

Challenge of arbitral awards before Courts of Appeal

BY FORMER CHIEF JUSTICE JOHAN MUNCK AND JUDGE HELGA HULLMANN¹

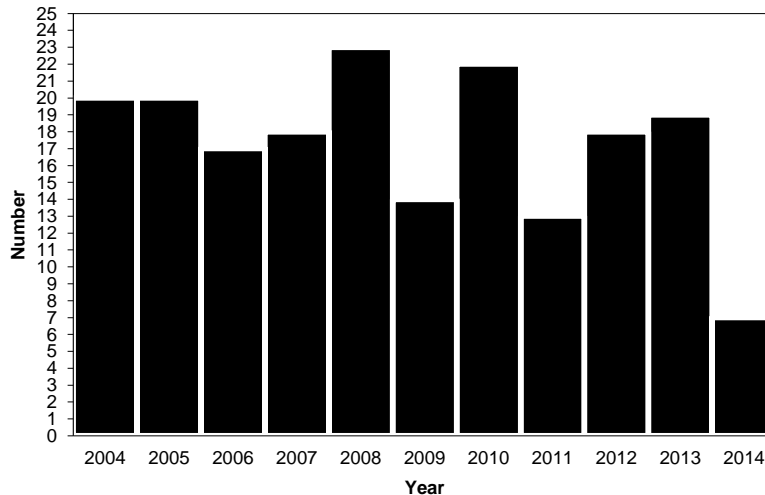
The Committee on the Review of Swedish Arbitration has carried out a review to chart the scope and nature of cases, here referred to as challenges or challenge proceedings, for which the grounds have been either Sections 33, 34 and/or 36 of the Swedish Arbitration Act, including cases dealt with under the Act on Arbitrators (1929:145) (the Old Arbitration Act). A challenge to an arbitral award under Sections 33, 34 and 36 is decided by the Court of Appeal within the jurisdictional territory of which the arbitration was seated; if the place of arbitration is not specified in the arbitral award, challenge proceedings may be opened before the Svea Court of Appeal. The review has covered all challenges opened during the period 1 January 2004 – 31 May 2014 at any and all of the Courts of Appeal. The main rule set out in the first paragraph of Section 43 provides that a decision by the Court of Appeal may not be appealed. In cases where the Court of Appeal pursuant to the second paragraph grants leave to appeal, the investigation has also covered the proceedings before the Supreme Court. For cases where background information has been limited, a reservation is made for the validity of statistical conclusions.

1. Number of challenges

The Committee's investigation shows that a total of 191 challenges have been before the Courts of Appeal². Three of those challenges were brought under the Old Arbitration Act. The diagram below shows the number of challenges filed for each year.

¹ In February 2014, the Government resolved to appoint a committee to review the Swedish Arbitration Act (1999:116), see Directive 2014:16, "A review of the Arbitration Act". Former Justice Johan Munck was appointed as special reporter and Judge Helga Hullman was appointed as secretary. The committee adopted the name "The Committee on the Review of Swedish Arbitration" and will submit its report during 2015. This article corresponds in all material respects to one section of the report.

² A list is attached, providing all case numbers at each Court of Appeal. Identification of cases filed with the Svea Court of Appeal is mainly based on Domstolsverket's case statistics and a manual review of the diaries for all types of case during the years 2004 to 2005. Identification of cases filed with other Courts of Appeal is based on a review of case lists and oral information from registrars.

Number of challenge proceedings opened nationwide every year

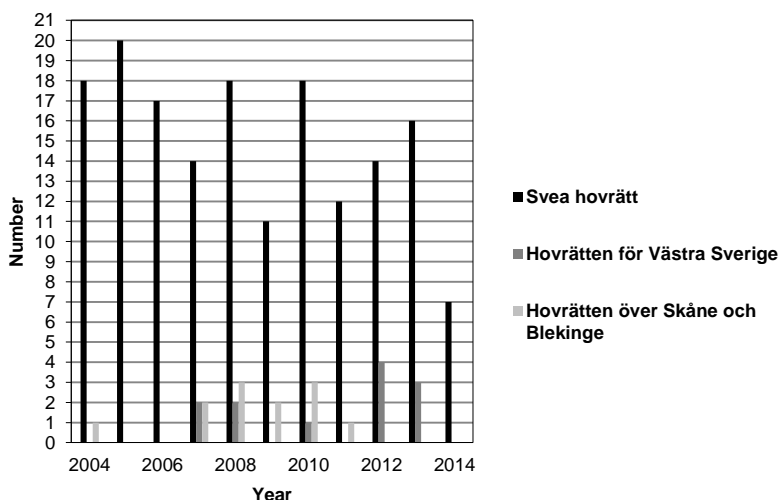
No less than 13 and 14 (2011 and 2009, respectively) and no more than 23 and 22 (2008 and 2010, respectively) challenges to arbitral awards were filed each year, whereas the number otherwise has remained roughly constant at a level of approximately 19 each year.

Of the 191 challenge proceedings opened, 165, or approximately 86 percent, were opened before the Svea Court of Appeal³. The Upper and Lower Norrland Courts of Appeal received no challenges, whereas two challenge proceedings were opened before the Göta Court of Appeal, 12 before the Court of Appeal for Western Sweden and 12 before the Court of Appeal for Skåne and Blekinge. The diagram below illustrates these numbers.

³ The number of challenges filed with the Svea Court of Appeal may appear very high compared to the number presented by Emilia Lundberg in her article, "An investigation of cases before the Svea Court of Appeal", JT 1990-00, p. 677-689. Her investigation showed that during 1987-1997 31 cases had been filed with the Svea Court of Appeal, all under the Old Arbitration Act. This number could be interpreted as meaning that the Swedish Arbitration Act encourages parties to challenge, as compared to the Old Arbitration Act, which was replaced by the Swedish Arbitration Act. In this respect, however, it must be noted that this number does not inform much on the number of challenge proceedings opened before the District Courts under the Svea Court of Appeal. Further, it must be assumed that the number of arbitrations taking place in Sweden has steadily increased over the years; for example, 123 arbitrations were registered by the SCC in 2003, compared to the 203 registered in 2013. In this context should be mentioned Niklas Elofsson's thesis "Arbitrators' excesses of mandate and procedural errors", University of Uppsala, 2010, which contains statistical information and good analyses of challenge proceedings.

Challenges broken down by Court of Appeal and year

Since only two challenge proceedings were opened before the Göta Court of Appeal, namely one case in 2004 and another in 2009, the Göta Court of Appeal is not included in the diagram.



One challenge registered in 2004 by the Svea Court of Appeal has not been identified, despite thorough investigations⁴. Thus, the continued report is based on 190 opened challenge proceedings⁵.

For two challenge proceedings⁶, information on the challenged arbitral award was insufficient, making it impossible to draw any conclusions on the nature of the arbitration preceding the challenge. To the extent the review is focused on the administration and language of the arbitration, the review is thus based on 188 challenge proceedings.

2. Ad hoc and institutional arbitrations

79 arbitral awards, corresponding to approximately 42 percent, originated in ad hoc arbitrations, i.e. those that were not administered by an arbitration institute, whereas 109 arbitral awards, corresponding to approximately 58 percent, originated in institutional arbitrations⁷. Thus, a

⁴ Here, special gratitude is directed to Madeleine Juth, archives administrator at the Svea Court of Appeal, and her colleagues for their invaluable assistance.

⁵ In this context it should be noted that in the same period, the Svea Court of Appeal received in total eight disputes concerning mandatory redemption under Section 32 of Chapter 14 of the Companies Act, one dispute under Section 16 of Chapter 3 of the Enforcement Code, one dispute concerning arbitrator fees, two disputes concerning affirmation under Section 2 of the Swedish Arbitration Act and one dispute concerning affirmation/challenge/damages; all in the form of appeals from District Courts.

⁶ One case was filed with the Court of Appeal for Skåne and Blekinge in 2004, whereas the other was filed with the Svea Court of Appeal in 2006.

⁷ One and the same arbitral award has in a few cases been challenged at the same time in separate challenge proceedings, whereas several arbitral awards in a few cases have been challenged in the same challenge proceedings. This has not been taken into

few more arbitral awards originating in institutional arbitrations than originating in ad hoc arbitrations were challenged. Possibly, it can be concluded that institutional arbitrations are more common than ad hoc arbitrations seated in Sweden.

The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) administered 103, the International Chamber of Commerce (ICC) five, and Sydsvenska Industri- och Handelskammaren (SSIH, the Chamber of Industry and Commerce of Southern Sweden) one of the 109 institutional arbitrations. No arbitration institute other than these three has been involved in the administration of the currently relevant arbitrations. Of the total number of 188 arbitrations, six (approximately 3 percent) were governed by the UNCITRAL Arbitration Rules and a few⁸ by Västsvenska Industri- och Handelskammarens Skiljeråds Regler om Medling och Skiljeförfarande (the Mediation and Arbitration Rules of the Chamber of Industry and Commerce of Western Sweden).

Thus it can be noted that the SCC administered nearly all, namely 94 percent, of the institutional arbitrations challenged during the period reviewed. Further, it should be noted that the Svea Court of Appeal dealt with 99, i.e. 90 percent, of challenge proceedings involving arbitral awards from institutional proceedings.

Breakdown of challenges filed by type and year

Cases before the Svea Court of Appeal noted within ().

Year	Filed	SCC	ICC	SSIH	Ad hoc	UN-CITRAL
2004	19 (17)	7 (7)	—	—	11 (10)	1 (1)
2005	20 (20)	11 (11)	1 (1)	—	8 (8)	—
2006	17 (17)	6 (6)	1 (1)	—	9 (9)	1 (1)
2007	18 (14)	7 (7)	—	—	11 (7)	—
2008	23 (18)	10 (10)	—	1 (0)	12 (8)	—
2009	14 (11)	11 (9)	—	—	3 (2)	—
2010	22 (18)	16 (14)	—	—	6 (4)	—
2011	13 (12)	6 (5)	1 (1)	—	6 (6)	2 (2)
2012	18 (14)	9 (7)	1 (1)	—	8 (6)	2 (1)
2013	19 (16)	14 (12)	1 (1)	—	4 (3)	—
2014	7 (7)	6 (6)	—	—	1 (1)	—
Sum	190 (164)	103 (94)	5 (5)	1 (0)	79 (64)	6 (5)

The numbers show that ad hoc proceedings were more often challenged than institutional proceedings until 2009, after which institutional proceedings increased at the expense of ad hoc proceedings: see for exam-

account, so the calculations are based on one arbitral award for each challenge and *vice versa*.

⁸ Only two (approximately 1 percent).

ple 2013 when challenged arbitral awards involving institutional proceedings amounted to 15 compared to four involving ad hoc proceedings.

The table below shows the types of dispute the ad hoc proceedings involved.

Ad hoc arbitral awards broken down by type and year

The numbers for the Svea Court of Appeal are noted within ().

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	Sum
SKN för arbetsmarknadsförsäkringar (<i>Arbitral tribunal for work place insurance</i>)	3(3)	1(1)	1(1)	1(1)	4(4)	—	2(2)	—	—	—		12 (12)
Advokatsamfundets SKN (<i>Arbitral tribunal of the Swedish Bar Association</i>)	1(1)	1(1)	2(2)	—	—	—	—	—	—	—		4(4)
Hyresnämnden i Sthlm/Arrendenämnden i Malmö (<i>Rent tribunal in Stockholm/Tenancy tribunal in Malmö</i>)	1(1)	—	—	—	—	—	1(0)	—	—	—		2(1)
I anställningssavtal (<i>Employment agreement</i>)	2(2)	1(1)	1(1)	1(1)	1(1)	1(1)	—	—	1(1)	—		8(8)
KFO Kommunals SKN (<i>Arbitral tribunal of KFO Kommunal</i>)	—	—	—	—	—	—	—	—	—	2(2)		2(2)
Svenska FF:s SKN (<i>Arbitral tribunal of Swedish FF</i>)	—	1(1)	—	—	1(1)	—	—	—	—	—		2(2)
SKN för vissa trygghetsfrågor (<i>Arbitral tribunal for certain security issues</i>)	—	1(1)	—	—	—	—	—	—	1(1)	—		2(2)
SKN för patient-skador/PSL (<i>Arbitral tribunal for patient injuries</i>)	—	—	—	1(1)	—	—	—	1(1)	—	—		2(2)
SKN för läkemedelsförsäkring (<i>Arbitral tribunal for medication insurance</i>)	—	—	—	—	—	—	—	—	1(1)	—		1(1)
Mäklarsamfundets SKN (<i>Arbitral tribunal of the Real Estate Agents' Association</i>)	—	—	—	—	—	—	—	1(1)	—	—		1(1)
Other, including commercial disputes, such as contractual disputes	4(3)	3(3)	5(5)	8(4)	6(2)	2(1)	3(2)	4(4)	5(3)	2(1)	(1)	43 (29)
Sum	11 (10)	8(8)	9(9)	11 (7)	12 (8)	3(2)	6(4)	6(6)	8(6)	4(3)	1(1)	79 (64)

The numbers show that ad hoc arbitrations related to, for example, 17 insurance disputes (approximately 21 percent), ten employment disputes (approximately 12 percent) and only, at most, 43 commercial disputes (approximately 54 percent).

The Svea Court of Appeal dealt with 64 (81 percent) challenges involving ad hoc arbitrations. Considering that the Svea Court of Appeal dealt with 86 percent of all challenge proceedings, this means that the Svea Court of Appeal proportionally dealt with a lower portion of ad hoc proceedings than the other Courts of Appeal.

3. Language of arbitrations

Of the 188 arbitrations for which the arbitral award was challenged, 108 (approximately 57 percent) were in Swedish, 78 (approximately 42 percent) in English and two (approximately 1 percent) in Russian⁹. A comparison of the numbers for each year in the table below with those presented in the report *Skiljeförfarandet i Sverige (Arbitration in Sweden)*¹⁰, according to which one-fifth of arbitrations involved international agreements, ought to imply that the number of international arbitration disputes is increasing in relation to domestic Swedish proceedings.

The Svea Court of Appeal dealt with 87 (approximately 80 percent) of the 108 Swedish arbitration disputes and 74 (approximately 95 percent) of the 78 English arbitration disputes and both (100 percent) of the Russian arbitrations.

Breakdown of challenges filed by language and year

⁹ The review established that the language of arbitration in general was also the language of the subsequent arbitral award. However, exceptions have occurred in a few cases; also, more than one language has been used in a few cases. This has not been taken into account, however, and so the calculation is based on the assumption that the language of the arbitral award was also the language of the arbitration. In about five cases, the conclusion on the language of the arbitration was based solely on the information in the case file, without any review of the challenged arbitral award.

¹⁰ Carried out by SIFO and set out in SOU 1995:65 p. 51.

Cases of the Svea Court of Appeal are noted within ().

Year	Swedish	English	Russian	Sum
2004	11 (10)	6 (6)	1 (1)	18 (17)
2005	16 (16)	4 (4)	—	20 (20)
2006	8 (8)	8 (8)	—	16 (16)
2007	13 (9)	5 (5)	—	18 (14)
2008	15 (10)	8 (8)	—	23 (18)
2009	6 (5)	8 (6)	—	14 (11)
2010	11 (8)	11 (10)	—	22 (18)
2011	5 (4)	7 (7)	1 (1)	13 (12)
2012	10 (7)	8 (7)	—	18 (14)
2013	11 (8)	8 (8)	—	19 (16)
2014	2 (2)	5 (5)	—	7 (7)
Sum	108 (87)	78 (74)	2 (2)	188 (163)

The numbers show that challenge proceedings preceded by institutional arbitrations in English were opened almost exclusively before the Svea Court of Appeal, whereas the other Courts of Appeal dealt with challenges almost exclusively preceded by Swedish ad hoc proceedings.

4. Referenced grounds in challenge proceedings

We have also investigated the extent to which the various grounds for challenge were referenced in the 190 challenge proceedings opened¹¹. In most challenge proceedings, several grounds were concurrently referenced in support of the challenge. In sum, approximately 400 references to the grounds of the Swedish Arbitration Act were made as well as to a few others. The grounds are broken down in the tables below.

	Sec. 33, 1 para., item 1	Sec. 33, 1 para., item 2	Sec. 33, 1 para., item 3	Sec. 36	Other/unclear
Number	10	30	5	20	25
Percent	2.5 %	7.5 %	1.2 %	5 %	6.3 %
Sum	45 (11.2 %)			20 (5 %)	25 (6.3 %)

¹¹ For obvious reasons, it is impossible to state exact numbers in this respect; thus, the numbers are estimates. The summation is based on how many times specific grounds were referenced, for which it was not taken into account that several different circumstances can be referenced for the same grounds. If one and the same circumstance was referenced for several grounds, all grounds have been taken into account. This is, of course, open to criticism, but luckily enough this was the case only in a very few cases. To determine whether a specific circumstance relates to item 2 or 6 of the first paragraph of Section 34 can also be a challenging task.

Sec. 34, para. 1	item 1	item 2	item 3	item 4	item 5	item 6
Number	50	100 (3/40)	0	10	25	125
Percent	12.5%	25 %	0 %	2.5 %	6.5 %	31 %
Sum	310 (77.5 %)					

Of the 100 instances in which reference was made to item 2 of the first paragraph of Section 34, three (corresponding to approximately 0.75 percent of the total number of references – 400) related to assertions on delayed arbitral awards and 40 (corresponding to 10 percent of the total number of references – 400) involved assertions that legally relevant circumstances which had not been referenced had been taken into consideration in the arbitral award decision.

Of the 190 challenge proceedings opened, 170 have been decided. The number of referenced challenge grounds in relation to decided challenges is set out in the tables below.

	Sec. 33, para 1, item 1	Sec. 33, para 1, item 2	Sec. 33, para 1, item 3	Sec. 36	Other/unclear
Percent	6 %	17,5 %	3 %	11 %	15 %
Sum	26.5 %			11 %	15 %

Sec. 34, para. 1	item 1	item 2	item 3	item 4	item 5	item 6
Percent	30 %	60 %	0 %	6 %	15 %	73 %
Sum	184 %					

The numbers show that challenges under Section 34 were the most common type of challenge; that invalidity cases under Section 33 were opened in almost one-third of the total number of challenges, and that cases for amendment of the arbitral award under Section 36 are even rarer. It is further common that more than one item of Section 34 is referenced in the same challenge proceedings and that at least two of Sections 33, 34 and 36 are referenced as alternative grounds in the cases. By far the most common grounds in the decided cases were item 6 of the first paragraph of Section 34, comprising approximately one third of all referenced grounds. Thereafter, excess of mandate pursuant to item 2 of the first paragraph of Section 34 was referenced in almost one in four of the decided challenges.

5. Challenge proceedings

Of the 190 challenge cases filed, oral preparatory hearings have so far¹² been held in 20 cases (approximately 10.5 percent), all before the Svea Court of Appeal. Main hearings have been held in 44 cases (approximately 23 percent), of which 41 were before the Svea Court of Appeal. Oral evidence was taken in 29 cases (approximately 15 percent), of which 27 were before the Svea Court of Appeal. In relation to the number of decided cases, main hearings were held in approximately 25 percent and oral evidence was taken in 17 percent of cases. In relation to cases decided by judgment (105 cases), these numbers are approximately 40 percent and 27 percent, respectively.

Cases decided by the Courts of Appeal

Twenty open challenge proceedings have been before the Courts of Appeal, of which 18 have been before the Svea Court of Appeal. Decisions in 170 challenge proceedings are shown in the table below. About two thirds of challenges were decided by judgment and about one third by decision.

	Judgment	Decision	
		Dismissal following withdrawal	Dismissal
Number	105	45	20
Percentage	62 %	26 %	12 %
Sum	105 (62 %)		65 (38 %)

The tables below set out the time taken for dealing with challenge proceedings in the Courts of Appeal.¹³ Numbers for the Svea Court of Appeal are noted within parentheses.

¹² I.e. until 31 May 2014.

¹³ The three challenge proceedings under the Old Arbitration Act are not included in the presentation. Thus, a total of 167 challenges are included in the tables.

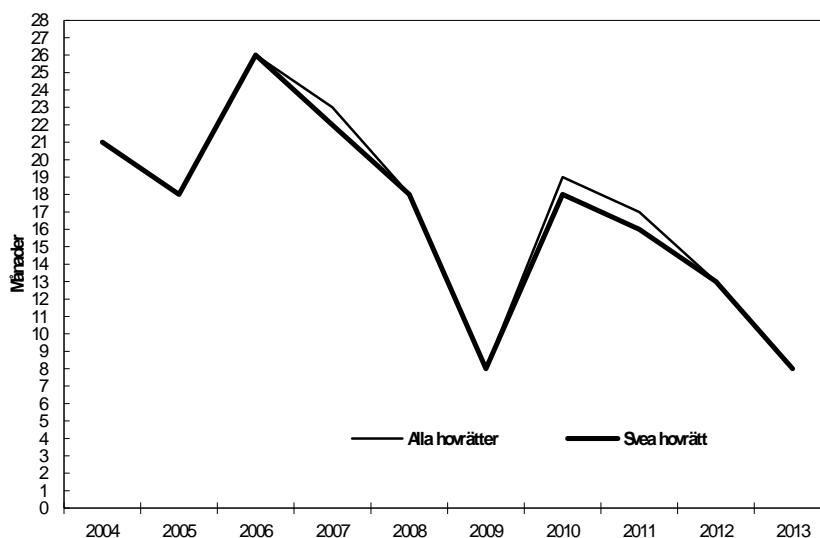
	Judgment	Dismissal following withdrawal	Dismissal	Sum	
				Number	Portion
0-3 months	6 (5)	17 (15)	11 (11)	34(31)	20 % (22 %)
4-6 months	8 (6)	11 ((6)	2 (1)	21(13)	13 % (10 %)
7-9 months	12 (11)	5 (5)	2 (2)	19(18)	11 % (12 %)
10-12 months	13 (12)	3 (3)	2 (2)	18(17)	11 % (12 %)
13-18 months	34 (31)	4 (2)	—	37(32)	22 % (22 %)
19-24 months	14 (11)	2 (2)	—	16(13)	10 % (9 %)
25-30 months	7 (7)	2 (1)	—	9(8)	6 % (6 %)
>30 months	8 (7)	1 (1)	3 (2)	12(10)	7 % (7 %)
Sum	167(143)				

The table below illustrates the time taken for dealing with challenge proceedings decided by judgment.

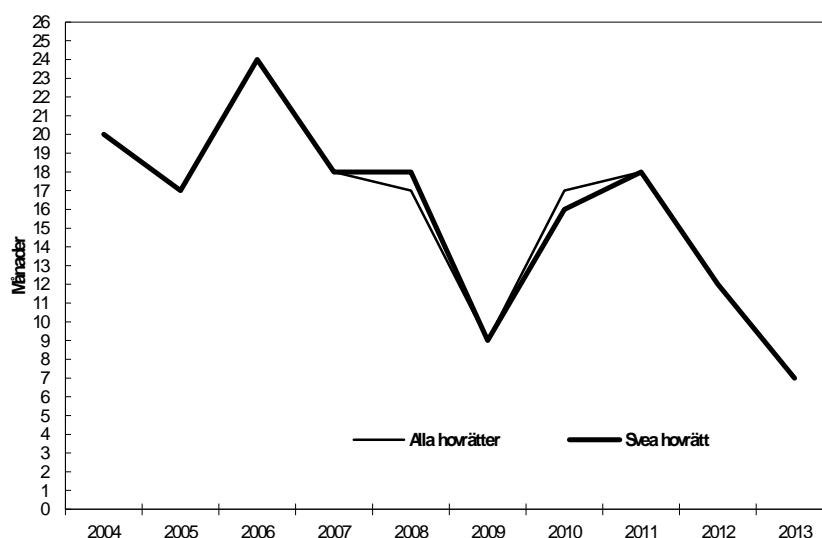
	Judgment number	Judgment portion
0-3 months	6 (5)	6 % (6 %)
4-6 months	8 (6)	8 % (7 %)
7-9 months	12 (11)	12 % (12 %)
10-12 months	13 (12)	13 % (13 %)
13-18 months	34 (31)	33 % (34 %)
19-24 months	14 (11)	13 % (12 %)
25-30 months	7 (7)	7 % (8 %)
>30 months	8 (7)	8 % (8 %)
Sum	102 (90)	

The time for dealing with cases irrespective of the nature of the ultimate decision has been in the range of eight days to four years, 5 months and 26 days. The average time for challenges decided by judgment¹⁴ has been 18 months (17 months for the Svea Court of Appeal). The diagram below shows the average time for challenges filed, broken down by year. (For example, the average time for challenges filed in 2004 was 21 months and for those filed in 2013 it was eight months.)

¹⁴ Three cases under the Old Arbitration Act as well as cases decided without issuing a summons, i.e. those cases the Court of Appeal decided were obviously unfounded, as well as cases decided by default judgment due to no statement of defence being filed or when no summons has been issued, or cases where the respondent has admitted or the claimant has waived the case are not included. Settlements confirmed by judgment are, however, included.



The median time for challenges decided by judgment¹⁵ has been 17 months (16 months for the Svea Court of Appeal). The diagram below shows the median times broken down according to challenges filed each year. (For example, the median time was 20 months for challenges filed in 2004 and seven months for those filed in 2013.)



The review clearly shows that the lead times in challenge proceedings before the Courts of Appeal are becoming shorter and shorter.

¹⁵ Three cases under the Old Arbitration Act as well as cases decided without issuing a summons, i.e. those cases where the Court of Appeal has decided were obviously without grounds, as well as cases decided by default judgment due no statement of defence being filed or when no summons has been issued, or cases where the respondent admitted or the claimant waived the case are not included. Settlements confirmed by judgment are, however, included.

Decisions

The numbers show that 65 (38 percent) of the 170 decided challenges were decided by the Courts of Appeal through a final decision, either as a dismissal following withdrawal or as a pure dismissal decision. Approximately one in four challenges was withdrawn and about one in ten was dismissed. The number of withdrawals is high, considering that challenge of arbitral awards is similar to extraordinary remedies. It has not been possible to draw any conclusions for the relatively high number of withdrawals based on the information reviewed.

Dismissal decisions were based on the claimant's failure to pay the application fee (seven cases), counsel's failure to produce a power of attorney (one case), absence of Swedish jurisdiction (two cases), commencement of challenge proceedings against the wrong party (two cases), failure to provide security (one case), failure to specify the challenged arbitral award (one case), failure of the challenged document to constitute an arbitral award (one case), the same case had already been decided (*res judicata*) (one case), presence of procedural impediments due to an agreement not to challenge an arbitral award providing a dismissal decision (two cases), failure to file the challenge in time (one case) and absence of procedural capacity for a party (one case).

6. Judgments

Amendment/invalidity/annulment of an arbitral award, whether whole or partial, following a review of the merits was carried out in ten cases, corresponding to almost six percent of all challenges. The Svea Court of Appeal decided nine cases (a few of them following proceedings before the Supreme Court) and the Supreme Court decided one.

1. T 2277-04¹⁶: The case was dealt with under the Old Arbitration Act. The District Court annulled, transposed into the regime of the new Swedish Arbitration Act under what would have been Section 36, the challenged arbitral award, which dismissed the case due to lack of jurisdiction by the arbitral tribunal. Concurrently, the District Court affirmed that a valid arbitration agreement applied to the dispute. The Court of Appeal affirmed the District Court's judgment as regards the appealed parts. The Supreme Court did not grant leave to appeal.
2. T 4390-04: Pursuant to item 3 of the first paragraph of Section 33, the Court of Appeal declared invalid a part of the challenged arbitral award, which was a correction of the award and which had not been signed by all arbitrators. The Court of Appeal did not grant leave to appeal.
3. T 6875-04: The Court of Appeal rejected the challenge, meaning that the arbitral award remained valid. The Court of Appeal granted leave to appeal. The Supreme Court subsequently amended the Court of Appeal judgment and annulled the arbitral award based on item 5 of the first paragraph of Section 34, since the Supreme Court concluded that there had been circumstances which could call the chairman's impartiality into question.

¹⁶ All case numbers in this article relate to cases before the Svea Court of Appeal, unless otherwise stated.

4. T 8016-04: The Court of Appeal annulled part of the challenged arbitral award based on item 2 of the first paragraph of Section 34, since the Court of Appeal concluded that the arbitrators had exceeded the motion and based their decision on circumstances which had not been referenced for their review. The Court of Appeal granted leave to appeal. Following withdrawal of the appeals, the Supreme Court dismissed the case.
5. T 7680-05: Based on item 2 of the first paragraph of Section 34, the Court of Appeal annulled the challenged arbitral award, since the Court of Appeal concluded that the arbitral tribunal had proceeded to review a party's motions, despite the party's request for arbitration being subject to conditions, and those conditions not having been fulfilled. The Court of Appeal did not grant leave to appeal.
6. T 3108-06: The case was dealt with under the Old Arbitration Act. The District Court rejected the challenge. The Court of Appeal amended the District Court's judgment and declared that the corresponding provision under the new Swedish Arbitration Act would have been item 1 of the first paragraph of Section 34, the challenged arbitral award invalid against one party, since the Court of Appeal concluded that there was no arbitration agreement binding on that party. The Supreme Court did not grant leave to appeal.
7. T 9424-07: The challenged arbitral award dismissed the claimant's case since there was no valid arbitration agreement. Based on Section 36, the Court of Appeal annulled the arbitral award in this part and amended it in other parts, since the Court of Appeal concluded that there was a valid arbitration agreement between the parties. The Court of Appeal granted leave to appeal. The Supreme Court affirmed the Court of Appeal judgment as regards the annulled part and itself annulled certain other parts of the arbitral award.
8. T 4548-08: based on item 2 of the first paragraph of Section 34, the Court of Appeal annulled the challenged arbitral award in its entirety, since the Court of Appeal concluded that the arbitrators had based their decision on an unreferenced legally relevant circumstance. The Court of Appeal did not grant leave to appeal.
9. T 10060-10: based on item 1 of the first paragraph of Section 34, the Court of Appeal annulled the challenged arbitral award with the exception of one item, since the Court of Appeal concluded that there was a District Court default judgment which finally determined that there was no valid arbitration agreement between the parties. The Court of Appeal did not grant leave to appeal.
10. T 1085-11: based on item 5 of the first paragraph of Section 34, the Court of Appeal annulled certain parts of the challenged arbitral award, since the Court of Appeal concluded that certain circumstances were present that called into question the impartiality of one arbitrator. The Court of Appeal granted leave to appeal. Following withdrawal of the appeal, the Supreme Court dismissed the case.

The review shows that arbitral awards were amended/declared invalid/annulled in one case based on item 3 of the first paragraph of Section 33 (approximately 10 percent), in two cases based on item 1 of the first paragraph of Section 34 (approximately 20 percent), in three cases

based on item 2 of the first paragraph of Section 34 (approximately 30 percent), in two cases based on item 5 of the first paragraph of Section 34 (approximately 20 percent) and in two cases based on Section 36 (approximately 20 percent). It should be noted that only one arbitral award was declared invalid based on Section 33. In seven cases, arbitral awards were annulled based on Section 34. Although item 6 of the first paragraph of Section 34 was referenced so often, not a single arbitral award was even partially annulled based on this item. Instead, the most successful grounds for annulment were items 1 and 5 of the first paragraph of Section 34 (in that order). Amendment of arbitral awards under Section 36 occurred in two cases, which appears proportionally high considering that the provision was referenced in only approximately 11 percent of all decided challenge proceedings.

Apart from these ten amended arbitral awards, the Svea Court of Appeal otherwise amended/annulled/declared invalid arbitral awards, wholly or partially, in four cases due to settlement, in two cases due to agreement and in two cases through default judgment, i.e. in total eight cases.

None of the other Courts of Appeal have amended/declared invalid/annulled any arbitral award.

Amendment/annulment/declaration of invalidity of arbitral awards, wholly or partially, have thus occurred in a total of 18 cases, corresponding to approximately 10 percent of all decided challenges during the relevant period.

It should be noted that generally there is only about a six percent likelihood of a challenged arbitral award not being entirely affirmed following a court review. Further, there is only about a one percent chance that an arbitral award is declared invalid based on Section 33 or is amended based on Section 36.

Arbitral awards have thus withstood court review in 87 (appr. 90 percent) of the 97 reviewed cases. Amongst these 87 cases, the Courts of Appeal declared the challenge obviously unfounded in eight cases (approximately 9 percent), of which six were cases before the Svea Court of Appeal.

7. Right to appeal

Of the 170 decided challenges, three were decided under the Old Arbitration Act. Thus, the Courts of Appeal were obliged to decide whether to grant leave to appeal under the second paragraph of Section 43 of the Swedish Arbitration Act in 167 cases, namely in 102 judgments and in 65 final decisions¹⁷.

In 102 cases, leave to appeal was granted in eight judgments (approximately 7.8 percent), all by the Svea Court of Appeal, whereas leave to appeal was denied in 94 judgments (approximately 92.2 percent). In the

¹⁷ Here, it should be noted that the Supreme Court did not grant leave to appeal in any of the three cases dealt with under the Old Arbitration Act.

other 65 cases, leave to appeal was granted in 28 decisions (approximately 43 percent)¹⁸, whereas it was denied in 37 decisions (approximately 57 percent).

The case files indicate that there were grounds to grant leave to appeal only as regards two decisions. Thus, leave to appeal under the second paragraph of Section 43 of the Swedish Arbitration Act ought to have been granted in only ten cases, corresponding to almost six percent of all decided cases.

In all cases where leave to appeal was explicitly granted under Section 43 of the Swedish Arbitration Act, appeals were filed with the Supreme Court. In a few cases, appeals were filed when the Court of Appeal provided regular appeal instructions without considering the provisions of Section 43 of the Swedish Arbitration Act; all such appeals have, however, likely been rejected by the Supreme Court.

8. Challenge proceedings before the Supreme Court

Apart from the three challenges¹⁹ dealt with under the Old Arbitration Act, and for which the Supreme Court decided the issue of leave to appeal, it was thus ten challenges, out of which eight were judgments and two final decisions, that were subject to the Supreme Court's review²⁰. The cases are the following.

1. T 6875-04: The Court of Appeal rejected the challenge, entailing that the arbitral award remained valid. The Court of Appeal granted leave to appeal. By amending the Court of Appeal judgment on the merits, the Supreme Court annulled the arbitral award based on item 5 of the first paragraph of Section 34, since the Supreme Court concluded that there were circumstances that could have called the impartiality of the chairman of the arbitral tribunal into question.
2. T 8016-04: The Court of Appeal partially annulled the challenged arbitral award based on item 2 of the first paragraph of Section 34, since the Court of Appeal concluded that the arbitrators had gone beyond the motion and based their decision on circumstances which had not been submitted for their review. The Court of Appeal granted leave to appeal. Following withdrawal of the appeals, the Supreme Court dismissed the case.

¹⁸ It is conceivable that the Courts of Appeal granted leave to appeal in these cases without considering Section 43 of the Swedish Arbitration Act, i.e. through oversight, two of the cases are not included (these related to two dismissal decisions because the Court of Appeal concluded that the parties had agreed not to challenge possible arbitral awards dismissing a party's case). Of course, it is also conceivable that the decision on the right to appeal was based on an interpretation of the law by which Section 43 was considered inapplicable to the dismissal decision (see NJA 2012 p. 761).

¹⁹ T 2277-04, T 4075-04 and T 3108-06.

²⁰ Cases involving new trials, grave procedural errors, motions for affirmation under Section 2 of the Swedish Arbitration Act, redemption disputes under Section 32 of Chapter 14 of the Companies Act etc. have, as indicated above, not been included in the review.

3. T 10321-06: The Court of Appeal rejected the challenge on its merits. The Court of Appeal granted leave to appeal. The Supreme Court affirmed the Court of Appeal judgment on its merits.
4. T 9424-07: The challenged arbitral award entailed that the claimant's case was dismissed on the grounds that there was no valid arbitration agreement. The Court of Appeal annulled the arbitral award in this part and amended others, based on Section 36, since the Court of Appeal concluded that there was a valid arbitration agreement between the parties. The Court of Appeal granted leave to appeal. The Supreme Court affirmed the Court of Appeal judgment as regards the annulled part (which involved the actual merits), but itself also annulled other parts of the arbitral award related to arbitration costs.
5. T 6798-10: The Court of Appeal rejected the challenge, entailing that the challenged arbitral award remained valid. The Court of Appeal granted leave to appeal. The Supreme Court affirmed the Court of Appeal judgment.
6. T 9345-10: The Court of Appeal rejected the challenge, entailing that the challenged arbitral award remained. The Court of Appeal granted leave to appeal. The Supreme Court affirmed the Court of Appeal judgment.
7. T 245-11: The Court of Appeal dismissed a challenge pursuant to Section 36, since the Court of Appeal concluded that there was a procedural impediment in the form of an agreement between the parties waiving the right to challenge, pursuant to Section 36, an arbitral award dismissing the case. The Court of Appeal granted leave to appeal. The case is pending in the Supreme Court.
8. T 314-11: The Court of Appeal dismissed a challenge pursuant to Section 36, since the Court of Appeal concluded that there was a procedural impediment in the form of an agreement between the parties waiving the right to challenge, pursuant to Section 36, an arbitral award dismissing the case. The Court of Appeal granted leave to appeal. The case is pending in the Supreme Court.
9. T 1085-11: pursuant to item 5 of the first paragraph of Section 34, the Court of Appeal annulled the challenged arbitral award in some parts, since the Court of Appeal concluded that certain circumstances were present that could call the impartiality of the arbitrator into question. Following withdrawal of the appeal, the Supreme Court dismissed the case.
10. T 4487-12: The Court of Appeal rejected the challenge, entailing that the arbitral award remained valid. The Court of Appeal granted leave to appeal. The case is pending in the Supreme Court.

The review shows that the Supreme Court decided seven of the 170 challenges decided by the Courts of Appeal, that the Supreme Court amended the Court of Appeal judgment on the merits in only one case and affirmed the Court of Appeal judgment on the merits in four cases, and that the Supreme Court dismissed two challenges following withdrawal of the appeal.

The average time spent on challenges decided by the Supreme Court on the merits was 17 months and the median time 18 months. For challenges that the Supreme Court decided on the merits, the average time

spent by the Court of Appeal and the Supreme Court was 35 months and the median time 31 months.

List of all 191 challenges received by the Courts of Appeal between 1 January 2004 and 31 May 2014

Svea Court of Appeal

2004: T 92, T 113, T 1388, T 1649, T 1915, T 2277, T 4075, T 4390, T 5043, T 5044, T 5417, T 5788, T 5863, T 6716-04, T 6875, T 7341, T 8016, one case with unidentified case number

2005: T 171, T 503, T 1038, T 1526, T 1683, T 2291, T 2309, T 2956, T 2960, T 4598, T 5171, T 5208, T 5397, T 5398, T 5998, T 6762, T 7250, T 7680, T 8249, T 8890

2006: T 197, T 745, T 980, T 999, T 1215, T 1824, T 2265, T 3108, T 4683, T 6072, T 6480, T 6508, T 7516, T 9383, T 9462, T 10112, T 10321

2007: T 1612, T 1803, T 1926, T 2418, T 3473, T 4018, T 4159, T 5883, T 6250, T 6562, T 6793, T 8336, T 9137, T 9424

2008: T 58, T 1132, T 1648, T 2375, T 2513, T 3864, T 4548, T 5004, T 5123, T 5267, T 6358,

T 7086, T 7087, T 7200, T 7290, T 7501, T 8622, T 8846

2009: T 754, T 841, T 2224, T 2423, T 2433, T 5254, T 6087, T 7862, T 8441, T 9459, T 9691

2010: T 43, T 63, T 740, T 2618, T 4050, T 4379, T 6147, T 6238, T 6798, T 7117, T 7449, T 7964, T 9345, T 10060, T 10329, T 10401, T 10470, T 10598

2011: T 245, T 314, T 611, T 1085, T 2484, T 2737, T 6681, T 7303, T 7319, T 8399, T 9620, T 10913

2012: T 844, T 3735, T 3780, T 4487, T 4800, T 5190, T 5483, T 5937, T 6123, T 6198, T 6981, T 8544, T 9294, T 9668

2013: T 1459, T 1931, T 2610, T 2635, T 2980, T 4037, T 4144, T 4519, T 4525, T 6877, T 7726, T 7727, T 8043, T 8851, T 8858, T 9331

2014/half: T 1417, T 2204, T 2289, T 2343, T 2454, T 2675, T 4861

Göta Court of Appeal

2004: T 2116

2009: Ö 1125

Court of Appeal for Western Sweden

2007: T 3399, T 4338

2008: T 1278, T 1426

2010: T 2962

2012: T 1279, T 1901, T 4256, T 4257

2013: T 1251, T 2290, T 4028

Court of Appeal for Skåne and Blekinge

2004: T 1864

2007: T 1858, T 1920

2008: T 336, T 734, T 3146

2009: T 1689, T 3174

2010: T 229, T 1309, T 2996

2011: T 2172