WHY CHOOSE STOCKHOLM: REFLECTIONS OF AN ENGLISH LAWYER AFTER TWO YEARS PRACTISING INTERNATIONAL ARBITRATION IN SWEDEN

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Introduction

“But Daddy – I want to be the winner!”
Sophia Hope, age 4½

Most little children want to win. In common with many athletes, they do not accept the Olympic maxim that the important thing is just taking part.¹ Winning is what matters.

The same is often very true in commercial disputes. To quote Sebastian Stark, the Los Angeles defense attorney turned prosecutor in the television series, Shark: “Litigation is war. Second place is death!” Parties often think like that by the time it gets to a hearing. They want to win, and, sometimes, they need to win.

How can lawyers ensure that their clients will win? The short answer is that they cannot. There is always an element of unpredictability and, quite frankly, that is what makes arbitration exciting. Sometimes, you will lose a case.

But if we cannot tell our clients that they will win, then what can we tell them?

We want to be able to tell them that we have made all the necessary preparations in order to win.² In particular, we want to be able to say that


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¹ Pierre de Coubertin, founder of modern Olympic Games, is famously quoted as saying: “The most important thing in the Olympic Games is not winning but taking part; the essential thing in life is not conquering but fighting well.”

² See Sun Tzu, The Art of War: “Now the general who wins a battle makes many calculations in his temple ere the battle is fought. The general who loses a battle makes but few calculations beforehand. Thus do many calculations lead to victory, and few calculations to defeat: how much more no calculation at all! It is by attention to this point that I can foresee who is likely to win or lose.” (Chapter 1, para. 26; from the 1910 English translation by Lionel Giles, MA, available at http://www.chinapage.com/sunzi-e.html#10).

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we have chosen the right battlefield – in other words, that the legal procedure that they find themselves in is a legal procedure that can be relied upon. We want to be able to say that they can trust the judges or arbitrators. Even if they end up losing, we want our clients to feel that their cases were properly heard and evaluated.

The Global Marketplace for Dispute Resolution

There is considerable competition for business between the various well-known seats of arbitration – Paris, London, Geneva, and Stockholm being firm favourites in Europe – and between arbitration institutions – the ICC, LCIA, the Swiss Chambers of Commerce, the Stockholm Chamber of Commerce. Other lesser known seats of arbitration and chambers of commerce are also trying to compete – for example, the Chamber of National and International Arbitration of Milan (CAM), German Arbitration Institution (DIS), the Vienna International Arbitration Centre (VIAC), to name just a few.

If you work in Stockholm, do you naturally choose SCC arbitration in Stockholm? If you work in London, do you naturally choose LCIA arbitration in London? If you work in Paris, do you naturally choose ICC arbitration in Paris? Of course you do. But which should you be choosing? And what do you do if your opponent rejects your first choice of seat and institutional rules?

To give a standard English lawyer’s answer, it depends – and that is actually probably the right answer. Different contracts call for different arbitration clauses.

Rather than attempt the difficult task of comparing different seats of arbitration, this article considers a specific issue – why Stockholm? Should parties choose Stockholm as their “battlefield”? Can international arbitration in Stockholm be recommended and does this provide parties with a legal procedure that they can rely upon?

This article offers a few personal insights, under the following ten headings:

1. A Thriving Arbitration Centre;
2. Detailed and Well-developed Arbitration Law;
3. Relatively Low Costs and Quick Procedures;
4. Arbitrators of Many Different Nationalities;
5. An Adversarial System;
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6. Flexible Procedures;
7. Some Particularly Good Features of Swedish Procedure;
8. A Dedicated Hearing Centre?
9. Few Successful Challenges;
10. Finally – A Question.

1. A Thriving Arbitration Centre

Stockholm has, of course, been a recognised arbitration centre for many years, and Sweden has a modern arbitration law in the form of the Arbitration Act of 1999. This Act is generally regarded as providing a good framework for both international and domestic arbitration. Moreover, the SCC Institute has recently revised its arbitration rules, and the 2007 version of the SCC Rules has been well received.

The SCC Institute has reported that 2007 was a record year, with 170 new cases being filed involving parties from almost 30 countries. This can be contrasted with similar figures from the LCIA, which apparently had 127 international cases in 2007, and rather lower figures from the Swiss Chambers of Commerce, which had 58 international cases in 2007.

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3 For an historical introduction, see Finn Madsen, Commercial Arbitration in Sweden, 2nd edition (2006), Chapter 2, section 2.1. See also Per Runeland, Sweden Thrives as a Neutral Arbitration Ground, 8 November 2004, available at http://www.mondaq.com/article.asp?articleid=29427, who notes that Stockholm became popular during the 1960s and 1970s: When trade picked up between the United States and the Soviet Union, the method of resolving any disputes was one of the key issues. Recognizing the wide acceptance of Sweden as a venue for international arbitration, the then U.S.S.R. Chamber of Commerce and Industry, the American Arbitration Association and the Stockholm Chamber of Commerce developed a model arbitration clause for use in contracts between parties in the United States and Soviet foreign trade organizations. This clause became known as the “Optional Arbitration Clause for Use in Contracts in U.S.A.-U.S.S.R. Trade 1977” and provided for arbitration in Stockholm, Sweden, under the auspices of the Stockholm Chamber of Commerce.

4 Lagen (1999:116) om skiljeförfarande. Often referred to in Swedish as “LSF”.

5 Although Sweden is not a ‘Model Law country’, the Act is considered to conform with the basic principles laid down by the Model Law. See Jernej Sekolec and Nils Eliasson, “The UNCITRAL Model Law on Arbitration and the Swedish Arbitration Act: a Comparison”, available at http://www.sccinstitute.com/uk/Articles_Archive/ under the heading “Speeches”).


7 Available at http://www.sccinstitute.com/uk/About/Statistics/.

8 A table of case statistics for a variety of arbitration institutions was published in Chapter 8 of the study by PricewaterhouseCoopers entitled, “International Arbitration: Corporate attitudes and practice 2008”, available at http://www.pwc.co.uk/eng/publications/international_
Stockholm made a name for itself in East/West arbitrations, and this trend looks set to continue. The SCC is looking, in particular, towards China as well as the former CIS republics, and the Institute has recently hosted a conference on arbitration in the Arab world.9

The SCC Institute also has a good track record of investment treaty cases. The Institute reports that 20 investment treaty cases have been filed with the SCC Institute during the period between 2001 and 2007.10

All this is a healthy record for a small jurisdiction.

2. Detailed and Well-Developed Arbitration Law

The Swedish law on arbitration is well-developed and scholarly. However, this may not be immediately obvious to foreign commentators, since much of the material is of course in the Swedish language.

Apart from the Arbitration Act itself, sources of law include:

- The travaux préparatoires to the Arbitration Act – SOU 1994:81 and proposition 1998/99:35. These are, of course, only available in Swedish, but they provide very detailed commentary and guidance on arbitration law, and they are often referred to by courts and commentators.


- Case law – Both Lindskog and Heuman, in their books, refer to over 200 Swedish Supreme Court cases stretching back to the 1800s, as well as a considerable number of other lower court cases.

- Articles – Heuman’s book has a thirteen-page bibliography of books and articles.

arbitration_2008.html. Note, however, that this table of statistics needs to be treated with caution. In particular, it is unclear whether the statistics show the total number of new cases filed or the number of on-going arbitrations. It is also not possible to make a comparison between the numbers of international cases alone.

9 This conference took place in Stockholm on 23 October 2008 – see http://www.sccinstitute.com/uk/Home/. It is part of a trend focusing on the Arab world – the ICC held a similar conference in May 2007, and see also the opening of the joint DIFC / LCIA Arbitration Centre, available at http://www.lcia-arbitration.com/.

10 See http://www.sccinstitute.com/uk/About/Statistics/. This can be compared with 135 ICSID cases during the period 2003-2007. See the PWC table quoted above.

11 Stefan Lindskog, who was formerly a practising lawyer and also an academic, has recently been appointed Justice of the Swedish Supreme Court.

12 An earlier version of this book was published in Swedish in 1999.
3. Relatively Low Costs and Quick Procedures

It is often said that “Justice delayed is justice denied”\(^\text{13}\), or to use the Swedish phrase “Snar rättvisa är dubbel rättvisa” (“Quick justice is double justice”).

Cost efficiency and speed used to be hailed as some of the major benefits of international arbitration as compared with litigation. While litigation has often been derided as being too slow and too expensive, arbitration used to be seen as a good and efficient alternative. However, in recent years, this picture of international arbitration appears to have been shattered, at least in the common law world. Commentators write of a crisis in international commercial arbitration.\(^\text{14}\) The ICC set up a task force last year in an attempt to find ways to deal with this crisis.\(^\text{15}\)

It is a real problem. It is common for the fees for one party in an international arbitration in London to reach US$1 million, and in large cases each party’s fees can be twenty times that or more. It might be said that these are relatively small sums as compared with the amounts in dispute in large cases. Nevertheless, how many companies will lightly accept a legal budget of these magnitudes, particularly in the current economic climate? How many companies in developing countries can afford to use such means for resolving their commercial disputes?

The ICC task force reported in the introduction to its report that 82% of the average cost of an ICC case represents costs borne by the parties to present their case – in other words, the lawyers’ fees and related expenses.\(^\text{16}\) The arbitrators’ fees and expenses represent, on average, 16% of the total costs, while the ICC’s administrative expenses amount to only 2% of the total.\(^\text{17}\) This has, of course, long been known by arbitrators who see their

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\(^\text{13}\) This quotation has been attributed to the 19th century British prime minister, William Gladstone


… We are finding increasingly that given lawyers’ remuneration at high hourly rates and the procedures and methods employed, particularly by common lawyers, largely from the City of London and New York, that bills of costs in the millions of dollars are commonplace even in cases of only moderate length and complexity.

It is now simply uneconomic for small and medium-sized companies engaged in international business to go to international arbitration in the main Western European cities under the aegis of leading institutions for the resolution of their disputes. In many instances in Western Europe, the parties would be better off litigating in an efficient non-common law commercial court system, such as exists in Rotterdam, rather than arbitrating or litigating in London.


\(^\text{16}\) See ICC Publication No. 843, loc. cit., page 11.

\(^\text{17}\) See ICC Publication No. 843, loc. cit., page 11.
fees strictly controlled by arbitral institutions, while counsel are often able to incur fees unchecked.

These issues are of far less concern here in Stockholm than they are in London or New York. One very striking difference between London and Stockholm is that lawyers in this city, quite simply, cost less. Hourly rates are lower because the cost of living is lower.

There is also another difference. Cases tend to be more complicated in England, they take more time, and time really does cost money, at least as long as the ‘hourly rate’ continues to be accepted. English law is often needlessly complicated. English lawyers tend to use more words, and they repeat themselves more. It is not uncommon in English proceedings to find pleadings, witness statements, ‘skeleton’ arguments, oral submissions, and then written closing submissions, all of which will more or less contain a recital of the party’s legal arguments.

Complicated does not mean better. Turning back to the theme with which this article began, winning is what matters in the end, and an argument or a pleading does not have to be complicated in order to be successful. In fact, as those who have acted as judges or arbitrators will know, a short and simple argument is often much more persuasive than a complicated one.

It should, of course, also be mentioned that the SCC is one of the few arbitral institutions with a special set of rules for ‘fast track’ proceedings – its Rules for Expedited Arbitrations. The main features of these rules are:

- There is only one arbitrator;
- Parties are generally entitled to file only two written submissions;

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18 According to a survey in The Lawyer magazine, partners in ‘magic circle’ and ‘city’ law firms in London charged between £400 and £700 per hour in 2007. That is between SEK 4800 and SEK 7400 at current exchange rates. See http://www.thelawyer.com/cgi-bin/item.cgi?id=129976&d=415&h=417&f=416. Top QCs can charge over £1000 per hour. By comparison, the top partners in Swedish law firms charge around SEK 4500, and often very considerably less than that.

19 London is the third most expensive city in the world according to Mercer’s Cost of Living Survey for 2008, available at http://www.mercer.com/costofliving. Stockholm is number thirty-one on the same list.

20 One of the principal themes of the ICC task force report is that parties and arbitrators must strive to eliminate unnecessary complication – see the Introduction, page 11: “The increasing and, on occasion, unnecessary complication of the proceedings seems to be the main explanation for the long duration and high cost of many international arbitrations”.

21 Unfortunately, making money has become more important than winning for many lawyers.

22 The most effective oral argument that the author ever heard was delivered in two minutes by a QC in the English Commercial Court, when the author was junior advocate for the other side.


24 Article 12.
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• Time limits for the submission of documents are not intended to exceed 10 working days; 26
• A hearing will be held only “if requested by a party and if deemed necessary by the Arbitrator”; 27
• A reasoned award will only be made if one of the parties requests it, 28 and;
• The final award is required to be issued within three months of the date when the case was referred to the arbitrator (the equivalent time limit in the main SCC rules is six months). 29

The idea that a case can be completed within three months is quite remarkable. It has been suggested that this works in about 50% of the cases under these rules, but even where the timetable slips a bit the award is usually made within four to six months. 30 Notably, there is almost always an oral hearing, despite the provision in the rules for this to be dispensed with, and the simple reason for needing an oral hearing is that parties invoke oral testimony. 31 Similarly, there is always a reasoned award, since the parties request one. 32

In this time of economic uncertainty and cost-cutting, and of concern about the future of arbitration, arbitration lawyers in Sweden should be proud of the fact that it is still possible to arbitrate efficiently and relatively inexpensively here.

4. Arbitrators of Many Different Nationalities

Choosing the arbitrators is arguably the most important step in any arbitration.

Under the SCC rules, in the case of a three-person tribunal, the appointment of the two party-appointed arbitrators is entirely in the hands of

25 Article 9(3)(b).
26 Article 9(3)(iii).
27 Article 27(1).
28 Article 35(1).
29 Article 36.
30 See a presentation of SCC fast track arbitration in Istanbul, Turkey by Dr. Patrik Schöldström (November 2007), available at http://www.sccinstitute.com/uk/Articles_Archive/ (under the heading “Miscellaneous”).
31 See Schöldström, loc. cit. It is notable that the rules appear to allow the arbitrator to refuse to have a hearing, even where this is requested by one of the parties, if the arbitrator deems that a hearing is not necessary. Nevertheless, it is difficult to imagine any arbitrator refusing to have a hearing if one is requested.
32 See Schöldström, loc. cit.
the parties. Save for issues of impartiality and independence, the parties are free to appoint any person of any nationality or profession as arbitrator.33

When it comes to appointing the Chairman or a sole arbitrator, the SCC appoints arbitrators of all nationalities,34 provided of course that, where the parties are of different nationalities, the Chairman or sole arbitrator will almost always be of a different nationality to that of any of the parties.35

So it would be a mistake to assume that an SCC arbitration will be decided upon by Swedish arbitrators. Certainly, the SCC Board does often appoint Swedes, including Supreme Court judges (both current and retired), academics, and lawyers from commercial law firms. However, in international cases the tribunal can indeed be truly international.36

33 The SCC has the following guidance on its website – see http://www.sccinstitute.com/uk/FAQ/#How%20do%20I%20appoint%20an%20arbitrator?:

How do I appoint an arbitrator?

Unlike some other arbitration institutions, the SCC Institute does not keep an official list of arbitrators. Consequently, a party is free to appoint anyone as arbitrator as long as he or she is impartial and independent (see Art 14). At the request of a party, the SCC Institute can recommend individuals suitable as arbitrators.

34 See http://www.sccinstitute.com/uk/FAQ/#How%20do%20I%20appoint%20an%20arbitrator?:

When appointing a chairperson or sole arbitrator, the SCC Institute takes the following aspects into consideration: Experience as arbitrator, the subject matter of the dispute, applicable law, the seat of arbitration, language of the proceedings and the nationality of the parties, counsel and co-arbitrators.

35 SCC Rules, Article 13(5):

If the parties are of different nationalities, the sole arbitrator or the Chairperson of the Arbitral Tribunal shall be of a different nationality than the parties, unless the parties have agreed otherwise or unless otherwise deemed appropriate by the Board.


A fictitious case may serve as an example of the board’s deliberations when appointing a chairman (it might be appropriate at this time to remind the reader of the introductory remarks above, i.e. that this article should not be seen as a blueprint for cases under the SCC Rules, which means that the below is neither to be read as an exhaustive list of circumstances to be taken into account for appointment, nor as a description of a set order of preference). In a dispute arising from a construction agreement between a Russian and an American party, each having appointed an arbitrator from its own country, with a contract in Russian and English (parallel language versions), and designating Russian law as the applicable law, the board might use the following reasoning; the chairman should (a) understand and have experience from the relevant area of construction, (b) be fluent in English, (c) not be either Russian or American, (d) be an experienced international arbitrator, preferably also with experience from cases with parties of the same nationality as now involved, and (e) complement the co-arbitrators’ skill and knowledge in a satisfactory manner. In addition, a knowledge of the Russian
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As in many countries, however, there needs to be a continued effort to identify and give experience to new arbitrators.

There is often said to a “mafia” within the world of international arbitration, with the same arbitrators appearing again and again. This has a number of disadvantages:

• First and foremost, the most popular arbitrators can become too busy. Arbitrators need to have sufficient experience, but they also need to have sufficient time. Delays in setting a hearing date can often be the result of arbitrators’ busy diaries.

• Secondly, there is a risk of conflicts of interest. Is it satisfactory for a law firm to have its favourite ‘pet’ arbitrators, whom it appoints again and again? Not according to the IBA Guidelines on Conflict of Interest in International Commercial Arbitration. Those Guidelines include in their “orange list” of circumstances which, depending on the facts of a given case, in the eyes of the parties may give rise to justifiable doubts as to the arbitrator’s impartiality or independence:

  3.3.7 The arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm.

Why three years, you may ask? Is it permissible for law firms to ‘play the system’ and make their appointments at intervals of just over three years? This is not a perfect rule, but the message is clear: be careful about creating a conflict of interest.

• As a third criticism, one of the real advantages of international arbitration is its flexibility, but this is undermined if the same arbitrators are appointed again and again. Attempts should be made to tailor the choice of arbitrator to the particular case. If the dispute is turns on complex engineering issues, then a professor of contract law may not be the best choice.

language, even if not required, might be regarded as meriting. It goes without saying that any conflict of interest will influence the decision, for example if an arbitrator is found to match the qualifications above but happens also to be a partner of a law firm representing one of the parties, this person will of course not be appointed.


39 As it happens, this particular issue under the IBA Guidelines is the subject of challenge proceedings which are currently before the Svea Court of Appeal in Stockholm.
5. **An adversarial system**

One of the most important features of any battlefield is that it is always best to fight on familiar territory.

In civil litigation terms, we all naturally prefer the system that we know. Common law lawyers tend to prefer their own adversarial system and look with some distrust upon the more inquisitorial features that appear in some civil law legal systems.

There would appear to be an assumption amongst some common law lawyers that the adversarial nature of common law procedure is unique to the Anglo-Saxon world. So it may come as some surprise to common law lawyers to learn that Swedish courts have an adversarial system of their own.

In fact, the Swedish system of civil procedure shares many of the key features of Anglo-Saxon models: giving primacy to the oral hearing, oral examination and cross-examination of witnesses, evidence being produced by the parties not by the court, and largely passive judges, whose role is to adjudicate between the parties’ respective claims rather than to seek out the truth.

The difference, as might be expected, can be found in the relative simplicity of the Swedish system:

- In England, the once predominantly-oral procedure is now both written and oral – typically, with written pleadings, written witness statements, written ‘skeleton’ arguments, oral opening submissions at

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41 See the following historical account, in “Arbitration in Sweden”, SCC, 2nd edition (1984), pp. 93-4:

All presently active Swedish judges and practitioners have been trained in the principles of judicial procedure which are set forth in the Procedural Code enacted in 1942 and made effective in 1948. At the time of its introduction, the Procedural Code constituted a radical departure from practices which had become entrenched over a period of a century and a half, particularly in the appellate courts, and which took the form of an inquisitorial and largely written procedure. The judicial administration also had become slow and inefficient. The three proclaimed leit-motifs of the new judicial process by contrast were to be “orality”, “immediacy” and “concentration”. These principles were stated to be derived from the Austrian Code of Civil Procedure of 1895, but in so far as they were meant to create an adversarial, oral trial procedure they evidently owed as much to Danish and English traditions.

42 For a summary of general procedures under the Swedish Civil Procedural Code, see “Arbitration in Sweden”, section 4.5.2, pp. 96-107.

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the start of the hearing, a certain amount of oral examination of witnesses, lengthy cross-examination, and sometimes both written and oral closing arguments.

• Swedish court procedure, on the other hand, is more predominantly oral. There can be several rounds of written pleadings, but once the case gets to a hearing there is no such thing as a ‘skeleton argument’. Swedish court procedure has no witness statements, all witness examination is carried out orally, and closing arguments and legal submissions are generally presented orally.

In fact, civil procedure in Sweden is quite similar to how it was in England in the 1960s.

6. Flexible Procedures

Swedish procedure is adversarial by tradition, but what actually happens in an international arbitration in Sweden?

The answer is that different arbitrators adopt different procedures. SCC arbitration and, of course, ad hoc arbitration is very flexible, and the procedures that are adopted can be very different, depending on the arbitrators and their experiences and background.

As an example, a comparison can be made between two very different international arbitrations in which the author acted as counsel over the past year. Stockholm was the seat of arbitration in both cases:

• Arbitration A: This was a dispute between Swedish, American, and Luxembourg parties, with three Swedish arbitrators, resolving arguments which turned on contractual interpretation under Swedish law: The chairman was a former Justice of the Supreme Court, and the procedure was quite typically Swedish, with two rounds of written pleadings, no witness statements, no production of documents, a ‘recital’ which the Chairman circulated to the parties in advance of the hearing, entirely oral witness evidence which were taped rather than being transcribed by a shorthand writer, and oral closing submissions.

• Arbitration B: This was a dispute between Swedish and French parties, with one Swedish arbitrator, one German arbitrator, and a Finnish chairman. Again, the governing law was Swedish law, but the procedure was quite different, with rather longer written pleadings, detailed witness statements, production of documents pursuant to the IBA Rules of Evidence, and a shorthand writer who produced a transcript of the hearing.
It should be noted that the arbitration clauses in both cases were very similar, but the procedure was different, since the arbitrators, counsel and parties were different and they had different expectations.

Which is better? In the author’s view, the following can be mentioned as particularly good features of the typical Swedish procedure.

7. Some Particularly Good Features of Swedish Procedure

(1) Witness Summaries vs. Witness Statements

Witness statements have become a standard feature in international arbitration. This practice comes directly from English litigation procedure, and it is notable that witness statements appear to have become accepted internationally in arbitrations, even in jurisdictions (such as the USA) where they are otherwise unknown.

But is it a good thing to have witness statements? Their principal purpose is to give advance notice of what the witnesses are going to say, which is generally thought to be fairer than waiting until the hearing. However, this advantage can be overstated: witnesses who have given witness statements often disclose new details at the hearing. Witness statements are also said to save time at the hearing, since the witness statement takes the place of direct examination. Again, though, this can be a bit of an illusion: direct examination may be shorter, but cross-examination is very likely to be longer, for the simple reason that it is much easier to prepare cross-examination on the basis of a detailed witness statement.

The procedure for taking witness statements can also all too easily get out of hand. To quote English Judge, Lord Woolf, writing in 1996 in his final report on “Access to Justice”, which preceded the changes to the English courts’ Civil Procedure Rules:

Witness statements have ceased to be the authentic account of the lay witness; instead they have become an elaborate, costly branch of legal drafting. Although the general view of judges appears to be that the use of witness statements shortens trial time, the great majority of cases do not go to trial: the costs of preparation are incurred in all cases but the savings of trial time in only a few.44

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It is, in fact, quite common in England to see witness statements that are over one hundred pages long. In the much publicised case of BCCI v. Bank of England, which collapsed in 2005 after what was said to be “the most expensive legal battle in UK history”, the witness statement of one of the Bank’s main witnesses was over 1000 pages long.

The recent English Commercial Court Long Trials Working Party, which was set up after the BCCI case amongst others, said the following about witness statements in its report:

Inevitably, in nearly all cases the witness statements are drafted by the lawyers, although based on interviews with the witness. But this process often leads to the statements being in lawyers’ language rather than the words of the witness. Also, all too frequently the statements spend far too long summarising documents that a party wishes to have in evidence and arguing the case. Not enough time is spent recording the witness’s actual memories of relevant events.

Of course, there are good witness statements, which concisely set out the witness’s evidence in largely his or her own words. When the lawyers do their job properly, this system can work very well, but it is always expensive. The process of drafting a witness statement and then finalising its contents often takes many hours, or even days or weeks.

Is there an alternative? Well, yes, there is. The Swedish Code of Civil Procedure provides that witnesses should be heard orally – indeed, witness statements are generally forbidden – but in order to provide some degree of predictability parties need to set out in summary form (a) the main factual statements that are expected to be made by the witness, and (b) what part of the party’s case each factual statement is intended to prove (referred to in Swedish as the förhörstema and the bevistema).

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45 See, e.g., King v. Telegraph [2004] EWCA (Civ) 613, in which the defendant criticised the claimant for serving a witness statement that was 114 pages long (paras. 48 and 73-4).

46 See http://www.independent.co.uk/news/business/news/bcci-liquidator-abandons-163850m-claim-against-bank-513718.html. The amount in dispute in this huge case was £850 million, and the hearing (until the case collapsed) lasted for 256 days, with estimated total legal costs of over £100 million. It is notable that similar monetary claims – and indeed much larger claims – are often tried in international arbitration, and yet arbitration hearings rarely last longer than a few weeks at most.


48 See the Swedish Code of Civil Procedure, section 42(2) (RB 42 kap. 2 §): “En ansökan om stämning skall innehålla … 3. uppgift om de bevis som åberopas och vad som skall styrkas med varje bevis” (“A statement of claim should contain … 3. information about the evidence relied upon and what is to be proved by each item of evidence”).
This is certainly a much simpler and cheaper procedure. It also has the distinct advantage that the witness’s direct testimony is heard live, rather than in the form of a written statement. Indeed, traditional Swedish practice is to have the witness give his testimony without interruption, on the view that even non-leading questions from counsel can influence the witness and therefore taint his evidence.49

This is a good procedure. It is perhaps an old-fashioned approach, but it is none the worse for that. It is a procedure that could well be adopted internationally, perhaps particularly in smaller cases where it is important to keep costs to a minimum.50

(2) Tape Recording vs. Shorthand Writers

Another fairly standard feature of arbitration procedure internationally is the use of shorthand writers, or stenographers. Invariably, since these proceedings are almost always in English, the shorthand writers will be English, and very often they will need to be flown out especially from England. Invariably, the cost is considerable.

Is this necessary? No, it is not. The Swedish solution is to have a tape recording of each witness’s evidence. In fact, with modern technology, it is easy to create an electronic file of each witness’s evidence, which can be given to the parties electronically virtually immediately, and which the parties can then listen to at their leisure using the respective computers.

In most cases, there will only be a few passages of the witnesses’ testimony that are of key importance, and these key passages can easily be transcribed and submitted to the tribunal during closing submissions. There is generally no need for the rest to be transcribed – except for the benefit of vain witnesses and counsel who might want to read them!

Again, this is a Swedish procedure which could well be adopted more widely internationally.

(3) Recitals

A third example of good Swedish procedure is the practice of Swedish arbitrators to draft and circulate a ‘recital’ (recit) to the parties, which is essentially the first part of the Award, containing the formal description of

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49 See the Swedish Code of Civil Procedure, section 36(17) (RB 36 kap. 17 §): “Vid förhöret skall vittnet först beredas tillfälle att på egen hand eller, om det behövs, med stöd av frågor avge sin berättelse i ett sammanhang” (“The witness shall at the hearing first be given an opportunity to give his account in one go, either on his own or, if necessary, with the help of questions.”). See also Ekelof, “Rättegång”, V, 7th edition, 1987, pp. 79-80.

50 The ICC report on “Techniques for Controlling Time and Costs in Arbitration” (see supra note 15) assumes that witness statements will be used, which is perhaps a surprising assumption.
the parties, the procedure, and summaries of the parties’ respective cases – all, in fact, except the tribunal’s reasoning.

This is an excellent means for the arbitrators to obtain confirmation from the parties that their cases have been properly and adequately summarised. Where the recital is to be exchanged before the hearing, it is also a good means of ensuring that the arbitrators (or at least the Chairman) have read the pleadings! Again, this procedure could well be adopted internationally.

8. A Dedicated Hearing Centre?

International arbitration hearings generally take place in meeting rooms, and there is a good supply of hearing rooms in Stockholm, with several law firms in particular having modern and well-equipped facilities.

There can be considerable benefit in having hearings in private, unofficial facilities, where only the parties have the possibility of being in attendance. The extent to which arbitration is truly confidential can be debated, but it is beyond doubt that arbitration hearings are held in private.

However, it is worth considering whether the time has come for the SCC to set up a specialist hearing centre, with dedicated facilities for arbitration hearings. The ICC opened such a centre in Paris, just across the river from the Eiffel tower, in October 2008,51 and the LCIA offers the facilities of the International Dispute Resolution Centre (the IDRC) in Fleet Street in London.52

Having such a hearing in centre would help to market Stockholm as an arbitration centre.

9. Few Successful Challenges to Swedish Arbitral Awards

Once you have your arbitration award, you want to be able to rely upon it. Of course, one of the primary tasks of the arbitrators is to ensure, as far as possible, that the award is enforceable and not open to challenge. Nevertheless, in this litigious world, parties will quite often seek to bring a challenge if they can.

Under the Swedish Arbitration Act, such challenges are limited to procedural issues. There is no possibility to challenge on a point of

52 See http://www.idrc.co.uk/. This is not to be confused with the International Centre for Dispute Resolution (the ICDR), which is the international arm of the American Arbitration Association (the AAA), available at http://www.adr.org/icdr.
substantive law – unlike in England where notably there is a possibility of an appeal on a point of law in certain situations.

During the period from 2002-2007, one hundred and fourteen challenge cases were initiated in the Svea Court of Appeal, of which thirty-three resulted in a final decision by the Court and only two cases resulted in a successful challenge:

- **IF v. Securitas**, where the Svea Court partially set aside an award on grounds that the arbitral tribunal had exceeded its mandate; and
- **Anders Jilkén v. Ericsson**, where the Supreme Court set aside an award on the grounds that the chairman was not impartial.

10. Finally – a question

Should the principle of *jura novit curia* be applied in international arbitration?

In Swedish court practice, and in purely domestic arbitration, the principle of *jura novit curia* applies (or in Swedish, *domaren känner / kan rätten*). To put this in English, the judge or arbitrator is taken to know the law, and the parties are therefore not required to invoke any legal rules or provide any evidence in support of them in presenting their case. This also means that the arbitrators can decide the case on the basis of a legal issue that has not been presented by either of the parties. The principle has been described as an important procedural fiction.

But can this fiction be applied internationally? It is certainly not a universal principle. In England, questions of law cannot be decided by an arbitral tribunal without prior debate with the parties.

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53 Swedish Arbitration Act, sections 33 and 34. Note that, under section 51, non-Swedish parties can also enter into an exclusion agreement, excluding or limiting the application of section 34.
54 English Arbitration Act, section 69.
55 For details, see Bagner and Brohmé, “The Swedish Challenge Procedure – an international perspective”, in the Festskrift till Lars Heuman (Jure, 2008).
56 Svea Court decision of 3 November 2005, case no. T 8016-04.
57 Svea Court decision of 3 May 2006, case no. T 6875-04; Supreme Court decision of 19 November 2007, case no. T 2448-06.
58 Although this does not fall within the category of challenge cases under sections 33 and 34 of the Swedish Arbitration Act, mention should also be made of the fairly recent case *Petrowart Ltd v. Republic of Kyrgyzstan* (Supreme Court decision of 28 March 2008, case no. T 2113-06), in which the Supreme Court set aside a negative ruling on jurisdiction, pursuant to section 36 of the Act. Sweden is one of few jurisdictions that provides for a review of negative rulings on jurisdiction.
WHY CHOOSE STOCKHOLM

The general view in Sweden appears to be that the principle of *jura novit curia* should be modified for international arbitration proceedings. In particular, it can be necessary in international cases for parties to provide evidence in support of the substantive law relied upon. This is obvious in cases where one or more of the arbitrators has no experience of the law in question. To put it simply, the fiction in such cases turns into a lie. It is simply not true that the arbitrator knows the law!

Furthermore, due process often requires *jura novit curia* to be modified. Justice needs to be seen to be done, and the losing party needs to feel that it has had a full opportunity to present its case, including presenting its legal case.

Therefore, in the author’s view, the following should be considered to be good practice:

- Sufficient notice of a party’s legal case should be given in advance of the main hearing, in order to give the other party a chance to comment on it;
- Each party should be invited to give authority for its propositions, again in order that the other side can have a chance to comment on that authority;
- If the arbitral tribunal intends to base its decision on a legal authority that has not been raised by either party, it must give each party a chance to comment on that legal authority; and
- Arbitral awards should include legal reasoning, with authority, as well as factual reasoning.

The importance of these matters should be quite obvious when considered from the losing party’s perspective. It is one thing to have given your arguments, for the arbitrators to consider those arguments and then, giving reasons, to reject them. It is quite another thing for the arbitrators to bring up arguments that have not been discussed during the case. The losing party might have wanted to advance further legal arguments had it known that the matters would arise.

22.1(c) of the LCIA Rules of Arbitration gives the arbitral tribunal power, unless otherwise agreed by the parties and only after giving the parties a reasonable opportunity to state their views, to “conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying the issues and ascertaining the relevant facts and the law(s) or rules of law applicable to the arbitration, the merits of the parties’ dispute and the Arbitration Agreement” (emphasis added).

It is relevant to note that the International Law Association (ILA) has recently considered such issues at its 73rd Conference in Rio de Janeiro in August 2008. The ILA also published recommendations following this conference which should be required reading for all international arbitration practitioners.62

Conclusion

Can international arbitration in Sweden be recommended as a means of settling disputes? After two years working in Sweden, the author’s view is that it can.

Tourists who have been to the magnificent golden hall on the first floor of Stockholm’s City Hall will remember the mosaic of the Queen of Lake Mälaren, a stern and wise figure who dispenses justice between the peoples of the east and the west.

This article began with the image of the battlefield from the point of view of the parties who want to win their cases. It is perhaps fitting to end with an image of justice from the point of view of the arbitrators who want to dispense justice.

In the end, once one party has won and the other party has lost, justice has to be seen to be done, and a perception of neutrality is essential for the perception of justice. Each party should feel that the proceedings have been fair, no matter what legal background and tradition they have come from.

This often requires the arbitrators to create a tailor-made procedure to suit the particular case. Parties from developed countries need to be happy that they are getting the standard of justice that they are used to. Parties from developing countries, perhaps with less of a legal budget at their disposal, need to feel that the procedure is fair and does not favour the stronger, ‘western’ party. International arbitration needs to be able to provide for the needs of the world’s business community, not just the privileged few who can afford it and who know the system well.

Stockholm has a long and fine tradition of neutrality and dispute resolution. The Queen of Lake Mälaren’s services in dispensing justice will no doubt continue to be required for many years to come.

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