by an organization representing the interest of one party and that the same number of arbitrators by a neutral body. Even if all those arbitrators shall choose a chairman and a majority of arbitrators are not thereby appointed by one party, there is hardly reason to set aside such a party agreement due to a lack of balance of interests. In the Supreme Court case it is not expressly stated that such a composition of the arbitral tribunal is unacceptable although there is not a complete balance of interests. A somewhat different situation exists when a party agreement allows one of the parties to indirectly appoint a majority of arbitrators, e.g., where a majority shall be chosen by an organization which is evidently in sympathy with one party either generally or in the case at hand. This problem is illustrated by the following judgement.

Christer J v. Svenska Kommunalarbetarförbundet (NJA 1982 p. 853). A trade union had refused to admit that Christer J left the union. He commenced a litigation against the trade union and requested the court to declare that he was no longer a member. The trade union objected that the dispute should be tried by arbitrators pursuant to a provision in the by-laws. It was provided that each party should appoint two arbitrators and that those so appointed should appoint a fifth member of the arbitral tribunal. If no agreement could be reached as to the choice of the fifth arbitrator, he should be designated by the secretariat of the Swedish Confederation of Trade Unions (LO), a national association. The trade union was associated with the Confederation.

The Supreme Court held that the arbitral clause in the by-laws may be considered void, if the clause could be deemed unfair according to section 36 of the Contracts Act. The Court stated that the by-laws of the union did not presuppose that the member had a real right to leave the union on the basis of a unilateral notice of termination. The Court opined that this notion was supported by the model by-laws the Confederation had drafted for use by the unions. These by-laws provided that the principal attitude of the trade union movement was that members had no right to leave a union.

The Court held that the provision prescribing the manner of appointment of the fifth arbitrator in cases of disagreement did not contravene the Arbitration Act. In considering the reasonableness of this provision, the Court deemed that it should be noted that the Arbitration Act provides that the remaining arbitrator shall, in the event of disagreement, be appointed by the district court, i.e., a body without any interest in common with one of the parties. The Court pointed out that the fifth arbitrator should, according to the model by-laws, be appointed in accordance with the requirement of special knowledge of the trade union movement, its basis and ideas, in order to enable the arbitral tribunal to fulfill its task. The Court declared further: In disputes between a trade union associated with the Confederation and a member of the union, it may be supposed that the secretariat of the Confederation and the union generally have the same point of view. When so is the case, it is, in the light of the above-mentioned, probable that as a fifth arbitrator, a person representing the position of the Confederation and the union will be appointed. This statement refers to the situation where the four party-appointed arbitrators could not agree on the appointment of the fith and where this arbitrator thus was to be appointed by the secretariat. If this occurs, an unbalanced composition of the arbitral tribunal will arise. Against this, the rules of disqualification of arbitrators will not provide protection, since certain opinions of an arbitrator will not disqualify him other than in extreme cases. The provision on the arbitrators' appointment in the by-laws will therefore typically be liable to evoke apprehensions as to the requirement of due process. The arbitral clause cannot in any case be accepted as a bar to court proceedings in the present dispute where the body which might appoint the fifth arbitrator has, already from the outset, expressed its attitude in principle on the basic issue.

From this judgement some limited conclusions may be drawn, which can be expressed in the following way in cases where the arbitral tribunal is composed of three arbitrators and each party is authorized to designate one. A party agreement which provides that the third arbitrator shall be appointed by an organization connected with one of the parties cannot be effective if *the present dispute has reference to such an issue on which the organization had previously expressed a clear position indicating that it would approve the claims of that party.* It is doubtful whether a party agreement will be operative in the event that the organization has not made an advance statement in principle concerning the same issue as the one in dispute. In such cases, the reasons for declaring the agreement void are not as strong as in the reported case. The decisive factor for the court's inclination *to set aside a party agreement solely because the third arbitrator shall be appointed by a body linked to the party must be the common interests,* which can be of varying strength. In such cases, it is difficult to predict whether the agreement, criticized as to the composition of the board, will result in the entire arbitral clause losing its effect as a bar to court proceedings. The Supreme Court only held that such a clause was liable to evoke serious apprehensions concerning due pro-

cess. This probably means that a party agreement will at least be set aside in the event of a strong common interest, which will result in the nullification of the arbitral clause in its entirety.

4.3 Enforcement of Foreign Arbitral Awards Rendered by Tribunals Composed in an Unbalanced Manner

Cordes Gmb H v. Kvarnabo Timber AB (HD SÖ 146/86). According to certain general contract terms on timber sales, the parties were to appoint one arbitrator jointly. In the event that they could not agree, each party was to appoint one arbitrator. If one of the parties failed to choose an arbitrator, then, on the request of the other party, the arbirator was to be appointed by the German Timber Importers Association.

A German buyer of timber, Cordes, requested arbitration in Germany against a Swedish seller, Kvarnabo, due to incomplete delivery. Cordes appointed an arbitrator and, thereafter, Cordes requested that one more arbitrator be designated by the German Timber Importers Association. After the arbitral tribunal had ordered Kvarnabo to pay a certain sum, Cordes applied for enforcement at the Svea Court of Appeal.

The Swedish seller asserted that the mode of appointing an arbitrator on behalf of the seller, as provided in the general conditions, violated Swedish *ordre public*. The respondent claimed that the application should be rejected by the court pursuant to the Swedish rule corresponding to the Convention Article V (2). The seller stated that the German association was to promote the interests of German importers and that an arbitrator appointed by such an organization was therefore highly inclined to decide a case in favor of the domestic party in its capacity as a member of the association. In support of this assertion, the respondent pointed to the association's solidarity with companies in its own country, the interest in promoting the economic interests of its own country, linguistic and personal contacts with the importers and the arbitrator's interest in maintaining good relations with the businessmen and organizations within the trade. The seller also relied upon *Christer J*, reported supra, to support the view that it contravenes Swedish law to allow an arbitrator to be appointed by an organization whose purpose is to promote the interests of one of the disputing parties. The seller also maintained that no copy of the general conditions had been delivered.

The German applicant asserted that the present case could not be ranked in the same category as *Christer J*, a case where the Supreme Court stated that it was unacceptable for the appointing authority of the fifth arbitrator to declare, already from the outset, its opinion in principle on the basic issue in dispute.

The Court of Appeal stated: The fact that the respondent had not received the general conditions (Deutschwaggon 66) does not mean that these provisions are not binding on the respondent. This company has failed, despite repeated requests, to utilize the opportunity to appoint an arbitrator. Due to this circumstance, it cannot be considered unjustified that the German association designated an arbitrator on behalf of the respondent. Complaints against composition of the arbitral tribunal made by the respondent do not place application for enforcement of the arbitral award in conflict with any basic principle of Swedish law (a violation of Swedish *ordre public*). There exists no other bar to granting enforcement.

After the respondent appealed without presenting any new arguments, the Supreme Court confirmed the judgement of the Svea Court of Appeal.

The Supreme Court upheld the opinion of the Court of Appeal. This probably means that the composition of the tribunal was considered *to be acceptable pursuant to the ordre public provision already from the standpoint that*

the respondent had been offered an opportunity to designate an arbitrator, but had failed to do so.

An application for enforcement may, due to the circumstances, be determined in a different manner if the parties have *agreed that one arbitrator be appointed by one party and one more arbitrator by an association obliged to promote this party's interests.* When one party from the outset completely lacks the right to appoint an arbitrator, the party agreement will not be a violation of Swedish *ordre public* merely due to the fact that one party, but not the other, is "represented" in the arbitral tribunal. An acceptable balance of interests may still exist. One more argument must be taken into consideration. Since the party entitled to appoint one arbitrator cannot designate a majority of arbitrators, there is no reason to declare the agreement inoperative under *Rita Urhelyi.* Swedish *ordre public* will, however, according to the principle of this case, be violated if the party-appointed arbitrator is to be the chairman and, in this capacity, is empowered to outvote the other arbitrator. Furthermore, conclusions drawn from *Christer J* would imply that the composition of the arbitral tribunal contravenes the provision on *ordre public.* If the appointing association had made advance statements expressing its view on an issue in dispute, it seems that its designation of an arbitrator would be in conflict with Swedish *ordre public.* Enforcement may then be refused, even if there is no evidence demonstrating that the arbitrator had made such statements or had not acted in a biased manner. The risk that the arbitrator shares the expressed views of the appointing authority will itself suffice to make the composition of the arbitral board unacceptable under *Christer J.*

Notwithstanding these last-mentioned viewpoints in *Christer J*, there is no reason to reject the appointment of the arbitrators in *Cordes, even if the German association had been authorized to appoint an arbitrator from the very beginning.* The Swedish seller had not even asserted that the German association had made any statements implying that German importers should be favored in any particular way, e.g., in the handling of disputes. The Swedish seller merely referred to presumptions of interest links between the German party and the German association, consisting of a solidarity attitude with the enterprises of its own country and an interest in promoting the economy of that country. Nor would these circumstances, which do not constitute a violation of *ordre pubic* in themselves,[41] mean that there exists an expressed interest of the association to appoint an arbitrator who will want to decide the dispute in favor of the German party. The lack of evidence that the association in the present dispute designated an arbitrator who would identify himself with the German interests is not a reason to refrain from enforcement when relying on the principle of *Christer J.* Even if the

[41]van den Berg 378-9 (1981).

German association had made no statements in principle favoring German interests, *Christer J* indicates that serious apprehensions as to due process could arise if the chairman is to be appointed by an organization sharing the general attitudes of one of the parties. It has been stated above that such a party agreement would be declared void, at least where there exists strong common interests. From that point of view, criticism would be raised against the German arbitral award, but the respondent did not furnish any concrete proof of common interests as provided in the Convention Article V (1). Furthermore, non-acceptance of such a party agreement would not involve a violation of Swedish *ordre public*, much less international *ordre public*, in cases of enforcement of arbitral awards. It is by no means evident that *Christer J* clarifies the meaning of the concept *ordre public*. It shall be stressed once again that enforcement in *Cordes* should under no circumstances be refused exclusively for the reason that the Swedish seller had not utilized his right to appoint an arbitrator. If no such right had existed, it seems even then unclear whether enforcement could be refused as demonstrated in the immediately foregoing discussion.

A somewhat different question on the composition of the arbitral tribunal will be discussed in connection with an award rendered in London and later enforced in Sweden. Where an arbitration agreement provides that the dispute shall be referred to two arbitrators, one to be appointed by each party, then, if, one party fails to appoint an arbitrator, the other party may appoint that arbitrator to act as sole arbitrator. This rule of the English Arbitration Act sec. 7 b is applicable unless a contrary intention is expressed in the agreement. Certain formal requirements have to be fulfilled by the party who seeks to appoint his arbitrator as a sole arbitrator.[42]

Uranus Maritime Company S.A. v. Borgo Export & Import AB (Svea hovrätt Ö 1843/78). In a maritime arbitral dispute, the Swedish respondent failed to appoint an arbitrator. The plaintiff, a shipowner, appointed his arbitrator as sole arbitrator. A notice of the appointment was served on the defaulting respondent. This party did not take part in the arbitration and was adjudged to pay a certain sum by the arbitrator. The shipowner applied for enforcement at the Svea Court of Appeal. The Swedish party did not respond. The Court held that there was no bar to declaring the award enforceable under the rule corresponding to the Convention Article V (2).

At first glance, it appears that the Court's opinion conflicts with *Rita Urhelyi*. In this case, mentioned supra, the Supreme Court stated that it could not be accepted as a bar to court proceedings that one party to the arbitral agreement is at liberty to appoint a majority of the arbitrators. One may consider that the appointment of the sole arbitrator in the maritime case was contrary to public policy to a higher degree than the type of arbitral clause prohibited under *Rita Urhelyi*. The reason for this view is that the respondent in the maritime case did not appoint any arbitrator, who could

[42]Mustill and Boyd 180-3 (1989).

ensure that his arguments and evidence were considered carefully, whereas, according to the Supreme Court case, an arbitral clause is unacceptable even if a party may appoint a minority of arbitrators who could present and discuss his view, but who could be outvoted by a majority of arbitrators designated by the other party.[43] An arbitral clause is thus, pursuant to the foregoing case, void when one party has appointed the majority of the arbitrators, even if the other party has appointed one arbitrator prepared to look after his interests and to ensure that his viewpoints will not be disregarded.[44]

The maritime case differs however from the Supreme Court case in the way that the respondent was offered an opportunity to appoint an arbitrator, but failed to do so. Swedish domestic case law provides no support for the view that such an arbitral agreement should be void. In the reported enforcement case, *Cordes*, where an association linked to the plaintiff had appointed one arbitrator on behalf of the defaulting respondent, the Court of Appeal stated that the arbitral clause was not improper, since the respondent had failed to utilize the right to appoint an arbitrator despite repeated requests. It seems thus consistent to accept a clause entitling one party alone to appoint an arbitrator(s), in the event that the other party, without legal excuse, does not designate an arbitrator. There is however a difference between the situation in *Uranus Maritime Company* and *Cordes*. A party is more likely than an association linked to a party to appoint an arbitrator who will favor the party. In both cases, the respondent is to some extent protected by the disqualification rules, which limit the freedom to appoint biased arbitrators. *Uranus Maritime Company* in any case demonstrates that an English award may be enforced in Sweden, even if the plaintiff has appointed his arbitrator as sole arbitrator. The recalcitrant party need not have been requested to appoint an arbitrator several times in order for the plaintiff's appointment to be acceptable. A single request would seem to suffice. A time limit of fourteen days for appointment of an arbitrator is clearly not too short.[45] This time limit complies with the one entitling a Swedish district court to appoint an arbitrator according to the Arbitration Act sec. 7 par. 2 when a party has failed to designate an arbitrator.

5 A Party Has Not Been Properly Served with Writings or Summons

An arbitration may not be completed unless the respondent has been given notice of the request for arbitration, indicating the name of the arbitrator

[43]Cf. Heuman, Advokatsamfundets skiljedomsprövning av arvodestvister mellan advokater och klienter 37 (1986).
[44]Cf Heuman, Reklamationsnämnder och försäkringsnämnder 125-7 (1980).
[45]van den Berg 304 (1981).

appointed by the plaintiff. This follows from the Convention Article V (2), i.e., the rule on public policy including fundamental requirements of due process. Neither the Convention nor the Arbitration Act requires that the respondent be served with the request for arbitration in the official manner prescribed by national laws for summons applications. Such a formal requirement is not applied to summons and the various pleadings sent to the party during the arbitration.[46]

After the respondent has been served with the request for arbitration, he may try to delay or sabotage the arbitration. He can do that by refusing to collect documents from the arbitration tribunal at a post office. In domestic arbitrations, such a dilatory tactic will often not succeed. There are often sufficiently effective alternative ways of serving documents on a recalcitrant party. In an international arbitration, however, it is sometimes difficult for the plaintiff to compel the respondent to acknowledge receipt of pleadings. After an arbitral tribunal has once or twice failed to serve documents on a party in a foreign country, no new measures will usually be taken on the pleading in question, unless the plaintiff specifically requires this and gives new instructions to the arbitrators how to solve the problems, e.g., by indicating other addresses to which the pleading could be sent. If the respondent has clearly received the request for arbitration, there is, according to the Swedish Arbitration Act, nothing to prevent the arbitrators from deciding the case even though the respondent has not commented on the plaintiff's pleading and has not appeared at a hearing. If a party fails without valid excuse to avail himself of the opportunity to present his case orally or in writing, then the arbitrators may, according to the Act sec. 14, decide the case on the existing material. One may however wonder under which circumstances a respondent had a valid excuse for not participating in the arbitration, when it is impossible to determine whether he has been properly informed of the progress of the arbitration at different stages. Should the plaintiff prove that the respondent had been duly served with all pleadings or should the respondent demonstrate that pleadings or summons sent to him have not been correctly addressed or dispatched? Problems related to burden of proof and evaluation of evidence will be decisive for the respondent's prospects of having the award set aside on the ground that he had not been duly offered an opportunity to present his case.

In order to simplify the service procedure, *the parties may agree at an early stage on how to proceed when a party shall notify the other party and the arbitrators*.[47] The parties may accept a proposal of the arbitral tribunal that they shall be deemed to have been duly notified if telefax messages have been sent to their counsel at a certain number. It is sometimes added to the

[46]van den Berg 303 (1981).
[47]van den Berg 303 (1981).

party agreement that each party shall send a copy of his writings to each arbitrator and the opposing party. The arbitral tribunal will in such cases be released from the obligation to notify the parties; this expedites the arbitral proceedings. Party agreements of this type cannot as a rule be reached if the respondent seeks to frustrate the arbitration from the very beginning by not collecting pleadings or acknowledging their receipt. The question will then arise as to whether the arbitrators may proceed without the respondent's participation and whether an award can be enforced over the respondent's objection. The following case will not provide any certain answers, but it may be used as a starting point for a discussion.

Firma Ottar Harmstorf & Söhne v. Göteborgs Dykeriteknik AB (Svea hovrätt Ö 1335/79). The German company had chartered a ship to be used for diving from the Swedish company. According to a contract, the German company undertook to order and pay for the installation of a hot water system and an air cleaner. At the end of the charter, this equipment was to be delivered to the Swedish company's possession. The Swedish shipowner was obliged by the contract to buy the equipment from the charterer at the prices indicated in the supplier invoice. A provision in the contract provided that German law was to be applied to the charter contract.

After a German supplier, Drägerwerk, made the installations, the Swedish shipowner Dykeriteknik only paid to the charterer, Harmstorf, a certain portion of the price invoiced, as the shipowner considered that the installations were defective. Drägerwerk filed an action at the district court of Hamburg against Harmstorf and claimed that this company should pay the remaining unpaid portion of the price invoiced. In this proceeding, Harmstorf informed Dykeriteknik of the dispute in accordance with the rules of Zivilprozessordnung sec. 72, 74 and 68. In the event that Harmstorf should lose the dispute with Drägerwerk, the judgement would have a certain effect under these rules as to issues of relevance to Harmstorf's right to compensation from the Swedish shipowner.

A German arbitral tribunal later adjudged Dykeriteknik to pay the remaining sum to Harmstorf. The arbitrators held that the Swedish company's defense (that the installations were defective) was unfounded, since the District Court of Hamburg had decided in the dispute between Drägerwerk and Harmstorf that the equipment was not defective. As Harmstorf had informed Dykeriteknik of the court proceedings, the arbitrators considered that the aforementioned rules of the Zivilprozessordung would mean that Dykeriteknik could not raise the claim that the dispute had been decided incorrectly. The arbitrators held therefore that they had to act on the assumption that the installations were not defective as established by the court.

Regarding the notification procedure, it appears from the award that the Swedish respondent, Dykeriteknik, had received the request for arbitration and that this company had demanded a respite for submitting a response. Such a petition (pleading of defence) was never sent to the arbitral tribunal. The respondent was summoned by registered mail to a hearing and was informed that the case could be decided upon the existing evidence and upon testimony presented during the hearing in the event that the respondent failed to appear. This letter was returned to the tribunal by the Swedish post office, which indicated that the letter had not been collected at the office. The minutes of the hearing were sent by registered mail to the respondent, whereby this company was offered an opportunity to comment within a certain time limit. This letter was also returned to the tribunal by the Swedish post office.

The arbitrators held that the respondent could not avoid taking part in the arbitration on the ground that it had not received writings sent to it. Due to the respondent's request for a respite, the arbitrators held that the company had definitively received the request for arbitration. The Swedish company, in disregarding the notification from the arbitral tribunal by not receiving the letters, had acted in bad faith. Accord-

ing to the Bürgerliches Gezetzbuch (BGB) sec. 162, which was held to be applicable because German law was to be applied under the contract, the arbitrators held that the respondent should be treated as if the content of the letters was known to the company.

Harmstorf applied for enforcement of the award at the Svea Court of Appeal. Dykeriteknik defended on the merits, but added that the company had not received the two letters and asserted that it had not thereby been given an opportunity to respond.

The Court of Appeal stated: The request for arbitration has been received by Dykeriteknik, but the other letters have been returned by the Swedish post office with a remark that the company, although informed to do so, had not collected them at the post office. The respondent's objection that it had not received a summons to the hearing and minutes from this session will not under those circumstances result in a bar to enforcement of the award.

As mentioned above, the Swedish Arbitration Act sec. 14 provides that an arbitral tribunal may decide a dispute upon the existing evidence, if a party without a valid excuse fails to present his case orally or in writing. If, for example, the respondent fails to appear at a hearing, the dispute may be decided. However, the arbitrators must not presuppose that the plaintiff's allegations are correct, but must make an ordinary evaluation of the parties' proof in determining what facts the award is to be based upon. When a Swedish court makes a judgement by default against a recalcitrant respondent, it may, according to the Code of Procedure chap. 44 sec. 8, presuppose that the plaintiff's allegations are correct and thus base the award upon those facts. An arbitral board is not entitled to make such a summary determination of the evidence and must not limit itself to determining whether the plaintiff's allegations are plainly ill-founded. According to the aforementioned section of the Code, a judgement by default may only be based upon the plaintiff's allegations to the extent that the respondent has been notified of them. Swedish procedural law requires that the respondent be served with the plaintiff's pleadings in order to allow the court to base its judgement on those writings. A court is barred from rendering a judgement by default due to the respondent's absence at a hearing, if there is no proof that this party has been notified of the summons. The respondent must be given an opportunity to comment on the plaintiff's allegations in all respects.

It is doubtful whether the requirement of demonstrable notification may be dispensed with in Swedish arbitration. This Court of Appeal case may be construed in such a way that in enforcement cases, the Convention does not require proof that every writing or summons has been received by the party. The outcome of the present case may be explained by the fact that the plaintiff demonstrably had received the request for arbitration at a certain address and that two signed letters were subsequently sent to the same address and received by the post office, which had declared that the respondent had not collected the letters although invited by the post office to do so. Assuming that the post office had informed the respondent of the name of the sender (this is likely), there are strong reasons to believe that the respondent inten-

tionally failed to collect the writings because the representatives of the company realized that the letters concerned an arbitration they did not want to take part in. Perhaps enforcement could have been refused, if it was quite possible that the respondent was never invited to collect the letters or that they were incorrectly addressed or lost during dispatching. Enforcement might according to another view only be refused when there is concrete evidence indicating that the respondent intentionally failed to receive the letters or other messages regarding the arbitral dispute. As the Convention requires that the losing party furnish proof for his ground for refusal of enforcement, it was appropriate to grant enforcement, since the respondent did not actually present evidence before the Court of Appeal.

The Court of Appeal did not indicate which rules of the Convention it took into consideration. This must be carefully analyzed in order to answer two questions: 1) Shall Swedish or German arbitration law be applied when determining the requirements of notification or shall generally accepted principles of international arbitration be applied? 2) Is the applicant in the enforcement case obliged to prove or to demonstrate probable cause that the respondent intentionally failed to collect the messages? Or shall the burden of proof be placed upon the respondent? This means for example that he would have to show that the notification had been carried out incorrectly, because the address was erroneous, the respondent was away or the message was incorrectly transmitted.

Enforcement of the award may, according to the Convention V (1) b, be refused at the request of the party against whom it is invoked, only if that party furnishes proof that he was not given proper notice of the appointment of the arbitrators or the arbitration proceedings or was otherwise unable to present his case. *van den Berg* states that this rule has been regarded as a rule outside the domain of domestic law. He maintains that this viewpoint is prompted by the desire to discard the law of the forum which may contain parochial requirements for an orderly procedure. However, the authors who adhere to this opinion add according to *van den Berg* that the judge before whom the enforcement is sought will "find his inspiration" in the notions of due process of his own law. No court has held that the Article constitutes an international rule, but many have, according to van den Berg, affirmed that the standards of due process are basically to be judged under their own law. He adds however that they either expressly or implicitly hold that what may be a violation of due process under their own law is not necessarily a violation of due process under the Convention.[48]

Should one attempt a kind of amalgamation of these two views, one could ask if the opinion of the Court of Appeal can be explained. The endeavors of *international arbitration* to counteract obstruction of arbitral proceedings

[48]van den Berg 298 (1981).

and enforcement implies that the requirements of due process are fulfilled if there are reasons indicating that the respondent intentionally has failed to receive pleadings and summons. This should be true even if arbitrators in Sweden normally would consider it inappropriate to proceed with an arbitral dispute between Swedish parties before a party has acknowledged the receipt of such a writing. However, it is even conceivable that an award made in Sweden in a domestic case would be set aside if the arbitrators would continue the proceedings to the end despite the lack of proof that a party had been notified of the content of important pleadings or of summons. However, a prerequisite according to the Arbitration Act sec. 21 par. 1 pt. 4 is that the error, the faulty notification, with probability can be assumed to have influenced the outcome of the dispute. One may therefore question whether the Court of Appeal might in similar enforcement cases be *affected by a stricter domestic attitude* and establish that it is contrary to due process to continue and terminate an arbitration despite lack of written proof demonstrating that notification had been duly carried out. There are reasons to doubt this. In international arbitral disputes, difficulties in serving documents will in some cases be much greater than in domestic cases. One should therefore accept the completion of the arbitration, when there is reason to believe that a party has on several occasions intentionally avoided notification of the proceedings, after it is quite evident that he has been served with the request for arbitration. From this point of view, an amalgamation of the opinions described by *van den Berg* is perhaps not always to be preferred. *In some procedural situations, the international standard should dominate, while in other situations a fundamental predictable domestic rule safeguarding a party's interest may be taken into consideration.* For example, the requirement of due process should be considered to constitute an international standard, where the influence of domestic rules has to be strongly limited in order to promote the effectiveness of international arbitration and enforcement of awards. Problems of notification in international arbitration is a good example of issues where domestic rules should not be applicable. In other situations where due process is of importance, it could be quite justifiable for the court to consider such rules which will protect non-recalcitrant parties according to a domestic law which does not substantially deviate from other laws. The need for the applicability of strictly international rules seems to be great where there is a risk of delaying tactics.

Regarding the second question on the *burden of proof*, it is quite clear that the respondent has such a burden. However, the scope of the burden of proof will be discussed, i.e., what facts does the respondent have to prove and whether the applicant has to prove certain facts when the respondent has presented the required evidence. According to the Convention, the respondent has to furnish proof as to the grounds for refusal of enforcement. Is it conceivable that the respondent may be considered to have proved that

he was not given proper notice of the arbitral proceeding and that the applicant then has to prove certain other facts in order to have the award enforced? The respondent may assert that he has fulfilled his obligation when he has demonstrated that he has not received a summons and that the claimant shall prove that this is not due to incorrect notification. The claimant may maintain that the respondent has the burden of proof even regarding this issue. This means that the respondent shall prove that he has not intentionally avoided his duty to collect a letter or to return a receipt. These are circumstances which are almost impossible to prove for the claimant. On the other hand, it is very difficult for the respondent to demonstrate that the claimant had addressed a letter incorrectly. This question of the distribution of the burden of proof shall not be determined by general principles for resolving such problems, e.g., by considering which of the parties it would be easiest for to prove a given fact. (In Sweden the "mail-box" rule is not recognized in procedural law. This common law evidentiary principle creates a presumption that a writing has been received by the addressee upon a showing that it was duly mailed, and thereafter the burden of proof is transferred to the addresse to prove that he did not receive the said writing.) The Convention indicates that the respondent shall prove that he was not given *proper* notice. This shows that the respondent has to demonstrate that the notice was made erroneously. In the reported case *Harmstorf*, the Swedish company did not furnish any proof of the notification, apart from what could be gleaned from the award. As no further required proof was presented by the respondent, it seems consistent that enforcement was granted.

According to the Convention Article V (2) b on *ordre public*, it is possible to refuse enforcement because wrongfully made notification *conflicts with such fundamental principles of due process that it amounts to violation of ordre public*. This is even possible if the respondent was properly informed of the arbitration procedure according to the law of the country where the arbitration took place.[49] Thus, the law of the country where enforcement is sought has to be taken into consideration. In the German award, a civil law provision was invoked in support of the conduct of the arbitration, BGB sec. 162. One may be surprised that the arbitrators held themselves to be at liberty to supplement or even to set aside the procedural law by applying a civil law principle. The arbitrators explained their decision not by stating that the arbitration is based upon a contract, but by referring to the choice of law clause, which indicated that German law was to be applied. The arbitrators held that it was possible to treat the respondent as if he had been properly notified. Section 162 of BGB governs prevention of, or bringing about a condition. The first paragraph provides: "If a fulfillment of a condition is prevented in bad faith by the party to whose disadvantage it would operate, the

[49]van den Berg 365-6 (1984).

condition is deemed to have been fulfilled." One may question if international public policy will be violated if one evades the respondent's requirement of being duly served with all pleadings and summons by referring to a civil law rule. According to this rule, one could presuppose that the respondent has been properly notified by assuming that the Swedish company failed in bad faith to take part in the fulfillment of a condition for the conduct of the arbitration. The Svea Court of Appeal has not expressly approved this opinion of the arbitrators, but has not rejected it either. The Court of Appeal considered that the conduct was acceptable because the respondent had received the request for arbitration and because the summons and the minutes were later sent to the respondent at the same address as the one indicated in the request for arbitration. This opinion indicates that the Court had held that it was made sufficiently probable that the respondent had intentionally failed to collect the letters. The rule of BGB seems to lead to the same result, which can be achieved with the reasoning of the Court. Decisive for the arbitrators and the Court was the requirement of proof of the statement that the respondent was not properly notified. The result of both the arbitrators' and the Court's opinions seems to be reasonable, but criticism may be raised against the arbitrators' reasoning that a civil law principle would be applicable in procedural issues because of a choice of substantive law clause.

The rule on public policy shall be applied on the court's own initiative. This does not mean that the respondent has no burden of proof as he has in cases when he invokes a ground for refusal of enforcement mentioned in the Convention Article V (1). *In fact, there is no expressed rule on the burden of proof when the rule on public policy shall be applied.* The burden of proof does not merely mean that a party has to present evidence. Such a rule implies that facts which are not demonstrated shall be considered as if they did not exist when the court is to decide a case. If no evidence is presented by the parties or on the court's initiative as to claims and defences covered by the burden of proof then this burden will not be satisfied. It thus does not matter if the parties or a court had failed to present evidence. The burden of proof must be distinguished from the court's right or duty to refuse enforcement *ex officio*. The court *may,* according to the Convention, refuse enforcement when public policy has been violated. It is likely that the *courts will not on their own initiative make extensive inquiries* as to the existence of such violations when the respondent has failed to invoke certain facts as grounds for refusal of enforcement pursuant to the Convention V (2). However, enforcement may be refused, if the respondent has overlooked a violation of public policy and a court finds it obvious from the documents and without further inquiry that an infringement of public policy has occurred.

This reasoning will lead to the following results if one assumes that it is *possible or probable, but not proven*, that the respondent had not been properly notified of the arbitral proceeding. It would be inconsistent for the

courts to place the burden of proof on the applicant in cases where there was a presumptive infringement of public policy, and the burden of proof on the respondent if the infringement would only be encompassed by the Convention Article V (1) b. This would probably mean a change of the burden of proof due to whether the infringement of due process was of "normal" standard or of such fundamental significance that public policy was violated. A better interpretation of the Convention seems to be to place the burden of proof on the respondent irrespective of whether an improper notification is merely a breach of the Convention Article V (1) b or (2). This would imply that enforcement could not be refused because the claimant had not furnished evidence which demonstrated that the respondent had not been properly notified as the court had found possible. Furthermore, this interpretation means that the respondent, from an evidentiary point of view, is only favored by the rule on public policy in so far as the court may, on its own initiative, apply this rule and ensure that evidence will be presented on this issue. It is however conceivable that the courts will limit such investigations and endeavors to present evidence. Therefore, the application of the rule of public policy will often be dependent on the respondent's ability to demonstrate the existence of facts required for the application of the rule.

6 The Respondent's Defense in Cases Concerning Execution of Awards Declared Enforceable

After Svea Court of Appeal or the Supreme Court has declared a foreign award enforceable, the prevailing party has to apply for execution from the execution authority in the place where the defendant is domiciled. The respondent cannot bar execution by referring to such objections which should have been presented in the earlier proceedings concerning the enforceablity, e.g., an objection that procedural irregularities had occured during the arbitration. According to the Execution Act chap. 3 sec. 21 some objections will impede executions.

If the respondent proves that he has fulfilled his obligation to pay a sum or to perform any other duty referred to in the application for execution, such enforcement may not take place pursuant to paragraph 1 of the above mentioned section. This means that an execution order must not be issued if the respondent demonstrates that he has paid the amount the arbitrators have awarded. If the respondent proves that he has made a payment before the award was rendered, there is no reason to refuse execution, since such a defense must be made during the arbitration. The *res judicata* effect of the award precludes all defenses which could be presented during the arbitration. Only a payment made after the arbitration, which thus could not poss-

bly be relied upon during the arbitration, may result in a bar to execution.[50]

According to the Act a *set-off claim shall also bar execution, if the claim has been confirmed in an enforcebale order or if the claim is based upon a promissory note* or other kind of documented proof and the prerequisites for set-off are fulfilled in other respects. The legislative history indicates that the execution authority should only be authorized to determine uncontroverted (simple) issues of set-off claims.[51] If the respondent has been ordered to pay a sum in a partial arbitral award which later has been declared enforceable, he cannot resist execution by referring to a counterclaim not yet decided by the arbitrators. Such a counterclaim cannot bar execution of the partial award until the arbitrators have ordered the plaintiff to pay the sum and this award is declared enforceable. The general prerequiste for set-off must also exist in order to empower the execution authority to reject an application. This means mainly that the parties to the debtor-creditor relationship must be the same as to the execution claim and the set-off claim and that the latter claim is matured. However, these general requisites may sometimes vary and cause problems.[52]

If the respondent relies upon *other facts concerning the matter between the parties as a bar to the execution* and this objection cannot be disregarded, execution may be refused according to the Act. The standard of proof for refusal of execution varies due to the nature of the objection. If the respondent asserts that he has been granted a respite for paying the sum awarded, he has to prove this. Sometimes a judgement or an award may be unclear to such an extent that the execution authority cannot decide the issue. Such cases have to be determined by a court.[53] Irrespective of whether execution has been refused or not, a party has, according to the Execution Act chap. 3 sec. 21 par. 4, the right to request that a court decide the objection.[54]

In a Swedish award the arbitrators had decided that a contract regarding the sale of a computer enterprise should be rescinded due to fraud. The arbitrators ordered the seller to repay the purchase sum in a certain amount and the buyer to return the enterprise. In the enforcement and execution case, the seller objected that the enterprise was not returned in the state in which it was sold. According to the seller, inter alia, an agency contract was not included in the returned enterprise nor a third-party-service contract, which contracts had been assessed in monetary terms in a loose manner. The execution authority declared the award enforceable, but refused to execute it, since the objections could not be disregarded. The authority held that statements and objections had been presented which had made the relation-

[50]Heuman, Specialprocess, utsökning och konkurs 114 (1987).
[51]Prop 1980/81:8 p. 331.
[52]Walin, Gregow and Löfmarck, Utsökningsbalken 96-7 (1987).
[53]Walin,Gregow and Löfmarck, Utsökningsbalken 99 (1987).
[54]Walin,Gregow and Löfmarck, Utsökningsbalken 101 (1987).

ships between the parties so unclear that the issues could not be solved in execution proceedings. This decision was appealed and the case is not yet decided. One of the parties commenced a new arbitration in order to have the issues decided.[55] It seems that a court, due to the arbitration agreement, cannot try these issues which have arisen during the execution.

If the seller, during the execution proceedings, would find that the goods sold have been mismanaged and damaged, problems of *res judicata* would arise. According to a Court of Appeal case, the seller may request damages in a new case, but he was not considered to be entitled to have the issue of rescission tried again with reference to the allegation that the goods sold were mismanaged. In this respect, it was held that the arbitrators had in their award in a binding way decided that the seller was empowered to rescind the contract.[56]

It seems that problems concerning the rescission of complex business contracts in domestic as well as in international disputes will often give rise to such complicated issues of restoration that they cannot be solved by the execution authority. The arbitrators cannot try these issues unless a party has so requested. It is important that the parties anticipate problems of execution in cases of rescission of contracts and, if needed, ask the arbitrators from the very beginning to resolve issues as to how the sold enterprise shall be restored. Often however, these issues of restoration will not be decided until the arbitrators in a partial award have decided if the claim of recission shall be granted.

It is sometimes *diffcult to determine if the Svea Court of Appeal has competence to rule on a certain objection in the enforcement proceedings or whether the same objection shall be tried by the execution authority* in proceeding where the prevailing party applies for execution of the award declared enforceable.

Victrix Steamship Co. S.A. v. Salén Dry Cargo AB bankruptcy estate (Svea hovrätt Ö 3782/85). In an arbitral case where the losing party had been declared bankrupt after the award was rendered the bankruptcy estate objected in enforcement proceedings before the Svea Court of Appeal that the plaintiff's claim could not be asserted in enforcement proceedings, but only in the bankruptcy proceedings. The bankruptcy estate cited a rule in the Bankruptcy Act which provides that assets belonging to the bankruptcy estate may not be executed upon for claims directed to the debtor after he has been declared bankrupt.

The Court of Appeal stated: If an application for enforcement will be granted, this means, according to section 9 of the Act Concerning Foreign Arbitral Agreements and Awards, that the award can be executed as a Swedish legally binding judgement. By granting an application the Court of Appeal has not decided whether execution proceedings or bankruptcy prooceedings shall take place during the actual enforcement. When an application for execution is made on the basis of the decision of the Court of Appeal, the Swedish execution authority is to decide whether there is any

[55]Cominvest AB v. Scanvest Ring A/S (Kronofogdemyndigheten i Stockholms län,Solnakontoret U 2831-89/0170 and Svea hovrätt Ö 2247/89:2).

[56]Arne Fransson v. Svenska Cellulosa AB (SvJT 1961 ref p. 53). Cf. note 58.

bar to, for example, garnishment, whereby the adjudged company's bankruptcy is a circumstance to be considered. It can also be noted, that the bankruptcy proceedings may be terminated with a surplus and that garnishment may thereafter be carried out against the company existing as a legal entity at that time. What the Court of Appeal shall try is whether a grant of the application is excluded with regard to the limitations indicated in section 7 of the Act Concerning Foreign Arbitral Agreements and Awards (article V of the Convention). The bankruptcy estate has not demonstrated any circumstance of this type. As no other bar to enforcement exists the application shall be granted.

This case seems to indicate that the Svea Court of Appeal only shall try objections encompassed by the Convention and that the execution authority shall try other objections under the Execution Act. However, this does not explain which forum shall decide objections not expressly mentioned in the Convention or in the Execution Act. If the respondent considers that the arbitrators have made erroneous determinations in the arbitration, such objections have to be raised before the Court of Appeal irrespective of whether the errors are related to the procedure or the substantive matter.[57] If the latter is the case the Court has to reject the objection and the respondent may appeal to the Supreme Court if he considers that the mistake is in fact a procedural one. The respondent cannot wait and make his objection after an application for execution is filed. This problem is of importance in cases when it is difficult to charaterize a mistake as being of a procedural or substantive nature.

A Svea Court of Appeal case *Rederi AB Gustaf Erikson* reported in the beginning of this essay has demonstrated that an enforcement declaration may not be granted if the respondent's bankruptcy proceedings have been terminated. The reason for this view was that there was no representative to be served the enforcement application, since the company has ceased to exist and the trustee in bankruptcy no longer was competent to represent the losing party in the enforcement proceedings and respond to the application. On the other hand, the foregoing case shows that an award can be declared enforceable if the respondent's bankruptcy proceedings have not been terminated before the application for enforcement is served on the bankruptcy estate.

Where the arbitrators have ordered a buyer to restore assets and the seller to pay back the purchase money, an old case concerning domestic arbitration shows that an application for an enforcement declaration can not be rejected because the assets sold cannot be restored to the state in which they were transferred to the buyer. This issue has to be tried in a later execution proceeding according to the Court of Appeal.[58]This principle also seems to be applicable to foreign awards. If the losing party wants to object that certain assets are of such nature that they cannot be executed upon it is quite clear that such an objection cannot be raised until the execution.[59]

[57]van den Berg 269-74 (1981).

[58]Svenska Cellulosa AB v. Arne Fransson (SvJT 1961 ref p 56). Cf. supra note 56.

[59]Götaverken Arendal AB v. GNMT (NJA 1980 p 84) a case mentioned in Arbitration in Sweden 169 note 10.

The Swedish Arbitration Act of 1929

The Arbitration Agreement

Section 1

Any question in the nature of a civil matter which may be compromised by agreement, as well as any question of compensation for damage resulting from a crime may, when a dispute has arisen with regard thereto, be referred by agreement between the parties to the decision of one or more arbitrators. An arbitration agreement relating to any such question may also have reference to future disputes arising from a particular legal relationship specified in the agreement.

Arbitrators may not assume jurisdiction in respect of any question which is the subject of a pending court action or summary documentary process although such court action will not prevent arbitration proceedings if notice of withdrawal has been given to the presiding judge.

Section 2

If the arbitration agreement does not reserve the right of the parties to appeal from the award, they will be deemed to have consented to abide by it.

The present Act shall not apply to an arbitration agreement which provides for a right of appeal.

Section 3

If, after a request has been made for the application of an arbitration agreement, that request is rejected by a party, or a party fails in his duty to appoint an arbitrator, and the other party prefers to bring the dispute before a court of law rather than insist on an arbitration award, then the arbitration agreement shall be no bar to the jurisdiction of the court over the dispute.

Section 3a

In regard to disputes between business enterprises and consumers concerning products or services supplied in the main for private use, an arrangement made prior to the dispute to the effect that disputes shall be referred to arbitration without a right for the parties to appeal against the award may be invoked only if chap. 1 sec. 3 d par 1 Code of Procedure is not applicable in a district court dispute.

The first paragraph does not apply if the dispute concerns an agreement between an insurer and an insured concerning insurance issued on the basis of collective bargaining contracts or of group agreements and are handled

by representatives of the group, nor if an international obligation of Sweden to the contrary is in existence.

Section 4
No arbitration proceeding under this Act shall be instituted against any party who is resident outside Sweden and who is not subject to the jurisdiction of the Swedish courts in disputes of the nature in question, unless the arbitration agreement is to the effect that the proceedings are to take place in Sweden or the arbitrators or an arbitration institution, under powers conferred by the arbitration agreement, has decided that the proceedings are to take place in Sweden, or the party otherwise agrees to such proceedings taking place as aforesaid.

The Arbitrators and their Appointment

Section 5
An arbitrator is not qualified to serve:
1. if he is a minor or has a trustee according to chap. 11 sec. 7 of the Parental Act;
2. if, as a judge or otherwise by reason of public office, he has tried the dispute submitted to arbitration; if he has given evidence in the matter or submitted an expert opinion on the issue; if he himself, or one so related to him, either by blood or by marriage, as would debar a judge, has a personal interest in the matter or can expect any considerable advantage or disadvantage therefrom; or if he is a party in a similar case;
3. if he is so related to a party either by blood or by marriage, as would debar a judge; if he is involved in litigation against or is an obvious enemy of one of the parties; if he is in receipt of a salary or financial support from either party: if he is the subordinate of either party; if he has assisted one of the parties in preparing or conducting his case; or if he has accepted or stipulated for remuneration contrary to the provisions of section 23 of this Act;
4. if there is any other special circumstance which is likely to reduce the confidence in his honesty or impartiality; or
5. if he is prevented from performing his functions by any obstacle which is likely to prove of long duration.
The receipt of a salary or financial support from the Crown does not disqualify an arbitrator in a case in which the Crown is a party, unless he is employed in or by the authority whose activities are directly concerned in the case.

An arbitrator shall not be disqualified merely because a person tries to provoke him or attacks him by word or deed in an attempt to disqualify him.

Section 6
If the parties do not agree on the choice of arbitrators and have made no agreement as to their number and the mode of their appointment, there shall be three arbitrators, one appointed by each party and the third by the two arbitrators so appointed.

Section 7
Where each party is to nominate an arbitrator or arbitrators and one party has given notice in writing to his opponent of his choice, the latter shall, unless otherwise agreed, within fourteen days notify the other party in writing of his choice.

A party who has given the other party notice of his choice of arbitrator may not revoke his choice without the consent of the other party.

Section 8
If a party who is bound to appoint an arbitrator fails to do his duty in that respect, or if the other arbitrators cannot agree on the choice of an arbitrator to be appointed by those others, then, unless otherwise agreed between the parties, an arbitrator shall be appointed by the District Court on the application of a party.

If an arbitrator is to be appointed by any person other than a party or other arbitrators but such person fails to make the appointment within a reasonable time, then, unless the parties have otherwise provided, the arbitration agreement shall terminate in so far as it applies to the dispute in question.

Section 9
If a person who is designated as arbitrator in an arbitration agreement dies, the agreement shall terminate unless otherwise agreed between the parties. Where an arbitrator, who has been appointed in the manner aforesaid, resigns or becomes disqualified or is prevented for any other reason from performing his functions, then the same rule shall apply in relation to the dispute in question.

If an arbitrator who is designated in the arbitration agreement fails to perform his duties in an adequate manner, the District Court shall on the application of a party remove the arbitrator and shall, unless the parties have otherwise agreed, declare the arbitration agreement terminated.

Section 10
If an arbitrator who is not named in the arbitration agreement resigns, then, unless the parties have otherwise provided, the District Court shall appoint another arbitrator on the application of a party.

Provided, however, that if the arbitrator has died or if his resignation is

due to any disqualification or lawful excuse which has occurred after his appointment, then, unless the parties have otherwise provided, the person or persons who appointed the arbitrator shall appoint another in his place; to such appointment, the relevant provisions of Section 7 shall apply.

If an arbitrator who is not named in the arbitration agreement fails to perform his duties in an adequate manner, he shall on the application of a party be removed by the District Court and, unless the parties have otherwise provided, another person shall be appointed by the District Court in his place.

The Procedure

Section 11

Each party may call for the application of an arbitration agreement.

If the arbitration agreement has reference to an existing dispute but has not been made in writing clearly specifying the issue in the dispute, or if the agreement has reference to future disputes, the party invoking the agreement shall give notice in writing to his opponent of the question or questions as to which an arbitration award is requested. The present provision shall not prevent the arbitrators from deciding questions which the parties jointly refer to them in the course of the proceedings.

Section 12

When there are several arbitrators, one of them shall be chairman of the tribunal. Unless otherwise agreed, that arbitrator shall be chairman who has been appointed by the other arbitrators or by the District Court in place of such arbitrator.

The chairman shall fix a convenient place and time for any meeting of the arbitrators, arrange for summonses and other administrative work, and shall preside at any hearing.

Section 13

Subject to the procedural provisions hereinafter contained, the arbitrators shall act, as far as possible, in accordance with the instructions of the parties and shall otherwise deal with the case in an impartial, pratical and speedy manner.

Section 14

The arbitrators shall give each party a sufficient opportunity to present his case orally or in writing. If a party fails without valid excuse to avail himself of such opportunity, then the arbitrators may decide the case on the existing material.

Section 15

Unless the parties otherwise provide, the arbitrators may take steps in order to promote the investigation of the matter, such as summoning a party or an expert or any other person to attend for examination, or call upon a party or any other person in possession of a written document or other object, which may be assumed to have importance as evidence, to produce the document or object. The arbitrators may not make orders on penalty of a fine, nor use other means of constraint, nor may they administer oaths or truth affirmations.

If a party wishes that a witness or an expert should be heard in court, or that a party should be examined with a truth affirmation, or that an order should be made for a party or any other person to produce as evidence a written document or an object, then he shall apply to the District Court in the area where the person is present who is to be heard or is otherwise affected. If the arbitrators have considered the procedure needed, and if the requisite information is made available, the court shall arrange for the examination or issue an order provided that there is no legal obstacle to such procedure. The rules on evidence taken otherwise than at the trial in an ordinary action shall, to the extent relevant, apply to the procedures referred to above.

Section 16

All the arbitrators must take part in the resolution of a dispute. If there is a divergence of opinion among them, the opinion shared by more than one half of their number shall prevail, unless the parties have agreed otherwise. If the majority of the arbitrators do not agree on the resolution of a question which has been referred to them, the arbitration agreement shall terminate in respect of such question, unless the parties have otherwise agreed.

Section 17

The award shall be put down in writing and signed by the arbitrators.

The arbitrators should state in the award when and where it was given and, as soon as possible and not later than immediately after the giving of the award, notify the parties when and where it will be available.

Section 18

The parties may lay down a period within which the arbitration award must be given. If the award is not given within that period, the arbitration agreement shall terminate as regards the dispute which has been submitted to the arbitrators for decision.

Where the parties have not laid down any period for giving the award, then the award shall be given within six months reckoned from the date when the arbitration agreement was made or, where the arbitration agreement has

reference to future disputes or has not been made in writing with a clear definition of the issue in dispute, from the date when the application of the agreement was called for in the manner provided in section 11 of this Act; but if proceedings concerning the validity or applicability of the arbitration agreement are commenced in any court of law within such time, the period for giving the award shall be reckoned from the date when the final decision was made in such proceedings. Provided, however, that the District Court may, for particular reasons, on the application of a party, extend the period referred to in this paragraph, but not, except for compelling reasons, for more than six months in the aggregate. The arbitration agreement shall terminate as regards the dispute in question on the expiration of the period fixed, unless before such time either an award has been given or application has been made for an extension of the period, which application is approved by the District Court. The provisions of this paragraph shall not apply in case the parties are, or one of them is, resident outside Sweden.

Section 19

Where several claims have been made in the matter, the arbitrators may give an award on one or more of such claims even if the parties have not concluded their cases concerning the remaining claims, provided that the rights of neither party be prejudiced thereby. Likewise the arbitrators may, where a party has partially admitted a claim, give a separate award on the part that has been admitted.

Void and Challengeable Awards

Section 20

The award is void:

1. if there was no valid arbitration agreement;
2. if the award has not been put down in writing and signed by the arbitrators; or
3. to the extent that the arbitrators have rendered a decision on a question which by law cannot be submitted to arbitration or if, when the award was given, the arbitration proceedings were inadmissible pursuant to the second paragraph of section 1 of this Act.

The absence of an arbitrator's signature on the award shall not, however, make the award void, if it has been signed by the majority of the arbitrators and if they have verified on the award that the arbitrator whose signature is absent took part in deciding the dispute.

If the award is void in part and, for such reason, cannot be enforced as regards the remainder, then the award shall be void in its entirety.

Section 21

At the request of a party an award shall be set aside by the court:

1. to the extent that the arbitrators have gone beyond the matters submitted to them or have given an award after the expiration of the period laid down in that behalf;

2. if the arbitrators have rendered a decision in a case in which the arbitration proceedings should not have taken place in this country;

3. if an arbitrator was disqualified or was not appointed in the proper manner; or,

4. if, through no fault of the party, any other irregularity of procedure has occurred, which in probability may be assumed to have influenced the decision.

A party may not rely on the existence of any irregularity of the aforesaid character if, by taking part in the proceedings without objection, or otherwise, he ought to be considered as having waived the irregularity.

An action to challange the award must be commenced within sixty days from the time when the party received an original or a certified copy of the award. A party who fails to observe the said time limit forfeits his right to challenge the award.

Section 22

If an award is found by the execution authority to be so obscure as to make enforcement impossible, the existence of such award shall not debar a party from commencing an action in court concerning the question so decided by the arbitrators.

The Costs of Arbitration

Section 23

An arbitrator must not accept or stipulate for compensation from one party unless the same benefit is due to him from the other party. An agreement to the contrary shall be void; and an arbitrator shall be bound to return what he has improperly received.

If no valid agreement has been made concerning the compensation of the arbitrators, the parties shall pay, jointly and severally, reasonable compensation to the arbitrators for their work and expenses. Unless otherwise agreed between the parties and the arbitrators, the arbitrators may fix, in the final award, the amount of the compensation due to each arbitrator and enjoin the parties to pay it.

Arbitrators may not withhold the award pending payment of their compensation.

Section 24
Unless otherwise agreed between the parties, the arbitrators may, at the request of either party, determine whether and to what extent the opposite party should reimburse the party the compensation due from the latter to the arbitrators, and his other costs in the proceedings.

Section 25
If a party is dissatisfied with a decision by the arbitrators relative to the compensation due to them, he may bring the matter before the court provided that he commences his action within sixty days from the time when he received the award. Each of the arbitrators has a similar right as regards compensation claimed by him; but the time for commencing action shall be reckoned from the day on which the award was given. The award shall clearly specify the procedure to be followed by a party wishing to proceed against the decision of the arbitrators.

Special Provisions

Section 26
In cases contemplated by section 21 of this Act, the competent court shall be the District Court which has jurisdiction over the defendant in civil actions concerning his person, and in cases contemplated by section 25 of this Act, the District Court in the place where the award was given. If there is no competent court according to this provisions, the action shall be tried by the Stockholm District Court.

Applications under sections 8, 9, 10 and 18 of this Act shall be entertained by the District Court in the place of residence of either party. If similar applications have been filed with more than one District Court, the District Court with which an application was first filed shall be competent and a decision made by any other District Court shall be void. If neither party is resident in Sweden, the Stockholm District Court shall be competent. No application must be granted until the other party has been given an opportunity to comment thereon. If an application contemplates the removal of an arbitrator, the latter should also be heard.

No appeal is allowed from a decision of a District Court appointing or dismissing an arbitrator or declaring an arbitration agreement terminated, or determining any question concerning prolongation of the period for giving an award.

Section 27
If the law provides that a party must commence proceedings within a certain

time, but pursuant to an arbitration agreement his claim is to be settled by arbitration, then the party shall, within the specified period, call for the application of the arbitration agreement in the manner provided in section 11 of this Act.

If subsequently, through no fault of the party, there is an obstacle to a valid arbitration award being obtained, the party nevertheless retains his rights if he commences an action in the court within sixty days reckoned from the time when he was informed of such obstacle or, if the award has been set aside after having been challenged, from the time when the judgment to that effect has become non-appealable. Any such act or omission by the opponent as is contemplated by section 3 of this Act shall be considered equivalent to an obstacle of the type referred to above.

Section 28

With regard to the application of foreign arbitration agreements and foreign arbitral awards, the special provisions enacted for such purposes shall be observed.

The Swedish Act of 1929 concerning Foreign Arbitration Agreements and Awards

Foreign Arbitration Agreements

Section 1
An arbitration agreement shall be considered as "foreign" if it stipulates that the proceedings are to take place outside Sweden.

An arbitration agreement which does not indicate whether the proceedings are to take place within or outside Sweden shall be considered as "foreign" if both parties were resident outside Sweden.

Section 2
If an arbitration agreement provides that the proceedings are to take place in a particular foreign State, the law of such State shall apply to the agreement.

Section 3
Swedish courts shall not, where objection is made, have jurisdiction to try any dispute which is subject to a foreign arbitration agreement, if the agreement is valid under the foreign law applicable to it and the dispute also is arbitrable under the law applicable to a Swedish arbitration agreement.

Section 4
No arbitration proceedings may, by virtue of a foreign arbitration agreement, take place in Sweden unless, in cases contemplated by the second paragraph of section 1 of this Act, the arbitrators or an arbitration institution, under powers conferred by the arbitration agreement, has decided that the proceedings are to take place in Sweden or the party against whom the agreement is invoked has become resident here after the making thereof. As regards the procedure in such cases, the provisions of the Swedish Arbitration Act (1929 No. 145) shall be observed.

Section 5
An arbitral award shall be considered as "foreign" if it was given abroad.

In applying this Act, an arbitral award shall be considered as given in the State where the arbitration proceedings have taken place.

Section 6
Foreign arbitral awards are valid in Sweden subject to such reservations as are hereinafter stated.

Section 7

A foreign arbitral award shall not be valid in Sweden if the person against whom the award is invoked shows:

1. that a party when the arbitration agreement was made lacked capacity to enter into such an agreement or was not properly represented or that the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereof, under the law of the country where the award was given,
2. that he has not received proper notice of the appointment of an arbitrator or of the arbitration proceedings or that he for any other reason has been unable to present his case,
3. that the arbitrators have gone beyond the matters submitted to them and that by reason thereof the arbitral award is ineffective in the State where it was given or under whose law it was given,
4. that the appointment of the arbitral tribunal or its composition or the arbitration proceedings are in contravention of the agreement of the parties or, failing any agreement in this respect, in contravention of the law of the State where the proceedings took place, and by reason thereof the arbitral award is ineffective in the State where it was given or under whose law it was given, or
5. that the arbitration award has not yet become enforceable or otherwise binding on the parties in the State where it was given or under whose law it was given or that it has been set aside or suspended by a competent authority in the said State.

Moreover, a foreign arbitration award is not valid:

1. if the arbitration award comprises a decision of any question which under Swedish law is not arbitrable, or
2. if the implementation of the arbitration award would be patently incompatible with the basic principles of Swedish law.

Section 8

Any application for leave to enforce a foreign arbitral award shall be submitted to the Svea Court of Appeal.

There shall be attached to the application the original or a certified copy of the arbitral award and a certified translation into the Swedish language.

Section 9

The application referred to in section 8 of this Act may not be granted unless the other party has been given an opportunity to comment thereon.

Where the other party claims that he has applied to such authority as is referred to in sub-paragraph 5 of the first paragraph of section 7 of this Act in order to have the arbitral award set aside or to have its enforcement post-

poned, then the Court of Appeal may postpone its decision and, at the request of the applicant, require the other party to provide reasonable security on penalty that a decision to give leave of enforcement may otherwise be made.

If the Court of Appeal grants the application, the arbitration award shall be enforceable in the same manner as a final non-appealable judgement of a Swedish court, unless the Supreme Court on appeal against the decision of the Court of Appeal orders otherwise.

Section 10

If several claims have been referred to arbitration and the award does not cover them all, the Court of Appeal may, if there are reasons to do so, require the applicant to provide security for the repayment of any sums which he may have to refund by virtue of any subsequent award of the arbitrators. If the applicant is unable to provide the security requested by the Court, his application shall be refused.

Section 11

The provisions of this Act relating to foreign arbitral awards shall not apply to any decision by arbitrators who, independently of any arbitration agreement, have been appointed by virtue of a provision in any enactment or pursuant to a decision of a public authority.

Special Provisions

Section 12

The provisions of the second paragraph of section 15 of the Swedish Arbitration Act concerning the taking of evidence in the course of arbitration proceedings within Sweden shall also be applicable when proceedings take place outside Sweden under an arbitration agreement relating to a matter which is arbitrable according to Swedish law.

Section 13

If the provisions of any foreign law applicable to a cause or matter relating to a foreign arbitration agreement or arbitral award is not known to the court or other authority charged with applying the law, then the court or authority may require the party concerned to furnish proof in this respect.

The Swedish Code of Judicial Procedure
(exerpts)

Chapter 15

Provisional Attachment, Injunction against Dissipation, and other Security Measures. Interlocutory Decrees

Section 1
If a person has shown probable grounds for possession of a claim which is or may be presumed to be the subject of legal proceedings or adjudication in other similar form, and it can reasonably be expected that the adverse party, by absconding, removal of property or by other means, will evade payment of the debt, a court may order provisional attachment of so much of the adversary's property that the claim may be assumed to be covered in the event of distraint.

Section 2
If a person has shown probable grounds for having a superior right to certain property which is or may be presumed to be the subject of legal proceedings or adjudication in other similar form, and it can reasonably be expected that the adverse party will remove, essentially impair or otherwise take possession of the property to the detriment of the applicant, a court may order provisional attachment of the property.

Section 3
If a person, in a case other than referred to in section 1 or 2, shows probable grounds for possession of a claim against any other which is or may be presumed to be the subject of legal proceedings or adjudication in other similar form, and it can reasonably be expected that the adverse party, by carrying on a certain activity or performing or refraining from performing a certain act, or by other means will prevent or render difficult the exercise of the claimant's right or substantially diminish its value, a court may impose an appropriate sanction to secure the claimant's legal right.

A sanction as stated in the first paragraph may entail prohibition, on penalty of fine, to carry out a certain activity or perform a certain act or an order, on penalty of fine, to respect the claimant's title, or appointment of a custodian, or the issue of directions otherwise calculated to prevent encroachment upon the claimant's legal right.

Section 4

In an action concerning superior right to property, if it is apparent that one party has unlawfully infringed the adverse party's possession or taken any other unlawful action in respect of the property, the court may direct that the possession be immediately restored or other rectification immediately made.

Section 5

Orders concerning the measures authorized by this chapter are issued by the court in which the action is pending. If an action is not pending, the question of competency of the court shall be governed by the directions for civil actions. The stipulations concerning restriction of a court's competency in respect of a controversy to be adjudicated otherwise than before a court shall, however, not apply.

The question of imposition of a measure as stated in this chapter may be determined only on request. If an action is not pending, the request shall be made in writing.

A request may not be granted unless an opportunity to respond thereto has been given to the adverse party. When delay entails risks, however, the court may act immediately, issuing an order which remains effective until it directs otherwise.

As regards the hearing in other respects of a question concerning a measure authorized in section 1, 2 or 3 when an action is not pending, the procedure shall be that applying when such a question arises in an action. A request by the claimant's adverse party for remuneration of costs may, however, be considered in conjunction with the decision concerning the question of the measure to be imposed.

Section 6

A measure authorized in section 1, 2 or 3 may be granted only if the claimant deposits with the court security to recompense the adverse party for the loss he may suffer. A claimant who is unable to furnish security may be excused by the court if he shows that his claim has extraordinary merit. The State, local and regional authorities need not furnish security.

As to the nature of security, the provisions in chapter 2, section 25, of the Code of Execution shall apply. The security shall be determined by the court if not assented to by the adverse party.

Section 7

When a measure authorized in section 1, 2 or 3 has been granted, if an action has not already been brought, the claimant shall, within one month of the order, bring an action before a court or, if the claim is to be entertained in another form, in accordance with the provisions pertaining thereto. An ac-

tion that is not to be entertained by a court or other authority shall be considered to have been brought when a request for examination has been addressed to the adverse party or the procedure has been initiated by other means.

If an action is not brought as stated in the first paragraph, the measure shall be immediately rescinded.

Section 8

A measure granted in accordance with section 1, 2 or 3 shall be immediately terminated if security relating to the purpose of the measure is furnished or there is otherwise no longer any reason for the measure. If a claim is withdrawn or dismissed without reaching the merits, the measure shall also be immediately terminated.

The question of termination is determined by the court in which the action is pending or, if no action is pending, by the court which first dealt with the issue.

When finally adjudicating a case brought to trial the court shall determine whether the measure shall continue in effect. A measure as stated above may also be ordered by the court in conjunction with its final judgment in the case.

Section 9

On the request of either party, for cause, the court may rescind an order imposed under section 4.

Section 10

As to execution of a measure authorized by this chapter the provisions of the Code of Execution shall apply. The court may issue further directions concerning execution if so required.

Chapter 34

Procedural Hindrances

Section 1

The court shall consider any hindrance to the processing of an action as soon as reason therefor arises.

In the absence of provision to the contrary, the court shall take notice of procedural hindrances on its own motion.

Section 2
Any party who wishes to assert an objection that the court lacks competence to try the case shall do so when he makes his first appearance in the action. If prevented from presenting the objection at that time by legal excuse, he shall present it as soon as possible after the excuse has ceased to exist. A party who fails to object within the time stated above forfeits his right to raise the objection.

Section 3
If a party has made a timely objection pursuant to section 2, the court shall issue a separate order thereon as soon as possible. As to an objection based upon any other alleged procedural hindrance, the court shall issue a separate order thereon if the character of the hindrance so requires.

Chapter 38

Documentery Evidence

Section 1
Documents presented as proof should be produced in the original. However, a certified copy may be produced if found sufficient, or if the original is not obtainable.

If a document contains information which the possessor is either not entitled or not obliged to disclose pursuant to section 2, or which otherwise should not be disclosed, the possessor may produce, in lieu of the document, a certified excerpt therefrom.

Section 2
Anyone possessing a document that can be assumed to be of significance as proof is obliged to produce it; however, in criminal cases, such an obligation is not imposed upon the suspect or upon any person related to him as stated in chapter 36, section 3.

Neither a party, nor any person related to him as stated above, is obliged to produce written communications between the party and such a related person, or between such related persons. Neither a public official, nor any other person referred to in chapter 36, section 5, may produce a document if it can be assumed that its content is such that he may not testify as a witness thereto; when the document is possessed by the party for whose benefit an obligation of secrecy is imposed, the party is not obliged to produce the document. The provision in chapter 36, section 6, as to the privilege of a witness to refuse to testify shall correspondingly apply to the possessor of a do-

cument, provided that the content of the document is such as is referred to in the said section.

The obligation to produce documents does not extend to memory notes, or to any other like notes prepared exclusively for private use, unless extraordinary cause exists for their production.

Section 3

If a possessor of a document, based upon a legal relationship between himself and a party, or as otherwise prescribed by law, is obliged to surrender the document or to allow another to inspect it, this obligation shall also apply to the production of the document in a pending action.

Section 4

When anyone is obliged to produce a document as proof, the court may direct him to produce it. The person against whom the directive should be addressed shall be given an opportunity to present any objection he may have to the production. For resolution of an issue so raised, an examination of the person from whom production is sought may be held in accordance with the provisions in chapter 36 and 37, and other proof may be taken.

Section 5

A directive for the production of a document shall state the place and manner of production. The person obliged to produce the document may be compelled to perform his duty under penalty of fine. If it appears more suitable, the court may order that the document be obtained and made accessible by an execution officer.

Section 6

Taking of evidence through written documents may occur outside the main hearing,

1. if the document cannot be presented at the main hearing, or
2. if the presentation of the document at the main hearing shall cause costs or inconveniencies to be incurred which are not reasonable in relationship to the significance of the evidence taking occurring at the main hearing.

If it is of extraodinary importance to the proof of the case, then also another procedure may be conducted in connection with the evidence taking according to paragraph 1.

Section 7

Anyone other than a party who has produced a document on the request of a party or the court is entitled to compensation for his expenses and inconvenience in an amount found reasonable by the court.

When the production has been requested by a private party, the compen-

sation shall be paid by the party. Otherwise the compensation shall be paid out of public funds.

Section 8
If a public document may be assumed to be important as evidence, the court may direct that the document be furnished.

The first paragraph does not apply to

1. a document containing particulars subject to secrecy pursuant to chapter 2, section 1 or 2, or chapter 3, section 1, of the Official Secrets Act (1980:100) or to a regulation referred to in any of these statutory provisions, unless the authority which has to examine an issue of surrender of documents has given its consent thereto;

2. a document the contents of which are such that anyone who has been concerned therewith, as stated in chapter 36, section 5, second, third, fourth or sixth paragraph, may not be examined thereon;

3. a document the production of which would disclose a trade secret, except for special cause.

Section 9
If provisions which differ from those prescribed in sections 1-8 have been issued concerning the obligation to produce a document, they shall apply.

Chapter 41

Perpetuation of Proof for the Future

Section 1
If there is a risk that proof concerning a circumstance of significance to a person's legal right may be lost, or difficult to obtain, and no action concerning the rights is pending, a lower court may take and perpetuate for the future proof in the form of witness testimony, expert opinions, views, or documentary evidence. However, proof may not be taken pursuant to this chapter for the purpose of investigating a crime.

Section 2
Anyone desiring to take and perpetuate proof for the future shall apply to the court.

The application shall state that fact expected to be established by the proof, the nature of the proof, the grounds claimed by the applicant in support of the proposed proof-taking and, if possible, the other persons whose interests may be a stake.

Section 3

The provisions on proof-taking outside a main hearing shall correspondingly apply to the perpetuation of proof for the future; if, however, in addition to the legal right of the applicant, the rights of another person can depend on the proof-taking, a notice to appear need not be given to such person absent special cause. No person is obliged to appear as a witness or an expert for the purpose of perpetuating proof in a court other than the one for the district in which he resides.

Section 4

Costs occasioned by the taking and perpetuation of proof for the future shall be paid by the applicant.

If another person whose right may depend on the proof-taking was served with a notice to appear and thereafter attended the proof-taking, such person may be reimbursed by the applicant for necessery travel and maintenance expenses and for loss of time in an amount found reasonable by the court.

Execution Act
(exerpts)

Chapter 3

Enforceable Decisions

Arbitral Award

Section 15
An arbitral award based upon an arbitral agreement may be enforced, if

1. the arbitral agreement does not contain a provision entitling a party to challenge the award on substantive matters

2 no circumstance exist which makes the award void, even if no action is filed against the award, and

3 neither is it demonstrated to be probable that the award can be set aside pursuant to Section 21 of the Arbitration Act.

As to the compensation of the arbitrator, the award may be enforced, if the time for appealing the award in this part has expired without such action having been filed and there is no circumstance existing as referred to in the first paragraph, point 2.

Section 16
When there is no arbitral agreement but the competence to give the award is based upon some particular legislation and the award has been given according to the Arbitration Act, then the provisions in Section 15 paragraph 1, point 2 and 3 and paragraph 2 are also applicable.

Section 17
If enforcement of an arbitral award is not prevented pursuant to the rules in Section 15 and 16, then the execution authority has to make a special ruling thereon. Before such a decision is made, the respondent shall be given an opportunity to comment.

Section 18
After a ruling referred to in Section 17 has been made, the award shall be executed as a binding judgement, unless otherwise provided for by a court where an action against the award is pending.

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prop. 1979/80:2 del A Förslag till Sekretesslag m.m.
prop. 1979/80:87 Om ändring i rättegångsbalken m.m.
prop. 1980/81:8 Utsökningsbalken.
prop. 1983/84:78 Ändringar i rättegångsbalken m.m.
prop. 1982/83:117 Lag om erkännande och verkställighet av österrikiska domar på privaträttens område.
prop. 1984/85:110 Konsumenttjänstlag.
prop. 1986/87:89 Om ett reformerat tingsrättsförfarande.
prop. 1986/87:90 Ny konkurslag.
prop. 1988/89:78 Högsta domstolen och rättsbildningen.

Legislative history

12 NJA II 4 Lagarne om skiljemän (1887) p. 1.
16 NJA II 1 Sjölagen den 12 juni 1891 (1891) p. 1.
42 NJA II 6 Lag om avbetalningsköp (1915) p. 302.
54 NJA II 2 Ny lagstiftning om skiljemän (1929) p. 1.
64 NJA II Den nya rättegångsbalken (1943) p. 1.

Government Official Reports

SOU 1938:44 Förslag till rättegångsbalk.
SOU 1944:10 Förslag till införande av nya rättegångsbalken m.m.
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Table of Cases

The Supreme Court of Sweden

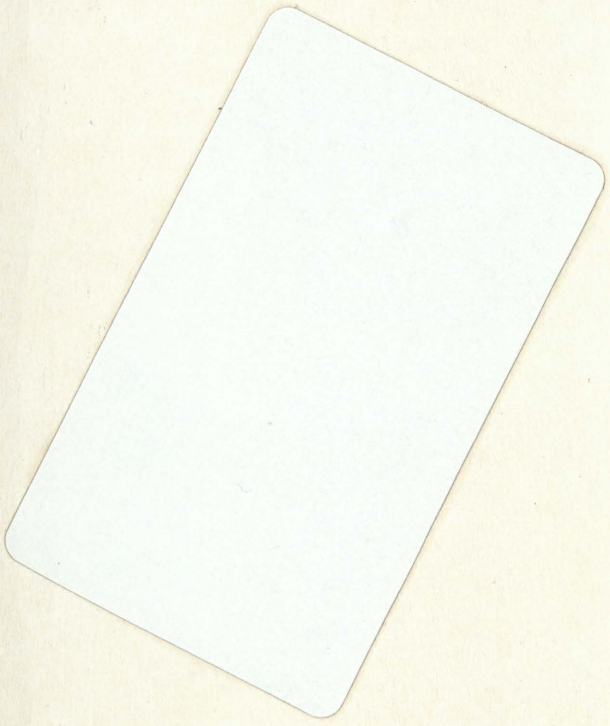
Swedish Courts of Appeal

District Court

Regeringsrätten

Labour Court

The Supreme Court of Norway



Current Issues in Swedish Arbitration

This book examines issues which can arise in modern commercial arbitration, not only in Sweden, but throughout the world. The discussion of these issues is useful for a wide audience, whether it be the practioner drafting a suitable arbitration clause in a contract, the arbitrator faced with defining the scope of his authority, or the researcher who is interested in a thoughtful analysis of issues seldom so comprehensively considered. For example, how can an arbitral clause be drafted in order that simple monetary claims can be excluded from a costly arbitration ? Can an arbitration refuse to allow discovery of relevant documents because they may contain trade secrets ? Is it possible to exclude national court rewiew of an arbitral award ?

These and many other issues of practical and theoretical concern are presented by a Swedish recognized authority. *Lars Heuman* is a Profesor of Procedural law at Stockholm University, the Director of the Swedish Institute of Arbitration Law, the author of numerous books and articles, and is a frequent consultant in arbitrations.

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