



# THE COLUMBIA JOURNAL OF EUROPEAN LAW ONLINE

## PRODUCTION OF DOCUMENTS - SWEDISH SUPREME COURT CONFIRMS A CONTINUING ARBITRATION-FRIENDLY APPLICATION IN SWEDISH COURTS

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### I. INTRODUCTION

Are courts' involvement in arbitration an opportunity for obstruction or a guarantee for justice and how do the courts consider their role when deciding matters that have a bearing on an arbitration? The underlying issues of court intervention in arbitration proceedings go to the core of the legal system as they also deal with the fundamental question of the parties' right to administer justice between themselves and to what extent the legal system should be available to support or monitor such proceedings.

This article deals with such borderline issues that may arise between the court and the arbitral tribunal when courts take measures that have a bearing on an arbitration. The main subject of the article is a recent ruling by the Swedish Supreme Court on production of documents in an arbitration where a party had requested assistance from the court. The issues raised in the court case, however, give rise to some reflections on the general issues that I started out with above, which issues of course can have different solutions depending on the legal system where the arbitration takes place. Therefore, I will begin this article by describing the position of arbitration in Sweden as a background to why Swedish courts have a strong confidence in arbitration as an institution (section 2). I will also point out some examples in the Swedish Arbitration Act on court involvement in arbitration (section 3) with special focus on the question of the taking of evidence in court in connection with arbitration proceedings (section 4). Finally, I will elaborate on the court case in section 5 and provide an analysis and conclusion in section 6 below.

### II. ARBITRATION IN SWEDEN – A BACKGROUND

Sweden has a long history of arbitration-friendliness. In the end of the 1700th century, the Swedish Code of Enforcement stated that when parties decide that their dispute shall be resolved

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by "good men" (*Sw. Gode män*) and waive the right to appeal the arbitration award, such award is enforceable (Stefan Lindskog, *Skiljeförfarande - en kommentar*, 2nd edition, Section 2.2.1). In 1887, Sweden enacted its first arbitration act. The current arbitration act came into force on 1 April 1999, replacing the old arbitration act of 1929.

At the time of drafting the Arbitration Act of 1999 in the late 1990's, the legislator considered to what extent Sweden should implement the results of the extensive legislative work leading up to the 1985 UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"). It was found that several countries with a long tradition of arbitration had chosen not to implement the Model Law but instead continued to base their legislation on their national tradition of arbitration. The Swedish legislator shared this idea and, consequently, the Model Law was considered only as one of many factors in the legislative process of modernizing the old arbitration act and in the drafting of the Arbitration Act of 1999.

In addition to the historical tradition of arbitration-friendliness, Sweden also benefits from a strong arbitration community among those involved in arbitration, as demonstrated not least by the extensive activities within the Swedish Arbitration Association (SAA), Young Arbitrators Stockholm (YAS), the Swedish Women in Arbitration Network (SWAN) and other associations that make up a well-trained and experienced resource of both counsel and arbitrators operating in Sweden and abroad. Further, the Arbitration Institute of Stockholm Chamber of Commerce is a well-established international center for arbitration since it was recognized in the 1970's as a neutral center for the settlement of disputes between East and West. Since then, the Arbitration Institute of Stockholm Chamber of Commerce has provided comprehensive services for international arbitration.

Finally, several of the Justices of the Swedish Supreme Court (as well as some other judges within the Swedish jurisdiction) are also recognized arbitrators and therefore have a thorough understanding of the needs of appropriate handling of court intervention in arbitration.

### **III. THE SWEDISH ARBITRATION ACT AND THE COURTS' INVOLVEMENT IN ARBITRATION**

An important guiding principle for the Swedish Arbitration Act of 1999, which applies to both domestic and international arbitration proceedings, is the party autonomy. Party autonomy entails that the arbitral tribunal is bound by the parties' agreements entered into both before and during the proceedings. This is an advantage because the arbitration can be designed in such a way that the parties mutually consider it to be appropriate.

A chain is, however, never as strong as its weakest link. When the parties disagree, and especially when the risk is imminent that any of them want to obstruct the arbitration, the legal system's support for arbitration is tested.

The Swedish Arbitration Act of 1999 is largely designed to allow handling of arbitrations in an efficient, safe and quick manner as well as, to the extent possible, prevent obstruction during the arbitration. The Act contains a number of rules that interact with the right of judicial intervention to prevent obstruction and delay. Thus the Act provides, for example, that a Swedish court of law must not decide on an issue which is subject to an arbitration agreement, provided that a party objects to the court's jurisdiction and that the party makes the objection, as a main rule, the first time when appearing before the court (see section 4 of the Arbitration Act of 1999, c.f. section 8 of the Model Law). A party, however, loses its right to invoke the arbitration agreement as a ground for inadmissibility if the party has already rejected a request for arbitration, failed to timely appoint an arbitrator, or failed to timely pay its share of security for the arbitrators' compensation (see section 5 of the Arbitration Act of 1999).

It could happen that a party, when a dispute has arisen, refuses to appoint an arbitrator as a way to obstruct. In such cases the Act gives a party the right to apply to the court to appoint an arbitrator. A court may refuse such a request on the basis that legal requirements for arbitration are not met, however only if this is obvious (see section 18 of the Arbitration Act of 1999). The pre-requisite "legal requirements" (*Sw. lagliga förutsättningar*) entails that a substantive examination must be made. However, considering that it must be *obvious* that the requirements are not met the courts should only in very exceptional cases be unable to assist the applicant. It could be added that if an arbitration is taking place in accordance with the Arbitration Rules of the Arbitration Institute of Stockholm Chamber of Commerce Arbitration (the "Arbitration Rules of 2010"), the question of intervention of the courts to appoint an arbitrator is unlikely to arise since the parties, by accepting the rules, already have agreed on a different order of how such a situation will be resolved, i.e. the Arbitration Institute appoints the arbitrator (see section 13 of the Arbitration Rules of 2010). See also the corresponding rules in the Model Law, Art. 11 (3).

According to the Arbitration Act of 1999, a party may challenge an arbitrator on basis of e.g. conflicts of interest, provided that the party adheres to certain tight deadlines for making the challenge (see section 10 of the Arbitration Act of 1999). As a general rule, the arbitral tribunal may itself decide on the matter. If the arbitral tribunal decides not to remove the arbitrator, the party may go to court to have the matter tried (the arbitrators may continue the arbitral proceedings pending the District Court's ruling, see section 10 of the Arbitration Act of 1999). It may be noted that the Act allows the parties to agree that another than the arbitral tribunal shall try the challenge and that an arbitral institute instead of a court shall be entitled to finally resolve the issue. Consequently, the Arbitration Rules of 2010 grants the SCC board the right to make final decisions on issues concerning conflicts of interest (see section 15 (4) of the Arbitration Rules of 2010). See also the corresponding rules in the Model Law, Art. 13.

The parties may also apply to the court to request that an arbitrator be removed if the arbitrator has delayed the arbitration proceedings (such a question may also, subject to the parties

agreement, be submitted to an arbitral institute for a final decision, cf. section 16 (1)(iii) of the Arbitration Rules of 2010). See also a corresponding rule in the Model Law, Art. 14.

Courts may also assist the parties in other ways, upon a party's request, by, for example, deciding on interim measures before or during the arbitral proceedings (see section 4 of the Arbitration Act of 1999 and the corresponding Art. 9 of the Model Law). Under Swedish law, an arbitral tribunal is deemed not to be authorized to make enforceable orders on interim measures (according to Swedish law, an interim measure is generally considered to be resolved by way of an order and not by an award, regardless of how the decision is named, and only awards are enforceable). If the arbitral tribunal has decided on an interim measure by way of an (unenforceable) order and the issue is thereafter also tried by a Swedish court of law, there is a high probability that the court will take impression of the arbitral tribunal's assessment. In Sweden there was some debate within the arbitration community whether Sweden should review the Arbitration Act based on the update of the Model Law in 2006 where enforceable arbitral awards on interim measures were introduced. Consensus seems, however, to prevail that the Swedish Arbitration Act of 1999 is not in need of updating on the basis of the additions made in the Model Law in 2006.

The Swedish Arbitration Act of 1999 is thus based on the fact that the Swedish courts support arbitration and that the parties are entitled to turn to the courts for assistance at the stages and with regards to such issues where the arbitral tribunal's powers are limited. The Act also gives the parties the right, to a certain extent, to agree that other persons than a court can assist them. In some cases, it is, however, not possible to refer to another instance than a court. This is the case with regard to e.g. claims to set aside an arbitral award, although the parties are free to waive, on beforehand, their right to claim that the award should be set aside provided that none of them is a resident or has a permanent establishment in Sweden. Consequently, for international parties, there are excellent opportunities to get a swift and effective resolution of their dispute by applying the opportunities that the Swedish Act on Arbitration of 1999 provides.

In conclusion, the Arbitration Act sets out a balance between party autonomy and judicial rights in a context in which the legislator considers that parties typically want their dispute to be resolved efficiently, safely and quickly. In terms of role allocation, the arbitral tribunal's role is to ensure that the parties dispute is finally resolved without delay while, in general, the courts or any other agreed instance can assist to accomplish such object. The concerns for court involvement in arbitration as expressed in the Model Law explanatory note, section 17, is not relevant for Sweden.

#### **IV. TAKING OF EVIDENCE IN ARBITRATION AND COURT INVOLVEMENT**

As for evidence, the Act is specific on the fact that it is the parties, not the arbitral tribunal, who are responsible for the evidence (the arbitral tribunal may, however, appoint an expert unless both parties oppose thereof). The arbitral tribunal may, however, reject offered evidence on the grounds that it is manifestly irrelevant or submitted too late. The Act further provides that arbitrators may not require witnesses to take oath, nor impose a fine or otherwise use measures aimed to be enforced to obtain evidence.

The above is based on the fact that, like Swedish courts in commercial litigation, an arbitral tribunal is bound by what the parties have submitted and the arbitral tribunal should not take an inquisitorial role. It may be added that in the context of international arbitration, there is nonetheless some understanding from a Swedish point of view that an arbitral tribunal can take a slightly more active role in the taking of evidence than the law specifies.

Given that the Arbitration Act of 1999 does not give the arbitral tribunal any right to force a party to submit evidence, a party may, nonetheless, with the consent of the arbitral tribunal, apply for such a measure before a district court in accordance with section 26 of the Act which provides as follows: "If a party wants a witness or expert to be heard under oath or a party to be heard under affidavit, the party, with the permission of the arbitral tribunal, may make an application thereof to the District Court. The same applies if a party wants a party or another person to be requested to produce a document or an object as evidence. If the arbitral tribunal considers that the measure is justified considering the investigation, they shall give permission to the application. If the legal requirements for the measure are met, the District Court shall grant the application. [...]"

The foregoing does naturally not mean that an arbitral tribunal cannot decide on production of documents. If the arbitral tribunal orders production of documents the parties are encouraged to observe such order even if the decision is not enforceable. This is naturally due to the fact that a party who refuses to comply with such arbitral order likely will have the refusal held against him or her in the forthcoming evaluation of evidence in the final award. From a practical point of view it is likely not a winning strategy to refuse to follow the arbitral tribunal's orders, regardless of them not being enforceable.

Although the Model Law nowadays goes a long way with investing enforceable powers in the arbitral tribunal, it is interesting to note that in terms of evidence, there is no regulation in the Model Law which grants the arbitral tribunal the right to take evidence with the support of the state's enforcement agencies. According to the Model Law (Art. 27), the arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of the state assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

Against this background, it is interesting to note the case from the Swedish Supreme Court, which was announced in May 2012, regarding an application with court to decide on production of documents with the consent of an arbitral tribunal (case no. Ö 1590-11, Euroflon. / Flexiboy). There has been consensus in Sweden that the court should at least normally not re-evaluate the arbitral tribunal's assessment that the granting of an application for production of documents is

justified. In cases where it appears that the tribunal may have made an incorrect assessment of the evidentiary value of the documents sought out, there have, however, been different opinions to what extent the court shall re-examine the arbitral tribunal's assessment.

#### **V. THE SWEDISH SUPREME COURT DECISION IN THE CASE OF EUROFLON ./. FLEXIBOYS**

In May 2012, the Supreme Court rendered its decision in Case No. Ö 1590-11, Euroflon ./ Flexiboy. The decision was based on an application for the production of documents by the claimant in a domestic arbitration between Euroflon and BA at the Arbitration Institute of Stockholm Chamber of Commerce.

The reason for the request was as follows.

Within the arbitration, Euroflon claimed that BA should pay 1.5 million SEK plus interest, asserting that BA, through a company, Flexiboy (which was owned and controlled by BA), had conducted operations with four different partners in violation of a non-competition clause applying between Euroflon and BA.

BA submitted a number of invoices from Flexiboy in the arbitration proceedings and according to BA these invoices constituted all invoices related to the four companies in question. Euroflon, however, requested that Flexiboy should submit some further specified invoices and argued that these invoices had evidential value for the dispute. Flexiboy on the other hand argued that the invoices were completely irrelevant to the proceedings and that the request was not limited to the grounds asserted by Euroflon in the arbitration proceedings. If Flexiboy was justified in its assertion, Swedish substantive procedural law entails that Euroflon would not be entitled to get access to the invoices since Swedish law does not allow for so-called "fishing expeditions" but instead sets out relatively strict requirements for a party to demonstrate relevance to the dispute if judicial assistance shall be granted to obtain documentation from anyone else.

On 9 August 2010, Euroflon received the arbitral tribunal's permission to go to court and request production of documents from Flexiboy. The arbitral tribunal noted that the documents had, or could have, evidential value in the arbitration proceedings.

In accordance with section 26 of the Arbitration Act of 1999, Euroflon thereafter requested that the District Court should order Flexiboy to produce the invoices in question. In the District Court, Flexiboy submitted that the requested documents were irrelevant, requesting that the District Court should reject Euroflon's claim for production. The District Court announced its decision to grant the production of documents on 22 November 2010 stating, *inter alia*, that its review was limited and that the arbitral tribunal's assessment of the importance of evidence could not be reconsidered by the court. The District Court's decision was appealed to the Court of Appeal which, after having granted leave to appeal, announced its decision on 8 March 2011. The

Court of Appeal stated that the court also had to consider whether the written documents could be assumed to be of importance as evidence in the arbitration proceedings especially when the request targeted a third party. The Court of Appeal questioned the evidentiary value of the requested documents and found that there were no exceptional circumstances to impose on Flexiboy to disclose the requested documents. The Court of Appeal's decision was finally appealed to the Supreme Court and after having granted leave to appeal, the Supreme Court handed down its decision in May 2012.

The Supreme Court stated that the *arbitral tribunal's* assessment on whether permission to go to court should be granted entails an assessment on whether the requested documents have evidential value and guidance therefore is given in the Swedish Code of Judicial Procedure and Article 3 of the IBA Rules on the Taking of Evidence in International Arbitration (the latter most likely to be relevant mainly to international arbitration).

The Supreme Court made it clear that since the arbitral tribunal has given its permission and the party then has applied to the court for production of documents, it remains for the court to ensure only that there is no legal obstacle to grant the application (c.f. section 26 of the Swedish Arbitration Act of 1999). The court shall not consider whether the measure is justified or similar.

The Supreme Court justified its position stating that a court reviewing a decision of the arbitral tribunal that a document is relevant as evidence would mean that the tribunal for its substantive review in the final award may be deprived of the ability to take into account a material that it deemed to be of importance.

The Supreme Court further stated that the court's assessment of whether the legal requirements for production of documents are met shall include a confirmation the following issues:

- the arbitral tribunal has given its consent that the request for production of documents is made with the court;
- the request for production of documents is submitted to the appropriate court;
- the request for production of documents is sufficiently clear so that it is possible to enforce;
- no exception to the duty to produce documents is applicable (such exceptions may include messages between near relatives to a party, memos unless there are exceptional reasons and documents containing information that the holder is not required to testify on, which entails a limited duty for officers, doctors, lawyers, etc. to disclose information as well as a duty to disclose trade secrets only if there are exceptional reasons); and
- no confidentiality provision prevents disclosure of the documents.

Flexiboy had claimed that there was an exception to the duty to produce documents at hand since the invoices contained trade secrets and that extraordinary reasons to disclose the invoices were not at hand.

The Supreme Court accepted that the invoices contained trade secrets and then went on to consider whether there were extraordinary reasons to disclose the documents anyway. For this assessment, the Supreme Court weighed the interests between the evidential relevance of the documents and the economic value of the trade secrets. The Supreme Court held that it lacked information about the importance that the arbitral tribunal had attached to the invoices' evidential value and noted that in case it is not a typical situation where it is clear which evidential value the requested documents have, it must be assumed that the evidential value was not more than just sufficient in order for the arbitral tribunal to decide to grant permission to the application. The Supreme Court thus held, without further justification, that the documents had great significance as evidence regarding the extent to which BA directly or indirectly had engaged in activities that competed with Euroflon's business. The Supreme Court also found that the harm that could arise for Flexiboy's due to a disclosure of the invoices was clearly limited, and that important reasons therefore were at hand for granting a disclosure. The Supreme Court also stated that the fact that the request for production was directed against a third party typically was a factor that could affect the assessment of whether there are exceptional reasons, but in this case this was of insignificant importance as Flexiboy's had a strong connection to BA and the dispute regarded an indirect pursuit of competing activities.

One of the Justices disagreed with the majority and argued that the legal requirements for granting production of documents were not met. The Justice pointed out that the arbitral tribunal had given its permission to Euroflon despite no theme of evidence theme being specified (*Sw. bevistema*) although it is a prerequisite for production according to Swedish law that such theme is a carefully described in the application. The Justice noted that the request for production of documents was rather a "fishing expedition" which a Swedish court is not entitled to allow.

## VI. ANALYSIS AND CONCLUSIONS

The reasoning of the District Court and of the Court of Appeal could be said to reflect two different approaches to arbitration vs. court interference. Is the court to examine the arbitral tribunal's decisions or only serve as a formal guarantor for justice? And where do the limits of the arbitral tribunal's mandate end and the court's mandate begin?

As mentioned above, Sweden is a very arbitration-friendly country. Swedish courts favor arbitration, and the standard of arbitration in Sweden is generally very high. The courts are therefore generally very confident of arbitration as an institution and a fundamental principle of court intervention during the arbitral proceedings is that the courts are to assist so that the proceedings are fast, safe and effective. Thus, it is not for the court to re-examine the arbitral tribunal's decision to permit an application for production of documents but only to ensure that certain basic safeguards are met before measures aimed at enforcement are granted.

In the present decision of the Supreme Court, it is doubtful whether the legal requirements were actually met for granting the request. The Supreme Court's ruling, however, entailed that the court



only has to make a formal assessment of whether the conditions for disclosing documents are complied with when the arbitral tribunal has given its permission for a party to go to court with the request. The interpretation is consistent with the preparatory works of the Arbitration Act of 1999 (see e.g. Govt. Bill 1998/99: 35, p 229), while it can be said to be rather incompatible with courts' legal function as guarantor of justice when the court will decide on enforceable measures based on a (possibly erroneous) assessment by an arbitral tribunal. It could be noted that there is another provision of the Arbitration Act which also refers to "legal requirements" but where the legislator has limited the application to what is *obvious* (see above regarding the court appointment of an arbitrator). There is no standard limiting the assessment to what is obvious in section 26 of the Arbitration Act so it could be argued, on the basis of the text of the law itself, that the court must be more thorough when applying a test on legal requirements when such limiting standard is missing and consequently also fully re-evaluate the arbitral tribunal's assessment. Such interpretation has, however, no support in the preparatory works of the Arbitration Act and certainly not in the present court case.

In both the Court of Appeal's reasoning and in the statements of the dissenting Justice it is questioned whether the arbitral tribunal had made a correct assessment of the evidential value of the requested documents. In light of the fact that Swedish law does not allow so-called fishing expeditions, the arbitral tribunal's decision seems inaccurate and could also lead to the arbitral proceedings not becoming as effective as they should have been otherwise (after a fishing expedition a claimant may want to expand its claims and broaden the arbitral proceedings in scope). In the end, it is, however, the arbitral tribunal who is responsible for carrying out the arbitration in an effective way and therefore is also the best to determine whether to allow the claimant to request the production in court.

In the legal literature, opinions have been expressed that the court is entitled to re-assess the arbitral tribunal's assessment if it was not made with necessary thoroughness (see Kaj Hobér, *International Commercial Arbitration in Sweden*, p 6.177). After the Supreme Court decision, it would now, however, be difficult for a court to re-examine a clearly erroneous decision of an arbitral tribunal with respect to the evidentiary value of the requested documents. It may be noted that Art. 27 of the Model Law likely would have given the court a greater mandate to overrule the arbitral tribunal's assessments in this regard.

The Supreme Court decision has once again made it clear that the courts in Sweden to a large extent are available for the parties to an arbitration without thereby interfering with the arbitral tribunal's mandate unless explicitly authorized to do so. This relationship between the court and the arbitral tribunal was taken to such an extreme in the present case that it is unclear whether the issue of the extent of evidentiary value was ever tried for real by either the arbitral tribunal or the court. The courts go to great length respecting the parties decision to give mandate to an arbitral tribunal to resolve their dispute and thereby also deciding to limit the courts' involvement in their dispute. From that perspective there does not seem to be any need to further limit judicial intervention in arbitration proceedings in Sweden.

It may, however, be noted that the request for production of documents when tried by the courts resulted in a delay for the parties. The decision from the District Court was announced only a little more than three months after the arbitral tribunal had given his approval to request production at court and after the matter had been tried also by the Court of Appeal and by the Supreme Court, it had taken nearly two years for Euroflon to get an enforceable court decision for Flexiboy to produce the documents. It may be noted that this is a relatively rapid processing in three instances of courts by Swedish standards. But nonetheless it was probably a significant delay compared to Euroflon being satisfied with an unenforceable order by the arbitral tribunal to grant the production of documents. From this perspective, of course, it could be considered if it had not been practical if the Swedish Arbitration Act of 1999 had expanded the arbitral tribunal's mandate to grant requests for production of documents by also allowing the arbitral tribunal the power to make enforceable decisions thereon in order to ensure rapid and effective processing. It cannot be ruled out that a party may use the courts to obstruct in order to gain time for any reason. In light of the fact that the arbitral tribunal's permission is required in such a situation, however, it would also be incumbent upon the arbitrator to consider this risk in the evaluation on whether to allow the court to become involved in order to formally evaluate a question on which the arbitration may or may not depend.