SUMMARY

General principles

The Arbitration Act (1999:116) is now fifteen years old. As far as the Inquiry has been able to ascertain, the general perception is that it has, on the whole, been effective. Nonetheless, under the terms of reference the Inquiry is to undertake a closer review of certain issues. Under the terms of reference, the Inquiry is free to look at other issues as well.

When the Arbitration Act was established, the idea of having different laws for domestic and international disputes was rejected. Another question that was considered in some depth was the extent to which the legislation should build on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. These deliberations led to the conclusion that the Model Law should not form the direct basis of the new Swedish legislation in terms of either disposition or content. However, it was considered important to take account of the provisions in the Model Law in every aspect. With the limited review now called for, the Inquiry did not consider that these basic standpoints should be re-examined.

However, the Inquiry has attempted to pick up on a number of problems identified by the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) and active arbitrators, among others, and in the legal literature. The terms of reference may be interpreted as meaning that one of the primary interests is making Swedish arbitration even more attractive than at present, not just for Swedish actors but also for foreign parties and arbitrators. In line with this, the Inquiry has given particular weight to issues with that focus.

The report discusses a number of issues on which the Inquiry does not make any proposals. The proposals made by the Inquiry are outlined below.

Arbitral proceedings

The term 'place' to be replaced by 'seat'.

The term 'place of arbitration' is found in several provisions in the Arbitration Act. The term is not intended to limit arbitral proceedings geographically, but rather is of a legal-technical nature to do with whether Swedish law or foreign law is applicable to the proceedings. This term has caused misunderstandings in several cases, and the legislative history of the current regulations is not entirely illuminating. The Inquiry proposes that the Arbitration Act be aligned with the terminology that is most commonly used internationally, thus replacing the term 'place of arbitration' with 'seat of arbitration'. This will make the meaning clearer, not least for foreign arbitrators and parties. It is necessary, but also sufficient, that the link between the arbitral proceedings and Sweden consists in the seat of arbitration being a location in Sweden for the Arbitration Act to be applicable to the proceedings.

The arbitral tribunal is obliged to follow the parties' choice of applicable substantive law. In the absence of agreement between the parties, the arbitral tribunal decides the applicable substantive law, taking account of the legal rules to which the dispute is most closely connected. The arbitral tribunal may only decide *ex aequo et bono* if the parties have expressly authorised it to do so.

The Arbitration Act does not currently contain any provisions concerning how arbitrators are to establish which substantive law is to be applied to a dispute. This is undoubtedly something of a flaw. Following patterns in the regulations contained in other countries' arbitration legislation, the Inquiry proposes a provision to the effect that a dispute is to be resolved applying the law or legal rules

agreed on by the parties. If the parties have agreed that the law of a certain country is to be applied, under our proposal this should be interpreted as referring to the substantive law of that country, not to its conflict of laws rules, unless otherwise expressly agreed. If the parties have not agreed on the applicable law, under the Inquiry's proposal the arbitrators would decide which law or legal rules are to be applied, taking particular account of which legal rules the dispute is most closely connected to. Furthermore, we propose a regulation to the effect that the arbitral tribunal may only decide *ex aequo et bono* if the parties have expressly authorised it to do so. There is no such provision in the Arbitration Act at present, but a regulation to that effect is recommended in the Model Law, and is standard in other countries' arbitration legislation.

District courts appoint all arbitrators if the opposite parties to the claimant cannot agree on the arbitrator. Consolidation of several arbitral proceedings is to be possible in certain circumstances.

The Arbitration Act is based on the premise that there are two parties to arbitral proceedings; the Act essentially lacks provisions for multi-party proceedings. Problems can arise in cases involving several disputes, or when there are three or more parties all with conflicting interests. Issues in such cases may include how the arbitral tribunal is to be appointed, and the conditions for consolidating several proceedings into one. It is a basic principle of both Swedish and international arbitration law that the parties are to be treated equally (principle of equal treatment of parties). One way in which this principle is expressed is the fact that each party is considered entitled to appoint its own arbitrator, and that opposing parties or interests are to have the possibility to influence the composition of the arbitral tribunal. In the Inquiry's view, the current regulations in the Arbitration Act do not fulfil the principle of equal treatment of parties (as expressed internationally) in all multi-party proceedings. To remedy this, the Inquiry proposes that a provision be introduced that is applicable to arbitral proceedings in which the parties have not decided how the arbitrators are to be appointed and when the parties on either side of the

dispute cannot agree on an arbitrator. In such cases, the district court should, at the request of any of the parties, appoint all arbitrators to the arbitral tribunal, notwithstanding any prior selection of arbitrator by one of the parties. This kind of system guarantees that the principle of equal treatment of parties is observed, as all of the parties have the same possibility to influence the composition of the arbitral tribunal.

Consolidating several arbitral proceedings (consolidation or joinder) can have major benefits, in that evidence only needs to be presented once, and the evidence will be assessed uniformly. This often saves costs and simplifies proceedings for both the arbitral tribunal and the parties. The Arbitration Act currently contains no provisions on this matter. The Inquiry considers that there are clear advantages to non-mandatory regulation in the Arbitration Act making it possible to consolidate arbitral proceedings. To minimise potential complications, the conditions for consolidating proceedings should be that the same arbitrators are appointed in all of the arbitral proceedings to be consolidated, that all parties request that proceedings be consolidated, and that the arbitrators deem it advantageous for the arbitral proceedings in question that they be consolidated. The Inquiry does not, however, propose any regulations on the possibility for third parties to take part in arbitral proceedings.

The arbitral tribunal may order a security measure via a special award if the parties have agreed to this in the arbitration agreement.

Under the Arbitration Act, if the parties have not agreed otherwise the arbitrators may, at the request of one of the parties, decide that the opposite party must, during the proceedings, take a certain measure to secure the claim that is to be examined by the arbitrators. The arbitrators may require the party requesting the measure to provide reasonable security for the damage that may be incurred by the opposite party due to the measure. A decision on interim measures under this provision is not enforceable, and is, therefore, non-binding in legal terms. The Inquiry does not consider that this system should be changed. One particular reason for this is that Sweden–unlike most other European countries –

does not have a system in which courts order executive measures. The Inquiry proposes that an express rule be introduced whereby an arbitral tribunal may order a security measure via a special award, if this is allowed by the arbitration agreement. Such special awards would become enforceable, but also be subject to the regular rules on applications for setting aside and suspension.

If the parties agree, a dismissal may be designated an award.

Section 27 of the Arbitration Act establishes that issues that have been referred to the arbitrators are to be decided in an arbitral award. It states further that where the arbitrators terminate the arbitral proceedings without deciding such issues, this also takes place through an award. This means that such decisions to dismiss or reject a matter are to be designated awards. The fact that dismissals due to withdrawal are to be designated awards repeatedly causes problems with practical application. Sweden would appear to be the only country in the world that calls a dismissal an award. After careful consideration, however, the Inquiry has decided not to propose any change in this respect. According to the legislative history of the current regulations, it would however appear that it was intended that, if it follows from arbitration rules of procedure or other agreement that a dismissal is to be designated a decision, it is possible to do so, and the decision is then to be treated as an award when applying the legislation. The Inquiry considers that system thereby implied should be expressed in the Act.

Once arbitral proceedings have been convened, declaratory claims concerning the arbitral tribunal's jurisdiction may not be raised other than by a consumer. The arbitral tribunal's decisions concerning their jurisdiction taken during proceedings may be appealed to the Svea Court of Appeal.

At present, under Section 2 of the Arbitration Act the arbitrators may rule on their own jurisdiction to decide the dispute, but this does not prevent a court from examining the question at the request of a party. A party is considered eligible to bring a positive or negative declaratory claim before a district court concerning the

jurisdiction of the arbitrators at any time during proceedings. The arbitrators may continue the arbitral proceedings pending the court's decision. As such, even if the arbitrators have, in a decision during proceedings, found that they have jurisdiction to decide the dispute, their decision is not binding.

As far as we know, there does not appear to be any country other than Sweden–and possibly Finland and Austria–that applies a system involving a practically unlimited right for one party to bring a declaratory claim in court with respect to the validity of an arbitration agreement before an arbitration award has been issued.

The Inquiry considers it evident that a party must have the opportunity to bring a declaratory claim in court with respect to the validity or applicability of an arbitral agreement before arbitral proceedings have been convened. Once arbitral proceedings have commenced, however, there may be serious concerns about this kind of possibility. For example, if the district court proceedings are not completed when an award is issued and subsequently contested, there can be dual proceedings ongoing with respect to the same matter. Foreign arbitrators and representatives seem to consider this quite anomalous. In addition, such proceedings tend to be complicated and time-consuming.

To remedy these problems in circumstances not involving consumers, the Inquiry has decided to limit the possibility to bring declaratory claims by means of a solution whereby if the arbitrators have ruled during proceedings that they have jurisdiction to decide the dispute, any party that is dissatisfied with this ruling may request an examination by a court of appeal, specifically the Svea Court of Appeal. Such a request should, in accordance with the Model Law, be brought within thirty days of receiving notice of the ruling. The arbitrators may continue the arbitral proceedings and even issue an award pending a decision of the court of appeal. The same limitations should apply for the possibility to appeal the decision of the court of appeal to the Supreme Court as apply for applications for setting aside.

Setting aside etc.

The time limit for applications for setting aside remains three months, unless the parties have agreed on a shorter limit.

The Inquiry was tasked with considering whether the currently applicable time limit of three months for applications for setting aside should be shortened in the interests of, for example, ensuring a swift final decision. Having investigated time limits internationally and considered the arguments for and against a shorter time limit than that currently applicable for applications for setting aside, the Inquiry has decided not to propose any change in this respect. To allow for autonomy of the parties, however, it is proposed that the parties be allowed to agree on a shorter time limit for applications for setting aside, as is the case in the German system.

Svea Court of Appeal should always be the forum for applications for setting aside and amendment.

At present, applications for invalidity, setting aside or amendment of an arbitral award are to be considered by the court of appeal of the court district in which the arbitral proceedings took place. The terms of reference, which strongly emphasise the efficiency and effectiveness of setting aside proceedings, expressly state that it is not part of the Inquiry's remit to consider changes whereby a court other than a court of appeal would have jurisdiction to examine applications for setting aside in the first instance.

Under the Inquiry's proposals, written proceedings would become the general rule in setting aside cases, which would mean that the parties would not need to attend court to the same extent as if the case involved oral hearings. Furthermore, the Inquiry's statistical analysis has shown that the number of setting aside cases considered in the Svea Court of Appeal is bigger by far than those considered in the other courts of appeal put together. This means that the other courts of appeal do not have the opportunity to acquire the same experience as the Svea Court of Appeal of the often very intricate procedural law issues that arise in cases of this kind. Moreover, it seems disproportionate to apply the special

measures needed to enable cases to be processed in English (see below) to all of the courts of appeal, given the relatively modest number of applications for setting aside involving foreign parties that are considered by courts of appeal other than the Svea Court of Appeal. All of this strongly argues in favour of deviation from the main principle that all courts of appeal should process all types of case, and that applications for setting aside and amendment should be concentrated within the Svea Court of Appeal. The Inquiry advocates this solution.

The invalidity rules are to be repealed. The public policy rule is to become a new ground for setting aside. Actions may be brought before a district court with respect to whether a document has legal force as an arbitral award.

Under current regulations (Section 33, first paragraph of the Arbitration Act), an arbitral award is invalid if 1) it includes examination of an issue that under Swedish law may not be decided by arbitrators; 2) the award or the manner in which the award arose is clearly incompatible with the basic principles of the Swedish legal system; or 3) the award does not fulfil the requirement with regard to the written form and signature in accordance with Section 31, first paragraph. There is no time limit on when an application for invalidity of an award can be brought.

The distinction in the Arbitration Act between grounds for invalidity and grounds for setting aside has no support in the Model Law, and no such distinction would appear to be found in any foreign legal system other than the Finnish one. Moreover, in the Inquiry's experience the invalidity rule has been perceived as problematic by both Swedish and foreign actors.

If a document designated an award includes examination of an issue that under Swedish law may not be decided by arbitrators, the question also arises as to whether the document can be considered an award at all. The same applies with respect to awards that are not issued in written form or not duly signed. This is a matter of what can be designated nullity, and the fact that such documents or declarations lack legal force as awards should be clear without any special provision. In addition, the public policy rule can be cited without time limit, and no countries other than Sweden or Finland

have such a rule. In the Inquiry's view, the public policy provision should be moved to the section that deals with setting aside upon application of a party (Section 34), with the result that if it is to be used as the grounds for an application this must be done within the time period generally applicable to applications for setting aside. This would mean that the Arbitration Act is brought in line with what can be considered the international standard. On this basis, there is no longer a need for a section in the Act concerning invalidity of awards. The Inquiry proposes that Section 33 be repealed.

However, it is conceivable that one of the parties may want to bring a declaratory claim on whether a document designated an award or equivalent can be considered to have legal force as an award. The Arbitration Act does not currently contain any rules on this, and such rules would be needed given that many cases are not covered by the current invalidity provision, in that a document cannot reasonably be accorded legal force as an award even though it claims to be one. The Inquiry proposes that a rule on this be included in the Act. Such a rule should also be applicable in the more flagrant public policy cases, for example. In accordance with the main principle of the division of responsibilities among the courts, such claims should be brought before a district court.

Certain other changes to the grounds for setting aside are proposed.

The Inquiry has reviewed the current grounds for setting aside contained in Section 34 of the Arbitration Act and found that the majority should be retained, but we also propose some changes.

Under point 2 of Section 34, there are grounds for setting aside an award if the arbitrators made the award after the expiration of the period decided on by the parties, or where the arbitrators have otherwise exceeded their mandate. The Inquiry considers that under amended regulations, it should be possible to differentiate between cases in which arbitrators have made an award after the expiration of the period decided on by the parties, and those in which their mandate has been exceeded with respect to the substance of the award. In the first case, the award should, in principle, always be set aside upon application–unless, of course,

the applicant party can be considered to have consented by implication to an extension. Naturally, whether the delay affected the outcome is irrelevant in such cases. With respect to the arbitrators' mandate having been exceeded in other respects, in the Inquiry's view there should be a requirement in principle that the irregularity probably influenced the outcome in order for the application for setting aside to be approved.

If the arbitral tribunal's decision exceeds the underlying claim, it should normally be considered to have exceeded its mandate, thus providing grounds to approve an application for setting aside. However, if a claim not presented is dismissed on the merits, the irregularity cannot be considered to have influenced the outcome. The Inquiry considers that the Arbitration Act should state that an arbitral tribunal may only decide based on what has been claimed by a party, but that the application of this should be somewhat more liberal than in court proceedings under Swedish regulations, thus corresponding to the intended system for international disputes under the current arrangements. The decisive factor should be whether the circumstance in question was introduced to the proceedings in such a way that the opposite party must have understood that it could constitute grounds for the award.

Under point 6 there are currently grounds for setting aside an award if, without fault of the party, an irregularity occurred in the course of the proceedings that probably influenced the outcome of the case. The Inquiry proposes that this rule expressly state that for this point to be applicable, there must have been a serious irregularity in the proceedings.

Applications for setting aside should be handled according to the rules that apply to appeals for grave procedural error. Hearings should always be held if requested by any party.

At present, when applications for setting aside are handled in the court of appeal the rules on proceedings before district courts are applied. This means that the court of appeal must issue summons and hold a main hearing, with the basic premise that everything that is to be used as grounds for the decision must be cited at the main hearing. In principle, a preparatory hearing should also take place. This arrangement is not particularly appropriate. As the

Inquiry sees it, it would be most appropriate for proceedings to take place in accordance with the rules of procedure that apply when the court of appeal examines appeals for grave procedural error. Such cases are governed by certain basic provisions in Chapter 59 of the Swedish Code of Judicial Procedure, and otherwise by Chapter 52 of the Code (in reality Sections 3–12 of that chapter), and these provisions are complemented where necessary by other rules in the Code. The Inquiry proposes that applications for setting aside be brought by submission to the Svea Court of Appeal, and that proceedings follow the rules applicable in the handling of appeals for grave procedural error. It should also be stated that hearings must always be held if requested by any party, and that the court of appeal's ruling in such cases is issued in the form of a decision.

The get-out clause for appeals should remain in place, but a requirement of leave to appeal in the Supreme Court is to be introduced.

Under Section 43 of the Arbitration Act, the court of appeal's decision on matters of invalidity, setting aside and amendment of an award pursuant to Sections 33, 34 and 36 may not be appealed. However, there is a get-out clause: the court of appeal may permit an appeal where it is of importance as a matter of precedence that the appeal be considered by the Supreme Court. If the court of appeal grants such permission, leave to appeal to the Supreme Court is not required.

In applications for setting aside, it is often only a specific issue that is of interest in terms of precedence. However, it is not possible for the court of appeal to limit permission to appeal to only encompass that issue. To enable the Supreme Court to re-examine only a specific issue, the Inquiry proposes that a requirement of leave to appeal be introduced for appeals to the Supreme Court.

English can be used as the language of proceedings in applications for setting aside.

The Inquiry was tasked with considering what measures can be taken to make things easier for non-Swedish-speaking parties in setting aside proceedings, primarily including whether English could in certain cases be used as the language of proceedings. The Inquiry's report tackles this question in depth, including the issue of how such a solution would relate to the Language Act. The Inquiry also outlines the situation in a number of other countries.
It would of course make things easier for foreign parties who have taken part in arbitral proceedings in languages other than Swedish to be able to continue to use the same language in setting aside proceedings. In practice, this means English: the number of Swedish arbitral awards made in any other foreign language is negligible.

The most important points are that written evidence can be submitted in English and that witnesses can be examined in English.

The Inquiry considers that the court of appeal should be able to allow proceedings to be held in English to an appropriate extent, if this is requested by one of the parties and the opposite party agrees to it. The court of appeal should thereby regularly examine whether the documents can be exchanged in English, whether written evidence can be drafted in English and whether witnesses and/or parties can be examined in English.

In the Inquiry's view, in light of the principles in the protocol to the Language Act, any decisions taken during proceedings and final court decisions should always be drafted in Swedish. Nonetheless, it should be possible, as a service to any party that so requests, to have these documents available in English when they are drawn up and issued.

The Inquiry's report also considered how material in English that may be produced in accordance with the Inquiry's proposals could be made available for any interested parties without a sufficient command of English. A number of different measures are possible, depending on the circumstances in the particular case. A general rule should be introduced into the Arbitration Act to the effect that, in so far as proceedings are conducted in English, the

court of appeal should, as far as is reasonable, ensure that the public can obtain information about the proceedings in Swedish via translation or other appropriate means.

It should only be possible to challenge a rejection pursuant to Section 36 when the decision was taken on the grounds that the arbitral tribunal ruled that it lacked jurisdiction.

At present, actions against awards that were dismissed or rejected are to be brought under the special procedure outlined in Section 36. Under this provision, the court of appeal is to re-examine the matter decided via the award, i.e. the decision to dismiss or reject. The position of the court of appeal therefore does not have the same standing (as an extraordinary examination) as an examination of an application for setting aside.

However, the regulations in Section 36 cause problems in the not infrequent cases in which an arbitral tribunal finds that the claim should be rejected for reasons other than a lack of jurisdiction on the part of the arbitrators under the applicable arbitration agreement. The question then arises whether a procedural impediment attributable to the substance of the case, and its rejection, can be tantamount to a dismissal on the merits. The substance of a decision to reject is to be examined if an action is brought under Section 36, but a decision to dismiss on the merits can only be examined if there are grounds for setting aside. It is extremely difficult to explain these regulations to foreign arbitrators, particularly because the clear distinction in Swedish law between rejection (*avvisning*) and dismissal on the merits (*ogillande*) often has no equivalent in foreign legal systems. The Inquiry therefore proposes that it should be possible to challenge a decision to reject a case without application for setting aside when the decision was taken on the grounds that the arbitral tribunal ruled that it lacked jurisdiction. In cases of rejection, the current system should be maintained.

The prohibition on withholding an award pending payment of compensation is to be repealed. It should not be possible to bring action against a decision on compensation that was taken by an arbitration institute and has not been made enforceable.

The Inquiry recommends that the current Section 40 of the Arbitration Act, under which arbitrators may not withhold an award until they are compensated, be abolished. This provision no longer fulfils any function.

Section 41 of the Arbitration Act states that a party or arbitrator may bring an action in a district court against an award concerning the payment of compensation to the arbitrators, and that such action must be brought within three months from the date upon which the party was notified of the award. In its decision in case NJA 2008 p. 1 118, the Supreme Court found that Section 41 was also applicable to decisions on compensation that were taken by an arbitration institute but that have been in some way incorporated into the decision in an award.

In the Inquiry's view, there are strong arguments in favour of– and none against–introducing an exception to the right to bring an action against a decision on compensation in cases where the compensation was set by an arbitration institute and the award does not contain any enforceable obligation for the parties to pay compensation.

Consequential amendments, entry into force, etc.

Finally, the Inquiry proposes certain consequential amendments, primarily to the Debt Enforcement Code.

It is proposed that the new legislation should come into force on 1 July 2016. For cases concerning arbitration convened prior to the entry into force, it is proposed that the old regulations apply.