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Arbitration and Company Law in Sweden

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1. INTRODUCTION

Sweden has a long tradition of arbitration and is generally described as a pro-arbitration jurisdiction.[1] For a country the size of Sweden the number of disputes presently settled through arbitration is considerable, and arbitration clauses are standard in contracts between Swedish business entities and even more so, in international contracts. Stockholm is also a common seat for international arbitrations, whether or not Swedish parties are involved.[2]

Any issue which parties are free to settle by agreement may be referred to arbitration. Accordingly, the parties' freedom of contract defines the scope of arbitrability under Swedish law. This basic principle of arbitration law applies also to Swedish company law.[3] However, although commercial disputes are commonly settled through arbitration in Sweden, corporate disputes[4] are not so often seen in arbitration. The line between arbitrable and non-arbitrable corporate disputes, and the consequences of referring certain issues to arbitration, are in some respects unclear and have to a large extent not been discussed by legal scholars, nor does case law provide much guidance on the matter.

This article aims to provide an overview of the concept of arbitrability under Swedish law and to further highlight and elaborate issues of arbitrability that may arise in the intersection between arbitrable and non-arbitrable corporate claims. In order for the reader to fully grasp the issues discussed, the article also includes a short introduction to the Swedish legal system and an introduction to Swedish company law.

2. INTRODUCTION TO SWEDISH ARBITRATION ACT AND THE SWEDISH LEGAL SYSTEM

Arbitration in Sweden is regulated by the Swedish Arbitration Act of 1999 (Sw. *lag (1999:116) om skiljeförfarande*, the 'SAA').[5] The SAA applies to both domestic and international arbitrations.[6] Although Sweden is not a Model Law country, the SAA generally follows the UNCITRAL Model Law[7] and there are very few material differences. The SAA imposes very few mandatory rules, and parties are thus free to contract out of the majority of its provisions. The aim when drafting it was to keep it user-friendly by keeping it short, simple and flexible. The SAA is currently being reviewed by the legislator,[8] and there is an ongoing discussion by legal scholars how this should be done and what amendments are desirable.[9]

Before the question of arbitrability of corporate disputes is further looked into, something may be mentioned about the Swedish sources of law. The Swedish legal system has essentially a statutory approach. International law, e.g., conventions becomes only directly applicable after either transformation into a statute or by way of incorporation through a statute. The preparatory works of an act[10] are extensively referred to by courts when interpreting the statutes, in particular where the language of the statute is

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1 Reference to arbitration can be found in the first law-rolls of the Swedish Provinces from the fourteenth century. The first statutory provision on enforcement of arbitral awards was adopted in the seventeenth century. The first arbitration act was adopted in 1887. It was later replaced by the 1929 Arbitration Act, the same year the Act on Foreign Arbitration Agreements and Arbitral Awards entered into force. The two acts remained in force for seventy years until they both were replaced in 1999 by the present arbitration act. The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) has a long history compared to other international arbitral institutes. It was established in 1917 and is today one of the major international arbitral institutions.

2 For more information on the subject, see *International Arbitration in Sweden –A Practitioner's Guide* (Franke et al. eds,1st ed., 2013 and Andersson & Löf, *Stockholm*, in *Choice of venue in international arbitration* (Ostrove et al. eds, 1st ed., Oxford U. Press 2014.

3 *White paper (1995:44) on the Organisation of Limited Liability Companies*, p. 193.

4 The meaning of the term 'corporate disputes' will be further analysed below.

5 For an English translation, visit http://www.sccinstitute.com/the-swedish-arbitration-act-sfs-1999121.aspx.

6 See s. 46 of the SAA. The act applies where the seat of the arbitration is in Sweden, also in cases where the dispute has an international connection.

7 UNCITRAL Model Law on International Commercial Arbitration, first adopted 1985 amended in 2006.

8 On 6 Feb. 2014, the Swedish Ministry of Justice decided to appoint a one-man committee (former Supreme Court Justice Johan Munck) to review the current legislation in order to ensure that arbitration in Sweden can continue to be a modern, efficient and attractive dispute resolution form for Swedish and foreign partners. The report will be presented no later than 15 Aug. 2015.

9 See Heuman & Lars, *Översyn av lagen om skiljeförfarande*, Juridisk Tidskrift ('JT') 2014/15, pp. 439–466.

10 Primarily Government bills ('Govt. Bill') and/or the Swedish Government Official Reports ('White paper').

Löf, Kristoffer & Steen, Andreas. 'Arbitration and Company Law in Sweden'. *European Company Law* 12, no. 3 (2015): 166–172.

ambiguous or where facts and circumstances does not fit the contemplated situation in the statute. Judgments by the Supreme Court are another principal source of law and scholarly writings are often referred to and considered by the courts.

3. SCOPE OF ARBITRABILITY UNDER THE SWEDISH ARBITRATION ACT

3.1. General Concept

Unlike the UNCITRAL Model Law, the SAA expressly addresses the question of arbitrability. Section 1 of the SAA provides as follows:

> Disputes concerning matters in respect of which the parties may reach a settlement may, by agreement, be referred to one or several arbitrators for resolution. Such an agreement may relate to future disputes pertaining to a legal relationship specified in the agreement. The dispute may concern the existence of a particular fact.
>
> In addition to interpreting agreements, the filling of gaps in contracts can also be referred to arbitrators.
>
> Arbitrators may rule on the civil law effects of competition law as between the parties.

Thus, the main rule is that only disputes which may be settled through agreement between the parties may be referred to arbitration. The arbitration agreement may relate to a current or future dispute. There is no requirement that the dispute must relate to matters of law or the legal consequences of a fact. It is thus possible for arbitrators also to try whether a contested fact is at hand and to supplement an agreement (provided that the parties have granted such a right). The powers of the arbitrators are in this sense wider than the powers of the Swedish courts.[11] The dispute must refer to a particular specified legal relationship. It is thus not possible to refer all future disputes between two parties, without any detailed specifications, to arbitration.

As regards competition law matters, arbitrators may rule on the civil law effects of competition law as between the parties. In other words, whether a competition law provision should lead to damages or the invalidity of a contract can be determined by an arbitral tribunal. However, competition law provisions of a public law nature, such as fines and penalties, may not be applied by an arbitral tribunal.

Disputes concerning matters where the parties may reach a settlement are termed *arbitrable*, as opposed to *non-arbitrable* disputes, which relate to matters not amendable to out-of-court settlement.[12] The limits of arbitrability are derived from the fundamental party autonomy and freedom of contract. It follows that arbitrators may decide on contractual penalties but not on executive penalties, since they are not amendable to settlement.[13] However, there are also disputes amendable to settlement, which have been explicitly excluded from arbitrability, notably certain labour disputes.[14]

It is not always an easy task to determine whether a dispute is amenable to out-of-court proceedings. The fact that mandatory provisions in law may apply does not necessarily result in the dispute being non-arbitrable.[15] For instance, Chapter 3 of the Contracts Act governs invalidity of contracts and contains many rights that cannot be waived by either party. The same goes for mandatory legislation protecting, for example, shareholders, consumers and employees. However, after a dispute of this kind has arisen, the protected party is free to waive its rights and enter into a settlement on the terms it finds suitable. Most mandatory rights under Swedish substantive law may be waived in this manner. Consequently, disputes concerning mandatory provisions are in principle deemed arbitrable.[16] A dispute which is non-arbitrable, however, may never be submitted to arbitral proceedings (even not after the dispute has arisen).[17]

Like a court judgment, an arbitral award only has legal force between the parties. However, if the resolution of a dispute will affect a significant public or third party interest, it may be deemed non-arbitrable, unless the third-party interest can be safeguarded in a separate action or by a different procedure.[18]

It is not possible to present exhaustive lists of arbitrable and non-arbitrable disputes. In general, however, examples of disputes that are incapable of settlement and which hence are not arbitrable are:

(1) *proceedings concerning rights in rem*,[19] i.e., rights associated with a property, not based on any personal relationship;
(2) *disputes relating to activity where compulsory rules prevail*, such as taxation, currency regulations and customs control;

11 *Govt. Bill (1998/99:35) on the Arbitration Act*, p. 60. The powers of the court to try requests for declaratory judgment is limited according to Ch. 13, s. 2 of the Swedish Code of Judicial Procedure (Sw. *rättegångsbalk (1942:740)*).

12 Heuman & Lars, *Arbitration Law of Sweden: Practice and Procedure* 139 (1st ed., 2003).

13 Heuman & Lars, *Arbitration Law of Sweden: Practice and Procedure*, 1st ed., 2003, p. 147. See the Supreme Court Judgment *TV 3 Broadcasting Group Limited v. Kanal 5 AB (NJA 2000 s. 435)*.

14 See, for example, Ch. 1, s. 3 of the Labour Dispute Act (Sw. *lag (1974:371) om rättegången i arbetstvister*).

15 *Govt. Bill (1998/99:35) on the Arbitration Act*, p. 48.

16 *International Arbitration in Sweden – A Practitioner's Guide* 68–69 (Franke, Ulf, Magnusson, Anette, Ragnwaldh, Jakob & Wallin, Martin eds,1st ed., 2013). See, for example, *G. Wrande and I. Wrande v. S. Wrande (NJA 2005 s. 276)*.

17 *Govt. Bill (1998/99:35) on the Arbitration Act*, p. 49.

18 *White paper (1994:81) on the Arbitration Act*, p. 78.

19 See, for example, the Supreme Court Judgment *Five Seasons Fritidsaktiebolag (bankruptcy estate) v. Five Seasons Försäljningsaktiebolag (NJA 1993 s. 641)*.

(3) *disputes regarding family matters* such as paternity, adoption, custody and marriage;
(4) *proceedings regarding registration and validity of patents and trademarks*; and
(5) *certain disputes in connection with bankruptcy*.

Moreover, contractual disputes concerning agreements which are invalid because they are improper (*pactum turpe*) or involve criminal liability as well as agreements directly aimed at evading tax by supplying incorrect information to the tax authority, are deemed invalid in civil law and by virtue of general principles. To the extent an arbitration agreement covers this kind of controversy, it will be inoperative.

3.2. Certain International Issues

As regards international arbitration in Sweden to which foreign substantive law is to be applied, it is to be decided on a case-by-case basis whether mandatory foreign law should result in the dispute being non-arbitrable. According to the preparatory works to the SAA, mandatory provisions of foreign law relating to economic policy will not affect the possibility to settle the dispute by arbitration in Sweden.[20] This is consistent with the international trend of allowing international arbitration even if the dispute in question is non-arbitrable under applicable domestic law.

It is not entirely clear how the above-mentioned statements in the preparatory works are to be interpreted.[21] The question of whether a dispute is amendable to settlement may be complex, in particular when dealing with international commercial arbitrations. The main question is what law should determine whether the dispute is amendable to settlement and, hence, whether the dispute is arbitrable. There is no definitive answer on this issue, and legal scholars have expressed different opinions on how the assessment is to be done. Some argue that Swedish law is always applicable to the question of arbitrability, even if foreign law is applicable to the arbitration agreement.[22] Others argue that the law governing the arbitration agreement should be decisive, or that the substantive law applicable to the main agreement may also have impact on the arbitrability.[23]

3.3. Invalidity and Non-enforcement

An arbitral award rendered over a non-arbitrable matter is invalid and will be set aside by a court upon application by a party.[24]

Moreover, a foreign arbitral award rendered over a non-arbitrable matter is unenforceable in Sweden.[25] Enforcement of a foreign arbitral award has, to the authors' knowledge, only been denied in two cases since the SAA came into force.[26] In none of those cases was enforcement denied with reference to (lack of) arbitrability.

4. AN INTRODUCTION TO SWEDISH COMPANY LAW

Swedish limited liability companies are regulated by the Swedish Companies Act of 2005 (*Sw. aktiebolagslagen* (*2005:551*), the 'Companies Act'). A limited liability company is characterized by the shareholders not being personally responsible for the company's obligations. The Companies Act includes regulation on the governance structure of the companies and the division of responsibilities between the shareholders' meeting, the board of directors and the managing director. The company's supreme corporate body is the general meeting of shareholders. In principle, the general meeting of shareholders can decide on all matters concerning the company.

The overall strategic and operational responsibility of the company rests with the board of directors. The board has a wide reaching competence to manage and represent the company in all relevant matters within the frame set by the shareholders' meeting and as long as decisions are not reserved for the shareholders' meeting to decide upon. The managing director is responsible for the day-to-day management of the company. The members of the board of directors are appointed by the shareholders' meeting, and the managing director is appointed by the board of directors. Each individual board member as well as the managing director are liable towards the company for any negligent acts or omissions. They may also under certain circumstances be liable in relation to third parties, including individual shareholders.

5. CORPORATE CLAIMS

5.1. Introduction

A claim regarding a 'corporate dispute' can be defined as a claim based on a regulation in the Companies Act, or on a legal principle or right deriving from the Companies Act. Corporate disputes may involve shareholders against each other, and may also involve the

20 *Govt. Bill (1998/99:35) on the Arbitration Act*, p. 49.
21 See, for example, the Supreme Court Judgment *Moscow City Golf Club OOO v. Nordea Bank AB (NJA 2012 s. 790)* and analysis by Ulrichs, Lars, *Ny HD-dom om tillämpligheten av främmande rätt vid prövning av skiljedoms ogiltighet*, JT 2012/13, p. 945.
22 Hobér, Kaj, *International Commercial Arbitration in Sweden* 115, 125 (1st ed., 2011).
23 Madsen, Finn, *Commercial Arbitration in Sweden*, 71 (3d ed. 2007) and Lindskog, Stefan, *Skiljeförfarande – En kommentar* 232–233 (2d ed., 2012). See also Heuman, Lars, *Arbitration Law of Sweden: Practice and Procedure*, 694 (1st ed., 2003), who suggests that the arbitral tribunal should first decide the issue of arbitrability under Swedish law and then continue, upon request by the parties, to assess whether the arbitration agreement is invalid due to lack of arbitrability under the law governing the arbitration agreement.
24 Section 33(1) of the SAA.
25 Section 55(1) of the SAA.
26 The Supreme Court Judgments *Robert G. v. Johnny L. (NJA 2002 C 45)* and *Lenmorniiproekt OAO v. Arne Larsson & Partner AB (NJA 2010 s. 219)*.

company as such. The question of arbitrability may be differently assessed in these situations.

As mentioned initially, the line between arbitrable and non-arbitrable corporate disputes, and the consequences of referring certain issues to arbitration, are in some respects unclear. The uncertainty primarily relates to the extent to which shareholders may agree to arbitrate corporate issues, which correlates with the limited or non-existent possibilities to agree on deviations from legal rules carrying a 'company law effect'. This is developed in the following sections.

5.2. The Companies Act

The Companies Act governs the internal affairs and to a limited extent also the external relations of a company. The provisions of the Companies Act generally has one or a combination of the following purposes: (i) to set the frame for the corporate governance; (ii) to protect certain fundamental rights of the individual shareholders as well as to provide certain additional rights to a minority group of shareholders representing 10% or more of the shares in the company; or (iii) to protect the interests of third parties such as creditors by means of restrictions on value transfers and handling of equity.

The Companies Act does not regulate the company's contractual relations with third parties, nor does it include any rules governing the relations between shareholders. Such relations are thus not considered to be 'corporate disputes', but are viewed as ordinary contractual relations between contracting parties. In fact, in Swedish company law, there is a clear distinction between the company's relations to its shareholders and the shareholders' relations to one another under *the company law principle of separation*.[27] Being contractual relationships governed by and construed under legislation such as the Swedish Contracts Act[28] and the Swedish Sale of Goods Act,[29] relations between shareholders are typically amendable to settlement. Accordingly, as described in section 3 above, those disputes are arbitrable as a matter of Swedish arbitration law.

5.3. Company Law Effect

Shareholders may very well regulate such corporate matters as relate to governance, shareholders' rights and liability in a shareholders' agreement. However, this will only have effect between the contracting shareholders as contractual obligations. It will not have an impact on the possibilities to enforce statutory rights and obligations under company law, nor does it bind or otherwise affect the company, its corporate bodies or its legal representatives.[30] For example, the shareholders cannot, other than through the shareholders' meeting, bind the company or any corporate body to act in a certain manner.[31] This is described in legal literature as the shareholders' agreement not having a *company law effect*.[32] To illustrate with an example: Five shareholders, holding all shares in a company, have agreed in a shareholders' agreement that each shareholder has the right to appoint one board member. Shareholders representing a majority of the shares vote at a shareholders' meeting, in conflict with the shareholders' agreement, for a board composition that exclude the 'minority representatives'. That corporate resolution would nevertheless be valid under the principle of separation, as long as the resolution was taken in accordance with the formal requirements under the Companies Act. However, the minority shareholders will still have a contractual claim against the majority shareholders for breach of contract (i.e., not a corporate claim). Needless to say, such a contractual claim is arbitrable (see further section 6.1 below).

It is evident from the aforementioned example that governance matters in an agreement will not achieve a company law effect. A more complicated issue about the meaning of 'company law effect' was subjected to the Swedish Supreme Court some years ago, in case where shareholders had agreed in a shareholders' agreement on a deviation from the Companies Act with respect to a specific majority/minority right.[33] The Companies Act provides that a majority shareholder, under certain conditions, has a right to buy-out minority shares, and a minority shareholder has a corresponding right to have its shares bought out by the majority shareholder.[34] In the shareholders' agreement, the majority shareholder had renounced its buy-out rights but anyway claimed its legal right under the Companies Act.

The Supreme Court noted that the principle of separation within company law is frequently said to entail that shareholders' agreements cannot, without explicit legislation, have any company law effects. The Court then raised the question as to what the term *company law effects* meant in this context between shareholders. The Court declared that shareholders may deviate from those rules

27 For further reading on the topic see; Stattin, Daniel & Svernlöv, Carl, *Introduktion till aktieägaravtal,* 30 (2d ed., 2013), Arvidsson, Niklas, *Aktieägaravtal. Särskilt om besluts-och överlåtelsebindningar* 277 (1st ed., 2010) and the Supreme Court Judgment *Carmeuse S.A. v. SMA International B.V (NJA 2011 s. 429).*

28 The Contracts Act (Sw. *lag (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område*).

29 The Sale of Goods Act (Sw. *köplag (1990:931)*).

30 Such as the managing director.

31 Stattin, Daniel & Svernlöv, Carl, *Introduktion till aktieägaravtal*, 30 (2d ed., 2013) and the Supreme Court Judgment *Carmeuse S.A. v. SMA International B.V*, (NJA 2011 s. 429).

32 *Govt. Bill (1975:107) on proposal for a new Companies Act*, p. 314 and *Govt. Bill (2004/05:85) on a new Companies Act*, p. 251.

33 The Supreme Court Judgment *Carmeuse S.A. v. SMA International B.V (NJA 2011 s. 429).*

34 The Companies Act, Ch. 22.

whose only purpose is to protect shareholders' interest, either by anonymous decision amongst all shareholders or by shareholders being negatively affected by consenting to such deviation.[35] The purpose of each provision is thus determinant, and an assessment must be made on a case-by-case basis and on the bases of the purpose of each provision.

The Supreme Court further concluded that the majority/minority rights at hand were statutory rights which cannot be deviated from in the articles of association. The Supreme Court went on to establish that the purposes of the buy-out rights are to facilitate mergers between parent companies and its subsidiaries, to satisfy the public interest of logical structures of ownerships of companies and to provide an opportunity for minority shareholders to get out of an exposed position. Hence, since the purposes of the buy-out rights are not merely to protect the shareholders' interests, it is not possible for the shareholders to dispose of the rules by agreement. The Supreme Court then concluded that although the majority shareholder has renounced its right in this respect, the agreement does not prevent the majority shareholder from exercising its right under the Companies Act.

The prevalent thought before this Supreme Court case was that the *effect* that the shareholders' agreement had in relation to the company and its corporate bodies was decisive for the question of whether an issue could be effectively regulated by a shareholders' agreement or not.[36] The shareholders' agreement was thus limited in the sense that an agreement could not have any effects on the internal legal standings of the company (i.e., the relations between the corporate bodies or between the company on the one hand and its shareholders, board members or managing director on the other hand). In the case at hand, however, the issue concerned the ownership of shares in the company, which is a question that does not per se affect the legal standing of the company.[37] The Supreme Court's interpretation of the company law principle of separation in this case has therefore been held to widen the meaning of the principle of separation.[38]

The conclusion is that it is not entirely clear where to draw the line between what corporate issues can be effectively governed by shareholders' agreements, and what corporate issues cannot.

6. ARBITRABILITY OF CORPORATE CLAIMS

6.1. Corporate Claims and Claims Based on Contract

Issues arising out of shareholders' agreements serve as illustrative examples of how the distinction is made under Swedish law between corporate claims and contractual claims.

In a case brought to the Court of Appeal in 2003, the distinction between a contractual claim and a corporate claim was the central issue of the case.[39] The parties had entered into a shareholders' agreement which included an arbitration clause providing that all claims arising out of the shareholders' agreement were to be settled by arbitration. The defendants were not only shareholders but also board members of the company. The plaintiff claimed that the defendants in their capacity of board members of the company had acted in a way that made them liable in damages under a specific section of the Companies Act.[40] The Court of Appeal ruled that since the claim was directed at the defendants in their capacity of representatives of the company, founded on a provision in the Companies Act and thereby being a corporate dispute, the shareholders' agreement was not applicable. Accordingly, the arbitration clause in the shareholders' agreement did not prevent the case from being brought to court, being the default procedure for a liability claim under the Companies Act.

6.2. What Corporate Disputes May Be Arbitrable?

For some types of corporate disputes, the Companies Act stipulates mandatory dispute resolution procedures and for some types of corporate disputes the shareholders may, by amending the articles of association, decide whether disputes shall be referred to arbitration or public court.

An example of a mandatory provision governing dispute resolution, is the buy-out provisions. A dispute regarding the existence of any buy-out right or obligation, or the amount of the purchase price *shall* be determined by three arbitrators.[41] This provision is mandatory, which entails that it is not possible for the parties to agree for a dispute to be settled in another manner, for example, by one arbitrator or in court.[42]

There are two kinds of corporate disputes where the Companies Act leaves the shareholders the option of referring such

35 By, for example, amending the articles of association or by consent by all shareholders on a specific occasion.

36 Arvidsson, Niklas, *Högsta domstolen och den aktiebolagsrättsliga separationsprincipen,* JT 2011/12 p. 52.

37 Who owns the company of course effects the company in the long run, for example, by the shareholders' votes at the shareholders' meeting, but the mere fact that the shares are transferred to a new shareholder does not.

38 Arvidsson, Niklas, *Högsta domstolen och den aktiebolagsrättsliga separationsprincipen,* JT 2011/12 p. 52 and Danelius, Johan & Ericson, Johannes, *Tvångsinlösen av aktier och aktieägaravtal,* Svensk juristtidning ('SvJT') 2011 p. 857.

39 The Court of Appeal Judgement, *Folgerö v. Isaksson, Lummi and Strandbacke*, Case Ö 2116-03 in Svea Court of Appeal.

40 The Companies Act, Ch. 29, s. 1.

41 The Companies Act, Ch. 22, s. 5.

42 *Govt. Bill (2004/05:85) on a new Companies Act* p. 458.

disputes to arbitration. In both cases, this is done by amending the company's articles of association to this effect.[43]

The first kind of dispute where this is possible is when the company's articles of association provide for transfer restrictions regarding the company's shares (consent, right to first refusal or post transfer acquisition rights). The shareholders' meeting may include a wording in the articles of association to the effect that any disputes relating to the application of the relevant transfer restriction shall be referred to arbitration.

The second kind of corporate dispute where this is possible is an 'internal' dispute in the company. Chapter 7, section 54 in the Companies Act state that:

> A clause in the articles of association to the effect that a dispute between the company and the board of directors, a member of the board of directors, the managing director, a liquidator or a shareholder shall be determined by one or more arbitrators shall have the same effect as an arbitration agreement.

It may be noted that with regard to a publicly listed company, the Companies Act also stipulates that the company shall carry the costs for the arbitral tribunal in these cases,[44] and that, if the board would want to initiate a claim against the company, a shareholders' meeting must be convened for the election of representatives to act on behalf of the company in the proceedings.[45]

An example of a dispute that would be covered by such a clause in the articles of association is found in Chapter 7, section 50 of the Companies Act, which states as follows:

> In the event a resolution of a general meeting has not been adopted in due order or otherwise contravenes this Act, the applicable annual reports legislation or the articles of association, a shareholder, the board of directors, a member of the board of directors or the managing director may bring proceedings against the company before a public court in order to set aside or amend the resolution. Such proceedings may also be brought by a person whom the board of directors has unduly refused to enter as a shareholder in the share register.

One might assume that since the above provision stipulates that the setting aside or amendment of resolutions by the shareholders' meeting may be settled in court, disputes regarding such resolutions should fall outside the scope of an arbitration clause in the articles of association. However, it is apparent from the preparatory works that the legislator assumed that arbitrators in fact have competence to decide upon setting aside disputes.[46] This is also the general opinion among legal scholars.[47]

The Companies Act, Chapter 7, section 52 further states that:

> Where a resolution of the general meeting is set aside or amended through a judgment, the judgment shall also apply to the shareholders who did not join in the proceedings.
> The court may amend the general meeting's resolution only where it is possible to determine the content which the resolution should duly have had.

The Companies Act apply as *lex specialis* in relation to the Arbitration Act. Thus, the provision stating that the court's ruling in a setting aside or amendment proceeding will apply also to shareholders not taking part in the proceedings, can be seen as a deviation from the general rule regarding arbitrability; that only matters that the parties are able to settle upon may be subject to arbitration.

The full practical consequences of having arbitration instead of court proceedings in these cases will not be explored in this article. However, it may be noted that several procedural provisions in the Companies Act and in the Companies Act Regulation[48] are based on the assumption that disputes are handled by a public court. As further elaborated below it is unclear how and whether these rules would apply if a dispute was referred to an arbitral tribunal. For example, it is conceivable that several shareholders wish to challenge a decision by a general meeting. If litigated in public court, there is a possibility under the Swedish Code of Judicial Procedure to consolidate such proceedings. There are no equivalent rules to consolidate several arbitrations. There is a risk that conflicting awards be delivered.

Another practical problem with challenging a decision through arbitration involves the public courts communication with other authorities. For example, the courts are obliged to report to the Swedish Companies Registrations Office if a challenged resolution is of a nature that needs to be filed there.[49] However, to the authors' knowledge, there is no practical guidance on how this should be done if a resolution of this sort is being challenged before an arbitral tribunal. Another issue is the filing of a resolution on a shareholders' meeting to issue new shares. Such resolution must be filed with the Companies Registrations Office. What if such resolution is challenged by only one shareholder and the arbitral award rules the resolution invalid, will the Companies

43 The Companies Act, Ch. 7, s. 54.
44 There is however a possibility for the arbitral tribunal to rule otherwise in special cases.
45 The Companies act, Ch. 7, ss 53 and 60.
46 *White paper (1995:44) on the Organisation of Companies p. 191, Govt. Bill (1997/98:99) on the Organisation of Companies*, p. 129.
47 Andersson, Sten, Johansson, Svante and Skoog, Rolf, *Aktiebolagslagen – En kommentar*, comment on Ch. 7, s. 54 of the Companies Act, and Sandström, Torsten, *Svensk aktiebolagsrätt* 194 (3d ed., 2010).
48 The Companies Act Regulation (Sw. *aktiebolagsförordning (2005:559)*).
49 The Companies Act Regulation, Ch. 1, s. 8.

Registrations Office then accept the award and reverse the registered share issued?[50]

There is no guidance in the Companies Act nor in the SAA how the above issues should to be handled if the dispute is not settled in public court but by an arbitral tribunal. The uncertainty in this respect points out how uncommon it is today to arbitrate such matters. In the authors' view, the most efficient way of handling some of these issues, would be that the parties on request of the tribunal handled such practicalities. However, although the practical aspects are somewhat unclear, it cannot affect the arbitrability as such. Moreover, as mentioned above, it is clear that these matters are arbitrable according to the preparatory works and the legal doctrine.

6.3. The Scope of an Arbitration Clause in the Articles of Association

The scope of an arbitration clause incorporated in a company's articles of association is limited to *company law aspects*.[51] This means that a civil law dispute between the company and a third party is not covered by an arbitration clause in the articles of association.[52] This applies also in a dispute, for example, between the company and its managing director if it concerns the managing director's position as employed in the company, and not his or her position as a corporate representative of the company. The former form of dispute would fall outside the scope of the arbitration clause in the articles of association.[53] However, arbitration clauses are quite common in employment contracts of managing directors. Thus, in practice, such a case may anyway be settled by arbitration based on the employment agreement.[54]

The Companies Act does not provide any possibilities to challenge decisions taken by the board of directors.[55] Since resolutions by the board cannot be set aside or amended by a court, the Companies Act does not provide for provisions on whether a ruling would apply to the board members or not. Accordingly, neither can arbitrators determine the validity of a resolution by the board. If a third party considers that it has suffered loss due to an invalid resolution by the board, the party has to contest the legal act taken by the company based on the invalid resolution by the board of directors. The question whether arbitrators can determine the legal acts taken by the company will have to be decided based on the principles for dispute resolution governing those legal acts.

6.4. The Proceedings

Unless otherwise provided for in the Companies Act, the provisions of the SAA shall, where relevant, apply to the arbitral tribunal and the arbitral proceedings in cases of mandatory arbitration under the Companies Act.

Under the Companies Act, an appeal against an arbitral award[56] shall be addressed to the District Court of Stockholm.[57] As the issue of appeal is specifically regulated in the Companies Act, the general restrictions in the Arbitration Act regarding the right of appeal do not apply, which entails that the court may review the award from a formal as well as from a substantive point of view.

7. CONCLUSIONS

Corporate disputes are to a large extent formally arbitrable in Sweden, either by the Companies Act referring to arbitration as the mandatory dispute resolution option, or by the shareholders' agreement amending the articles of association to include a clause referring certain disputes to arbitration. Clauses in the articles of association referring disputes regarding transfer restrictions of shares to arbitration are far more commonly occurring than clauses referring disputes between the company on the one hand and the board of directors, a member of the board of directors, the managing director, a liquidator or a shareholder, to arbitration. Dispute resolution clauses in shareholders' agreement referring disputes to arbitration are on the other hand widely used, which may lead to complicated legal assessments, the outcome of which in a potential dispute in public courts are hard to predict. The uncertainties are not limited to whether a provision in the shareholders' agreement will have any company law effects or not, but also if the agreement will be held valid and enforceable on a contractual basis between the shareholders.

50 The Companies Act, Ch. 13, s. 27.

51 Lindskog, Stefan, *Skiljeförfarande – En kommentar* 197 (2d ed., 2012). See, for example, the Supreme Court Judgment *Såg-och kvarnaktiebolaget, Lindblad et al. v. Holmkvist (NJA 1929 p 631)*.

52 Heuman, Lars, *Arbitration Law of Sweden: Practice and Procedure* 157 (1st ed., 2003) and Lindskog, Stefan, *Skiljeförfarande – En kommentar* 197 (2d ed., 2012).

53 Lindskog, Stefan *Skiljeförfarande – En kommentar* 197 (2d ed., 2012), n. 476.

54 As opposed to disputes involving enterprises and consumers, there are no certain limitations in the SAA regarding arbitration clauses in employment contracts. However, an arbitration clause may still be considered unfair under s. 36 of the Contracts Act.

55 But merely the general restrictions on the authority of the representatives of the company and the sanction where such representatives are in violation of the authority provisions, see Ch. 8, s. 41–42 in the Companies Act.

56 Also separate awards.

57 The Companies Act, Ch. 22, s. 24.

Author Guide

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