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Chapter 9: The Proceedings

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I. INTRODUCTION (1)

1. This chapter will deal with the conduct of an arbitration seated in Sweden, from its commencement to its termination. In principle, two sets of rules apply to the conduct of arbitral proceedings in Sweden.

2. First are the rules of the Swedish Arbitration Act (*Sw: Lag (1999:116) om skiljeförfarande*) (the Act), some of which are mandatory. Second, where no such mandatory rules are applicable to the situation at hand, resort should be had to the parties' agreement as to the conduct of the arbitration. Such agreement is most commonly found in the arbitration agreement, including any institutional rules specified therein.

3. Beyond this, the arbitral tribunal is free to decide on the most appropriate way of conducting the arbitration, within the limitations that follow from the overriding procedural principles of party autonomy and due process.

4. Generally speaking, the principle of party autonomy entails that it is for the parties to decide on the appropriate procedure and the arbitral tribunal must, as a general rule, abide by the parties' joint instructions. (2) In cases where the parties fail to agree, it is for the arbitral tribunal to determine the proper conduct of the proceedings, within the
P 218 confines of the requirement of due process. Due process, in turn, is manifested in ● requirements of equal treatment of the parties and that each party should be afforded a reasonable opportunity to present its case.

5. This chapter will address the mandatory rules with which the arbitral tribunal must comply in order not to make the award susceptible to successful challenges for excess of mandate or failure to observe due process. As for institutional rules, this chapter will address the solutions provided for by the 2017 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the SCC Rules) with respect to the issues discussed herein. (3) Although many international arbitrations seated in Sweden are conducted under the ICC and the UNCITRAL Rules (and indeed under other rules) those rules will not, with a few exceptions, be discussed here. However, irrespective of which set of rules applies, the interrelationship between the Act and institutional rules is generally the same. Most of what is said here will therefore also have a bearing on arbitrations conducted under rules other than the SCC Rules.

6. Furthermore, this chapter makes an attempt to describe a 'typical' international arbitration in Sweden, from the viewpoint of what can be conceived of as 'best practice'. Taking a bird's eye perspective, a typical international arbitration in Sweden may include the following general steps, all of which will be discussed in further detail below:

(1) The arbitration is commenced by filing a request for arbitration, including the claimant's appointment of an arbitrator. The respondent submits its answer to the request for arbitration, in which the respondent appoints an arbitrator. Although the parties may agree on the appointment of a third arbitrator to serve as the chair of the tribunal, the fallback options are normally resorted to. Thus, in ad hoc arbitrations, the two party-appointed arbitrators will normally appoint the chair, whereas in SCC arbitration, the SCC will appoint the chair (following which the file is transferred to the arbitral tribunal).

(2) When the arbitral tribunal has been constituted and is in receipt of the file, the parties and the arbitral tribunal fix a timetable and set basic rules for the arbitration.

(3) The written phase of the arbitration then commences. The claimant submits a statement of claim, specifying its case. This is followed by the respondent's statement of defence, as well as any counterclaim. (4) These two submissions are then followed by one or several additional submissions by each party. Written witness statements and expert reports are also submitted in this phase.

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(4) During the written phase of the proceedings, the arbitral tribunal may also have to decide on procedural issues, such as its jurisdiction, amended claims, production of documents, and applicable law. Separate hearings can be organized in order to hear the parties' arguments in respect of parts of the case determined in separate awards, or on various procedural matters determined in procedural orders.

(5) Following a possible pre-hearing conference, a hearing is held where witnesses and experts are heard and the parties' respective cases are orally presented.

(6) In some arbitrations, post-hearing briefs are submitted by the parties.

(7) Submissions are made on costs.

(8) The award is rendered.

7. The steps set out above are more or less closely followed in most international arbitrations in Sweden. However, as will be seen in this chapter, the parties and the arbitral tribunal enjoy great flexibility in organizing an arbitration in Sweden in the manner that best fits the efficient resolution of the case.

II. COMMENCEMENT OF ARBITRATION

A. Request for Arbitration

1. Introduction

8. Arbitral proceedings are formally commenced when the claimant requests initiation of arbitration. (5) This is made by filing a 'request for arbitration'. A request for arbitration must fulfil the formal requirements of the Act, unless the parties have agreed that other requirements are to apply. Such other requirements, which deviate from or supplement the rules of the Act, are often found in institutional rules. Institutional rules are binding on the parties if they have referred to them in the arbitration agreement or otherwise agreed to adopt the rules.

2. Requirements under the Act

9. A request for arbitration becomes effective – and the arbitration thus commences –
P 220 when one party receives from the other party a written communication that meets the ●
requirements of constituting a request for arbitration. (6) This rule is non-mandatory and the parties may agree that arbitration is to be initiated in other ways. (7)

10. Under the Act, the request for arbitration must contain the following:

(1) An express and unconditional request for arbitration.

(2) A statement of the issue covered by the arbitration agreement and to be resolved by the arbitral tribunal.

(3) A statement of the party's choice of arbitrator, where the party is required to appoint one. If the dispute under the parties' arbitration agreement is to be resolved by a sole arbitrator, the claimant need not make a statement of its choice of arbitrator in the request for arbitration.

11. A request for arbitration that does not fulfil these requirements is of no effect and will not constitute a valid request for arbitration under the Act. (8) The consequence is that no arbitration will be considered to have commenced until the respondent receives supplementary information that completes the request for arbitration.

12. However, if the other party accepts a defective request by appointing an arbitrator, or by otherwise responding to the request for arbitration in a manner that implies acceptance of commencement of the arbitration, the arbitration will be considered to have commenced despite the defects of the request. (9)

13. As mentioned above, a request for arbitration must be in writing. (10) There is no requirement that it be signed. Electronic submission is sufficient, (11) provided that the sender can prove that the respondent actually received it (*see* further in section 4 below, regarding evidentiary issues with respect to service of the request for arbitration). An excerpt from the claimant's e-mail 'sent box' is not sufficient to prove that the respondent received the request. (12)

14. Two exceptions exist to the requirement that a request for arbitration must be in writing. If a written arbitration agreement has been entered into concerning an existing
P 221 dispute and the agreement includes a clear statement of the issue in dispute, no need ●
arises to notify the opposing party in writing of the issue in dispute in a separate request for arbitration. (13) Similarly, no separate written notification is required when the parties in the presence of the arbitral tribunal enter into a new or expanded arbitration agreement on issues they wish the arbitral tribunal to determine. (14)

15. The requirements of a request for arbitration will be addressed further in the following.

a. Requirement of an Express and Unconditional Request for Arbitration

16. The first requirement for a valid request for arbitration is that it contains an express and unconditional request for arbitration. (15) This requirement is based on the notion that, in view of the important legal consequences of filing a request for arbitration, it must be clear to the respondent whether and when a request has been made.

17. Neither a proposal to arbitrate nor an expression of intent to initiate arbitration constitutes an express and unconditional request for arbitration. (16) Nor does a notification stating that a party will request arbitration if payment is not received by a certain date, or if the dispute is not resolved before a specified date, qualify as a request for arbitration. (17)

b. Requirement of a Statement of the Disputed Issue

18. The second requirement for a valid request for arbitration is that it must include a statement of the issue covered by the arbitration agreement that is to be resolved by the arbitral tribunal. (18) The purpose of this rule is to set a preliminary framework for the proceedings and to enable the respondent to appoint an arbitrator based on the information provided.

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19. Requests for relief do not have to be included in the request for arbitration. (19) Nor does the matter in dispute have to be described exhaustively or in detail in the request for arbitration, and the claimant is not required to state legal grounds for its claims. (20) In practice, however, the request for arbitration usually includes a preliminary statement of the relief sought and a brief account of the issues in dispute.

20. It has been debated whether it is sufficient to indicate the abstract nature of the issue to be determined by the arbitral tribunal, or whether a party should describe the issue in concrete terms. (21) In practice, however, the question whether the disputed matter has been described in sufficient detail is seldom an issue, because parties tend to describe the actual dispute in the request for arbitration rather than referring to abstract concepts. It seems clear, however, that a request for arbitration regarding 'this dispute' or 'with reference to the arbitration clause' in a particular contract cannot be accepted as a request for arbitration because, in such a case, the matter in dispute is not indicated at all. The same applies if a request for arbitration merely refers to a question regarding 'compensation' or 'damages'. Such a request needs to be supplemented so as to provide the opposing party with a basis for its choice of arbitrator as well as an approximate idea of the matter to be decided by the arbitral tribunal. (22) The opposing party must also be able to ascertain whether the dispute is covered by a valid and applicable arbitration agreement and whether it is arbitrable. Furthermore, it has been suggested that the contents of the request for arbitration should be such that the respondent be put in a position to ascertain whether statutes of limitation or contractual time bars apply to the claim. (23)

21. Facts, legal grounds and arguments presented in the request for arbitration may be substantially developed in the course of the proceedings before the arbitral tribunal. Moreover, the Act enables the claimant subsequently to introduce new claims, as well as for the respondent to present counterclaims. (24) Accordingly, the description of the dispute contained in the request for arbitration is preliminary and thus provides the framework for the arbitration only to a limited extent.

c. Requirement of a Statement on Choice of Arbitrator

22. The third requirement for a valid request for arbitration is that it includes a
P 223 statement of the requesting party's choice of arbitrator. Needless to say, this requirement applies only in cases where the requesting party is required under the arbitration agreement to appoint an arbitrator. (25) Failure to appoint an arbitrator where required means that the claimant has not made a request for arbitration within the meaning of the Act. (26)

23. The purpose of this requirement is to expedite the proceedings. Since the claimant – at this early stage – will normally have a better understanding of the dispute than the opposing party, it is logical that the claimant is to appoint an arbitrator before the respondent. (27)

24. If the arbitration agreement provides that the parties are jointly to appoint the arbitrator(s), it is not necessary for the claimant to suggest an arbitrator in the request for arbitration. (28)

25. If the arbitration agreement provides that the dispute is to be decided by three arbitrators, but the claimant nevertheless prefers a less expensive route with a sole arbitrator, the claimant should still appoint an arbitrator and seek the opposing party's consent to having the dispute decided by a sole arbitrator. (29)

26. The appointed arbitrator is presumed to have accepted the mandate. (30) However, this has not been understood to mean that a request for arbitration becomes inoperative if the arbitrator does not accept the mandate. (31) The Act requires the request for arbitration to be unconditional, but is silent as to whether the choice of arbitrator must be made without conditions. In our view, this means that the request for arbitration as such must not be conditional upon the appointed arbitrator accepting the nomination. However, the choice of arbitrator may be conditional upon the appointed arbitrator's acceptance of the nomination, with the request for arbitration still being valid. (32)

d. Withdrawal of Request for Arbitration

27. There is no provision under the Act addressing the situation where a request for arbitration is withdrawn. However, it has been suggested that withdrawal should be possible in accordance with general legal principles, provided that a notification of withdrawal is communicated to the party prior to, or simultaneously with, receipt by that party of the request. (33)

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28. It is unclear what the legal effect would be if a request for arbitration is withdrawn before the arbitral tribunal is constituted, but after receipt by the opposing party of the request. According to one commentator, there is probably no right to withdraw the request in this situation. (34) An arbitral tribunal should thus be constituted if the opposing party nominates its arbitrator. (35) This would also be in line with the provision in section 28 of the Act, under which the arbitral tribunal is to dismiss a claim that is withdrawn unless the opposing party requests a ruling on the issue. A respondent thus has a right to require final adjudication of a claim that the claimant has referred to arbitration, even if the claimant withdraws the claim.

3. Requirements of a Request for Arbitration under the SCC Rules

29. As mentioned in the preceding section, the rules set forth in the Act with respect to commencement of arbitration are non-mandatory. The parties are thus free to agree on how arbitration is to be commenced. Accordingly, if the parties' arbitration agreement refers to institutional arbitration under the SCC Rules, the requirements laid down by those rules take precedence over the fallback rules of the Act.

30. Under Article 8 of the SCC Rules, the arbitration will be deemed to commence on the date the SCC receives the request for arbitration. Accordingly, as opposed to what is the case under the Act, the date when the *respondent* receives the request for arbitration is of no relevance in this context under the SCC Rules.

31. Article 6 of the SCC Rules sets out the requirements for a request for arbitration to be valid. The request must include:

(1) the names, addresses, telephone numbers and e-mail addresses of the parties and their counsel;

(2) a summary of the dispute;

(3) a preliminary statement of the relief sought by the claimant, including an estimate of the monetary value of the claims;

(4) a copy or description of the arbitration agreement or clause under which the dispute is to be settled;

(5) where claims are made under more than one arbitration agreement, an indication of the arbitration agreement under which each claim is made;

(6) comments on the number of arbitrators and the seat of arbitration; and

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(7) if applicable, the name, address, telephone number and e-mail address of the arbitrator appointed by the claimant. (36)

32. Upon filing the request for arbitration, the claimant has to pay the registration fee in accordance with Article 7 and Appendix IV of the SCC Rules. If the claimant fails to pay the registration fee after having received a reminder from the SCC, the request for arbitration will be dismissed. (37) Evidence of payment should preferably be enclosed with the request, thereby expediting the proceedings. (38)

33. Similar to the Act, the SCC Rules allow the respondent to accept a defective request for arbitration. Consequently, Article 36 states that a party that has failed to object without delay to a defective request will be considered to have waived the right to object to such failure. However, if the deficiency is substantial, the SCC will ask the claimant to supplement its request.

34. In the same manner as the Act, the SCC Rules do not require the claimant to set out in detail the issues to which the dispute relates. The claimant will have the opportunity fully to develop its case before the arbitral tribunal at a later stage. (39) A short summary of the background to the dispute is therefore sufficient.

35. The nature and complexity of the dispute is of relevance for the number of arbitrators to be appointed (if not agreed on in the arbitration agreement) as well as the qualifications such arbitrators should possess. The complexity of the dispute may also have an impact on the amount of the advance on costs to be deposited. (40)

36. In contrast to the Act, the SCC Rules require a preliminary statement of the relief sought, including an estimate of the monetary value of the claims, to be indicated in the request for arbitration. (41) However, the statement of relief is only preliminary until a statement of claim is submitted to the arbitral tribunal. (42) Preliminary details of relief are necessary in order for the SCC to determine the amount of the advance on costs to be paid. (43)

37. Absent an agreement between the parties, the SCC will decide on the number of
P 226 arbitrators in accordance with Article 16 of the SCC Rules. The SCC decides on either ● a sole arbitrator or three arbitrators, having regard to the complexity of the case, the amount in dispute and any other relevant circumstances.

38. The parties are free to comment on the appropriate procedure, including on the nomination and qualifications of the arbitrator(s) to be appointed by the SCC. (44)

39. A request for arbitration is normally accompanied by a power of attorney for counsel for the claimant. If a power of attorney is not submitted, that failure is not considered a

bar to continuation of the proceedings at the SCC. It is the duty of the arbitral tribunal to make sure that necessary authorization is in place. (45)

4. *Service of Request for Arbitration*

40. A party is considered to have received the request for arbitration when that party is notified of the request and has been given the opportunity to read it. It is therefore of great importance that the claimant obtains some reliable form of written evidence showing that the respondent (through an authorized person) has actually received the request for arbitration. The importance of securing evidence of service should be stressed, since the sender bears the burden of proof in this respect. (46)

41. The Act does not set out formal requirements with respect to service of a request for arbitration. However, the Supreme Court has clarified that the Swedish Service of Documents Act is not applicable to arbitral proceedings, but that service of the request for arbitration must be effected personally. (47) It is therefore of great importance for the
P 227 ● claimant to make sure that the opposing party actually receives the request for arbitration and to secure proof thereof.

42. If the request for arbitration is transmitted by fax, the sender's activity report has been found to be insufficient evidence as to whether the fax transmission has resulted in a corresponding printout from the addressee's fax transceiver. (48) Therefore, the general view is that the sender should always request confirmation by an authorized representative that the recipient has received the message. (49)

43. Although uncertainties exist, the same is likely to apply when a request for arbitration is sent by e-mail. In the authors' view, proof of service should be deemed sufficient in cases where the request for arbitration has been sent to an e-mail address known to be used by an authorized representative of the respondent and where receipt can be confirmed, for example in the form of an automatic e-mail delivery receipt or an acknowledgement that the recipient has read the e-mail (both of which can be requested by the sender). (50)

44. It is common that commercial agreements include 'notices provisions'. (51) Case law suggests that it is not sufficient to comply with such a notice provision in order to have achieved proper service of a request for arbitration if there is no evidence that the request has actually been received by an authorized representative of the ● opposing
P 228 party. (52) One view is that, even if complying with the notice provision, the claimant must at least check public records in order to verify the accuracy of the address stated in the provision. (53)

45. Applying the SCC Rules avoids the uncertainty of establishing the exact time of the respondent's receipt of the request. Once the request for arbitration has been received and accepted by the SCC, the arbitration is considered to have commenced and the SCC assumes responsibility for serving the request for arbitration on the respondent. However, pursuant to Article 6(i) of the SCC Rules, the claimant is responsible for providing the SCC with the respondent's address. (54)

46. The requirements of the SCC Rules for proper service of documents are relatively low. In principle, it is sufficient to send a request for arbitration by any means that records the sending of the communication, for example by e-mail provided by the claimant. However, in practice, the SCC makes great efforts in order to ensure that the respondent actually receives the request for arbitration. Service is considered to have been achieved when reasonable efforts have been made to reach the respondent. (55)

47. Article 5 of the SCC Rules provides that any notice or communication from the SCC is to be sent to the last known address of the addressee. Delivery can be by either courier or registered mail, e-mail or any other means that records the sending of the communication. Further, a notice will be considered to have been received by the addressee on the date it would normally have been received given the means of communication used. The same rules apply to the arbitral tribunal's communications to the parties. Since September 2019, the SCC uses an electronic platform for communication between the SCC, the parties and the arbitrators. Even though it is not a firm requirement, all submissions, including the request for arbitration, should preferably be uploaded to the SCC Platform. (56) The request for arbitration will be notified to the respondent in electronic form, by sending a link to the SCC Platform. (57)

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B. Answer to Request for Arbitration and Constitution of the Arbitral Tribunal

48. The Act provides that, if the claimant has appointed an arbitrator in the request for arbitration, the respondent must notify the claimant in writing of its choice of arbitrator within thirty days as from the date of service of the request for arbitration. (58) Absent an agreement to the contrary, the two arbitrators thus appointed then appoint the chair of the arbitral tribunal, (59) at which point the arbitral tribunal is constituted.

49. Apart from the requirement for the respondent to notify the claimant in writing of its choice of arbitrator, the Act is silent as to what is to be included in the answer to the request for arbitration. In practice, however, the answer may set out a brief response to

the request for arbitration, including the respondent's position with respect to the claim, and other information, such as contact details of counsel. Thus, although not provided for in the Act, the answer to the request for arbitration in ad hoc proceedings is often similar to an answer submitted in accordance with the more detailed requirements of the SCC Rules, which will be discussed in the following.

50. Under Article 9 of the SCC Rules, the Secretariat of the SCC sends to the respondent a copy of the request for arbitration (and documents attached thereto). The Secretariat also sets a time limit within which the respondent must submit an answer to the SCC. Usually the respondent is given fifteen days to submit an answer. (60) The respondent's answer must include:

(1) objections concerning the existence, validity or applicability of the arbitration agreement (however, failure to object does not preclude the respondent from raising such objections at any time up to and including submission of the statement of defence);

(2) an admission or denial of the relief sought in the request for arbitration;

(3) a preliminary statement of any counterclaims or set-offs, including an estimate of the monetary value thereof;

(4) where counterclaims or set-offs are made under more than one arbitration agreement, an indication of the arbitration agreement under which each counterclaim or set-off is made;

(5) comments on the number of arbitrators and the seat of arbitration; and

(6) where applicable, the name, address, telephone number and e-mail address of the arbitrator appointed by the respondent.

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51. The Secretariat sends the respondent's answer to the claimant and the claimant is given the opportunity to comment on the answer. Under Article 9(3) of the SCC Rules, failure by a respondent to submit an answer will not prevent the arbitration from proceeding. The Board of the SCC appoints the chair unless the parties have agreed otherwise (Article 17 of the SCC Rules). The case will be referred to the arbitral tribunal once the tribunal has been appointed and the advance on costs has been paid.

III. ISSUES RELATING TO MULTIPARTY AND MULTI-CONTRACT ARBITRATIONS

A. Introductory Remarks

52. Arbitrations that involve more than two parties are referred to as 'multiparty arbitrations'. (61) Arbitrations that concern claims arising out of more than one contract are referred to as 'multi-contract arbitrations'. A multiparty arbitration can also be a multi-contract arbitration, and vice versa.

53. This section examines a selection of issues relating to multiparty and multi-contract arbitrations, including multi-contract arbitration under the 2017 SCC Rules, joinder and intervention. The section also deals with consolidation, although it does not necessarily involve multiparty or multi-contract situations (two arbitrations between the same two parties and under the same contract may be subject to consolidation). Another important issue is the question of how to appoint arbitrators in multiparty situations. This latter issue will not be discussed here.

54. The concepts of consolidation, joinder and intervention are connected and the terms are sometimes used interchangeably. In this contribution, the term 'consolidation' is used as it is most commonly used, that is, to describe when two arbitral proceedings are merged into one proceeding. The term 'joinder' is often used to reflect a situation where a party to an ongoing arbitration requests that a third party be joined to the arbitration. The term 'intervention' is typically used for situations where a third contracting party wishes to join a pending arbitration. This is also how the terms 'joinder' and 'intervention' will be used here, although, admittedly, 'joinder' is regularly used to describe both those concepts.

B. Multi-contract Arbitration

55. Through the 2017 SCC Rules, a provision explicitly addressing multi-contract arbitration was introduced. However, the new Article 14 essentially codifies an already
P 231 existing SCC practice in how to treat claims under several contracts in the same arbitration. (62) As mentioned in section III.A above, such an arbitration may in turn involve two or more parties. Regarding the latter, *see* section III.C below.

56. Under Article 14, the parties to an SCC arbitration 'may make claims arising out of or in connection with more than one contract in a single arbitration'. There is a presumption in favour of handling such claims in a single arbitration. Consequently, the SCC will only decide on the matter if any party objects. (63) If the parties cannot agree on this issue, the SCC will decide after having consulted the parties and having regard to:

(1) whether the arbitration agreements under which the claims are made are compatible; (64)

(2) whether the relief sought arises out of the same transaction or series of transactions;

(3) the efficiency and expeditiousness of the proceedings; and

(4) any other relevant circumstances.

57. Regardless of the SCC Board's decision, it should be recalled that it is up to the arbitral tribunal to decide on its jurisdiction over the claims, if a jurisdictional objection is raised. (65) The SCC will only make a preliminary, prima facie finding on jurisdiction. (66)

58. In *Belgor*, (67) the Swedish Supreme Court clarified that the Act may give an arbitral tribunal jurisdiction to decide over claims under several contracts, even though an explicit decision to grant multi-contract arbitration had not been made. (68)

59. Belgor argued that the arbitral tribunal had decided on issues that were not covered by a valid arbitration agreement. The parties had entered into a construction contract under which the respondent was to carry out certain construction works and subsequently an additional work agreement under which the respondent was to perform additional works. The construction contract included an arbitration clause referring to the SCC Rules, while the additional works agreement included a dispute clause referring to the 'Minsk economic court'. In the setting aside proceedings, Belgor argued that the dispute resolution clause in the additional works agreement excluded the arbitral tribunal's jurisdiction over the additional works and that the tribunal was thus not mandated to decide those claims. The Supreme Court found that the arbitral tribunal also had jurisdiction over the claims under the additional work agreement.

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60. The Supreme Court first noted that the scope of the arbitration agreement is defined by the legal relationship as set out in the agreement and that customary principles for contract interpretation apply: 'In instances where the wording provides for differing interpretations and other relevant interpretation data give no guidance, it is natural to start with the view that the arbitration agreement should fulfil a sensible function and serve as a reasonable set of rules for the parties' respective interests.' (69)

61. In light of these principles, the Supreme Court concluded that it should be presumed that: (i) the parties' common intention when choosing arbitration was that disputes be settled quickly and in a coherent procedure, and (ii) the parties have intended that disputes within their relationship be settled in the same forum, as to do otherwise would trigger delays, higher costs and inconsistent rulings on connected issues.

62. Notably, under section 1 of the Swedish Arbitration Act, an arbitration agreement should relate to a specified legal relationship. In its judgment, the Supreme Court clarified that this term should be interpreted in a manner consistent with how the term 'defined legal relationship' in Article II(1) of the New York Convention is understood. (70) The Supreme Court noted that international case law and legal literature support a broad interpretation of the term so that the arbitration agreement can also cover issues not strictly related to the main contract, such as those relating to subsequent contracts between the parties. This is a clarification, and possibly a shift, of Swedish law in a more international direction, since it now gives broader application to the concept of 'legal relationship'. (71)

63. Regardless of the above, it is of course always a good idea for parties in any legal relationship encompassing two or more contracts to clarify from the outset whether disputes under several or all of those contracts should be decided the same way, for example in a single arbitration.

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C. Multiparty Arbitration

64. There may be many advantages in having all issues related to a dispute dealt with in the same arbitration, rather than in separate arbitrations. Potentially, this saves time and costs, at least if it can be assumed that the sum of the time and costs spent on the consolidated arbitration is less than the time and costs that would have been spent on the separate arbitrations combined. (72) It also avoids the risk of conflicting decisions in respect of the same issues of facts or law, or both. In national court proceedings, it is generally possible to consolidate separate proceedings, or to join additional parties, and often a number of mechanisms are available to achieve this. (73) However, in arbitration this is more complicated, sometimes even impossible, since arbitral proceedings are based on a contractual undertaking between the relevant parties. (74)

65. The most straightforward example of a multiparty arbitration is when the request for arbitration already names several parties, all of which are parties to the contract in dispute and, thus, parties to the same arbitration agreement. More complex situations occur when additional parties are joined after the arbitration has commenced. (75) Even further complexity is added if a multiparty situation occurs because there are several contracts, each of which has a bearing on the issues in dispute, but with different parties to the various contracts. (76)

66. A core question widely debated in the arbitration community is whether to accept joinder or intervention of additional parties to an ongoing arbitration. (77) It has been suggested that, as a matter of principle, from the moment an arbitration has commenced
P 234 a third party may only be joined to the arbitration 'in case this is authorized by ● the relevant arbitration rules and the applicable procedural law. When they are silent, such joinder is not possible without the consent of all parties involved'. (78)

67. Under Swedish arbitration law, it is not possible to join additional parties to an ongoing arbitration absent an agreement to that effect between all parties affected (this is also the case with consolidation, *see* section D below). Such agreement may be found in the arbitration agreement, including by reference to institutional rules, or consent may be given when the question arises.

68. This approach is in line with Article V(1)(d) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention) which allows refusal to recognize and enforce arbitral awards where '[t]he composition of the arbitral authority, or the arbitral procedure was not in accordance with the agreement of the parties'. By allowing a request for joinder without an unambiguous agreement between the parties, an arbitral tribunal alters the parties' agreement as regards both the 'composition of the arbitral authority' and the 'arbitral procedure', thus jeopardizing recognition and enforceability of any future award. (79)

69. Although the Act remains silent on the issue of joining (whether by intervention or joinder) additional parties to an already ongoing arbitration, the SCC Rules, since the 2017 update, allow for joinder of additional parties pursuant to Article 13.

70. Article 13 of the SCC Rules allows for a party to an arbitration to request the joinder of additional parties to the arbitration. (80) The request must be made as early as possible but in connection with the submission of the answer, at the latest. After this point it may not be considered, unless the Board decides otherwise.

71. Approval of joinder is subject to the SCC not manifestly lacking jurisdiction over the dispute between the parties, including the party requested to be joined to the arbitration.

72. Article 13 does not alter the arbitral tribunal's power to decide on its own jurisdiction over the claims. Following the Board's approval of a request for joinder it remains for the arbitral tribunal to decide on its jurisdiction over the joining party.

73. If the joining party objects to an already appointed arbitrator, the SCC may, following approval of joinder, release the arbitrators and appoint the entire arbitral tribunal, unless all parties to the arbitration, including the additional party, agree on a different procedure for appointment of the arbitral tribunal.

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74. In addition to the 2017 changes to the SCC Rules regarding joinder, Articles 3 and 4 of Appendix III to the Rules specify the conditions for third-party interventions – on the basis of amicus curiae in investment treaty disputes – by third persons and non-disputing treaty parties. The issue concerns intervention by an entity that is not per se a party to the dispute but whose intervention may benefit the arbitral proceedings or whose interest might be affected by the outcome of the proceedings.

D. Consolidation

75. The same limits that apply to intervention and joinder also apply to consolidation. As mentioned above, the Act provides that an arbitration clause must target an explicit legal relationship to legally bind the parties. (81) Therefore, the possibility to consolidate multiple arbitrations, even between the same parties, is limited. Unless the parties consent, all of the relevant arbitration agreements must allow for consolidation in order for such consolidation to be possible. Moreover, the most recent amendment to the Act provides that consolidation of arbitral proceedings is subject to the parties' agreement that the consolidation benefits the administration of the arbitration and that the same arbitrators have been appointed in the cases in question. (82)

76. Agreements to consolidation are most commonly found in institutional rules referred to in the arbitration agreement, but may also have been drafted by the parties themselves in anticipation of a multiparty situation. The provision in the SCC Rules on consolidation, Article 15, goes further than the Act. Since 2017, the rule for consolidation has been given a wide reach, potentially allowing for a greater number of consolidations than before: (83)

> (1) At the request of a party the Board may decide to consolidate a newly commenced arbitration with a pending arbitration, if:
>
> (i) the parties agree to consolidate;
>
> (ii) all the claims are made under the same arbitration agreement; or
>
> (iii) where the claims are made under more than one arbitration agreement, the relief sought arises out of the same transaction or series of transactions and the Board considers the arbitration

agreements to be compatible.

(2) In deciding whether to consolidate, the Board shall consult with the parties and the Arbitral Tribunal and shall have regard to:

(i) the stage of the pending arbitration;

(ii) the efficiency and expeditiousness of the proceedings; and

(iii) any other relevant circumstances.

(3) Where the Board decides to consolidate, the Board may release any arbitrator already appointed. (84)

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77. Although Article 15(3) allows for the release of appointed arbitrators, the Article explicitly addresses 'a newly commenced arbitration' so as to avoid the use of Article 15(3) to the extent possible. (85) Accordingly, Article 15 does not provide for consolidation of two ongoing arbitrations which both have arbitral tribunals in place. A number of further requirements must be met in order for the SCC Board to be able to grant a request for consolidation under Article 15.

78. First, as indicated above, a party must request consolidation.

79. Second, all claims must be made under the same arbitration agreement or, where the claims are made under more than one arbitration agreement, the relief sought must arise out of the same transaction or series of transactions. When deciding on consolidation, even when the arbitrations have been initiated under the same arbitration agreement, the Board must also consider whether the arbitrations share common issues of fact or law, as this could be such 'a relevant circumstance' that the Board has to consider according to Article 15(2). (86) The possibility to consolidate arbitrations under different arbitration agreements is potentially very far-reaching. However, according to the commentary to the Rules, Article 15 is to be applied with caution in this respect as the parties to separate arbitration agreements may not expressly have agreed to arbitrate with one another. (87)

80. Third, consolidation is subject to the Board's approval. There is an express requirement for the Board to consult all parties on the matter. In examining the conditions for consolidation, Article 15(2) provides a non-exhaustive list of circumstances for the Board to consider before deciding. This includes the stage of the pending arbitration, the efficiency and expeditiousness of the proceedings, and other relevant circumstances. (88)

81. Fourth, as stated above, the Board has the mandate to release appointed arbitrators. However, considering the Article's express reference to newly commenced arbitrations, it is, in the authors' view, considered undesirable to do so.

E. Considerations When Drafting the Arbitration Agreement

82. As discussed above, the Swedish legislator has determined that it is for the users of arbitration to decide if and how they want to provide for joinder and intervention in
P 237 arbitration. When there are multiple parties to a transaction, careful consideration should be given to drafting the arbitration clause in order to allow – or to not allow – joinder, intervention and consolidation.

83. If the parties agree on certain arbitration rules to apply, they should be aware whether those rules include the possibility of joinder, intervention and consolidation. As explained above, the SCC Rules, for instance, give the SCC Board mandate to consolidate arbitrations under more than one arbitration agreement. Parties who want to use the SCC Rules but exclude this possibility may use the SCC model arbitration clause but add that certain articles of the rules should not apply. For guidance on how to phrase more complex arbitration clauses in multiparty situations, the IBA Guidelines for Drafting International Arbitration Clauses provide useful tips and examples. (89)

84. If consolidation and joinder/intervention is expressly allowed by the applicable arbitration rules, the parties have effectively given their consent to it. For example, a reference to the SCC Rules (which provide for joinder, multi-contract arbitration and consolidation in Articles 13, 14 and 15) will be considered sufficient by the Swedish courts.

85. Careful analysis of the contract in question, and of the various party constellations and claim structures that may arise, should be carried out before adopting tailored arbitration clauses providing for intervention and joinder. However, although the parties themselves may have drafted an arbitration agreement in anticipation of a multiparty situation, it is more common that the situation is solved with references to institutional rules in the arbitration agreement.

IV. CONDUCT OF PROCEEDINGS

A. Introduction

86. As alluded to in the introduction to this chapter, in principle two sets of rules will decide the conduct of arbitral proceedings in Sweden. First, we have the mandatory rules

in the Act. Second, where no such mandatory rules exist, there is the arbitration agreement including institutional rules specified therein, such as the SCC Rules.

87. The Act contains few mandatory rules on procedure, while the SCC Rules provide an outline only of the various steps to be taken, but not a comprehensive set of procedural rules. Instead, the arbitral procedure is to a great extent set by the parties' agreements and by directions from the arbitral tribunal having regard to the overriding procedural principles of equal treatment of the parties and the parties' right to present their cases.

88. As a matter of principle, an arbitration in Sweden is to be conducted independently of the Code of Judicial Procedure. (90) However, the Code contains general procedural
P 238 principles which could serve as non-mandatory guidance to the arbitral tribunal when determining procedural issues in relation to which the Act and other applicable rules are silent and there is no set arbitral practice to rely on. (91) There are also other sets of non-mandatory rules which serve as guidance to the arbitral tribunal, such as the IBA Rules on the Taking of Evidence in International Arbitration (the 'IBA Rules on the Taking of Evidence'). (92)

1. Party Autonomy and Due Process

89. The principle of party autonomy is one of the cornerstones of Swedish arbitration. Under section 21 of the Act, the arbitral tribunal should, in its handling of the dispute, 'act in accordance with the decisions of the parties, unless they are impeded from doing so'. In short, this means that the parties' joint instructions regarding procedure must be complied with unless they violate Swedish public policy/mandatory rules or if they cannot reasonably be carried out (*see* section IV.A.2 below). (93) The same principles are repeated in the SCC Rules: 'The Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate, subject to these Rules and any agreement between the parties.' (94)

90. The principle of equal treatment of the parties is another fundamental principle governing arbitrations in Sweden. (95) The principle is recognized in section 21 of the Act, which provides that the arbitral tribunal should handle the dispute in an 'impartial, practical and speedy manner', although it has been held that the principle of equal treatment has wider implications than the requirement of impartiality. (96) The principle of equal treatment means that the parties should be offered the same procedural rights and duties so that each party will be given an opportunity, to the extent necessary, to
P 239 present its case orally or in writing. (97) For example, the arbitral tribunal may not determine that only one party is permitted to request production of documents, present evidence or otherwise present its case, or that only one party must comply with the timetable set for the arbitration. However, this requirement of equal treatment should not be interpreted to mean, for example, that the parties must be afforded the exact same amount of time to present their respective case at the hearing. Nor does it mean that because one party's request for production of documents has been granted, the other party's request must also be granted. Rather, the parties' respective requests for production of documents must be subject to the same rules.

91. Article 23(2) of the SCC Rules provides that 'the Arbitral Tribunal shall conduct the arbitration in an impartial, efficient and expeditious manner, giving each party an equal and reasonable opportunity to present its case'. Accordingly, a party is not entitled to an unlimited number of submissions or unlimited time to present its case. (98) What constitutes a 'reasonable opportunity' must be determined in view of the case at hand, taking into account the obligation to conduct the arbitration efficiently and expeditiously. (99) As discussed immediately below, holding a party to a timetable could rarely be a ground for a challenge (while the opposite – that a party is allowed to disregard the timetable – may be a ground for a challenge if the result is that the principles of equal treatment or party autonomy have been violated). (100)

92. In *Belgor*, the Supreme Court clarified that a precondition for annulment of an award on the basis that a party has not been granted more time to present its case than as follows from the agreed timetable is that the challenging party has not itself caused its predicament. (101) The party must point to circumstances outside its control that have prevented it from presenting its case and which the party ought not to have foreseen. In addition, the challenging party must show that there were no clearly acceptable alternative ways of presenting the case. The Supreme Court found that the arbitral tribunal in the arbitration under review in *Belgor* had not violated due process by holding the challenging party to the agreed timetable.

93. On the other side of the spectrum, the Supreme Court has in two recent cases – *Robot*
P 240 *Grader* and *Lenmorniiproekt* – clarified what kind of procedural decisions may indeed amount to due process violations. These cases both concerned enforcement of foreign arbitral awards in Sweden, rather than challenges to Swedish arbitral awards. The facts in the cases were such that the affected party had clearly been deprived of the right to present its case. In one case, *Robot Grader*, the respondent in the arbitration was deemed to have been denied its due process right to present its case by finding itself at a hearing on the merits, although the respondent thought it was merely a meeting to discuss settlement. (102) The Supreme Court denied enforcement of the award on due process grounds. The same was the result in *Lenmorniiproekt*, where the respondent was not aware of the arbitration at all. (103)

94. The efficiency requirement is perhaps particularly relevant in the most complex arbitrations, so as to ensure that such disputes are possible to manage and finalize. If an extension of time is granted to file a submission in an arbitration with a small number of contentious issues, it may still be possible to conclude the arbitration in a timely manner. In larger proceedings, however, even a small deviation from the agreed procedural rules may have ramifications on aspects of the proceedings that result in considerable delay. In keeping with the speedy and cost-efficient manner in which the proceedings are to be conducted, the arbitral tribunal may thus exclude irrelevant, unnecessary and untimely submissions and material. The arbitral tribunal may, for example, limit the exchange of briefs or the time afforded to oral submissions when it reasonably believes that the parties have had sufficient opportunity to present their cases.

95. The due process requirements underpinning the principle of equal treatment sometimes override the principle of party autonomy. An agreement between the parties which gives only one party a procedural benefit or which deprives one party of a procedural right it has under the Act may be held invalid. (104) As part of the requirement of due process, the parties will have a strong interest in the proceedings being conducted in a stringent and foreseeable manner, with no unnecessary procedural surprises. An unpredictable procedure that allows surprises will likely limit a party's ability to present its case and to respond to the other party's case. Accordingly, such a procedure would not meet the requirements of due process.

2. Powers of the Arbitral Tribunal

96. It follows from the above that the arbitral tribunal should respect the parties' agreements on procedure unless they violate Swedish public policy/mandatory rules or
P 241 ● if they cannot reasonably be carried out. (105) Another justified reason for an arbitral tribunal to disregard an agreement by the parties may be that it substantially changes the basis upon which the arbitrators accepted their mandate, for example with respect to timing and scope.

97. Absent mandatory procedural rules or binding instructions from the parties, an arbitral tribunal has broad discretion to decide the most appropriate way to conduct the proceedings within the confines of the governing principles of equal treatment of the parties and their right to plead their case. (106) Before doing so the arbitral tribunal should allow the parties to present a view on procedural matters.

98. The arbitral tribunal's determinations with respect to procedure are often made in the form of procedural orders. As to their legal status, procedural orders and other procedural determinations are categorized as decisions within the meaning of section 27(3) of the Act (*see* further section VIII below).

99. It is important that the arbitral tribunal enforce its procedural orders. (107) An arbitral tribunal that allows a party, against the party's objections, to circumvent a procedural time table or other parts of procedural agreements or procedural orders is likely to be considered to be acting in conflict with the SCC Rules. It would also expose the award to challenges since a procedure that is conducted without regard to a timetable to which the parties have agreed could be viewed as violating party autonomy. In institutional arbitrations, and likely also in ad hoc arbitrations, such conduct on the part of the arbitral tribunal could result in lower remuneration for the arbitral tribunal (*see* further section VII.A.2 below). (108)

100. As described in detail elsewhere in this book, section 34(1)(7) of the Act provides that an award may be wholly or partially set aside if an irregularity occurred in the course of the proceedings and it is probable that the irregularity influenced the outcome of the case. Similarly, based on the latest revision of the Act, a challenge on the grounds that the arbitral tribunal exceeded its mandate also requires that exceeding the mandate probably influenced the outcome of the proceedings. (109) However, under section 34(2),
P 242 a party is not entitled to rely on a procedural error which the party, ● through participation in the proceedings without objection, may be considered to have waived. (110) This rule applies to procedural decisions that violate procedural rules or principles as well as to instances where the arbitral tribunal has disregarded an agreement between the parties. (111)

101. The Act does not specify at what point in time a party must object to the decision in question. In this regard, it has been suggested that Swedish proceedings would in most cases follow Article 4 of the UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006 (Model Law), which provide that an objection should be made 'without undue delay'. (112) What constitutes undue delay may vary depending on the circumstances in the particular situation, for example, on the nature of the decision or omission by the arbitral tribunal. An alternative is that the arbitral tribunal informs the parties at an early stage that any protest must be made within a certain period as from the relevant decision. (113)

B. Organizing the Proceedings

102. Management and planning of the arbitration is essential in order to ensure efficient proceedings. (114) Once the arbitral tribunal has been constituted and in receipt of the

case file, the manner of conducting the proceedings must be determined.

103. Since the Act, as well as the major institutional rules, provides few details with respect to the conduct of the proceedings, it is for the parties and the arbitral tribunal to adopt detailed rules which fit the case. These detailed rules for the proceedings may be discussed and adopted at the outset of the arbitration, or the arbitral tribunal may resolve issues later, as they arise. Commonly, the arbitral tribunal initiates a telephone conference or summons the parties to a case management meeting for the purpose of
P 243 resolving these matters (*see* section IV.G.2 below). (115) The SCC Rules require the ● arbitral tribunal to 'promptly' organize such a meeting, to organize, schedule and establish procedures for the conduct of the arbitration. (116)

104. The result of the meeting is often the first procedural order by the arbitral tribunal (the 'PO1'). The Act and the SCC Rules do not require terms of reference or detailed procedural orders to be adopted by the arbitral tribunal. The PO1 may therefore be limited to including a timetable for the parties' written submissions.

105. In practice, however, it is advisable even in the PO1 to address procedural issues which can be expected to arise later on in the proceedings. There are several reasons for this. It is generally easier to agree on procedural issues in the abstract at the beginning of the arbitration, rather than when the issues have arisen and the parties have already taken their positions. It also saves time if as many issues as possible are sorted out early and all at once, instead of being argued in separate correspondence before the arbitral tribunal at a later stage. And importantly, it provides for a fair proceeding if all parties involved – counsel, arbitrators, party representatives – share common ground with respect to the rules that are to apply.

106. It is therefore often advisable that the PO1 sets out details on how the arbitration is to proceed. (117) The first draft of the PO1 is most often presented to the parties by the arbitral tribunal and is commonly based on the first procedural meeting (*see* section IV.G.2 below) as well as procedural orders that the arbitrators have issued as arbitrators or come across as counsel in previous arbitrations. The parties are then invited to comment on the draft PO1, drawing on their own experiences from previous arbitrations and preferences for the specific case. By using and reusing procedural orders in this way, good practices and solutions spread and a best practice develops. In most cases, this exercise will result in an agreed document that provides for a procedure with which all parties are comfortable from the perspective of their individual expectations.

107. As noted above, the PO1 should include a timetable for the arbitration. The timetable should set out the number of submissions, when those are due, and what they should include (*see* section IV.F below). Most international arbitrations are conducted in a front-loaded manner. This means that the parties are permitted to file a limited number of written submissions on the merits and that the parties are expected to integrate and submit substantially all evidence, including witness statements and expert reports, with their first respective submission. (118) Even in large arbitrations, the number of submissions will often be two per party, with the case expected to be set out in full in the
P 244 first round and commented on in the second round. Limiting the number ● of submissions in this manner greatly enhances the efficiency of the proceedings. The front-loaded procedure will furthermore promote due process, since surprise tactics are not rewarded.

108. In order to achieve the front-loaded procedure, most PO1s will authorize the arbitral tribunal to reject unsolicited submissions, that is, submissions which do not follow from the agreed timetable or which are not specifically requested by the arbitral tribunal. (119) Moreover, in order to be effective, such authority will relate not only to full submissions but also to parts of submissions that do not comply with the PO1's specifications as to the scope of submissions. It is also common to have a cut-off date, after which no further evidence will be admitted (*see* section V). (120) Such provisions in the PO1 will give the arbitral tribunal powers to fend off attempts by parties to apply, for whatever reason, a backloaded procedure with late introduction of facts and evidence. (121)

109. Most PO1s also provide that the arbitral tribunal, in its procedural decisions with respect to the taking of evidence, is to be 'guided' or 'inspired' by the IBA Rules on the Taking of Evidence. (122) The IBA Rules on the Taking of Evidence thus become part of the legal framework by way of non-mandatory reference. It is unusual for the rules to be fully applicable by way of binding adoption in the PO1. The reason for this is likely that neither the arbitral tribunal nor the parties want to be formally bound by the IBA Rules on the Taking of Evidence, should a situation arise during the proceedings that requires a solution not foreseen by the Rules. In practice, however, it makes no significant difference whether the arbitral tribunal is bound by the rules or is merely to be guided or inspired by them. In either case, the parties may be expected to argue their respective positions on evidentiary matters with reference to the IBA Rules on the Taking of Evidence. And even if the PO1 contains no reference at all to the IBA Rules on the Taking of Evidence, they will be relevant as an expression of best practice (*see* further section V).

110. In addition to cut-off dates for submitting evidence and the reference to the IBA Rules on the Taking of Evidence, most PO1s set out the general rules to apply with respect to the taking of evidence. Such rules include how and when production of documents may

be requested, whether and how witness statements should be used, and how documentary evidence is to be submitted and referenced. Today it is not uncommon to include in the PO1 that the submissions are to be submitted as 'e-briefs', with the evidence accessible through hyperlinks.

111. Most PO1s also regulate the hearing. As mentioned above, it will often be easier for the parties to agree on practical and procedural matters at the outset of the arbitration. Planning the hearing early on is also important in order to coordinate the schedules of
P 245 everyone involved. Consequently, the number of days needed for the ● hearing(s) is usually decided and booked already at the beginning of the proceedings. If the parties are unable to agree on the number of hearing days, the arbitral tribunal may decide. Within the confines provided by the principles of procedural equality and the parties' right to a reasonable opportunity to present their cases, an arbitral tribunal may thus limit the number of hearing days and impose reasonable time limits for oral arguments (*see* section IV.G.4 below).

112. The PO1 typically also includes rules for how the documentary evidence is to be presented at the hearing (electronically or in hardcopy), whether experts will be allowed to present their findings, and whether a party should be allowed to hold a direct examination of witnesses of fact despite having submitted witness statements. Many PO1s also include rules with respect to how to organize the case file at the hearing, whether only to use a 'common bundle' or 'common e-brief' with the core documents in the case, or simply refer to the exhibit binders or e-briefs submitted. Other issues to discuss and regulate may be the possibility to conduct the hearing by virtual means (*see* section IV.G.5). Furthermore, in cases where the SCC Platform or similar databases are used, it is advisable to regulate in the PO1 how to structure and use the folders, how files should be named and the number of users that may be granted access to the platform. (123)

113. The chair of the arbitral tribunal manages the proceedings. Subject to the approval of the parties, the arbitral tribunal may appoint an administrative secretary to assist with the administration. (124) This should also be discussed early in the proceedings, preferably at the first procedural meeting.

114. As mentioned in section IV.A.2 above, it is important that procedural orders be enforced by the arbitral tribunal. Conducting the proceedings in compliance with the PO1 will essentially safeguard due process, while a lax approach to the PO1 will result in an unpredictable proceeding that will have difficulties in ensuring equal treatment of the parties.

C. Preliminary Issues

115. At an early stage of the proceedings, there may sometimes emerge issues that need to be dealt with as preliminary issues in the sense that they must be resolved before the arbitral tribunal examines the substance of the claims. Examples are the seat of arbitration, the arbitral tribunal's jurisdiction, the applicable law and whether the proceedings should be bifurcated into, for example, a liability phase and a quantum phase.

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116. Under the Act, the arbitral tribunal is to decide the seat of arbitration, absent an agreement between the parties, (125) while under the SCC Rules it is for the SCC Board to determine the seat in such circumstances. (126) Most often, however, the seat of arbitration has already been determined by the parties in the arbitration agreement.

117. Through the latest revision of the Act, section 27a(2) provides that, absent the parties' agreement, the arbitral tribunal shall determine the applicable law. The arbitral tribunal may decide when and in what form the issue of the applicable law should be decided. The provision is similar to the corresponding Article 27 of the SCC Rules. The Act as well as the SCC Rules are, however, silent on how the arbitral tribunal should proceed when determining the applicable law. If the applicable law is not clear, it is advisable for the arbitral tribunal to determine the applicable law in a decision early in the proceedings, so that the parties know which law or rules will apply to the case that they are to present. In practice, however, it is not uncommon that such a decision is first made in the final award, particularly in cases where the issue of the applicable law hinges on evidentiary issues, such as whether a party has acceded to a certain agreement or accepted a set of general terms containing a choice-of-law provision.

118. Under section 29 of the Act, '[a] part of the dispute, or a certain issue which is of significance to the resolution of the dispute, may be decided through a separate award, unless opposed by both parties'. A corresponding rule is found in Article 44 of the SCC Rules. Accordingly, the arbitral tribunal may raise the question of bifurcation sua sponte, although it is of course more likely that the initiative comes from one of the parties. If both parties agree that a separate award should be rendered on, for example, liability or on an issue of law, the arbitral tribunal is bound to respect the parties' agreement. (127) If the parties disagree in this regard, the arbitral tribunal must conduct a careful analysis of the issues involved and the potential consequences before deciding on bifurcation (*see* section VIII.A.3). (128)

119. Another example of a preliminary issue that may have to be decided by the arbitral

tribunal at an early stage is the question of the arbitral tribunal's jurisdiction. The Act does not contain a specific provision as to when during the proceedings the arbitral tribunal should rule on its own jurisdiction. Depending on the circumstances of the case there may be reason for an arbitral tribunal to deal with this issue before it proceeds to the merits phase.

D. Interim Relief

120. Unless the parties have agreed otherwise, the arbitral tribunal may, at the request of
P 247 a party, order the other party to undertake a certain interim measure to secure the claim which is to be adjudicated in the dispute. (129) The arbitral tribunal is afforded extensive authority to decide on the particular measure to be undertaken in order to, for instance, secure evidence. (130)

121. In Sweden, as in most jurisdictions, (131) an arbitral tribunal's decisions in this respect are not enforceable. However, the parties are contractually bound by such decisions as between themselves and a party's failure to comply with this kind of decision may be ascribed importance by the arbitral tribunal in other respects, for example in terms of determining liability for loss caused or when calculating damages. (132) In practice, parties therefore tend to comply with interim relief ordered by arbitral tribunals, regardless of their lack of enforceability.

122. Interim measures granted by an arbitral tribunal or by an emergency arbitrator are discussed in further detail elsewhere in this book. (133)

E. Summary Procedure

123. In 2017, an innovative provision was introduced in Article 39 of the SCC Rules. By this rule, a factual or legal issue can be determined by the arbitral tribunal in a summary procedure, thereby saving time and costs.

124. Summary procedure is a case management tool that is available at any time during the arbitration. (134) The aim of the provision is to contribute to a more efficient and expeditious arbitration. It can only be applied at the request of a party, although the arbitral tribunal may make such a suggestion. (135) A request for summary procedure may concern issues of jurisdiction, admissibility or the merits. It may include, for example, an assertion that:

(1) an allegation of fact or law, which is material to the outcome of the case, is manifestly unsustainable;

(2) even if the facts alleged by the counterparty are assumed to be true, no award could be rendered in favour of that party under the applicable law; or

(3) any issue of fact or law which is material to the outcome of the case is, for any other reason, suitable to determination by way of summary procedure.

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125. The party requesting a summary procedure must indicate the grounds for its request, propose the form of summary procedure and demonstrate that such procedure is efficient and appropriate for that particular case. (136) The other party will be given an opportunity to submit comments on the request, within a time frame as determined by the arbitral tribunal. (137) Thereafter, the arbitral tribunal will issue an order either dismissing the request or fixing the summary procedure in an appropriate form. (138) The arbitral tribunal enjoys considerable discretion in this determination. (139)

126. The point of having an issue determined by way of summary procedure pursuant to Article 39 is that the arbitral tribunal may decide the issue without necessarily undertaking every procedural step that might otherwise be adopted for the arbitration. (140) The Rules as well as the commentary to the Rules are silent with respect to what procedural steps may be excluded in order for the arbitral tribunal to expedite the summary proceedings.

127. As can be seen from the list above, a summary procedure may be applied to a broad range of issues. The first category – relating to allegations of facts or law which are manifestly unsustainable – most closely resembles the concept of summary judgment in the common-law tradition, from which the SCC's summary procedure likely has borrowed its name. Significant for a summary judgment is that it disposes of a case or an issue in a case, without proceeding to trial. (141) Arguably, Article 39 gives an arbitral tribunal a similar possibility to decide a matter without proceeding to a hearing. However, considering that the right to a hearing, which is an absolute right unless the parties have agreed otherwise, (142) has not been explicitly excluded in the provision, an arbitral tribunal is probably wise to err on the side of caution and not interpret Article 39(1) as giving it a mandate to decide the issue on the basis of documents only against a party's objection.

128. Instead, the arbitral tribunal can use its discretion (which already existed before the introduction of Article 39), to limit the time for and the number of submissions and the time afforded to argue the case orally. With Article 39, the parties must be deemed to have accepted that the arbitral tribunal deviates in important respects from the 'ordinary' course of an arbitration, thus expediting the proceedings to a considerable

extent. In the authors' view, it should, for example, be possible for the arbitral tribunal to be influenced by or to adapt the principles of the SCC's Rules for Expedited Arbitration, thus applying them (subject to the caution with respect to hearings mentioned above) on separate issues within the arbitration otherwise conducted under the ordinary arbitration rules.

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129. Notably, although the first item in the list above refers to manifestly unsustainable allegations, items 2 and 3 do not. Summary procedure may thus be used in virtually every situation where the efficiency of the arbitration may benefit from having a certain issue tried in an expedited manner. This leaves room for parties and arbitral tribunals to be innovative in how the rules are used.

F. Written Submissions

1. Introduction

130. Once the basic rules of procedure have been set, the arbitration typically continues with exchange of written submissions. The primary purpose of the first exchange of written submissions (the statement of claim and the statement of defence) is to define the issues to be determined by the arbitral tribunal and to set the framework for the dispute. In virtually all arbitrations, the first exchange of submissions is followed by at least one further round of submissions: the claimant's 'reply' and the respondent's 'rejoinder'.

131. Submission of the statement of claim and the statement of defence is expressly provided for in Article 29 of the SCC Rules and indirectly provided for under section 23 of the Act. Apart from these provisions, there are no rules with respect to the written submissions to be made by the parties. The requirements that apply with respect to the statements of claim and defence, respectively, will be discussed below.

132. It is noteworthy that the most recent revision of the SCC Rules for expedited arbitration has 'front-loaded' the proceedings even further by merging the request for arbitration with the statement of claim and the respondent's answer with the statement of defence, in order to accelerate the proceedings. (143) The parties are allowed a second submission each but additional submissions may only be allowed at the discretion of the arbitral tribunal. (144)

2. Statement of Claim

133. Section 23 of the Act sets forth the minimum requirements for the claimant's statement of claim and the respondent's statement of defence, if not otherwise agreed between the parties. The statement of claim must contain the claimant's prayers for relief in respect of the issue stated in the request for arbitration and the material facts invoked in support. Failing this, the arbitral tribunal should order the claimant to remedy deficiencies.

134. The Act does not require the claimant to file or even identify evidence, whether oral or documentary, together with the statement of claim. In domestic arbitrations in
P 250 Sweden, which may be more or less influenced by practices before the Swedish courts, it has therefore historically been seen that evidence is submitted and specified only towards the end of the written phase of the proceedings. However, this approach contradicts the fundamental requirement for expeditious proceedings, as well as the very spirit of the SCC Rules. (145) In most domestic arbitrations, as well as in virtually all international arbitrations in Sweden, it is agreed by the parties or determined in the PO1 issued by the arbitral tribunal that all evidence, including witness statements, relied on by the claimant in support of the allegations in the statement of claim are to be referenced in and submitted together with the statement of claim. This is also the default rule under the SCC Rules.

135. Pursuant to Article 29(1) of the SCC Rules, the statement of claim must include the following (if not already submitted):

(1) the specific relief sought;

(2) the factual and legal basis on which the claimant relies; and

(3) any evidence on which the claimant relies.

136. According to the commentary to the 2017 SCC Rules, an 'important purpose of Article 29 is to convey the message that the parties should strive to set forth their respective cases and evidence in full, as early as possible in the arbitration'. (146) As explained above, much is gained in terms of time and the number of briefs can be kept to a minimum, if this 'front-loaded' procedure is adopted, rather than having a procedure where the evidentiary situation is not known until shortly before the hearing.

3. Statement of Defence

137. Under the Act, the respondent is to state its position in relation to the claimant's prayers for relief and state the facts supporting its own position within the time set by the arbitral tribunal. Thus, the statement of defence should contain an acceptance or

denial of the claimant's prayers for relief. In addition, the statement of defence normally contains admission(s) or denial(s) of the facts relied upon by the claimant. (147) If the respondent wishes to object to the jurisdiction of the arbitral tribunal, that objection must, as a general rule, be included in the statement of defence. Failing this, the objection may be considered to have been waived.

138. Article 29(2) of the SCC Rules provides that a statement of defence should be submitted by the respondent within a period set by the arbitral tribunal. The statement of defence must include the following (if not already submitted):

(1) objections concerning the existence, validity or applicability of the arbitration agreement;

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(2) a statement whether, and to what extent, the respondent admits or denies the relief sought by the claimant;

(3) the factual and legal basis on which the respondent relies;

(4) any counterclaim or set-off claim and the grounds on which it is based; and

(5) any evidence on which the respondent relies.

4. Request for Relief

139. The scope of the arbitral tribunal's jurisdiction is set by the arbitration agreement and supplemented by agreements or admissions made by the parties during the course of the proceedings.

140. The prayers for relief (and any counterclaim filed by the respondent) also define the limits of the arbitral tribunal's mandate and are therefore of fundamental importance to the outcome of the proceedings. This is so both with respect to regular arbitration and with arbitrations where the arbitral tribunal has been given a specific mandate. (148) The prayers for relief also have decisive implications for the res judicata effect of the award and the lis pendens effect of the proceedings.

141. There are no explicit requirements as to how the request for relief should be formulated. An arbitral tribunal has the power to order performance, of either a specific action or payment of monies, and to grant injunctive and declaratory relief, if either of the parties so requests. Declaratory claims seeking to establish the existence of a certain fact or an alleged interpretation of a contract may also be granted by the arbitral tribunal. But again, since the request for relief to some extent defines the limits of the arbitral tribunal's mandate, it has to be specified to such a degree that there is no doubt how the award is to be phrased if the relief is granted. The parties must explicitly and unequivocally state what they wish the arbitral tribunal to decide. An undefined request for 'appropriate relief' or similar is not sufficient.

142. However, the request for relief does not need to include every conceivable outcome of the case. If a monetary award is sought in a certain amount, it is sufficient for the claimant to request the highest amount that it seeks to obtain. The arbitral tribunal will still be free to award a lower amount, without the claimant having explicitly requested alternative amounts or included a statement that it seeks 'the full amount or such lower amount that the arbitral tribunal finds appropriate' or similar. This follows from the legal maxim *major includit minor*, entailing that an arbitral tribunal may not rule *ultra petita* under Swedish arbitration law by awarding something more or substantially different than what has been requested. However, a tribunal is free to rule *infra petita*, by awarding less than what has been requested. (149)

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143. In addition to the request for relief, the facts and allegations made in support of a request also set the limit of the arbitral tribunal's mandate. (150)

144. The same applies to requests for declaratory relief where the *major includit minor* principle applies not only to claims which are numerically comparable, in which case the comparison of what is more or less is obvious, but also to reliefs that are not so easily compared. (151) What ultimately should be decisive for how specific the request must be is that it must be possible for the respondent to understand what it has to respond to. With respect to declaratory claims, it must thus be clear to the respondent whether it is sufficient for it to falsify one aspect of the declaration as stated in the request for relief in order to be successful, or whether it needs to address the various components of the request and alternative interpretations of it. If the arbitral tribunal orders declaratory relief with respect to which the respondent has not had reason or opportunity to comment on, this could constitute an excess of mandate as well as a procedural error.

145. The above applies to the ordinary adjudication of disputes by arbitration, where the arbitral tribunal derives its mandate from section 1(1) of the Act. (152) The main rule is that the arbitral tribunal's mandate with respect to the parties' agreements is to interpret and apply them, not alter or amend them. However, pursuant to section 1(2) of the Act, '[i]n addition to interpreting agreements, the filling of gaps in contracts can also be referred to arbitrators'. The right to refer 'filling of gaps' to arbitration is also considered to include a right to request an arbitral tribunal to alter or amend an agreement. (153) Accordingly, the parties may agree to give an arbitral tribunal such a

specific mandate. (154)

146. How specific the request for relief (or proposal for a new contract term) must be has not been clarified by the Supreme Court, but authorities on Swedish arbitration law are overall in consensus that the mandate of a tribunal is considerably wider when given the
P 253 right to supplement a contract than is the case under an ordinary mandate to ● adjudicate a dispute. (155) Even so, commentators agree that, as a general rule, the arbitral tribunal should supplement the contract in accordance with the principles jointly indicated by the parties. (156) These guiding principles for supplementing a contract may be provided in a joint instruction by the parties during the course of the arbitration, but it is probably more common that this is done through a specific contract review clause or directly in the arbitration clause. (157) In the absence of any express principles of this kind, the tribunal is likely allowed to more freely decide the new content of the parties' contract, guided by the nature of the contract and the underlying purpose of the supplement to be made. (158)

147. Irrespective of what mandate the arbitral tribunal operates under, it has the power to dismiss a request for relief that is not sufficiently specific and clear. (159) Before doing so, however, the arbitral tribunal has an obligation to seek clarification of the requests for relief in question. Failure to do so may constitute a procedural error and subject the award to challenge. (160)

5. Facts Relied on in Support of Request for Relief

148. In both domestic and international arbitrations in Sweden, the parties are expected to identify the factual allegations they rely upon in support of requests for relief. The arbitral tribunal is bound by the factual allegations made by the parties. The arbitral tribunal may thus not grant a request for relief on the basis of facts not relied on by the parties. (161) If it does, this may give cause to challenge the award under section 34 of the Act. This restriction is explained by fundamental due process requirements. In order for the respondent to be afforded a fair opportunity to present its case, it must be able to understand what case the claimant is advancing, that is, what alleged facts the claimant is relying on as relevant for its requested relief.

149. The parties themselves are responsible for presenting their facts and allegations in a way that the counterparty can understand and respond to. The arbitral tribunal should
P 254 make sure that both it and the parties understand the procedure in the same ● way. (162) However, the arbitral tribunal must be careful to avoid assisting a party in improving its case. (163) Assistance should not invite a party to present new requests for relief, make new assertions, or invoke new evidence. (164) However, the exact extent to which guidance by the arbitral tribunal is acceptable will depend on a number of factors in the case in question. (165)

150. Gillis Wetter, the renowned Swedish arbitrator, once described the adversarial arbitral proceedings in Austria, Germany and the Nordic countries as a '*laissez-faire* philosophy', which 'emphasizes that the judge or arbitrator should bring minimum influence to bear on the parties' freedom and duty to handle their own affairs by formulating their claims, defences and counterclaims in the fashion which appears most advantageous to them'. (166) He further concluded that if the arbitral tribunal is to provide the parties any guidance, this should be done 'early on and orally'. (167)

151. In cases where the parties are represented by counsel (which is almost always the case), there may be even less of a reason for the arbitral tribunal to assist them. This was concluded by the Svea Court of Appeal in *Refaat el-Sayed v. Industrivärden*. (168) With reference to the challenging party having had four legally trained counsel, the court found that the arbitral tribunal had not failed in its duties to provide guidance to the party, by not asking the party if he would want to invoke additional facts in response to facts introduced by the other party.

6. Amendment and Withdrawal of Claim

152. Under section 23 of the Act and Article 30 of the SCC Rules, the claimant may submit new requests for relief and the respondent its own request for relief (counterclaim or set-off claim) during the proceedings. (169) However, two conditions must be fulfilled. First, the claims must fall within the scope of the arbitration agreement. Second, adjudication of those claims must not be considered inappropriate by the arbitral tribunal. It is thus within the discretion of the arbitral tribunal, taking into consideration the time at which
P 255 the new claim is submitted and other circumstances, ● to decide if a new claim should be allowed. Subject to the same conditions, each party may amend or supplement previously presented claims and introduce new facts in support of its case.

153. According to the *travaux préparatoires*, and for reasons of procedural economy and efficiency, the presumption is that the arbitral tribunal should be generous in allowing a new claim as long as the claim falls within the scope of the arbitration agreement. (170) If the new claim is not allowed, the party seeking to introduce it may instead be forced to initiate a second arbitration, resulting in delay and additional costs. Another factor to be considered by the arbitral tribunal is whether the award will result in res judicata for the dismissed claim if it is brought separately in subsequent proceedings. (171)

154. However, the timing of the claim is of fundamental importance to consider, since

late introduction of claims must not be allowed to be used as a means of obstructing the proceedings. (172) Nor may it limit the other party's right to a reasonable opportunity to present its case and to respond to the other party's case. Given the foreseeability that comes with them, preclusion rules are fundamental parts of due process. (173) However, if they are incorrectly disregarded, the proceedings may become unpredictable.

155. The right to amend or supplement a claim under section 23 of the Act is not mandatory and the parties may thus agree to disregard or amend that section. If the arbitral tribunal has issued a procedural order with cut-off date(s) for the introduction of new facts and evidence, that order ought to override the right of a party under the Act to amend its case.

156. In the view of the authors, absent determined cut-off date(s), an arbitral tribunal in an arbitration in Sweden should only dismiss a new or amended claim if allowing it would have a material adverse effect on the proceedings. When deciding this issue the arbitral tribunal needs to consider a number of factors. Two important aspects are time- and cost-efficiency. The arbitral tribunal must balance efficiency and timeliness in the proceedings with procedural fairness. (174) Undoubtedly, in many cases, what is fair will be in line with what is efficient, which in turn requires that an agreed procedural timetable be upheld. Nonetheless, the aim to avoid challenges may make the arbitral tribunal more inclined to permit amendments than to reject them. (175) If so, the arbitral tribunal must also be prepared to allow the other party a reasonable opportunity to consider and respond to the new or amended claim. Consequently, permitting amended claims may indeed delay the proceedings.

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157. It should be noted that the parties in an arbitration may enter into a valid arbitration agreement orally or by conduct (including by omission to object). This implies that if a party submits a claim that is not covered by the arbitration agreement, that claim may, nevertheless, be tried by the arbitral tribunal if the opposing party fails to raise a jurisdictional objection. In that case, the original arbitration agreement is considered to have been extended to cover the new claim as well. (176)

158. If a delay in the proceedings has been caused by a party due to amendment of, or a supplement to, a claim being allowed, this may have an impact on allocation of costs among the parties. (177)

159. If a party withdraws a claim, the arbitral tribunal should dismiss (without prejudice) that part of the dispute unless the opposing party requests a ruling on the withdrawn claim (section 28 of the Act). The party's entitlement to a ruling exists to prevent the opposing party from initiating new arbitration proceedings concerning the same claim. (178)

G. Hearings

1. General

160. Upon a party's request and provided that the parties have not agreed otherwise, at least one hearing should be held prior to determination of an issue referred to the arbitral tribunal for resolution. (179) A party's right to a hearing is absolute in the sense that a request for a hearing may not be denied by the arbitral tribunal, save for the –
P 257 arguably rare – cases where the parties have already agreed that no hearings are to be held during the arbitration. (180) However, the right to a hearing is not unlimited in the extent or numbers of hearings (*see* section IV.G.4 below).

161. The right to a hearing does not extend to other issues than those substantive matters which have been referred to the arbitral tribunal for adjudication. (181) In other words, the right to a hearing applies to issues relevant to the merits of the case. Consequently, a party cannot require the arbitral tribunal to arrange a hearing solely to deal with, for example, questions pertaining to case administration. (182)

162. In certain circumstances, the parties may lose their right to a hearing due to their own inaction. The *travaux préparatoires* to the Act explain that the arbitral tribunal can order the parties to request a hearing within a certain period. Should both parties fail to do so before the given deadline, they will be considered to have impliedly waived their right to a hearing. (183) However, considering the great importance attached to the right to a hearing in Swedish legal tradition, the arbitral tribunal should be wary of drawing conclusions solely based on the parties' failure to request a hearing within a stipulated period. Before considering denying a party a hearing on the grounds that the party has missed a deadline for requesting a hearing, the arbitral tribunal must be confident that the deadline imposed was not unreasonable and that the party has had adequate time to consider whether a hearing is necessary. If this is not the case, the decision not to have a hearing may be considered a violation of due process, subjecting the resulting award to the risk of being set aside in a subsequent challenge proceeding.

163. In practice, the absolute majority of arbitrations involve at least one hearing, during which the parties are allowed to present their legal arguments and evidence – and to challenge the other party's evidence. This hearing is often referred to as the 'main hearing', the 'final hearing' or the 'merits hearing'. It is also sometimes referred to as the

'evidentiary hearing'. (184) Although the proceedings, as a matter of principle, may be organized so that the evidence is taken at a separate hearing and counsel's oral submissions are delivered at another hearing (as is often done, e.g., in France), in most arbitrations in Sweden the hearing is used strictly not only for the purpose of presenting the evidence but also for counsel to argue their case. For this reason, this contribution uses the term 'merits hearing', to distinguish the hearing from hearings on procedural and jurisdictional issues (such hearings may also involve taking evidence and may, thus, be 'evidentiary hearings').

164. Depending on the complexity of the case before the arbitral tribunal, the merits hearing may be preceded by other forms of hearing, as will be discussed below.

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165. The arbitral tribunal has considerable flexibility in determining the place of hearings. Unless the parties have agreed otherwise, the arbitral tribunal may in principle decide to hold meetings and hearings in a different place or country than the seat of arbitration, (185) or that the hearing be held using videoconferencing technology. (186) Notwithstanding the flexibility granted to the arbitral tribunal in this respect, it should always set the time, date and place for hearings in consultation with the parties. (187)

2. Procedural Meetings

166. As soon as the arbitral tribunal has been constituted, a meeting or, perhaps more commonly, a telephone conference is often arranged with the parties. This meeting is sometimes referred to as a 'scheduling conference' or a 'directions hearing'.

167. As mentioned in section IV.B above, the SCC Rules require that the arbitral tribunal promptly hold a case management conference. (188) One of the purposes of that meeting is to consult with the parties in order to set a provisional timetable for the arbitration. Although it is not a legal requirement, it is advisable also in ad hoc arbitrations under the Act to fix the timetable for the entire arbitration at the outset of the proceedings. In less complex matters, this may be done through e-mail correspondence rather than at a meeting. Another important purpose of the first meeting is to discuss the rules that are to apply to the conduct of the proceedings (*See* section IV.B above).

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168. As mentioned in section IV.C above, the arbitral tribunal should also at this point raise and determine issues regarding the applicable law and, if it is an ad hoc arbitration under the Act, the seat of the arbitration, if these issues have not already been agreed upon. (189) In most cases, the meeting will also be used to try to establish the procedural rules for the proceedings (*see* section IV.B above). As indicated above, the first procedural meeting typically results in a procedural decision by the arbitral tribunal, taking the form of a PO1. The written phase of the arbitration then proceeds in accordance with the PO1. Unless issues arise that require intermittent meetings, the next occasion for the arbitral tribunal and the parties to meet is often at a 'pre-hearing conference', which is typically held over the telephone.

169. The pre-hearing conference generally deals with practical and procedural issues that need to be arranged or settled before the hearing. These may be issues relating to booking the hearing venue and arranging court reporters and interpreters, or how to schedule witnesses for appearance at the hearing. The case as such is normally not discussed in detail at this meeting, although certain clarifications may be sought, for example, with respect to the relief sought.

170. However, in some arbitrations, the pre-hearing conference can have a somewhat different purpose. In addition to sorting out practical and procedural issues, the meeting can be used to clarify the parties' respective cases, including prayers for relief and facts, legal arguments and evidence relied upon. (190) In these cases, the meeting is often referred to as a 'preparatory hearing'. (191) This meeting may be useful for the arbitral tribunal's and the parties' understanding of what factual and legal issues are in dispute, so as to focus the merits hearing on contentious issues. However, before holding a preparatory hearing of this kind, the arbitral tribunal should explain in detail what it wants to achieve with the meeting and what it expects from the parties. Considering that arbitrations in Sweden are adversarial proceedings, the arbitral tribunal should refrain from assisting the parties in pleading their respective cases (*see* section IV.F.5 above).

171. As an alternative to arranging a preparatory hearing of the kind described immediately above, the arbitral tribunal may issue a 'case summary' for the parties to
P 260 comment on in writing. (192) The case summary is essentially a draft of the background sections of the final arbitral award. It thus includes the procedural background as well as the factual background to the dispute, to the extent the facts are not contentious. It also sets out the issues in dispute and the parties' respective factual account and arguments in relation to each such issue. The case summary leaves blank the arbitral tribunal's reasons and the operative part of the award – the *dispositif* – which obviously should not exist, let alone be presented, even in draft format before the arbitral tribunal has heard all evidence and the parties have concluded their respective arguments. Although primarily used in domestic Swedish arbitrations, case summaries are sometimes also seen in international arbitrations in Sweden. If used correctly, a case summary can, just

as the preparatory hearing, serve to focus the hearing on the issues in dispute, since the parties have received confirmation from the arbitral tribunal that it has correctly understood what those issues are. At the same time, the case summary allows the parties to ascertain that all their arguments have been read and correctly understood by the arbitral tribunal.

172. However, case summaries are also associated with risks. In *OAO Tyumenneftegaz v. First National Petroleum Corporation*, the Svea Court of Appeal concluded that the arbitral tribunal had based the award on facts not included in the case summary, which (at the initiative of the arbitral tribunal) had been determined to set the boundaries for the case to be adjudicated, thereby superseding the parties' previous submissions. (193) The court concluded that the arbitral tribunal had thus exceeded its mandate and set aside the award. Thus, in instances where the case summary is not exhaustive, it is advisable to clarify that this is the case and that the parties continue to rely on all written and oral submissions made in the case.

3. Jurisdictional Hearings

173. In cases where the respondent challenges the arbitral tribunal's jurisdiction (or competence), and the arbitral tribunal decides to bifurcate the proceedings to resolve the jurisdictional objections separately before proceeding to the merits of the case, it may be necessary to hold a jurisdictional hearing. Just as a merits hearing, a jurisdictional hearing is preceded by written submissions as well as procedural meetings as described above. At the jurisdictional hearing, witnesses and experts relevant to the issue of jurisdiction may be heard, typically in accordance with the format of a merits hearing. Should the arbitral tribunal subsequently rule that it has jurisdiction, another scheduling meeting is normally arranged, setting out the timetable for the remainder of the arbitration. The parties then exchange written submissions on the merits of the case, followed by a pre-hearing conference and, finally, the hearing on the merits.

174. A decision to bifurcate the proceedings into a separate jurisdictional phase
P 261 inevitably leads to delays if the arbitral tribunal finds that it has jurisdiction. The ● procedural steps set out above then need to be taken twice. In some cases it may therefore be more economical, with regard to both time and costs, to hear the jurisdictional objections together with the case on the merits, at the merits hearing.

4. Merits Hearing

175. In most arbitrations conducted under Swedish arbitration law, the proceedings before the arbitral tribunal are concluded by a merits hearing. During the merits hearing, each party is given the opportunity to present its case by giving an oral account of the prayers for relief, factual and legal arguments, as well as presenting written and oral evidence.

176. In accordance with the principle of party autonomy, the parties may of course agree that the merits hearing be more limited in scope. For instance, the parties can decide that the merits hearing should be devoted only to examination of witnesses and experts and that the parties' arguments will be presented by written submissions to the arbitral tribunal.

177. Similarly, unless the parties agree otherwise, the arbitral tribunal may give directions limiting the scope of the merits hearing. However, it is important for the arbitral tribunal to allow each party sufficient opportunity to elaborate on those parts of its case that the party regards as important and to highlight certain content in the written evidence. Although a party's right to argue its case orally is absolute, there is no right for a party to do so for an indefinite period. Indeed, pursuant to the Act, the '[t]he arbitrators shall afford the parties, to the extent necessary, an opportunity to present their respective cases in writing *or* orally'. (194)

178. The right to a hearing is not unlimited in the extent or numbers of hearings, and a party's right to present its case does not entail that it must be afforded a right to present every aspect of it orally. Within the confines provided by the principles of procedural equality and the parties' right to a reasonable opportunity to present their case, the arbitral tribunal may, for example, impose time limits for oral arguments. (195) In the experience of the authors, most parties are willing to shorten the time for their opening statements, if the arbitral tribunal so requests. In practice, in order to save time and costs, most hearings in international arbitrations are kept as short as possible. (196)

179. In *Poland v. PL Holding* the Svea Court of Appeal confirmed that a party in an
P 262 arbitration is not necessarily entitled to present everything both in writing and ● orally. (197) The case concerned a challenge to an award on a number of bases, one of them being that the arbitral tribunal had denied a request for an additional hearing. The challenging party claimed that the arbitral tribunal had thereby exceeded its mandate or committed an irregularity, which had probably influenced the outcome of the case (section 34(1) of the Act). The Svea Court of Appeal rejected this argument and concluded that since a hearing on the issues in question had already taken place, the parties had already been granted a hearing in accordance with section 24(1) of the Act. The court concluded that it was thus for the arbitral tribunal to determine whether another hearing was necessary. Considering the fact that the arbitral tribunal had given the challenging

party an opportunity to comment on the relevant issues in writing, the party was deemed to have been given an opportunity to present its case to the extent necessary.

180. The aim under Swedish legal tradition is to hold the merits hearing for a continuous period without prolonged intermissions. (198) In complex arbitrations, the arbitral tribunal may foresee that the merits hearing will last for several weeks and experience severe difficulties in scheduling a merits hearing without prolonged intermissions. In these cases, the solution is often to divide the merits hearing into a number of shorter hearings. Although not very common, it is also conceivable to hear all evidence at one hearing and then after some days or weeks hear the oral closing arguments (which may also be preceded or followed by post-hearing briefs).

181. There is no provision in the Act or the SCC Rules that regulates the conduct of a hearing, leaving great leeway for the arbitral tribunal and the parties to set up a tailor-made schedule for the merits hearing. Despite this, a distinct pattern or structure exists for merits hearings, which is more or less closely followed in most arbitrations under Swedish law.

182. The merits hearing is thus typically initiated by the parties' opening statements. In this first stage of the hearing, each party – beginning with the claimant, unless otherwise agreed (199) – gives an account of its prayers for relief as well as the material facts and legal arguments relied upon in support. The central written evidence relied upon by the party is also presented and commented upon. However, there is no requirement that a document must be exhibited or referred to at the hearing in order for it to be relied upon as evidence. It suffices that the document has been filed with the written submissions and referred to there in connection with the factual allegation that the document is intended to prove. The arbitral tribunal can be presumed to have considered all documents submitted to it before the merits hearing. (200)

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183. The opening statements can generally be relatively concise. (201) In giving their opening statements, the parties' counsel should thus try to summarize the most important parts of the written material already submitted to the arbitral tribunal in a clear and logical manner in order to give the arbitral tribunal 'a good, coherently positive predisposition towards the party's claim'. (202)

184. It is often rather difficult for counsel orally to describe certain elements of the case, such as complex technical details. In these situations, counsel can use technical aids, display sketches, photographs, films and the like to explain the relevant circumstances for the arbitral tribunal. Importantly, however, in order to allow the other party to prepare its case without the risk of surprises, no new evidence and no new factual allegations are expected to be made or presented at the hearing. (203) If, for example, a picture is used during the opening statement to describe a company structure, the information in that picture should already be in the case file, albeit in writing and not previously depicted in that way. (204)

185. The parties' opening statements are followed by examination of witnesses and experts. In virtually all international arbitrations, the parties submit written witness statements prior to the merits hearing. In these cases, it is common practice not to allow examination-in-chief of witnesses. Instead, written statements stand in lieu of examination-in-chief and oral testimony is limited to cross-examination and, possibly, re-direct examination (*see* section V.B.1). (205) With respect to party-appointed experts who have submitted expert opinions on legal, technical, economic and other issues, the common practice is also to limit examination-in-chief and focus on cross-examination. However, experts are typically allowed at least some time to explain their expert reports, the subject matter of which may be complex.

186. The final stage of the merits hearing generally consists of the parties' closing arguments. In delivering their closing arguments, the parties are expected to argue their cases from a legal as well as a factual perspective. The parties are also expected to give their view on how the arbitral tribunal is to assess the written and oral evidence presented during the merits hearing or earlier in the proceedings. Unless otherwise
P 264 agreed, the claimant should start with its closing argument. This general principle applies even in situations where the claimant does not bear the burden of proof. (206) In the view of the authors, it is often advisable to reserve some time in the hearing schedule between taking evidence and the closing arguments, so as to allow the parties to digest what has transpired during the examinations and finalize their arguments and presentation material. However, the arbitral tribunal should be wary of splitting up the hearings so that one party is treated more favourably than the other. For instance, it has been suggested that it would be inappropriate to divide the hearing so that the claimant presents evidence at one hearing and the respondent at a later one. (207)

187. Unless post-hearing briefs are to be exchanged or the proceedings for some other reason are set to continue after the merits hearing, it is preferable that the arbitral tribunal ends the merits hearing by declaring the arbitral proceedings closed and explaining that it will not consider further submissions from the parties. This declaration – which must be made before the award is rendered under the SCC Rules, but which is not a requirement under the Act (208) – clarifies that the arbitral tribunal wishes to receive

no further input. It also reinforces the arbitral tribunal's ability to disregard belated and unsolicited submissions from the parties.

5. Virtual Hearings

188. Today, there is an increasing demand for virtual options to the usual physical hearings. The reason may be travel restrictions, (209) climate awareness or simply that the parties want to save time and costs by not having counsel, witnesses and the arbitral tribunal travel and stay at hotels for weeks.

189. Since the demand for virtual hearings and the technology allowing it are relatively new, virtual hearings are not explicitly provided for in the Act, or in the SCC Rules. There are views that a virtual hearing can never fully replace a physical hearing, (210) but this view appears to be based on practical preferences more than on whether a virtual hearing legally would fulfil the parties' right to a hearing pursuant to Article 24 of the Act. The *travaux préparatoires* to the Act mention examination of witnesses 'via telephone or TV-monitor' as an alternative if the witness is not (physically) present at the hearing and explicitly recognize that the boundaries of how a hearing is conducted are not determined by law, but by available technology. (211)

190. Both the Swedish Code of Judicial Procedure and the European Convention on Human Rights acknowledge virtual alternatives as fulfilling the requirements of a hearing. The Code of Judicial Procedure explicitly mentions telephone and video as alternatives
P 265 for participating in hearings under the Code, albeit the main rule should ● still be for the participants to be physically present at the meeting. (212) Pursuant to Chapter 5 section 10 of the Code of Judicial Procedure, the court may decide that a party or other person who is to be present at a meeting (such as a hearing) is to participate by audio only or audio-visually. (213) If someone participates in that way, that person is deemed to be participating in the hearing. Consequently, even pursuant to the Code of Judicial Procedure, according to which there is a principle that the court may only rule on requests for relief, facts and evidence that have been presented at the hearing (a principle which does not apply in arbitration), it may be possible to conduct a hearing virtually, at least in part.

191. As mentioned, the European Convention on Human Rights also accepts videoconferencing as a means of fulfilling the requirements for a fair trial. Even the minimum right of a person charged with a criminal offence to be able to cross-examine any witness in the case, set out in Article 6.3 of the Convention, may be satisfied by means of videoconferencing. (214)

192. The IBA Rules on the Taking of Evidence may also provide guidance. In the list of definitions, 'Evidentiary Hearing means any hearing, whether or not held on consecutive days, at which the Arbitral Tribunal, whether in person, by teleconference, videoconference or other method, receives oral or other evidence.' Accordingly, the IBA Rules on the Taking of Evidence offer videoconferencing as an alternative to a traditional hearing. It is further stated in Article 8.1 that '[e]ach witness shall appear in person unless the Arbitral Tribunal allows the use of videoconference or similar technology with respect to a particular witness'. It is thus within the arbitral tribunal's discretion to decide whether it is appropriate to hear the witness in videoconference format.

193. The technical aspects of virtual hearings must of course meet certain standards in order for the hearing to count as a hearing. What those standards are may be debated, but it can be concluded that there is nothing under Swedish law, the SCC Rules or the IBA
P 266 Rules on the Taking of Evidence prohibiting a hearing by virtual means. Rather, ● under certain circumstances, since the necessary technology is now available, a virtual hearing may be the only way to comply with the fundamental requirements to conduct the proceedings efficiently and expeditiously, subject, of course, to the principles of party autonomy and equal treatment of the parties. (215)

6. Post-hearing Briefs

194. In complex arbitrations where the merits hearing has lasted for several days or weeks, it may be difficult for the parties to present their cases orally at the end of the merits hearing. In these cases, it is common for the closing arguments to be presented after the merits hearing in the form of post-hearing briefs. This approach enables the parties to review the transcript from the hearing and carefully analyse all evidence. (216) Even in cases where the merits hearing is concluded with oral closing arguments, post-hearing briefs may be used as a complement. Effective post-hearing briefs are used to assist the arbitral tribunal in writing the award. Preferably, the arbitral tribunal, at the end of the merits hearing, asks the parties to comment on particular legal or factual issues of interest to the arbitral tribunal.

195. There are no provisions in the Act or in the SCC Rules specifically dealing with post-hearing briefs. It is therefore up to the parties and the arbitral tribunal to determine the approach they see fit. The most common approach to submission of post-hearing briefs is that both parties submit their briefs simultaneously on a date either agreed between them or ordered by the arbitral tribunal. These first post-hearing briefs are sometimes followed, after a short period, by rebuttal post-hearing briefs, also filed simultaneously. It is common for arbitral tribunals to limit the number of pages allowed in the post-

hearing and rebuttal post-hearing briefs. The rebuttal briefs are also typically limited to comments on errors and new arguments in the other party's first brief.

H. Conduct of Proceedings When One Party Is Absent

196. A basic principle under Swedish arbitration law is that each party should be given a
P 267 reasonable opportunity to present its case. The rule is expressly set out in section 24 ● of the Act and in Article 23(2) of the SCC Rules. Section 24 also provides for the right of each party to receive all material submitted to the arbitral tribunal by the opposing party or other party. A party is also entitled to a hearing prior to determination of an issue referred to the arbitral tribunal, if it so requests and unless otherwise agreed between the parties.

197. Instances occur, however, when one party is inactive or entirely absent in the proceedings. The Act and the SCC Rules provide tools to deal with attempts to obstruct the proceedings, including how to proceed where a respondent does not participate in the proceedings.

198. Section 24(3) of the Act provides that, if a party fails without valid cause to appear at a hearing or otherwise to comply with an order of the arbitral tribunal, this does not prevent continuation of the proceedings and resolution of the dispute on the basis of existing materials.

199. Similarly, Article 35 of the SCC Rules provides directions in case a party defaults in presenting its case. If the claimant fails to submit a statement of claim in accordance with Article 29 of the SCC Rules and cannot show good cause for its failure to do so, the arbitral tribunal will terminate the proceedings (provided that the respondent has not filed a counterclaim). If the respondent has filed a counterclaim, the arbitration will proceed only as regards the counterclaim. (217)

200. In other cases, if a party fails without good cause to submit a statement of defence or other written submission in accordance with Article 29, or if it fails to appear at a hearing or otherwise to avail itself of the opportunity to present its case, the arbitral tribunal may proceed with the arbitration and render an award. The SCC Rules thus accord with the Act in this respect. These rules entail that the arbitral tribunal is authorized to proceed ex parte if a party fails without justification to appear or to plead its case.

201. The arbitral tribunal cannot render a 'default judgment' based exclusively on the failure of a party to appear or to participate in the arbitration. Nor can it dismiss the case due to a party's inaction. (218) The arbitral tribunal must examine the case on the merits based on the entirety of the evidence presented, notwithstanding that one party is absent. A party's inaction does not entail an implied admission of the facts invoked by the opposing party. Thus, facts and arguments in favour of the absent party must objectively be taken into account by the arbitral tribunal, but without introducing new facts or evidence. (219)

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202. An absent party that shows 'valid cause' or 'good cause' for its failure to submit a statement or to appear at a hearing should be given a new opportunity to do so. The cause may, for example, be that the respondent has not been duly notified about the ongoing arbitration. A misunderstanding may also be accepted as valid cause if there is no reason to assume that the party is trying to obstruct the proceedings. (220)

203. Even in proceedings with one party absent, the arbitral tribunal should aim at maintaining the adversarial principle. (221) The arbitral tribunal should thus keep the inactive party informed and all submissions and all summonses to hearings should be communicated to that party with an opportunity to comment.

204. If new submissions are made at the final hearing, it is for the arbitral tribunal to decide whether the absent party should be given the opportunity to comment on them. (222) However, the arbitral tribunal has no obligation to proactively safeguard the interests of an absent party. (223) In other words, the adversarial principle applies and the fact that one party is absent does not turn the arbitration into an inquisitorial proceeding.

205. In rendering an award when one party is absent, the arbitral tribunal must ensure that the non-active party has been given an opportunity to present its case and to submit comments on the arguments and evidence submitted by the opposing party. It has been proposed that the arbitral tribunal should explain in the award the measures that have been taken in order to enable the absent party to present its case. (224)

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V. EVIDENCE

A. Introduction

206. Presentation of evidence is crucial to the outcome of virtually every dispute. (225) Evidence is everything that supports the facts and allegations presented by the parties

and is thus intended to assist the arbitral tribunal in determining issues of fact and disputed issues of expert opinions. (226)

207. Arbitration in Sweden is an adversarial procedure. Pursuant to section 25(1) of the Act, the parties are responsible for presenting and introducing evidence. The arbitral tribunal is not to conduct any factual investigation of its own volition. The arbitral tribunal may, however, appoint experts unless both parties object (*see* further section V.C.2 below). The adversarial principle is also inherent in the SCC Rules. Pursuant to Article 29, it is for the parties to submit any evidence they intend to rely on together with their written pleadings.

208. A party in an arbitration seated in Sweden may request the arbitral tribunal to order the other party to produce documents. The arbitral tribunal has wide discretion when ruling on such requests but will commonly base its decisions on the principles set forth in the IBA Rules on the Taking of Evidence. (227)

209. The IBA Rules contain not only principles relating to document production but also provisions regarding presentation of documents, factual and expert witnesses, and inspections, as well as conduct of evidentiary hearings. As mentioned above, the IBA Rules on the Taking of Evidence are not directly applicable to arbitrations in Sweden unless the parties so agree, but they may nevertheless serve as guidelines for the parties and the arbitral tribunal as, in many respects, they reflect 'best practice' in international arbitration. (228) In practice, most international arbitrations taking place in Sweden, as well as many domestic arbitrations, are indeed guided by the IBA Rules on the Taking of Evidence.

210. The IBA Rules on the Taking of Evidence are designed for use in conjunction with institutional rules, ad hoc rules or other rules or procedures governing international
P 270 arbitrations. They are intended to reflect procedures in use in many different legal systems, which makes them particularly useful when the parties come from different legal cultures. In the authors' view, the IBA Rules on the Taking of Evidence provide a number of helpful clarifications and guidelines, which are useful in international as well as domestic arbitration in Sweden.

211. In Swedish arbitral proceedings, the admissibility, relevance, materiality and weight of evidence is for the arbitral tribunal to determine. This principle is enshrined in the SCC Rules. (229) While an arbitral tribunal enjoys wide discretion in its considerations of the evidence, (230) the parties are, in principle, free to present almost any kind of document, witness, statement or occurrence to support their case. Accordingly, there is nothing preventing a party from submitting, for example, evidence obtained illegally or wrongfully, or hearsay evidence. (231) Lawyers from common-law jurisdictions participating in arbitrations in Sweden should thus be aware that reliance cannot successfully be placed on technical rules concerning admissibility of evidence. Instead, the arbitral tribunal may take such circumstances into account when evaluating the evidence. (232)

212. Section 25(2) of the Act identifies two instances where the arbitral tribunal may refuse to admit evidence. First, evidence may be rejected if it is 'manifestly irrelevant to the dispute'. Since it may be difficult for the arbitral tribunal fully to assess evidentiary relevance beforehand, this option is sparsely exercised in practice. (233) Second, the arbitral tribunal may refuse to admit evidence where 'such refusal is justified having regard to the time at which the evidence is invoked'. This rule may be applied if, for instance, the arbitral tribunal has issued a procedural order under which the parties are to submit their evidence by a certain date. Only in specific circumstances should a party be permitted to submit additional evidence after that date. (234) This rule is also applicable where a party, even when there is no explicit cut-off date for the submission of new evidence, wishes to introduce new evidence at a late stage of the proceedings. (235) The tribunal will then have to consider and weigh whether there is a risk that the proceedings will be delayed if the new evidence is accepted, if the new evidence was presented at a late stage with the aim of surprising the other party, and whether there was any relevant reason or obstacle (beyond the party's control) preventing the party from making a timely submission. (236)

213. In the *Belgor* case, the party seeking to set aside an arbitral award (Belgor) argued that it had been deprived of the opportunity to prove a particular assertion in the
P 271 underlying arbitration as a result of the arbitral tribunal's decision not to extend a deadline for the filing of a submission. (237) The Supreme Court clarified that a prerequisite for setting aside an award due to such a decision is that the party who sought the extension did not itself cause its own predicament. It is accordingly required, the court found, that the party seeking to set aside the award can identify unforeseeable reasons, beyond its control, which resulted in a situation where that party was unable to present its evidence in a timely manner. Lastly, the court added, the challenging party must show that there was no clearly acceptable alternative manner in which the party could have presented its case (i.e., as it must be understood, whether there were ways to overcome the obstacle or delay that allegedly prevented the party from making a timely submission). (238)

214. In practice, arbitrators are generally cautious about mitigating the risk of successful challenges and may therefore view it as a 'safer alternative' to permit a belated

submission of evidence than to reject it. As elaborated on in section IV.F.6 above, however, there are strong arguments for the view that arbitral tribunals should not accept belated submissions unless there are compelling reasons to do so. In cases where one party is permitted to introduce new evidence at a late stage of the proceedings, however, it is important that the tribunal ensures that the opposing party is provided reasonable time and opportunity to digest the new evidence, and be allowed to supplement its own evidence, if deemed necessary. Thus, if a late request to submit additional evidence is prompted by evidence recently introduced by the other party, it may be appropriate to admit the new evidence. (239)

B. Documentary Evidence

1. Reliance on Documents

215. Documentary evidence tends to play a fundamental role in international arbitrations. Arbitrators generally accord greater evidentiary weight to documents than to witness testimony. (240) Witnesses may forget or have false recollections of certain events. They may also feel inclined, without lying or omitting crucial facts, to adapt their testimony in favour of the party who introduced them, whether or not they have an interest in the outcome of the dispute. It is therefore understandable that arbitrators prefer, as far as possible, to place reliance on documentary evidence.

216. As already noted in section V.A above, any kind of document may be relied on as evidence in arbitral proceedings in Sweden. The parties and the arbitral tribunal normally agree at an early stage on how and when documents are to be presented. The
P 272 common practice is for the parties to submit the documentary evidence they rely on ● together with their written pleadings. (241) Typically, the arbitral tribunal, after having consulted with the parties, will decide on a 'cut-off date' after which no new documents may be introduced, unless extraordinary circumstances apply (*see* section IV.B above). (242)

217. Under Article 31(2) of the SCC Rules, the arbitral tribunal may order a party to identify, separately, (243) the documentary evidence it intends to rely on and specify the circumstances intended to be proved by such evidence. This is a practice used in Swedish courts and also in some domestic Swedish arbitrations that seek to resemble Swedish litigation. (244) In the experience of the authors, arbitral tribunals rarely, if ever, exercise this option in international arbitrations taking place in Sweden (and it is also becoming increasingly uncommon in purely domestic arbitrations). Rather, the practice is that the parties – as in any international arbitration – identify and refer to the written evidence in connection with the factual allegations in the submissions that the relevant evidence is intended to prove. Preferably, this issue should be discussed at the first procedural meeting, and be clarified in the arbitral tribunal's PO1 (*see* section IV.F.2 above).

2. Production of Documents

218. There is no duty of 'disclosure' or 'discovery' under Swedish law. As noted in section V.A above, however, the arbitral tribunal may order a party to produce documents. Article 31(3) of the SCC Rules provides that '[a]t the request of a party, or exceptionally on its own motion, the Arbitral Tribunal may order a party to produce any documents or other evidence that may be relevant to the case and material to its outcome'. Absent specific rules agreed by the parties, the arbitral tribunal has wide discretion – within the confines of the general procedural principles of the Act – to set the conditions for document production. (245) However, in most international arbitrations seated in Sweden (as well as in many domestic Swedish arbitrations) the IBA Rules on ● the Taking
P 273 of Evidence serve as guidelines for the arbitral tribunal and the parties in issues relating to document production. (246)

219. As mentioned above, in cases where the IBA Rules on the Taking of Evidence for some reason are not considered an appropriate source of guidance, arbitral tribunals will occasionally turn to the Swedish Code of Judicial Procedure (which is not otherwise applicable to arbitrations) for guidance. (247) In the view of some arbitral tribunals, this may be an appropriate source of inspiration where both parties are represented by Swedish counsel appearing before an all-Swedish arbitral tribunal. However, arbitral tribunals should not automatically resort to the Code of Judicial Procedure in domestic arbitration, that is, without considering the appropriateness thereof in each specific case. (248)

220. The IBA Rules on the Taking of Evidence and the Code of Judicial Procedure largely impose similar requirements, although some differences exist, in particular regarding the threshold for the materiality of a requested document and the grounds for objecting to production. Swedish procedural law takes the approach that a requested document must be of potential relevance in relation to a fact in dispute, and that such fact – in turn – must be relevant to the requesting party's case. Pursuant to the Code of Judicial Procedure, a court may reject a request if the document in question appears to be immaterial as evidence or if evidence can be obtained by different means and at a lower cost.

221. The threshold for document production pursuant to the IBA Rules on the Taking of

Evidence is relatively high. They require that the document be relevant to the case and material to its outcome. (249) It follows that the arbitral tribunal must engage in a prima facie analysis of the request and determine, first, whether the documents sought are relevant to substantiate a party's factual allegation and, second, whether such factual allegation (if proven) may realistically affect the outcome of the case. Hence, the arbitral tribunal may very well find that the documents requested are relevant to substantiate a certain factual allegation, but deny the request since the allegation will (prima facie) have no effect on the outcome of the case. (250)

222. In international arbitrations in general, as well as in arbitrations seated in Sweden, it
P 274 is common practice to use so-called Redfern Schedules for document ● requests. (251) A Redfern Schedule is a table, usually in a Word document, which contains the following five columns: (1) identification of document(s) or categories of documents requested; (2) short presentation of the reasons for each request; (3) summary of objections by the other party to production of the document(s) requested; (252) (4) the requesting party's response to the objections; and (5) the arbitral tribunal's decision on each request. The parties discuss the requests among themselves by exchanging updated versions of the Redfern Schedule, which is then submitted to the arbitral tribunal for decisions if the parties have not been able to agree on each request. This procedure is intended to help the arbitral tribunal make an informed decision promptly and efficiently. (253) However, the use of Redfern Schedules is sometimes perceived as impractical since the parties' arguments may span several pages, thus making it difficult to read the document. Perhaps this is an instance where there is room for further innovation in international arbitration. A solution following the same steps, but using an electronic platform replacing the Redfern Schedule, could potentially be preferable.

223. In order for the arbitral tribunal to be able to assess the relevance and materiality of a certain document, the document and its alleged relevance must be sufficiently identified by the requesting party. For the arbitral tribunal to grant the request, a third party executing the order should be able to ascertain whether the order has been complied with or not. If several documents are requested, it may be acceptable for the requesting party to refer to specific categories, such as e-mails or letters between certain individuals, covering a certain period and relating to a clear and specific subject matter. Vague requests or requests for wide categories of documents are generally denied. (254) A request must be worded in a manner enabling the producing party to understand which documents are responsive to the request and the producing party should not have to analyse a large number of documents to determine which may be the ones referred to in the request. (255)

224. It follows from the IBA Rules on the Taking of Evidence that a party should not be ordered to produce documents if such production would be unreasonably burdensome. (256) The rules further provide that it is within the arbitral tribunal's discretion to
P 275 consider 'procedural economy, proportionality, fairness or equality of the [p]arties' ● when rendering decisions on requests for production of documents. (257) Accordingly, an arbitral tribunal takes good care to consider these aspects when rendering its decision on a request for production of documents.

225. Neither the Act nor the SCC or the IBA Rules on the Taking of Evidence address the issue of the timing of requests for document production. The timing issue is, however, commonly addressed in the PO1. At an early stage of the proceedings it is often difficult to assess the relevance of evidence, unknown to what extent various factual allegations will be relevant, and in many cases impossible for the requesting party to refer to factual allegations (already) made in the case. The document request phase is therefore often scheduled to take place after the first round of submissions. At that stage, the arbitral tribunal is typically better informed of the case, and, thus, in a better position to determine whether a requested document is relevant and material. (258)

226. While the above-mentioned ban on 'fishing expeditions' prohibits a method of obtaining documents, (259) an otherwise acceptable request to produce may also be denied due to the content of the requested documents. This may, for instance, be the case if the content of the document qualifies as trade secrets or contains privileged information. (260) The obligation to produce does not extend to personal notes prepared exclusively for private use, (261) unless compelling reasons exist. (262) Such compelling reasons may be that a witness has referred to personal memoranda in support of a witness statement. (263)

227. An arbitral tribunal has no power to order a third party to produce documents. However, a party to an arbitration may, after having obtained the consent of the tribunal, submit such an application to a district court. If the court approves the application, any entity or individual within the jurisdiction of the court may be ordered to produce it. (264)

228. The IBA Rules on the Taking of Evidence provide that '[d]ocuments that a Party maintains in electronic form shall be submitted or produced in the form most convenient
P 276 or economical to it that is reasonably usable by the recipients, unless the ● Parties agree otherwise or, in the absence of such agreement, the Arbitral Tribunal decides otherwise'. (265) This means, for instance, that if a party is in the possession of documents in a searchable PDF-format, the document should be produced as such, instead of being

printed and delivered in binders. However, sometimes PDF-format is not appropriate either, for example if the format would hide information or make it difficult to use. Examples include databases such as construction time schedules, which can only be read as native files in their appropriate program.

229. In *R.G. AB v. Securitas Teknik AB*, the Supreme Court confirmed that information which is kept only in electronic form may also be subject to an order to produce pursuant to the Code of Judicial Procedure. (266) The same principle is enshrined in the IBA Rules on the Taking of Evidence. In *Idre Fjällrestauranger AB v. Stiftelsen Idre Fjäll*, the Supreme Court concluded that, as a starting point, production should be in the same format as the producing party itself stores the information. (267) The Supreme Court also stated that production should be in a format that is conventional for storing, using and transmitting the information in question. However, it should be considered that electronic files may contain information, such as metadata, which is not covered by the request or order by the arbitral tribunal. If such information is not possible to remove, the court will have to determine whether the native file's relevance as evidence and the requesting party's interest in obtaining the file in its native format outweighs the producing party's interest not to disclose such additional information. The Supreme Court concluded that, in such cases, the court may also consider whether the electronic file should be printed. In the authors' experience, e-mails are an example of documents which are commonly produced as PDF files instead of in their native format. This approach is explained by integrity concerns since e-mails, if produced in their native format, can be replied to, forwarded, etc.

230. In Swedish arbitrations, no sanctions are available to the arbitral tribunal should a party fail voluntarily to comply with a tribunal order for production of documents. Under section 26 of the Act, a party may however seek the arbitral tribunal's consent to apply to the district court for an enforceable document production order. The arbitral tribunal should grant the application if it finds that the documents requested may be relevant as evidence. *If approved by the arbitral tribunal*, the district court will grant the application if it is considered 'lawful' (*see* further section V.F below). The arbitral tribunal may furthermore take failure to produce into consideration when evaluating the (other) evidence before it, and draw adverse inferences from failure to comply with the order to produce (*see* section V.E below). This may be a more time and cost-effective alternative, compared to requesting or permitting to seek assistance from the courts.

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C. Witnesses and Experts

1. Witnesses

231. The parties are free to agree on the modalities of witness testimony. This may be presented in the form of a written witness statement or through examination of the witness at the merits hearing, or both. The practice in international arbitrations in Sweden is that the parties submit written witness statements which they refer to in support of the factual allegations made in written pleadings. (268) As part of further modernizing and bringing Swedish domestic arbitration into line with international standards, this is increasingly the norm in domestic arbitrations as well.

232. If witness statements are used, the normal practice is for statements to stand in lieu of oral direct examination, which will save time at the hearing and also make the hearing more predictable. However, a party should always be entitled to cross-examine a witness whose testimony is presented by way of a written witness statement. Consequently, the general rule is that a witness or expert on whose testimony a party seeks to rely must attend the hearing for cross-examination, unless otherwise agreed by the parties. (269) Since the practice is that written witness statements replace oral direct examination, it will be for the party not relying on the witness to decide whether the witness is to appear at the hearing. Usually, the PO1 sets out rules for how and when a party is to inform the other party of which witnesses it wishes to cross-examine. If a witness, called for cross-examination, fails to appear, the arbitral tribunal should carefully consider whether the circumstances are such that some evidentiary weight should nevertheless be attached to the witness statement, or – absent such circumstances – the witness statement should be disregarded altogether.

233. In arbitrations where no written witness statements are submitted, the parties usually indicate, in so-called statements of evidence, the oral evidence on which the parties wish to rely and what they intend to prove with each examination. In arbitrations under the SCC Rules, the arbitral tribunal may order the parties to submit such a statement. (270) Such a statement should always be required in cases where no written statements are submitted, to minimize the inherent risk of surprise tactics and give the other party at least some chance to prepare a cross-examination. This notwithstanding, written statements are in the authors' view clearly preferable considering factors such as cost- and time-efficiency, procedural fairness (permitting each party to know in advance of the hearing what factual statements the other party's witness will make), and the
P 278 tribunal's evaluations of the evidence (in that a properly ● prepared cross-examination on the basis of a written statement will enable the tribunal to assess the credibility and relevance of the testimony).

234. The parties' responsibility under the Act to present evidence includes a responsibility to ensure that the witnesses on whose testimony they rely are present at the hearing. (271) Should a witness fail to attend the hearing, the consequences have to be assessed in each individual case. (272) The absence of a witness will normally not constitute grounds for postponing the hearing, although this may be an alternative if the witness is crucial for one of the parties and that party is able to demonstrate that the witness had valid reason/lawful excuse for not appearing. If possible, however, the arbitral tribunal should, in the authors' view, attempt to arrange for the witness to testify by means of videoconferencing or telephone conferencing or, alternatively, schedule a separate session for examination of that witness, so as to avoid delays.

235. There are no restrictions as to who may testify in arbitral proceedings. Consequently, party representatives may testify in the same way as witnesses not formally affiliated with a party. (273) It is for the arbitral tribunal to take issues of party affiliation into account when assessing the evidentiary weight to be attached to testimony.

236. The Act contains no rules on evidentiary privilege. Absent the parties' agreement, it will therefore be for the arbitral tribunal to determine which privilege regime will apply. It has been suggested that the provisions of the Code of Judicial Procedure may be applied by analogy in this regard. (274) Some privileges under the Code of Judicial Procedure are absolute, whereas others may be set aside under certain circumstances. For instance, an attorney may only be heard as a witness concerning matters entrusted to him in the performance of his assignment if the party concerned (usually the client) consents. (275) A witness may also refuse to give testimony that would involve disclosure of a trade secret, but that privilege is not upheld if some 'extraordinary reason' exists to examine the witness on the subject. (276) However, the rules of the Code of Judicial Procedure offer little guidance in situations where the parties and the witnesses are from different jurisdictions, with different privilege regimes. It has therefore been suggested that the privileges of the country of domicile of the witness may be invoked in addition to the Swedish provisions. (277) Arguably, however, that could lead to unequal treatment of the parties, since the parties may come under different privilege protection. In the authors' experience, arbitral tribunals are sometimes seen resolving this by
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determining in a procedural order a common privilege regime which may be inspired by the rules of several jurisdictions and applicable to all parties and witnesses involved.

237. Under Swedish ethical rules for lawyers, it is generally accepted that counsel meets with the party's witnesses to interview and prepare them before they give oral testimony at a hearing. (278) The same view is adopted in the IBA Rules on the Taking of Evidence, which provide that '[i]t shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses and to discuss their prospective testimony with them'. (279) Indeed, it is crucial for counsel to meet with witnesses during the preparatory stage in order to assess the relevance of their testimony as well as their general credibility, to draft the witness statement and, later, to prepare witnesses for the unfamiliar situation of being cross-examined. (280) It is sometimes argued that there is a risk that a witness' memory may be affected by these contacts. (281) There is certainly such a risk – which counsel should be cautious of when assisting witnesses in preparing their statements and to appear for cross-examination. (282) However, the risk of incorrect witness testimony and false recollection of events is, in the authors' experience, considerably greater if counsel has not critically tested and challenged the recollections of a witness, for example by assisting the witness with sorting out the chronology of events with reference to the contemporaneous documentary evidence.

238. Arbitral tribunals are not empowered to administer oaths. (283) Thus, witnesses cannot testify under oath before an arbitral tribunal. However, under 26(1) of the Act, a tribunal may consent to witnesses being heard under oath before a competent district court. Under Article 8(4) of the IBA Rules on the Taking of Evidence:

> A witness of fact providing testimony shall first affirm, in a manner determined appropriate by the Arbitral Tribunal, that he or she commits to tell the truth or, in the case of an expert witness, his or her genuine belief in the opinions to be expressed at the Evidentiary Hearing. If the witness has submitted a Witness Statement or an Expert Report, the witness shall confirm it.

239. This provision is an expression of common practice in international arbitrations.

240. Where no written witness statements have been submitted, the party relying on the witness starts the examination and the other party is then offered the opportunity to conduct a cross-examination. Where witness statements have been submitted, counsel for the party relying on the witness' testimony is generally permitted only to ask a limited
P 280
number of 'warm-up' questions. Unless there is a need to correct or clarify any part of the witness statement, the examination is usually very short, and is generally confined to introductory questions such as whether it is indeed a copy of the witness' statement on the desk in front of the witness, before cross-examination begins.

241. The cross-examination is followed by an opportunity for the party relying on the witness to conduct a re-direct examination, limited to issues raised in the cross-examination. In Swedish judicial procedure, leading questions may not be asked during

direct and re-direct examination of a witness. (284) The Act does not contain such a restriction, but it is part of set arbitral practice that the same principle also applies to arbitral proceedings in Sweden. (285) This is also common practice in international arbitration in general. This is not surprising, as the evidentiary weight of testimony will arguably be lower if largely induced by leading questions put by counsel. (286)

242. Occasionally, a party is able to extract new relevant evidence from cross-examination. However, this function must be considered incidental, as the main objective of cross-examination is rather to weaken the other party's case and to reinforce facts favourable to the client's case. (287) Typically, the cross-examiner will attempt to expose flaws, inconsistencies, and the like, in direct testimony or a written witness statement in order to undermine the credibility of the witness.

243. The first question a party, or rather its counsel, needs to ask itself in this regard is whether cross-examination is necessary in the first place. (288) In many cases, this question should probably be answered in the negative, as the potential risks often outweigh the potential gains. (289) The fact that a party chooses not to cross-examine the other party's witnesses is not to be interpreted as an acceptance of the testimony. There are other – sometimes more efficient – ways than cross-examination to challenge testimony, for example by referring to documentary evidence.

244. Cross-examination in international arbitration is an area where differences in legal culture may be particularly apparent. If one were to generalize, common-law lawyers opt to cross-examine more often than their continental colleagues, and their examinations tend to be longer. The common-law approach to cross-examination is also typically more intense, in a way sometimes perceived as aggressive by arbitral tribunals not accustomed to the practice.

245. The purpose of re-direct examination is, essentially, to remedy potential damage caused by cross-examination. Accordingly, the purpose should not be to supplement the
P 281 direct examination or to ask other questions unrelated to issues discussed in ● cross-examination. Also this aspect should be thoroughly considered by counsel tasked with conducting cross-examination, as cross-examination questions relating to a certain subject or area may put (a well-prepared) opposing counsel in a position to explore the matter further in re-direct examination (and, thus, to de facto supplement the direct examination by referring to the questions asked during cross-examination, even if this – as noted – is not the intended purpose of a re-direct examination).

246. The arbitral tribunal may ask questions which the arbitrators consider relevant to the issues before them. Swedish arbitrators tend to exercise this mandate with considerable caution; perhaps sometimes even too much caution, thereby even avoiding clarifying issues which are genuinely unclear to them. However, good reasons exist for the arbitral tribunal to take a passive role in the examination of witnesses. First, the arbitral tribunal should not 'invent' new allegations or give rise to presentation of new allegations. Second, the arbitral tribunal should avoid the risk of creating an appearance of bias by coming across as assisting one party's case.

2. Experts

247. International commercial arbitrations often involve advanced technical issues and complicated quantifications of damages claims. Since most arbitrators are lawyers, they may need the assistance of experts to resolve the dispute in these cases. The involvement of experts is often a necessity to ensure efficient proceedings in complex disputes. (290) There are no general requirements as to who may appear as expert witnesses. The rules and procedure usually applied to submission of expert evidence are in all material respects similar to those applied to the submission of witness testimony (*see* section V.C.1 above).

248. Experts are with a few exceptions appointed by the party relying on the expert testimony at issue. The possibility for the arbitral tribunal to appoint its own expert(s) under section 25 of the Act is an exception to the fundamental principle that the parties present the evidence. Notably, however, if both parties object, the arbitral tribunal may not appoint its own expert(s). In practice, experts are very rarely appointed by tribunals in Swedish arbitrations.

249. If each party appoints its own expert to testify on a certain matter, which is by far the most commonly adopted method, (291) the evidence presented will almost invariably be conflicting with respect to crucial issues. The arbitral tribunal will then find itself in the difficult position of having to evaluate the respective expert testimony, both of which are founded on experience foreign in kind to their own. In addition, party-appointed experts have often been accused of submitting reports based on different facts and assumptions, which makes the tribunal's task even more difficult. However, some guidance on how to deal with this problem is found in the IBA Rules on the Taking of
P 282 Evidence. Article 5.4 provides that the arbitral tribunal may in its discretion ● order party-appointed experts who submit expert reports on the same or related issues to meet and confer on such issues and to report on remaining areas of disagreement and the reasons for such disagreement. The tribunal may also suggest that the experts are to be examined together, commonly referred to as witness conferencing (or 'hot-tubbing'). The rationale behind this concept is that the presence during the examination of the

expert relied on by the other party will decrease the risk of vague, illogical, biased or unsupported statements and arguments, as such statements and arguments may be corrected or exposed by the other expert in 'real time'.

250. Whether appointed by a party or by the arbitral tribunal, experts will present their findings in a written report. Pursuant to Article 5.2(e) of the IBA Rules on the Taking of Evidence '[d]ocuments on which the Party-Appointed Expert relies that have not already been submitted shall be provided'. It is fundamental that the opposing party's expert gets access to the same information in order to be in a position to review and analyse the first expert's reports. If a party has failed to submit the documents on which its expert relies, contact between counsel will often be sufficient to obtain the documents. In the authors' experience, such documents are only rarely subject to formal requests for production to the tribunal.

251. Like witnesses in general, experts may be subjected to cross-examination at the hearing unless otherwise agreed by the parties. However, unlike other witnesses, expert witnesses are often permitted to present their findings at the hearing, even though their opinion has been expressed in a written report. Absent agreement between the parties, the form and duration of such presentations should be decided upon by the tribunal in a procedural order.

D. Inspection of Subject Matter of Dispute

252. At the request of a party, the arbitral tribunal may inspect the subject matter of the dispute. This method is mainly used in construction disputes or disputes concerning production plants or similar properties. It normally takes the form of a site inspection. However, inspections have become increasingly uncommon in modern arbitrations, since models, photographs, drawings or video recordings may often be used to fulfil the same purpose, albeit in a more efficient manner. (292)

253. Where an inspection is used, the parties and their representatives may attend. The arbitral tribunal, in consultation with the parties, sets the timing and arrangements for the inspection, including how observations made during the inspection are to be recorded. (293)

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E. Evaluation of Evidence and Burden of Proof

254. The Act contains no rules on how the arbitral tribunal is to analyse and assess evidence presented by the parties. Accordingly, arbitrations in Sweden are based on the principle that the arbitral tribunal is free to evaluate evidence in any manner considered appropriate. The principle of free evaluation of evidence also governs Swedish judicial procedure.

255. Despite the discretion afforded to the arbitral tribunal in evaluating evidence, some general observations can be made. As alluded to in section V.B.1 above, arbitrators tend to attach greater weight to documents than to oral testimony. Moreover, witnesses with a clear interest in the outcome of the case will generally be regarded with more scepticism than those who come across as 'truly independent'. (294) In the authors' experience, however, Swedish arbitrators may generally be more inclined – compared to arbitrators from certain other jurisdictions – to accept that statements made by witnesses are true and accurate absent indications to the contrary.

256. As noted above, if a party fails to comply with an order to produce documents issued by the arbitral tribunal, the tribunal may draw negative (adverse) inferences from such failure. Although the Act is silent on this issue, statements in the *travaux préparatoires* indicate that the arbitral tribunal has a general right to draw such conclusions. (295) A clear-cut example is that a party has questioned the authenticity of a copy of a document and the opposite party fails to present the original, despite being ordered to do so by the arbitral tribunal. In many instances, however, it is less clear what type of inferences the arbitral tribunal may and should draw from failure to comply with an order. (296) Both the SCC Rules (297) and the IBA Rules on the Taking of Evidence (298) recognize the right to draw negative inferences, although neither set of rules provides guidance as to the precise nature of such inferences, which is left to the discretion of the arbitral tribunal. (299) It has been suggested that the practical importance of this right is limited since, arguably, few arbitrators might be prepared to decide a case solely on the basis of a negative inference. (300)

257. While the evaluation of evidence is viewed as a procedural matter governed by the *lex arbitri*, the burden of proof is viewed as a matter governed by the substantive law applicable to the agreement (the *lex contractus*). (301) It has been said, however, that international arbitral tribunals almost invariably apply the principle that each party is
P 284 to prove the facts upon which it relies in support of its case (unless a certain proposition is so notorious or obvious that no proof is necessary). (302) This principle is explicitly stated in the UNCITRAL Rules, which provide that '[e]ach party shall have the burden of proving the facts relied on to support its claim or defense'. (303) However, the burden of proof may shift depending on the facts and circumstances of the individual case and the arguments relied on by the parties. (304) In Swedish civil procedure, the

claimant often has the burden of proving the facts upon which it relies, but the burden of proof may also be imposed on the party for whom it is easiest to secure certain evidence. (305)

258. As noted, there are no general rules setting the standard of proof required to convince an arbitral tribunal. Naturally, the tribunal may be inclined to require a higher degree of proof with respect to more serious allegations – for example, of misconduct or criminal activity. Under normal circumstances, however, the required standard ought to be that of a 'balance of probability'.

F. Court Assistance with Respect to Evidence

259. An arbitral tribunal in Sweden is not empowered to administer oaths, nor is it empowered to impose conditional fines or take other coercive measures against a party or third party who refuses to be examined or to produce documents. However, as mentioned in section V.B.2 above, Swedish arbitration law allows for the courts to provide assistance in this regard. (306) Section 26 of the Act lays down a procedure involving two steps. A party seeking court assistance must first request permission from the arbitral tribunal, (307) which is to approve the request if it considers the measure to be 'justified having regard to the evidence in the case'.

260. As for the arbitral tribunal's decision on whether to grant a request, the arbitral tribunal should consider the importance of the evidence in question. According to the *travaux préparatoires*, the examination or document requested must be of significance as evidence. (308) This implies that the measures must be capable of affecting the outcome of the case. (309) In other words, the evidence must, prima facie, be of relevance to a factual allegation which, if proven, would affect the outcome of the case. As to examinations of witnesses, experts or a party, the party seeking court assistance must
P 285 also explain why the relevant person should be heard under oath or truth affirmation ● and not just before the arbitral tribunal at an evidentiary hearing in the arbitration. If the party refers to credibility reasons and provides at least some support in this regard, it has been suggested that the arbitral tribunal should be rather generous in its assessment. (310) However, if the benefits are not obvious, it is submitted that considerations as to time and costs often outweigh the need to have a witness heard under oath. The arbitral tribunal may refuse to give its consent if the request is considered to have been made too late in the proceedings.

261. Once the arbitral tribunal has approved the request, the party may apply to the relevant district court. The approval of the arbitral tribunal must be submitted together with the application. Unless the arbitral tribunal has indicated another court, the application is to be considered by the Stockholm District Court. (311)

262. The district court will grant the application if 'the measure may lawfully be taken'. This has been held to mean that the court should assess whether Swedish procedural law allows the court to order the measure in question, whether the arbitral tribunal has granted permission for the court's assistance, whether the request has been submitted to the correct district court, and whether the request is specified to an extent that is possible to enforce. (312) Notably, the rules on privilege in the Code of Judicial Procedure may prevent the court from ordering a witness to testify or a document to be disclosed. Moreover, it is not uncommon that the opposing party objects that the documents requested contain trade secrets. (313) A party may only be ordered to disclose documents that include trade secrets if there are extraordinary reasons for such disclosure. (314)

263. The district court's examination is thus limited to issues of lawfulness. Accordingly, it is not for the court to examine whether the measure could be considered justified, but the court is to accept the arbitral tribunal's assessment of the evidentiary relevance in
P 286 this respect. (315) If the request relates to documents that contain trade ● secrets, the situation is somewhat more complex. As mentioned above, an order to disclose trade secrets is only lawful if there are 'extraordinary reasons' for disclosure. In order to determine whether such reasons exist, the court's lawfulness test must establish whether the evidentiary value of the document in question can be expected to be sufficiently high as to outweigh the interest of a party in not having its trade secrets disclosed. The Supreme Court made clear in *Flexiboys* that, also in such a situation, the starting point is that the court is to accept the arbitral tribunal's assessment of evidentiary value. (316) However, if the arbitral tribunal has not provided any details shedding sufficient light on the evidentiary value of the documents in question, the court is to make its own assessment thereof so as to be able to weigh the interest of the evidence being disclosed against the interest of protecting trade secrets.

264. The question whether Swedish courts have jurisdiction when an application under section 26 of the Act is directed against a foreign party is not explicitly addressed in the Act. However, in *RosInvestCo v. Russian Federation*, (317) the Supreme Court concluded that, for Swedish courts to have jurisdiction, it is sufficient that the parties have agreed that Sweden should be the seat of the arbitration. The ruling of the Supreme Court has been relied on by the Swedish courts in proceedings initiated under section 26 of the Act. (318)

265. In many international arbitrations in Sweden the documents requested are located

abroad and witnesses are domiciled in other countries. Even in such situations, Swedish courts may assist in ordering the measures in question. (319) However, if an order by a Swedish court is not enforceable in the country where the witness or document is located, an application under section 26 of the Act may not be worth the trouble. (320)

VI. CONFIDENTIALITY

266. It is often said that parties choose arbitration over litigation due to the 'confidentiality' of the proceedings. However, the Act contains no provisions regarding the confidentiality of arbitral proceedings. This notwithstanding, arbitral proceedings are *private* in the sense that arbitral proceedings take place in camera, unless the parties have agreed otherwise. Thus, third parties can generally not attend hearings in arbitral
P 287 proceedings or request access to submissions and other documents submitted in the ● arbitration without the consent of the parties. (321) This principle is reflected in the SCC Rules. (322) However, there are exceptions to this rule to cater for *amicus briefs* in investment treaty arbitrations under Article 3 in Appendix 3 of the SCC Rules.

A. Parties

267. As already indicated above, the Act contains no provisions regarding the parties' duty of confidentiality in arbitration. The same is true for the SCC Rules. However, the Supreme Court judgment in *Bulbank* (323) provides important guidance as to the role of confidentiality in arbitral proceedings under Swedish law in general, and the parties' duty of confidentiality in particular. The case was determined under the 1929 Arbitration Act, but the Supreme Court made clear that the conclusions also applied to the 1999 Act. There is no reason to believe that the conclusions do not equally apply to the Act as updated in 2019.

268. In the course of ongoing arbitral proceedings between Bulbank and AIT, representatives of AIT sent a copy of a decision by the arbitral tribunal on the validity of the arbitration agreement to an award reporting service in the United States, *Mealey's International Arbitration Report*, where it was published. When Bulbank became aware of the publication, it wrote to AIT and to the arbitral tribunal, stating that the publication was a material breach of the arbitration agreement. Bulbank purported to revoke the arbitration agreement with immediate effect and requested the arbitral tribunal to declare the arbitration agreement invalid on this ground. Bulbank's request did not succeed. Subsequently, an arbitral award on the merits was rendered against Bulbank, prompting Bulbank to challenge the award.

269. The question before the Supreme Court was whether AIT was bound by a duty of confidentiality under the arbitration agreement. As a point of departure, the Supreme Court accepted that arbitral proceedings are private and that third parties have no right to attend hearings or request copies of submissions in the arbitral proceedings. With regard to the duties of the parties themselves, the Supreme Court found that the generally prevailing view in Sweden was that in arbitration, the duty of confidentiality does not apply without an agreement to that effect. Noting that a review of foreign law did not provide any clear answer, the Supreme Court concluded that there is no implied duty of confidentiality for parties having concluded an arbitration agreement.

270. In summary, *Bulbank* establishes that a duty of confidentiality for parties is neither a legal obligation that follows from the very nature of arbitration as a means of dispute
P 288 resolution nor an implied condition of any arbitration agreement. Accordingly, ● parties that consider the confidentiality of arbitral proceedings to be of importance are well advised to expressly agree to confidentiality. This should preferably be done by way of a specific sub-clause in the parties' arbitration agreement (or a separate agreement explicitly referring to the arbitration agreement), which clearly stipulates the scope and duration of, and sanctions for breach of, the parties' confidentiality undertakings. (324) Before adopting such a clause, the parties should consider whether they wish to be bound by strict confidentiality or whether the private nature of the proceedings may suffice. For example, parties may wish to inform the market or other stakeholders of the existence and progress of an arbitration. In such case, the confidentiality provision should not be drafted too narrowly.

B. Institutions, Arbitrators and Administrative Secretaries

271. Under Article 3 of the SCC Rules, the SCC, the arbitral tribunal and any administrative secretary of the arbitral tribunal shall maintain the confidentiality of the arbitration and the award, unless otherwise agreed by the parties. The SCC, the arbitral tribunal and the administrative secretary could be liable to compensate the parties if they breach this duty of confidentiality, provided that wilful misconduct or gross negligence can be established (325) (the threshold for which is high). (326) Since an arbitrator's duty of confidentiality applies in relation to all parties in an arbitration, consent to reveal information relating to the arbitration is valid only where all parties have given such consent. (327)

272. The Act contains no provision corresponding to Article 3 of the SCC Rules. As noted above, however, the view that arbitrators have a duty of confidentiality by virtue of their assignment was confirmed in *Bulbank* where the Supreme Court held that: (328)

There also appears to be an in principle unanimous view that arbitrators, because of the assignment with which they have been entrusted, must observe discretion in the arbitral proceedings, which applies even if an arbitrator has been appointed by a court.

273. This duty of loyalty continues to apply after the arbitrators' mandate is terminated. An arbitrator who violates the duty of confidentiality with regard to an ad hoc arbitration
P 289 under the Act could be liable to pay damages to the parties. (329) However, ● according to Supreme Court case law, an arbitrator who is called as a witness to testify in challenge proceedings may not (and is thus under no obligation to) refuse to answer questions regarding the arbitral tribunal's deliberations if this is relevant to the case. (330)

C. Counsel

274. Much like arbitrators, counsel in arbitral proceedings have traditionally been considered bound by a duty of confidentiality in relation to the arbitral process. In *Bulbank*, the Supreme Court clarified that this duty does not extend further than counsel's duty of confidentiality vis-à-vis its *client*. Read in conjunction with the Supreme Court's conclusion on the (absence of) confidentiality obligations of the parties, it can be inferred that counsel is permitted to reveal information regarding the arbitration if its client has consented to disclosure.

D. Witnesses and Experts

275. Witnesses and experts testifying in arbitral proceedings are not bound by a duty of confidentiality, absent an agreement to that effect.

E. Effects of GDPR

276. The European General Data Protection Regulation (GDPR) is, as of 25 May 2018, in force as directly applicable law in the European Union (EU), including in Sweden. According to the regulation, processing of personal data is prohibited unless the individual concerned has consented to processing or, for example, if processing is necessary to comply with a legal obligation or for the purposes of safeguarding a legitimate interest. (331)

277. In the context of arbitral proceedings in Sweden, the regulation affects, among other things, the possibility to store evidence containing personal data. The data controller must ensure that processing complies with all the requirements of the GDPR. It is generally prohibited to transfer any personal data, such as evidence that contains personal data, to any country outside the EU or the European Economic Area. However, transfer of personal data necessary to establish, exercise or defend a legal claim may be allowed. In such case it is generally required that the transfer be made in close connection with the relevant legal proceedings and that the data transferred is limited to include only the information necessary to establish, exercise or defend the legal claim at issue. (332)

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VII. COSTS

A. Costs in Arbitration

1. Introduction

278. Costs arising from an arbitration can be divided into four main categories: (i) fees of the arbitral tribunal; (ii) registration and administration fees of the arbitral institution (333) (if applicable); (iii) expenses of the arbitral tribunal and the arbitral institution (if applicable); and (iv) costs incurred by each party (including fees for legal representation). (334) Questions regarding the scope, allocation and determination of costs will be addressed in the following.

2. Fees of the Arbitral Tribunal

279. In arbitrations under the SCC Rules, the fee for the chair of the arbitral tribunal or for a sole arbitrator is to be set based on the amount in dispute, in accordance with a fixed schedule of fees. (335) Within each bracket of amounts in dispute, the schedule of fees sets out two fee amounts – a minimum fee and a maximum fee. Fees are normally fixed at the median level (336) but are ultimately decided based on the specific circumstances of the case. These circumstances may include, for example, the complexity of the dispute, the number of parties involved and other procedural aspects of the case, such as the duration of the proceedings. (337)

280. In exceptional circumstances, the Board of the SCC may, under Article 2(4) in Appendix IV of the SCC Rules, deviate from the amounts set forth in the schedule of fees. Such deviation is only rarely made at a late stage in the proceedings and more often when determining the advance on costs. (338) Where the amount in dispute cannot be ascertained (which is sometimes the case when declaratory relief is sought), the Board of the SCC will set the fees of the arbitral tribunal, taking all relevant circumstances into

account. (339)

281. Notably, Article 49(3) of the SCC Rules specifically mentions 'the extent to which the
P 291 Arbitral Tribunal has acted in an efficient and expeditious manner' as a criterion ● when determining the costs of the arbitration. This means that the Board of the SCC may reduce the arbitrators' fees, for example, if the time for rendering the final award has been extended on multiple occasions. According to the commentary to the Rules, this does not apply if such extensions are justified by reference to the parties' conduct or other circumstances beyond the arbitral tribunal's control. (340) For the parties' conduct to be taken as an excuse for an inefficient procedure, however, it ought to be the parties' joint conduct that matters, while it is incumbent on the arbitral tribunal to safeguard the integrity of the arbitration and its timetable if only one party is trying to obstruct that timetable. Accordingly, in the authors' view, the fact that one obstructing party has been successful in derailing the proceedings is not a valid argument for the arbitral tribunal's fees not to be affected by the rule in Article 49(3).

282. In ad hoc arbitrations under the Act, the fees of the arbitral tribunal are set by the arbitral tribunal itself, subject to any agreement entered into with the parties. Section 37 of the Act provides that the arbitral tribunal is to receive 'reasonable compensation' for its work and expenses. The provision is non-mandatory and may, under section 39 of the Act, be altered or waived by the parties' agreement. An agreement that institutional rules apply is in effect an agreement that the Act's provision in section 37 on fees to arbitrators does not apply. In such cases, the parties have instead agreed to be bound by the decision on fees made by the arbitral institution.

283. The expression 'reasonable compensation' is not further elucidated in the Act. However, the question of reasonable compensation was considered in the Supreme Court case *NEMU Mitt i Sverige AB (NEMU) v. Jan H, Gunnar B and Bo N (the arbitrators)*. (341) In this case, NEMU took the position that the compensation to the arbitral tribunal, which was set by the arbitral tribunal in the award, should be reduced. The arbitrators contested the claim on the basis that their compensation was reasonable. The Supreme Court did not reduce the compensation. The Supreme Court concluded that the basis for the arbitrators' compensation should be time spent and, consequently, the arbitrators should keep notes regarding measures taken and time spent on these measures. (342) With respect to the hourly rates to apply, the Supreme Court took into consideration that the arbitrators were highly qualified and had particular competence in the relevant field. (343) The Supreme Court also stated that the question of reasonable compensation should be assessed by comparing the fees to what is normally paid for similar assignments (i.e., compensation should be assessed on the basis of commercial principles). In principle, an attorney who is engaged as an arbitrator has the right to obtain compensation for the assignment as arbitrator on the same principles as other assignments in his or her capacity as an attorney. The Supreme Court also made it clear that when the parties appoint distinguished business lawyers or highly qualified specialist lawyers as arbitrators, they have to expect ● remuneration at a level normally
P 292 charged by such lawyers (as long as not otherwise agreed). (344)

284. Notably, the Supreme Court also stated that the fact that the arbitration costs were disproportionally high compared to the value in dispute did not call for a reduction of compensation to the arbitrators. (345) The high costs could essentially be attributed to the parties' conduct in the proceedings. This statement by the Supreme Court has been construed in different ways. On the one hand, the statement has been construed by some to suggest that although the amount in dispute has no 'direct bearing on the assessment of what is reasonable compensation … the arbitrators should ensure that the costs of the arbitral proceedings are commensurate with the value of the subject matter'. (346) The statement has been construed by others to mean that the relationship between the arbitration costs and the value in dispute should not affect the assessment of reasonable compensation, at least not necessarily. (347)

285. As mentioned above, the parties may jointly enter into an agreement with the arbitrators regarding their compensation. (348) An agreement between the parties to which the arbitrators are not parties is only binding in relation to the arbitrators if the agreement was known to and understood by the arbitrators when they accepted the assignment. (349)

286. The arbitral tribunal's fees, as determined in the final award, may be adjusted after an application by a party to the district court under section 41 of the Act – a possibility which the arbitral tribunal is under an obligation to remind the parties of in the award. (350) In *Soyak v. WM* et al., the Supreme Court found that section 41 also applied to fees
P 293 of the arbitral tribunal that had been set by an arbitral institution. (351) The ● Supreme Court ruling has been described as controversial and criticized for interfering with the autonomy of the institutional arbitral process. (352) However, the Supreme Court concluded that section 41 of the Act gives a party a procedural right to challenge the decision on fees, even in cases where the fees have been set by an arbitral institution. In the authors' view, any other outcome would have been surprising since the wording of the mandatory statutory provision in question leaves no room for another interpretation. Importantly, although acknowledging the procedural right to appeal, the Supreme Court did not assess whether the challenging party had substantive rights to have the decision on fees amended. The Supreme Court remitted the case back to the district court in this

respect. However, the case subsequently settled, without this substantive issue being assessed by the district court. Notably, although the question whether it should be possible to challenge a decision by an arbitral institution was raised in connection with the revisions of the Act in 2019, no amendment was made. (353) In the authors' view, the practical implication of *Soyak v. WM* is limited, as the reviewing court will likely find, as a substantive matter, that the parties are bound by the SCC schedule of fees as a result of having incorporated the SCC Rules into their arbitration agreement.

3. SCC Administrative Fee

287. If the dispute is to be settled in accordance with the SCC Rules, an administrative fee is also payable. The fee is set in accordance with a certain schedule based on the amount in dispute. (354)

288. The administrative fee includes a registration fee payable by the claimant upon filing the request for arbitration. (355) If the registration fee is not paid upon filing the request for arbitration, the Secretariat of the SCC will set a period within which the claimant must pay the fee at the risk of dismissal. The registration fee is non-refundable. (356)

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4. Expenses of the Arbitral Tribunal and the SCC

289. Under the Act, the parties must reimburse the reasonable expenses of the arbitral tribunal. (357) The same applies under the SCC Rules, under which expenses of the SCC are also to be reimbursed. (358)

290. Reimbursable expenses of the arbitral tribunal are, according to SCC practice, compensation for travel (359) and accommodation, and costs of premises and technical equipment which the arbitral tribunal has arranged for in connection with the arbitral proceedings. When staying somewhere other than their place of practice, arbitrators are also entitled to a per diem allowance. (360) The expenses of the arbitral tribunal may furthermore include the fees and expenses of an expert appointed by the arbitral tribunal (under Article 34 of the SCC Rules). (361)

291. Before taking measures that could lead to considerable costs, the arbitral tribunal should obtain consent from the parties. Such measures might involve hiring an interpreter or renting hearing premises. The arbitral tribunal should of course carefully consider objections and the reasons for these by the party concerned. However, if the arbitral tribunal considers it necessary to take the measure in question, it has been suggested that 'the arbitration agreement can be deemed to include an acceptance by the parties of the arbitral tribunal involving them in joint and several liability for costs'. (362)

5. Costs of the Parties

292. In addition to the fees and expenses of the arbitral tribunal and, where applicable, the arbitral institution, the parties of course have costs of their own. The most significant cost item is usually the parties' costs of legal representation. The cost of retaining experts to present their opinions on various issues may also be significant.

293. Upon the request of a party, the arbitral tribunal may order one party to compensate the other party for costs incurred, including its costs of legal representation. (363) Neither the Act nor the SCC Rules provide guidance as to what kind of costs of the parties are reimbursable (*see* further section VII.C below with respect to allocation of costs as between the parties). In *Bonnierföretagen v. Bertil B*, the Supreme Court found
P 295 that, unless the parties have agreed on another way of determining costs, it is natural for an arbitral tribunal to seek guidance from the Code of Judicial Procedure. (364) This judgment predates both the 2019 and 1999 Arbitration Acts, under which the principles of the Code of Judicial Procedure are not relevant in arbitrations. However, the principles of the Code with respect to reimbursable costs for legal representation are largely in accordance with what may be perceived as a general arbitral practice. The Supreme Court judgment is therefore still of some relevance.

294. Under the Code of Judicial Procedure, compensation for litigation costs is intended to cover reasonable costs of preparation and presentation of the case, including fees for legal representation. Further, compensation is also payable for the time and effort expended by a party by reason of the litigation.

295. In *Sala International AB v. Alliance Assurance Co Ltd among others*, the Supreme Court made clear that determining compensable costs for legal representation should not primarily be based on time spent. (365) Instead, such determination is to take into account the nature and magnitude of the case as well as the care and expertise with which the work has been carried out by counsel. When assessing the nature of the case, the complexity of the substantive and legal circumstances should be considered as well as the degree of specialist knowledge required by counsel. (366) As regards the magnitude of the case, the length of the case in terms of time and work required by counsel may be considered. (367)

296. Amounts awarded as compensation for costs may, if a party so requests, include

interest under the Interest Act, (368) running from the date of the award until payment. Since the right to receive interest on arbitration costs is a procedural right, the Interest Act applies in this respect when Swedish law governs the arbitration, irrespective of whether another law applies to the underlying agreement between the parties.

B. Advance on Costs (369)

297. The arbitral tribunal's right to compensation normally does not arise until the arbitration has come to an end and the final award is rendered. In order for the arbitral tribunal to secure payment from the parties, the Act and the SCC Rules contain provisions enabling the arbitral tribunal and the SCC, as applicable, to request advance payments for costs. (370) In ad hoc arbitrations, the parties may agree in advance, with ● binding effect on the arbitrators, that the provisions on advances for costs shall not apply. (371)

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298. Under the SCC Rules, the Board of the SCC sets the amount to be paid by the parties as an advance on costs. This amount should correspond to the estimated amount of the costs of the entire arbitration. (372) The advance on costs is set by adding together the preliminary fees to the arbitral tribunal according to the schedule of fees (*see* section VII.A.2 above), the administrative fee to the SCC (as preliminarily decided), a predefined amount to cover expenses and an amount to cover value added tax (if applicable). (373) When deciding the advance on costs, the principle is that no additional deposits should be needed. (374) However, if the amount in dispute changes or if other circumstances arise, so as significantly to change the size or character of the case, fees could be recalculated. In that case the advance on costs should also be recalculated. (375)

299. Under section 38 of the Act, the arbitral tribunal in ad hoc arbitrations may request security for its compensation (including arbitrator fees and expenses). This security often takes the form of an advance on costs to be paid as a deposit. The Act contains no provisions on how the advance on costs should be calculated. The arbitral tribunal may therefore set the amount more freely than the SCC. However, the provision of advance on costs is non-mandatory for the arbitral tribunal. The arbitral tribunal is of course free to decide not to request an advance on costs from the parties.

300. Where proceedings concern different individual claims, counterclaims and set-offs, the arbitral tribunal may fix separate advances on costs for each individual claim. In that case each party pays an advance on costs corresponding to its claim. (376) One purpose of this rule is that it may prevent a respondent from presenting an unfounded counterclaim in order to force the claimant to pay a higher advance on costs. (377)

301. An advance on costs may be requested at the beginning of the proceedings, which is the normal procedure, or later during the proceedings. (378) If the advance on costs already furnished is found not to be sufficient, the arbitral tribunal may require an ● additional advance on costs from the parties during the proceedings. (379) Where the requested advance on costs is not provided by either of the parties, the arbitral tribunal may terminate the proceedings, in whole or in part (corresponding to the individual claim for which the advance on costs has not been paid). (380)

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302. A request for an advance on costs is to be addressed to both parties, for each to pay half of the total amount. (381) If a party fails to provide its share of the requested advance on costs within the period specified by the arbitral tribunal, the opposing party may provide the entire advance on costs. (382) Moreover, a party that does not pay the advance on costs is considered to have waived its right to invoke the arbitration agreement as a bar to judicial proceedings in court. (383)

303. In *3S Swedish Special Supplier AB v. Sky Park AB*, the Supreme Court addressed the question whether a party who had paid the other party's advance on costs could seek payment from the other party of that other party's share in court when the arbitration was still ongoing. (384) In the arbitration, Sky Park AB had declared that it had no intention of paying its part of the amount requested. 3S Swedish Special Supplier AB therefore paid the entire advance on costs. The Supreme Court stated that the parties, unless otherwise agreed, are jointly and severally liable for compensation to the arbitral tribunal. The court further stated that a party who has paid the entire advance on costs has a right to claim compensation from the counterparty for the counterparty's share. However, it is not until the arbitration is finally settled that final liability for payment between the parties can be determined. Thus, there is no right to recourse for an advance on costs paid while the arbitration is still ongoing. Conversely, under the SCC Rules, if one party makes the required payment, the arbitral tribunal may, at the request of that party, make a separate award for reimbursement of the payment; *see* Article 51(5) of the SCC Rules. (385)

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304. As an exception to the general rule of equal payment between the parties, the parties may agree that one of the parties is to pay the entire or most of the compensation for the arbitration costs. Agreements of this kind are common in employment contracts, such as agreements between a company and its managing director or other executives, where the company typically bears the entire cost of the arbitration. A request for advance on costs should in that case be proportional to the agreement. (386)

305. Under section 38(2) of the Act, the arbitral tribunal may decide during the

arbitration to release a portion of the advance on costs in order to cover its expenses. However, the advance on costs may not, without the parties' approval, be used to cover compensation for the arbitrators' work. This may be done only after the arbitrators' compensation has been decided in a final award and the parties have failed to fulfil their payment obligations in accordance with that award. (387) In the great majority of cases, the advance security is a monetary deposit (rather than, e.g., a bank guarantee). The arbitrators can set off their compensation against the advance on costs. It is appropriate that the arbitral tribunal, in connection therewith, provides a final statement of account to the parties. (388) Under Article 51(6) of the SCC Rules, the Board may '[a]t any stage during the arbitration or after the Award has been made, … draw on the Advance on Costs to cover the Costs of the Arbitration', that is, including fees for the arbitrators' work. In practice, however, this will normally be done only after the award has been rendered. (389)

306. A decision to request an advance on costs from the parties or to release the advance on costs must be made by the arbitrators collectively. Thus, one of several arbitrators is not authorized to make that decision alone. (390) If only one of the parties has provided the entire advance on costs, the same party may also solely consent to release of the advance on costs by the arbitral tribunal. (391)

C. Final Allocation of Costs Between the Parties

307. Under the Act and the SCC Rules, the parties are jointly and severally liable to pay compensation to the arbitral tribunal for work and expenses. (392)

308. However, one exception exists to this general rule of joint and several liability. Where the arbitral tribunal has determined in the award that it lacks jurisdiction to determine the dispute, the respondent is liable for payment only in special circumstances. (393) For example, if the respondent's negligence has increased the costs,
P 299 the ● respondent should be liable for such additional costs notwithstanding the lack of jurisdiction. (394)

309. Upon a request from a party, and although the parties are jointly liable vis-à-vis the arbitral tribunal, the tribunal may order one party to compensate the other party for the arbitration costs. The arbitral tribunal may also order a party to compensate the costs incurred by the other party itself, including that party's costs of legal representation. When allocating costs between the parties, the main rule is that costs follow the event and, accordingly, that the losing party bears all costs including costs reasonably incurred by the winning party. (395)

310. It is not always easy to determine which of the parties 'won' a case for the purpose of allocating costs. An arbitration usually involves several contentious issues and several prayers for relief, some of which may be granted and others denied (partially or in their entirety). It could be argued that the arbitral tribunal should allocate the costs between the parties taking into account the time and effort spent during the proceedings with respect to the contentious issues in question (if that is possible to assess). If, for example, the greater part of the parties' submissions concerned the issue of liability and only little effort was spent on arguing quantum, it may be correct to view the claimant as the successful party if liability was established, even if the full quantum amount sought by the claimant was not awarded. To assist the arbitral tribunal in this exercise, the parties may, in their cost submissions, summarize their respective views on how the total time spent was divided among the main contentious issues in the case. (396) In cases where the arbitral tribunal has terminated the proceedings because one of the parties failed to pay the requested advance on costs (and the other party chooses not to pay that party's share), the party which failed to make payment should normally be considered as the 'losing party' when allocating costs. (397)

311. The arbitral tribunal may also use its discretionary powers to allocate costs to sanction an obstructing party. In order for the sanction to have any effect on the proceedings, it is advisable that the arbitral tribunal make clear already during the proceedings that obstruction may influence the arbitral tribunal's decision with respect to allocation of costs. For example, a statement to that effect may be included in the PO1. In an arbitration under the SCC Rules, this right to use the cost allocation as a sanction
P 300 must be understood to follow from the wording of Articles 49(6) and 50, ● whereby the arbitral tribunal is to have regard to 'each party's contribution to the efficiency and expeditiousness of the arbitration and any other relevant circumstances'. Even if a party has been fully successful on the merits, it may not be entitled to fully recover its costs if it has failed to contribute to efficient and expeditious proceedings. (398)

D. Security for Costs

312. Under the SCC Rules, the arbitral tribunal may 'in exceptional circumstances and at the request of a party, order any claimant or counter-claimant to provide security for costs'. (399) This possibility, which was introduced in the 2017 Rules, is aimed at providing the requesting party security for its expected legal and other costs in defending the claims pursued by the counterparty. (400) The arbitral tribunal has broad discretion in determining what circumstances are relevant to consider when assessing a request for security. (401) The remedy, if a party fails to comply with an order to provide security for

costs, is that the arbitral tribunal may stay or dismiss the party's claims, in whole or in part. (402) There is no corresponding provision in the Act.

313. In the authors' experience, arbitral tribunals are cautious in ordering security for costs, as it may be seen as an issue of denial of justice and unfairly alter the balance between the disputing parties. Typically, there ought to be some kind of culpable behaviour on the part of the party against whom the order is made, such that the party is withdrawing or embezzling funds with the aim of escaping future liability. The mere fact that a party has a weak balance sheet should usually not be sufficient for it to be required to pay security for costs. (403) In the authors' view, additional factors rendering the circumstances 'exceptional' (which were not known or possible for the requesting party to foresee when entering into the arbitration agreement) must be established in order for a request to be successful.

E. Third-Party Funding

314. There are no rules dealing with issues arising in connection with cases involving third-party funding. Questions such as whether a funded party may claim compensation
P 301 for costs paid by a funder and whether a funder may be held liable for adverse ● costs must therefore be answered on the basis of general rules on costs applicable to arbitrations in Sweden.

315. So far as there is no evidence indicating that the funded party is under no contractual obligation to reimburse the costs paid by a third-party funder, the prevailing (funded) party will be awarded compensation for its costs based on otherwise applicable principles, as described above in section VII.C. (404) The question whether the funded party may claim reimbursement of costs associated with the funding arrangement itself (i.e., costs in addition to the expenses for legal representation) is uncertain. It could be argued, however, that a funded party may be in a position to do so in cases where it can be demonstrated that the prevailing party's need to obtain funding is attributable to the losing party.

316. As for the question whether a funder may be held liable for adverse costs, an arbitral tribunal cannot make such an order against a third party not participating in the arbitration. However, it cannot be ruled out that the prevailing party in an arbitration may attempt to seek compensation for its costs before the Swedish courts. The question whether such an action may be successful remains to be answered.

VIII. THE AWARD

A. Categories of Awards

1. Distinguishing Between an 'Award' and a 'Decision'

317. The Act distinguishes between 'awards' and 'decisions' (or 'orders'). Under section 27(1) of the Act, a determination of the substantive issues in an arbitration – that is, the merits of the case – is to be made in an 'award'. This applies irrespective of whether the entire matter in dispute or only a part of it is decided.

318. Section 27(1) of the Act further provides that a decision by which the arbitral tribunal terminates the proceedings without ruling on the issues that have been referred to it is also to be made in the form an award.

319. Pursuant to the definition in section 27(3) of the Act, decisions are determinations that neither include a ruling on the merits of a case nor terminate the proceedings as a whole, except if the arbitral tribunal terminates the proceedings (*Sw.* '*avskriver*') following a withdrawal of all claims by the parties. Determination of a procedural issue which does not imply that the proceedings are to be terminated is thus to be considered as a decision.

320. It does not matter how the arbitral tribunal designates its decision. If the decision is, in fact, an award, because: (i) it includes a determination on the merits or (ii) it terminates the proceedings, then it will be treated as an award by Swedish courts.
P 302 Similarly, it does not matter if a finding that the arbitral tribunal has jurisdiction is ● designated, for example, 'partial award on jurisdiction'. This finding does not dispose of the merits of the case and since it does not result in termination of the proceedings, it is, as a matter of Swedish law, a decision. (405)

321. It follows from the foregoing that a separate decision on jurisdiction is to be styled differently depending on the outcome of the jurisdictional issue. When an arbitral tribunal finds that it lacks jurisdiction and thus dismisses (*Sw.* '*avvisar*') all claims and terminates the arbitral proceedings on that basis, this is to be done in the form of an award. The award can be reviewed by a competent court by way of an appeal under section 36 of the Act. Conversely, should the arbitral tribunal find that it has jurisdiction, the determination will take the form of a decision. As further explained below, such a decision is not binding. (406) Recourse against it is only possible in connection with a challenge of the final award under section 34 of the Act. (407)

322. Unless the parties have agreed otherwise, an award is final and binding. Decisions, in

contrast, do not acquire legal force and are thus not enforceable or binding on the arbitral tribunal. (408) Consequently, decisions may – at least as a general rule – be amended by the arbitral tribunal at any stage of the proceedings. (409) This does not mean, however, that it can generally be perceived as appropriate for an arbitral tribunal to deviate from a decision that it has taken earlier in the proceedings (on the contrary, one might add). The parties necessarily adapt to the procedural decisions made by the arbitral tribunal and should not need to reargue each issue covered by those decisions in the event that the arbitral tribunal were to reconsider its decision. (410) If the arbitral tribunal has decided a preliminary issue in a procedural order and indicated that the
P 303 decision constitutes the final determination of a certain issue, it is a challengeable error for the arbitral tribunal to revise its decision without inviting the ● affected party to supplement its case. This was established by the Supreme Court in the 2019 *CicloMulsion* case. (411)

323. Moreover, if a procedural decision has been accepted by both parties, for example by signing terms of reference that include the decision or by confirming their agreement with a draft PO1, the decision ought also be considered binding on the arbitral tribunal and on the parties as an effect of the principle of party autonomy. Consequently, in order for the arbitral tribunal to deviate from such a decision, both parties should agree to the deviation.

324. The arbitral tribunal can also determine that certain categories of decisions, for example, on matters of jurisdiction, should be binding. Such a determination does not elevate the decisions in question to awards according to the Act, but nevertheless implies that the decisions become binding on the parties and the arbitral tribunal during the arbitral proceedings. (412)

2. Final Award

325. Except in cases where the parties withdraw their claims, an arbitration in Sweden is always concluded through the rendering of an award. (413) The final award – which may be preceded by one or multiple separate awards – either determines the substantive issues referred to the arbitral tribunal, that is, the merits of the case, or terminates the arbitration without a ruling on the merits. (414) The latter may occur in a number of different scenarios, such as when the parties have settled the case, the arbitral tribunal concludes that it lacks jurisdiction or that the dispute should be dismissed on the basis of lis pendens or res judicata. Other examples where a final award is rendered without a
P 304 ruling on the merits are when the claimant withdraws its claim and where the ● proceedings are terminated because the parties have failed to provide security for costs pursuant to section 38(1) of the Act.

326. Final awards that do not contain a ruling on the merits may be appealed to the competent court of jurisdiction, in accordance with section 36 of the Act. Most often, such an appeal is made when a party is dissatisfied with a finding by the arbitral tribunal that it lacks jurisdiction to hear the case.

327. Final awards that do contain a ruling on the merits may not be appealed in accordance with section 36 of the Act. The only recourse available against awards rendered on the merits is to rely on the limited grounds available to set aside the award pursuant to sections 33 and 34 of the Act.

3. Separate Awards

328. The arbitral tribunal may decide part of the dispute or a certain issue that is relevant for final resolution of the dispute in a separate award, unless both parties object. (415) Separate awards – which are subject to the same formal requirements as other types of awards – are final in nature and, *mutatis mutandis*, acquire the same legal effects as final awards, including being enforceable and recognizable.

329. Although the term used in the Act and the SCC Rules is 'separate award', (416) in practice, these awards are sometimes referred to as, for example, 'partial awards', 'interim awards', or 'interlocutory awards'. However, irrespective of the designation of the award, if it is an award on the merits of the case, but not the final award, the provisions of the Act (and the SCC Rules) addressing separate awards apply.

330. Somewhat simplistically, separate awards may be divided into two categories: (1) separate awards that finally dispose of one of several claims in a case (dispositive separate awards), and (2) separate awards on issues that are determinative of, but do not dispose of, resolution of the main claim(s) in the case (determinative separate awards). (417)

331. A dispositive separate award is typically enforceable. (418) A practical example of a
P 305 situation in which such a separate award may be rendered is where a party, in whole ● or in part, has admitted one of several prayers for relief. (419) A dispositive separate award may also be an appropriate tool to adjudicate a relatively uncomplicated claim that is not interconnected with other claims in the dispute and which can be assessed relatively easily on the basis of a limited amount of immediately available evidence. Under Article 51(5) of the SCC Rules, the arbitral tribunal may also, upon a party's request, make a separate award for reimbursement of costs, in cases where one party refuses to pay its share of the advance on costs and the other party has thus paid the entire advance.

332. As a limitation on the arbitral tribunal's freedom to render separate awards, the Act provides that a claim invoked as a defence by way of set-off must be adjudicated in the same award as the main claim, against which set-off is sought. (420) In effect, this limitation implies that a dispositive separate award cannot preclude the opposing party from raising a set-off claim. (421)

333. A determinative separate award does not typically adjudicate any of the prayers for relief, but rather serves to determine an issue which is preliminary to the main issue, so as to make the remainder of the arbitration less complex. This kind of separate award is only declaratory and, thus, cannot normally be enforced. For example, there may be an argument over the existence or meaning of a certain contractual provision. If the provision exists, extensive evidence will be required in order to establish breach, while if it does not exist, no further argument or evidence is required. In this situation, it may save time and costs first to determine as a preliminary issue whether the provision exists.

334. The most common situation in which a determinative separate award is rendered is probably where the arbitral tribunal has ordered the arbitration to be bifurcated into a liability phase and a quantum phase. The separate award will in these instances deal with the issue of liability, that is, whether the respondent is, as such, liable in damages. Only if the arbitral tribunal makes a finding of liability will it proceed to assess causation and 'quantum', that is, the extent to which damages should be awarded in the final award and the amount thereof. A determinative separate award may, as a further example, be appropriate if there is an objection that a particular claim is time-barred. (422)

335. In complex cases, the proceedings may sometimes be divided into several phases, each concluded by a separate award. However, as discussed in section IV.C above, bifurcated proceedings may sometimes result in delays and increased costs. In cases with overlapping issues, bifurcation may even be wasteful. (423) The possibility to bifurcate proceedings should therefore be used with caution and only if there are clear
P 306 ● benefits in doing so. (424) If a case is being bifurcated, considerable care should be taken with respect to clearly defining what is being bifurcated and the potential outcomes. (425)

336. A determinative separate award acquires legal force and is binding. Accordingly, it binds the arbitral tribunal, or any subsequent arbitral tribunal adjudicating issues pertaining to the same legal relationship between the same parties. Consequently, the final award must not deviate from the ultimate finding of the determinative separate award. However, this applies only to the operative part of the award, not to the reasons. In the final award, and if justified, the arbitral tribunal may thus diverge from the reasons stated in a separate award, (426) for example with respect to how certain evidence has been assessed or with respect to how certain findings are to be legally qualified.

337. All separate awards can be challenged in accordance with the rules that apply for final awards. In this connection, it should be underlined that the period for bringing such an action starts to run upon receipt of the separate award and not upon receipt of the final award. (427) Therefore, in most cases, it is necessary for the dissatisfied party to initiate challenge proceedings against a separate award before the final award has been rendered and thus before the arbitration has been terminated.

338. When a separate award is challenged by one of the parties before the final award has been rendered, the arbitral tribunal may decide, at its discretion, whether to continue or stay the arbitral proceedings pending the outcome of the challenge proceedings. (428) However, the arbitral tribunal should be wary of its general obligation to conduct the proceedings in a practical and expeditious manner. (429) The authors would submit that exceptional circumstances should exist in order for an arbitral tribunal to accept that the arbitration be delayed merely because one of the parties does not agree with, and challenges, a separate award rendered by the arbitral tribunal. Such exceptional circumstances could be that the arbitral tribunal realizes that it has committed a grave procedural error in the separate award and, consequently, that a real risk arises that the separate award will be set aside.

4. Consent Awards

339. At the request of the parties, the arbitral tribunal may record a settlement reached by the parties in an award. (430) Such a consent award on agreed terms is subject to the same formal requirements and has the same legal effects as other types of award.

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340. In practice, a settlement is often recorded in a consent award so that the arbitral tribunal notes in the award that the parties have agreed to settle the dispute and then refers to an appendix to the award, where the settlement agreement is found. In other instances, the parties do not want the entire settlement agreement to be appended. They then instruct the arbitral tribunal what terms are to be included in the consent award, for example, that the respondent is to pay a certain amount to the claimant, failing which certain interest is to accrue.

341. The parties can request that the arbitral tribunal record their agreement in a consent award at any time until the arbitral tribunal renders its final award. (431) The parties' rationale for seeking confirmation of a settlement reached in a consent award is

typically that an award – in contrast to a settlement agreement – is enforceable and recognizable under the New York Convention. (432)

342. As indicated above, both section 27(2) of the Act and Article 45(1) of the SCC Rules use the word 'may': '... the Arbitral Tribunal may ... record the settlement in the form of a consent award'. The wording suggests that it is within the arbitral tribunal's discretion to decide whether or not to issue a consent award. The *travaux préparatoires* to the Act clarify that there is indeed no unconditional obligation incumbent upon an arbitral tribunal to issue a consent award at the parties' request. (433) However, considering the fundamental principle of party autonomy, the situations in which it can be considered justifiable for an arbitral tribunal to refuse such a request are very limited. In essence, an arbitral tribunal should only deny a joint request from the parties if it can foresee that the consent award would become invalid, for example on the basis that it violates public policy or that it would include determination of a non-arbitrable issue. (434)

5. Default Awards

343. As discussed in section IV.G above, a party's failure without valid cause to appear at a hearing or otherwise to comply with an order of the arbitral tribunal does not prevent the arbitral tribunal from proceeding with the arbitration. (435) In other words, non-appearance or non-participation by a party does not ultimately prevent the arbitral tribunal from rendering an award on the merits of the case.

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344. However, it is not possible for the arbitral tribunal to issue a default award. Even if one party refuses to participate in the arbitration, the award must be based on an assessment on the merits of what has been submitted to the arbitral tribunal. (436)

345. In proceedings where one party chooses to remain passive without valid cause, the arbitral tribunal should ensure that the non-active party is given sufficient opportunity to present its case before the award is rendered. In order to minimize the risk of the award being invalid or challengeable, it is also advisable for the arbitral tribunal to include a detailed description of those efforts in the award. (437)

6. Interim Orders

346. The arbitral tribunal may order interim measures, such as freezing orders and injunctions, necessary to secure the claim that is the subject of the arbitration. (438) These orders are sometimes referred to as 'interim awards' or 'awards on interim measures' and, notably, the SCC Rules provide that an interim measure may take the form of 'an order or an award'. (439) However, if the measure in question is 'interim' and, thus, does not finally dispose of an issue on the merits of the case, the measure is really a 'decision' within the meaning of the Act. In arbitrations taking place in Sweden, it is therefore more appropriate to designate rulings on security measures as 'decisions' or, as is more commonly the case, 'orders'. (440) Regarding interim relief, *see* Chapter 7.

B. Requirements as to Form of Awards

1. Statutory Requirements

347. Pursuant to the principle of party autonomy, the parties to an arbitration agreement are in essence at liberty to agree on the formal requirements of the award to be rendered by the arbitral tribunal. This freedom is limited only by certain statutory minimum requirements, laid down in section 31 of the Act.

348. Requirements as to the form of the award are as follows: (441)

(a) The award should be in writing.

(b) The award should be signed (442) by the arbitrators. As a main rule, all arbitrators
P 309 should sign the award. It is sufficient, however, that a majority ● of the arbitrators sign the award, provided that the reasons why not all the arbitrators have signed the award are stated in the award. (443) Another deviation from the main rule is that the parties may agree that the chair of the arbitral tribunal alone will sign the award. (444) This is often a practical solution to avoid delay in issuing the award when the arbitrators reside in different countries.

(c) The award should state the seat of arbitration. This information is of significance since the seat of arbitration determines, among other things, which Swedish court is competent to try an action against the award under sections 33 (invalidity), 34 (challenge), 36 (termination of proceedings without a ruling on the merits) and 41 (compensation to the arbitrators) of the Act.

(d) The award should state the date when the award is made.

349. An award that does not fulfil the statutory requirements with regard to written form and signing, that is, items (a)–(b) above, is invalid. (445) However, deficiencies pertaining to written form and signing – and thus the validity of the award – can be rectified by amending the award under section 35 of the Act.

350. The requirements to state the seat of arbitration and the date when the award was made, that is, items (c)–(d), are not sanctioned in the sense that failure to observe either

or both of these requirements leads to invalidity of the award. (446) Since this kind of error cannot lead to invalidity of the award, it can only be attacked by way of a challenge to the award under section 34 of the Act on the basis that a procedural error has been committed. However, for such a challenge to succeed, the error in question must be found probably to have influenced the outcome of the case. (447) It may therefore be ruled out that an award could be successfully challenged on the basis that it omits the seat of arbitration or the date upon which it is made, or both. (448)

351. In cases where the award lacks an indication of the seat of arbitration, Swedish jurisdiction for challenge proceedings is not automatically ruled out. Pursuant to the *travaux préparatoires* to the Act, a party may in such circumstances initiate challenge proceedings with the Court of Appeal at the seat which ought to have been specified in the award. (449) Should it not be possible to determine that location, for example, due to
P 310 the arbitration agreement being silent in respect of the seat of arbitration and the ● proceedings having been held in a number of different locations, the parties are always entitled to challenge the award before the Svea Court of Appeal. (450)

352. In addition to the above requirements, some types of award must contain instructions with respect to how to seek recourse against them, as follows:

(1) An award whereby the arbitral tribunal has concluded the proceedings without ruling on the issues submitted to it – that is, a final award without a ruling on the merits – must contain clear instructions to the parties as to how to appeal the award. (451)

(2) An award that includes an order to the parties to pay compensation to the arbitrators must instruct the parties how to bring an action against the award in this respect, that is, how to challenge costs separately. (452)

353. In every arbitration under the SCC Rules, the SCC supplies the arbitrators with a copy of the 'Arbitrator's Guidelines to the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce'. These guidelines include an SCC Model Award. (453)

2. More on Content of the Award

354. Awards typically encompass an account of the procedural background to the arbitration, including the identity of the parties and a description of the dispute to be adjudicated. It is also advisable that the arbitral tribunal – as part of the procedural background – explains the circumstances that give the arbitral tribunal jurisdiction. In this regard, the *travaux préparatoires* to the Act hold that for evidentiary reasons it is sensible – although not a mandatory requirement – that the award reproduces the applicable arbitration agreement. (454) Finally, the procedural background commonly includes a chronology of the parties' submissions and the procedural decisions taken by the arbitral tribunal.

355. The award should also specify the parties' respective prayers for relief and the legal grounds invoked in support. Typically, this part of the award also includes a summary of the arguments, facts and evidence relied upon by each of the parties.

356. As will be discussed in the following section, the background description and the parties' respective arguments are commonly followed by the arbitral tribunal's discussion, setting out the reasons for the award. However, the length, structure and style
P 311 of ● the reasons vary, depending on the nature of the dispute and the individual preferences of the arbitrators (and, in some cases, the parties and their counsel). (455)

357. Finally, the award must include a clear dispositive ruling in relation to each prayer for relief. This operative part of the award – the dispositive section or the *dispositif* – is of crucial importance for enforceability of the award and for determination of its res judicata effect.

3. Reasons

358. The Act contains no requirement to the effect that the arbitral tribunal must state its reasons for the award (but, as discussed below, the arbitration agreement or institutional rules, or both, may contain such a requirement). According to the *travaux préparatoires* to the Act, the rationale for not requiring the arbitral tribunal to provide reasons includes: (i) that the costs of arbitration can be kept low, (ii) that the dispute can be settled more expediently, and (iii) that the number of challenge proceedings relating to the arbitral tribunal's reasons can be kept down. (456) The fact that the award in an arbitration under the Act lacks reasons or that the reasons provided are too brief, contain contradictions or are otherwise flawed, is thus not ground for challenging the award. (457) In practice, however, including in ad hoc arbitrations under the Act, it is extremely uncommon that an arbitral tribunal delivers an award without providing the reasons upon which the award is based. (458)

359. Unlike the Act, the SCC Rules require the arbitral tribunal to state the reasons upon which the award is based, unless the parties have agreed otherwise. (459) This is in line with most other institutional rules as well as the UNCITRAL Rules. (460) Accordingly, if the parties have referred to such rules in the arbitration agreement, the award is to contain
P 312 reasons. As an exception to this, the SCC Rules for Expedited Arbitration, ● which are gaining increased popularity for international arbitrations as well, (461) do not require

the arbitral tribunal to provide reasons unless a party so requests. (462)

360. When the arbitration agreement refers to the SCC Rules, or the parties have otherwise agreed that the award is to contain reasons, the question arises what the consequences are if the arbitral tribunal fails to provide reasons. May lack of reasons in the award or other flaws pertaining to reasons amount to a successful ground for challenge of the award?

361. This question was addressed in *Soyak International Construction & Investment Inc v. Hochtief AG*. (463) In this case, the Supreme Court had to consider whether an arbitral tribunal had fulfilled its obligation to provide reasons under an arbitration agreement that referred to the SCC Rules. The plaintiff submitted that the reasons in the award were incomplete and inconsistent and that this constituted a violation of Article 36(1) of the SCC Rules. In turn, the Supreme Court underlined that, in the context of challenge proceedings, the value of obtaining complete and well-articulated reasons for an award must be balanced against the interest in the finality of the award.

362. Moreover, it must be taken into account that challenge proceedings should only concern procedural irregularities and not amount to a review of the arbitral tribunal's determinations on the merits. In judging whether the arbitral tribunal had complied with the requirement to render a reasoned award, the courts will by necessity have difficulty in distinguishing between, on the one hand, the sufficiency of the reasons provided from a purely procedural viewpoint, and, on the other hand, the quality of the reasons given in relation to the merits of the case. Under these circumstances, the Supreme Court concluded that only a total lack of reasons, or reasons so poor that they must be considered equivalent to non-existent, can constitute a procedural irregularity of such severity that the award can be successfully challenged. (464) In the case before it, the Supreme Court found that the arbitral tribunal had in fact described what it considered to be established with respect to every disputed issue. Accordingly, the challenge to the award was rejected.

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4. Dissenting Opinions

363. Neither the Act nor the SCC Rules address dissenting opinions of arbitrators. (465) However, it is generally held that under Swedish arbitration law, an arbitrator is entitled – albeit not obliged – to declare its view on matters adjudicated by attaching a dissenting opinion to the award. (466)

364. The above implies that it is within the dissenting arbitrator's discretion to decide whether the dissenting opinion should be communicated to the parties via an appendix to the award or completely left out of the award. In the former case, that is, when an arbitrator chooses to disclose a dissenting opinion to the parties, the dissenter is expected to provide the reasons for dissent with the majority. (467) However, in providing those reasons the dissenting arbitrator should take into account the confidentiality of deliberations and be wary of disclosing statements made under discussions not covered by the reasons provided by the majority. (468) It has been held that the dissenting arbitrator should typically focus on explaining the basis of their own opinion, rather than passing on strictures and thereby undermining the majority reasoning. (469) It has also been submitted that a dissenting arbitrator should under certain circumstances limit the scope of their reasons in order not to incur unnecessary costs on the parties to the arbitration. (470)

365. In practice, it is common that the dissenting arbitrator signs the award along with the majority and makes a note next to the signature that informs recipients of the award
P 314 that its dissenting opinion is set out in an appendix to the award. In other – arguably less frequent – cases, the dissenting arbitrator abstains from signing the award and self-limits to referring to the dissenting opinion attached to the award. (471)

366. Finally, it should be emphasized that although an arbitrator – as a matter of principle – is entitled to declare to the parties dissent with the majority, an error committed by the arbitral tribunal with respect to drafting or disclosure, or both, of the dissenting opinion, does not render the award invalid or challengeable. (472)

C. Decision-Making of the Arbitral Tribunal: Deliberations and Voting

1. Governing Principles

367. The Act lays down few formal requirements for the arbitral tribunal's decision-making process. The purpose of the Act's provisions on decision-making is merely to provide minimum requirements necessary to ensure enforceability of the award. (473)

368. First, unless the parties have agreed otherwise, (474) the arbitral tribunal is under a duty to base its award on the applicable law. However, the practical importance of this so-called duty to apply the law is limited by the fact that the award cannot be challenged by reference to incorrect determination of the merits. (475) Accordingly, incorrect application of the law is not a ground for challenge.

369. Second, the arbitral tribunal must limit its determination to the issues referred to it

by the parties for determination. The arbitral tribunal may therefore not go beyond the parties' prayers for relief. Should the arbitral tribunal act in breach of this principle, and thus rule *ultra petita*, the award is challengeable under section 34 of the Act. (476)

370. Third, the arbitral tribunal cannot base its award on facts other than those invoked by the parties. Deviation from this principle may amount to a procedural error that can form the basis for challenge proceedings against the award under section 34 of the Act. (477)

371. Fourth and finally, the arbitral tribunal is under an obligation to consider all claims submitted to it. Should the arbitral tribunal inadvertently fail to deal with a particular claim in the final award, the arbitral tribunal can supplement the award under section 32 of the Act within a certain time frame. If supplementation is not made in due time, the
P 315 ruling *infra petita* may constitute a procedural error of such nature that ● the award can be successfully challenged under section 34 of the Act, (478) or appealed under section 36 of the Act.

2. Deliberations

372. The arbitral tribunal's deliberations typically commence after the final hearing and may be held with the arbitrators physically present or, for example, by teleconferencing, via video link or by written correspondence. (479)

373. Among the few provisions of the Act dealing with deliberations, section 30 is pivotal. This provision provides that an arbitrator's failure to take part in deliberations without valid cause does not prevent the other arbitrators from deciding the matter. (480) Two important conclusions can be drawn from this rule.

374. First, all arbitrators must be given the opportunity to participate in all stages of the deliberations. (481) This implies that deliberations should not, as a general rule, be carried out in the absence of one of the arbitrators. It also implies that each arbitrator must be allowed to state its point of view on the matters referred to the arbitral tribunal. (482) This requirement must be strictly upheld in relation to contentious issues. (483) However, the arbitrator's individual right to participate in the deliberations is not unconditional. Should contentious issues have been duly discussed between all arbitrators and two arbitrators agree on how to decide the matter, they may decide by majority vote that the deliberations are to be considered closed, (484) and then – in order not to delay the proceedings further – decide the case without the participation of the dissenting arbitrator in drafting the reasons. (485)

375. It does not matter who appointed the arbitrator; all arbitrators have the same duty to remain impartial and independent throughout the proceedings – including in the deliberations – and to consider the arguments of all parties involved.

376. Second, if an arbitrator is absent from the deliberations without valid cause, the other arbitrators may still hold deliberations and decide on the issues referred to them
P 316 by the parties. (486) The possibility to hold deliberations in the absence of one of the ● arbitrators is intended to prevent obstruction by one of the party-appointed arbitrators and should be used restrictively. (487) The other arbitrators may only proceed with deliberations in the absence of the third arbitrator if the absent arbitrator has been given due notice of the deliberations and has failed to present a valid cause for absence. The term 'valid cause' is to be construed as any situation or event that prevents the arbitrator from participating in the deliberations, for example sickness. (488) Should deliberations be held and the case be decided in the absence of an arbitrator that has presented a valid cause, the award could be set aside. (489)

377. The deliberations are confidential and the arbitrators may not – either before or after the award has been rendered – reveal matters discussed during deliberations or other information relating to deliberations. The confidentiality of the deliberations applies not only in relation to third parties but also vis-à-vis the parties and their counsel. Consequently, neither the parties nor any of their representatives may be present during deliberations. If one of the parties claims that a procedural error occurred relating to the conduct of deliberations, the chair may, however, prove the party wrong by disclosing brief information of a procedural nature concerning the conduct of deliberations. Furthermore, confidentiality does not prevent an arbitrator from revealing relevant information about the deliberations, if ordered to testify in court proceedings concerning a challenge to the relevant award. (490)

378. Pursuant to the SCC Rules, the arbitral tribunal may at any time during the arbitration submit to the SCC a proposal for the appointment of an administrative secretary of the arbitral tribunal. (491) The administrative secretary must be impartial and independent at all stages of the arbitration, which shall be ensured by the arbitral tribunal. (492) The appointment of an administrative secretary requires the approval of the parties, and the arbitral tribunal shall consult the parties regarding the tasks of the administrative secretary. (493) Although the administrative secretary may be present during the deliberations, the arbitral tribunal may not delegate any decision-making authority to the administrative secretary. (494)

379. It has been suggested that an expert engaged by the arbitral tribunal may be allowed to attend the deliberations to give opinions, under the strict condition that the

expert does not add new facts to the case. (495) Another view, which the authors subscribe to, is that an arbitral tribunal ought to be careful in communication with its appointed expert. Preferably, the arbitral tribunal should discuss and agree with the parties how it is to interact with the expert and, failing such agreement, communication with the expert should take place in the presence of the parties. (496)

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3. Voting

380. If the arbitral tribunal cannot reach a unanimous decision, the issue is resolved by majority voting. (497) If no majority can be reached, both the Act and the SCC Rules provide – in contrast to the Model Law – that the chair of the arbitral tribunal shall have the decisive vote. (498) The risk of a hung arbitral tribunal is thereby avoided.

381. The Act is silent with respect to how to determine 'voting themes' as well as to the voting procedure, leaving these issues to the discretion of the arbitral tribunal. (499) As a general rule, however, the vote concerns the dispositive section of the award, which in turn is essentially determined by the prayers for relief, irrespective of the arbitrators' individual reasons for the award. (500) Should a disagreement arise on how voting is to be conducted, the majority – or, as a last resort, the chair – decides. (501) Notably, since the voting procedure is left to the arbitral tribunal's discretion, nothing prevents the arbitrators from conducting the vote by way of, for example, expressing acceptance of a draft produced by one of the arbitrators concerning a certain issue.

382. An arbitrator who has lost a vote on an issue – whether in a decision or in a separate award – is still expected to participate in subsequent decisions and vote in a loyal manner, bound by the majority's, or the chair's, previous decision. (502)

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D. Rendering the Award

1. Time Limit for Rendering Award

383. The Act does not specify a certain period within which the award must be made by the arbitral tribunal (i.e., an 'award period'). In other words, no statutory time limit exists for rendering the award.

384. The SCC Rules set a six-month award period. (503) The period starts to run on the date when the arbitration is referred to the arbitral tribunal. Upon a reasoned request from the arbitral tribunal, or if otherwise considered necessary, the SCC Board may extend the award period. (504) The SCC monitors the award period and assists the arbitral tribunal by notifying it if the end of the period is approaching without an award having been rendered. (505) The possibility for the SCC Board to extend the award period 'if otherwise deemed necessary' aims at avoiding expiry of the award period, and the arbitral tribunal thereby losing jurisdiction. (506) However, this is only used on 'rare occasions when the Secretariat, despite repeated attempts, has been unable to procure a request for an extension from the Arbitral Tribunal and the expiry of the time limit is approaching'. (507)

385. Awards rendered after expiry of the relevant award period are not invalid, but can be challenged and set aside on the basis of section 34(2) of the Act. Should no such challenge proceedings be initiated within the two-month period for challenge proceedings under section 34(2) of the Act, the error is considered to have been waived.

2. Delivery of Award

386. The Act assumes that the arbitral tribunal will prepare a written award to be transmitted to the parties. Pursuant to section 31(3) of the Act, the award should be delivered to the parties immediately after it has been rendered. Although not expressly stated in the Act, this obligation is incumbent upon the arbitral tribunal, and is usually arranged for by the chair. (508) Under the SCC Rules, the arbitral tribunal is also to deliver the award to the parties. (509)

387. It is sufficient that the award is delivered by mail or courier, since the Act does not require formal service of the award. (510) If the award is served through the legal representatives of the parties, the chair should verify that the representatives' powers of attorney do not exclude authorization in this respect. (511) There are no legal requirements that the award be deposited, approved or registered with a court or other authority. However, in arbitrations under the SCC Rules, one original of the award should be sent to the SCC Secretariat for archiving. (512)

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388. It is in the winning party's interest that the award is promptly delivered to the parties since the time limits for challenging the award under section 34(3), section 36 and correction, interpretation or additional award under section 32 of the Act, start to run when the award is served. It is also in the arbitrators' interest that the award is delivered as soon as possible, as the time limit to challenge compensation payable to the arbitrators, under section 41(1) of the Act, is normally counted from when the parties receive the award. (513)

389. The award is served when it reaches a party and the party knows that the document served is an arbitral award. (514) However, a party does not have to read the award for

the time limits to start running. (515) Usually, the arbitral tribunal will send an electronic copy of the award by e-mail, followed by distribution of the original via post or courier. It is recommended that the arbitral tribunal request confirmation of receipt of the award as the time limit to challenge the proceedings starts to run as of the date of receipt of the award. (516) If the award is sent by ordinary mail, it may be advisable that the arbitral tribunal also sends it by e-mail so as to avoid one party receiving the award before the other party. (517)

390. To avoid uncertainty as to calculation of the periods for challenge, the chair should obtain written confirmation that the parties have received the award. When such proof is considered necessary, the award should be sent by courier with receipt or by registered mail with a receipt. In most cases, the signed receipt in combination with testimony as to the content of the package will constitute sufficient evidence.

3. Refusal to Render Award

391. According to section 40 of the Act, the arbitral tribunal may not refuse to render, or withhold, the award pending payment of compensation due to the tribunal. The fact that the arbitral tribunal may request the parties to make advance payments for costs has
P 320 been considered sufficient to protect the arbitrators' interests in this respect. (518) ●
However, the provision is non-mandatory. In principle, the arbitrators may therefore agree with the parties to have a lien over the award. (519) In practice, agreements to that effect are rarely, if ever, entered into.

392. As discussed in section VII.B above, under the SCC Rules, the parties must pay an advance on costs – sufficient to cover the arbitrators' fees as well. (520) This is why the question of lien over the award seldom arises in SCC arbitrations.

E. Correcting, Interpreting and Supplementing Award

1. General

393. The mandate of the arbitral tribunal is completed upon rendering the award. (521) Therefore, the general rule is that the arbitral tribunal cannot change the final award once rendered. However, exceptions to this rule exist. In order to avoid unnecessary and costly involvement of courts, the arbitral tribunal may under certain circumstances correct, amend and/or interpret the award after it has been rendered. (522)

394. The authority of the arbitral tribunal to correct and amend arbitral awards is limited to obvious inaccuracies, such as typographical or computational mistakes. (523) As indicated above, the arbitral tribunal may also supplement an award if it has inadvertently failed to decide on an issue that should have been settled in the award. (524) The arbitral tribunal's authority to correct and amend does not entail a right to correct inaccuracies brought to the arbitral tribunal's attention and that can be traced back to the arbitral tribunal's assessment of the case, such as mistakes in the application of law or failure to properly consider certain evidence. (525) Correction or amendment should thus not require new substantive considerations by the arbitral tribunal. (526)

395. Under the Act, the arbitral tribunal has authority to correct and supplement the award of its own volition, that is, without a request from a party. (527) In contrast, the SCC
P 321 ● Rules only permit the arbitral tribunal to correct – but not to supplement – the award of its own volition. (528) Neither the Act nor the SCC Rules allow the arbitral tribunal to interpret an arbitral award without a request by any of the parties. (529)

396. Section 32 of the Act is non-mandatory on the arbitral tribunal. The arbitral tribunal is thus under no obligation to correct, supplement or interpret awards, even if requested by both parties. (530) Under Articles 47 and 48 of the SCC Rules, the arbitral tribunal may only deny a party's request in this respect if it considers the request not to be justified. The arbitral tribunal must afford the parties the opportunity to comment on any measure under section 32 of the Act that the arbitral tribunal intends to take, before a final decision is made. (531)

397. With respect to supplements to the award (under the Act) or rendering an additional award (under the SCC Rules), unlike a correction of the award, these measures do not entail a change in the award delivered but merely a supplementation. A supplement can, for example, be made when an interest claim has been overlooked or when the award fails to state how the responsibility to pay the arbitrators' remuneration is to be allocated between the parties. (532)

398. The award cannot be supplemented if the arbitral tribunal has decided deliberately not to rule on a certain issue, since the authority to supplement covers only flaws or shortcomings in the award caused by an oversight or a mistake. (533) In cases where the arbitral tribunal has deliberately not ruled on a certain issue, the arbitral tribunal's decision to leave out an issue from the award may constitute a procedural irregularity. The party affected by the irregularity may then challenge the award under section 34 of the Act, rather than request an additional award. Alternatively, the award may be appealable under section 36 of the Act if the arbitral tribunal has terminated the proceedings without addressing all issues referred to it for determination.

399. If a party has failed to properly raise an issue, present a claim or invoke certain

evidence during the course of the arbitration, an amendment cannot be made. In this situation, it is not the arbitral tribunal that has overlooked the issue. (534)

400. With respect to interpretation of the award in an arbitration under the Act, (535) the arbitral tribunal may only clarify the dispositive section, that is, the operative part of the award. It cannot interpret the reasons, even if the reasons given in the award are vague in part or in full. (536)

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401. Unlike the Act, the SCC Rules do not limit the scope of interpretation to the operative part of the award. Article 47 of the SCC Rules refers to a 'specific point or part of the award'. (537) However, in order for a request for interpretation to be justified – which is a requirement for the request to be entertained – it should in most cases need to concern the operative part of the award. It is important that the assessment of the merits in the case is not amended through interpretation. (538)

2. Time Limitations

402. Proceedings under section 32 of the Act and Articles 47 and 48 of the SCC Rules must be carried out promptly. To this end, those provisions set out the following time limitations:

(1) Should the arbitral tribunal of its own motion wish to correct or supplement the award, it must do so within thirty days of the date of issuing the award. (539)

(2) A party requesting a correction, supplement or interpretation of the award must do so within thirty days of the day of receipt of the award. (540)

(3) After having received a timely request from a party, and having given the other party opportunity to comment on the request, the arbitral tribunal must – if it considers the request justified – correct or interpret the award within thirty days, and supplement the award within sixty days, from receipt of the request. (541)

403. During the time limits thus set, the arbitral tribunal is unimpeded from correcting, supplementing or interpreting the award, irrespective of the expiry of any time limits for delivery of the award that the parties may have otherwise agreed upon. (542) Moreover, the arbitral tribunal may correct, supplement or interpret an award even though the winning party has applied for enforcement of the award and even if an enforcement order has been issued. (543) The arbitral tribunal cannot order a stay of execution due to a request for correction. (544)

404. Since the arbitral tribunal is not entitled to extend the time limits under the Act, and since the SCC Board may only grant extensions of time for rendering additional awards – not for corrections – the arbitral tribunal may occasionally have to refrain from correcting, supplementing or interpreting the award. This situation may arise when, for example, there is not sufficient time for the other party to comment on the request, and for the arbitral tribunal to subsequently make the correction within the time limits. The arbitral tribunal is encouraged to set the time limit for the other party so as to enable the arbitral tribunal itself enough time to make the correction. (545)

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3. Additional Remuneration to Arbitral Tribunal for Correcting, Supplementing or Interpreting Award?

405. The Act and the SCC Rules are silent with respect to whether the arbitral tribunal is authorized to order the parties to pay additional remuneration to the arbitrators for correcting, amending or interpreting the award.

406. Decisions whereby the arbitral tribunal corrects, supplements or issues an interpretation of the award are formally part of the final award. (546) Since the Act entitles the arbitral tribunal to decide on the compensation due to the arbitrators in the final award, it has been suggested that the arbitral tribunal must also be considered competent to award themselves additional remuneration for correcting, supplementing or interpreting the award. (547) If this were not the case, arbitrators might be unwilling to correct, supplement or interpret an award, even though such a measure would be justified. (548) If correction, supplement or interpretation is a consequence of negligence on the part of the arbitral tribunal, it has been suggested that the arbitrators should refrain from awarding themselves additional remuneration for the additional work resulting from their own error. (549)

407. In SCC arbitrations, where the arbitral tribunal's remuneration is based on the amount in dispute and, thus, not strictly on the actual time spent on the case, the situation is somewhat different from arbitrations under the Act. The remuneration set in the final award should – in SCC arbitrations – probably be viewed as also including compensation for subsequent work relating to correcting, supplementing and interpreting the award.

F. Legal Effects of Award

1. Enforceability

408. The immediate effect of rendering the award is that the award becomes enforceable

unless declaratory in nature, in which case it becomes recognizable.

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2. Res Judicata

409. An award rendered has legal force – or, in other words, res judicata effect – according to the principles of Swedish civil procedural law. (550) In concise terms, the res judicata effect implies that a court or arbitral tribunal may not review the matter on the merits after it has been decided in a final award, but must instead, if subsequently seized with the same matter, dismiss it. Furthermore, it means that issues decided in the final award are binding in future disputes between the same parties – be it in court or arbitration – where the same issues are of incidental or preliminary character. (551)

410. The general rule is that the principle of res judicata is to be applied in the same manner in arbitration as it is applied in civil procedure under the Code of Judicial Procedure. (552) However, the Swedish Supreme Court has made it clear that this will not be the case if, due to the distinctive features of arbitration, strong reasons exist to depart from the civil procedure doctrine of res judicata. (553) Differences between civil procedure and arbitration must therefore be considered when assessing the case at hand, and in case of such differences, it must be assessed whether reasons exist to depart from the res judicata doctrine of civil procedural law. (554)

411. Under civil procedure doctrine, the res judicata effect generally only extends to the parties to the dispute. The award will only have legal effects and bind third parties under exceptional, well-defined, circumstances, such as where a third party would have been bound by a party's disposition of the legal relationship in dispute. (555)

412. The res judicata effect of the award applies to those legal consequences considered in the dispute, as well as alternative legal consequences that are economically equivalent to those in the dispute. Thus, new requests for relief that merely differ quantitatively from claims already adjudicated become res judicata and should be dismissed in future disputes. (556)

413. All alternative factual bases, legal grounds and possible objections to the relief sought are precluded by the award. (557) However, facts that occur after the award and
P 325 which thus could not be relied upon in the arbitration constitute *facta supervenientia* and may be invoked as facts in support of or in defence against a claim in future disputes. (558) The res judicata effects of an arbitral award extend only to questions covered by the arbitration agreement. Consequently, issues outside the competence of the arbitral tribunal are not precluded by the award. (559)

414. The award's reasons do not acquire res judicata effect, but may nevertheless be of critical importance in interpreting and understanding the legal effect of the award. (560)

3. Other Effects of Award

415. Other effects of the award have already been accounted for above, but are here briefly summarized for convenience.

416. As noted, the mandate of the arbitral tribunal is considered terminated when the final award has been rendered. (561) Nevertheless, the arbitral tribunal still possesses authority to:

(1) correct, supplement and interpret the award under section 32 of the Act; (562) and

(2) resume the arbitral proceedings after a remission order by a court during challenge proceedings, in order for the arbitral tribunal to eliminate a ground for setting aside or invalidating an award. (563)

417. Another effect of the award is that periods for certain time limits start to run, namely:

(1) the thirty-day period for the parties to request, and for the arbitral tribunal to decide, to correct, supplement or interpret the award under section 32 of the Act; (564)

(2) the two-month period to initiate challenge proceedings under section 34 of the Act; and

(3) provided that an instruction to the parties is included in the award, the two-month period to bring action against the award regarding payment of compensation to the arbitrators under section 41 of the Act.

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418. For the parties in the arbitration, these periods start to run on the day upon which the party receives the award. No formal service of the award is required under the Act, but the day of service may have to be proved in order to decide when the periods have commenced. The periods relevant to the arbitrators start running on the day when the award is rendered. (565)

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References

1) This chapter is the result of teamwork. A number of associates at Mannheimer Swartling have contributed with research and assistance for this second edition of the contribution, including Daniel Holmdahl, Emeli Pålsson, Gustav Sannegård and David Akrad. The contribution builds upon Chapter 8 of the first edition of this book, which was authored by Kristoffer Löf and Stefan Brocker with assistance from Marcus Irajinia Berglie, Maria Bouvin, Azadeh Razani, Helena Sjöholm and Oskar Wrede.
2) *See* s. 21 of the Act, under which the arbitral tribunal should 'act in accordance with the decisions of the parties, unless they are impeded from doing so'.
3) Arbitral proceedings under the SCC Expedited Arbitration Rules are addressed elsewhere in this book (*see* Chapter 3), and will accordingly not be addressed in Chapter 9.
4) Notably, if the arbitration is conducted under the SCC Rules for Expedited Arbitrations, the claimant's request for arbitration also constitutes its statement of claim. The same applies to the respondent's answer, in that it constitutes the respondent's statement of defence; *see* Arts 6 and 9 of the SCC Rules for Expedited Arbitrations. Expedited proceedings are dealt with elsewhere in this book.
5) The date of commencement of arbitration may be of significance. In situations where it is required by law or contract that a party must bring an action within a certain period in order not to lose its right to bring a claim, the decisive date for determining whether such an action has been brought is the date of commencement of arbitration (*see* s. 45 of the Act).
6) Section 19 of the Act.
7) Govt. bill 1998/99:35, 224. It should be noted that applicable institutional rules may provide that the arbitration is commenced on another date than that which follows from the Act, normally on the date when the institution has received the request for arbitration.
8) Govt. bill 1998/99:35, 103 et seq.
9) Govt. bill 1998/99:35, 224; SOU 1994:81, 274.
10) Section 19 of the Act.
11) Govt. bill 1998/99:35, 221; SOU 1994:81, 270. *See also Kenneth O v. Motor Union Assuransfirma AB*, the Supreme Court, 23 Jun. 1993, NJA 1993 p. 308 (Ö 2317-91); Stefan Lindskog, *Skiljeförfarande: en kommentar* Chapter III, s. 19, para. 4.1.1 (Norstedts Juridik 2C ed. 2018); Lars Heuman, *Arbitration Law of Sweden: Practice and Procedure*, 306 (Juris Publg. Inc. 2003); Johan Englund, *Användande av e-post vid underrättelser enligt lagen om skiljeförfarande*, 1 Juridisk Tidskrift, 133–139 (2009/10); and Thorsten Cars, *Lexino Commentary on the Swedish Arbitration Act*, 19 § (Juno 18 Dec. 2014), s. 2.2, https://juno.nj.se.
12) *F.D.* (application for restoration), the Supreme Court, 24 Mar. 2010, NJA 2010 p. 165 (Ö 3626-08); Cars, *supra* n. 11.
13) Govt. bill 1998/99:35, 101. *See also* Bengt Lindell, *Civilprocessen*, 715 (Iustus Förlag AB 4th ed. 2017).
14) Govt. bill 1998/99:35, 101; SOU 1994:81, 133. *See also C. G. Ohlssons v. C. Bergström and J. S. L. Lindberg*, the Supreme Court, 18 Oct. 1911, NJA 1911 p. 499; *Kenneth O v. Motor Union Assuransfirma AB, supra* n. 11, 308.
15) Section 19 of the Act.
16) *See* Lindskog, *supra* n. 11, Chapter III, s. 19, para. 4.1.1; Heuman, *supra* n. 11, 299. *See also Rättviks ångsågsaktiebolag v. Aktiebolaget Hälsinge träexport,* 27 May 1921, NJA 1921 p. 253. In this case, a party had terminated an agreement due to breach of contract by the opposing party. The opposing party protested against the termination in a letter, in which it stated that the wrongful termination constituted a breach of contract, demanded that the dispute be referred to arbitration and reserved its right to claim compensation for all damages incurred. After further correspondence between the parties, the opposing party finally sent a letter stating that it requested arbitration. This first letter was not considered sufficient to serve as a request for arbitration. A valid request for arbitration was considered to have been made first in the second letter.
17) Thorsten Cars, *Lagen om skiljeförfarande – En kommentar,* 93 (Jure Förlag AB 3d ed. 2001); Heuman, *supra* n. 11, 299.
18) Section 19 of the Act.
19) Under s. 23 of the Act, the claimant may present the relief sought at a later stage of the proceedings.
20) Govt. bill 1998/99:35, 102.
21) *See* Cars, *supra* n. 17, 93 et seq.; Heuman, *supra* n. 11, 300–302; Lindskog, *supra* n. 11, Chapter III, s. 19, para. 4.2.
22) Heuman, *supra* n. 11, 301. *See also Fredriksson v. Smålandsstenars vatten- och sanitära förening,* the Supreme Court, 10 Mar. 1955, NJA 1955 p. 224. In this case, the claimant first sent a letter to the opposing party setting out the details of the claim. After the claim was contested by the opposing party, the claimant sent a request for arbitration without repeating the details of the issue. The request for arbitration was considered to be valid.
23) *See* Finn Madsen, *Commercial Arbitration in Sweden*, 210 (Jure Förlag 5th ed. 2020).
24) Section 23 of the Act.

25) Section 19 of the Act.
26) Govt. bill 1998/99:35, 103 et seq.
27) Govt. bill 1998/99:35, 102; SOU 1994:81, 134 et seq.
28) Govt. bill 1998/99:35, 224; SOU 1994:81, 136.
29) Govt. bill 1998/99:35, 224; SOU 1994:81, 274.
30) *Ibid.*
31) *See* Madsen, *supra* n. 23, 211.
32) Other views have been discussed in Heuman, *supra*n. 11, 306, and Lindskog, *supra*n. 11, Chapter III, s. 19, para. 4.2.2, n. 214, the latter stating that a conditional choice of arbitrator should render the request for arbitration invalid. If that view were to be accepted, the request should in any event become operative as soon as the claimant makes its choice of arbitrator unconditional or appoints another person as arbitrator; *see* Heuman, *supra*n. 11, 306.
33) *See* Chapter 1 s. 7 of the Contracts Act, and Lindskog, *supra*n. 11, Chapter III, s. 19, para. 4.4.1.
34) Lindskog, *supra*n. 11, Chapter III, s. 19, para. 4.4.2.
35) Section 14(1) of the Act provides that a party's notification of its choice of arbitrator cannot be withdrawn without the consent of the opposing party. According to Lindskog, *supra*n. 11, Chapter III, s. 19, para. 4.4.2, this should mean that an opposing party can see to it that an arbitral tribunal is constituted by nominating its arbitrator.
36) According to a policy adopted by the SCC Board, each party should also, in its first submission in an SCC arbitration, disclose the identity of any third party with a significant interest in the outcome of the dispute. *See* the SCC Policy Disclosure of Third Parties with an Interest in the Outcome of the Dispute, 11 Sep. 2019.
37) Article 7(2) of the SCC Rules.
38) Jakob Ragnwaldh, Fredrik Andersson & Celeste E. Salinas Quero, *A Guide to the SCC Arbitration Rules*, 21 (Wolters Kluwer 2019).
39) Article 29 of the SCC Rules.
40) Ragnwaldh et al., *supra* n. 38, 50. *See* Art. 51 of the SCC Rules on advances on costs.
41) *See* Art. 6(iii) of the SCC Rules. In this regard, the Act only requires a statement on the disputed issue covered by the arbitration agreement, i.e., which issue is to be resolved by the arbitral tribunal, *see* s. 19(2) of the Act.
42) Article 29 of the SCC Rules.
43) Ragnwaldh et al., *supra* n. 38, 17.
44) Marie Öhrström, *Stockholms Handelskammares Skiljedomsinstitut: en handbok och regelkommentar för skiljeförfaranden*, 120 (Norstedts Juridik AB 2009).
45) *Ibid.*, 121 et seq. *See also* Ragnwaldh et al., *supra* n. 38, 16. The claimant usually also submits registration certificates and other relevant documents if the parties are corporate entities. *See also* Lindskog, *supra*n. 11, Chapter III, s. 0, p. 2.2.3. Lindskog is of the view that the arbitral tribunal has no obligation to verify whether the parties have authorized representatives. However, since the parties are responsible for payment of the arbitrators' fee, it is in the interest of the arbitral tribunal to make sure that the parties are legally represented.
46) Lars Heuman, *Delgivning av påkallelseskrift i skiljeförfarande*, 2 Juridisk Tidskrift, 461 (1996/97). The Service of Documents Act and the alternative forms of service of process set out therein are not formally applicable to arbitral proceedings; *see*, however, *Christine L. v. Sven A.*, the Supreme Court, 26 May 1999, NJA 1999 p. 300 (Ö 3715-97), where the Supreme Court applied a provision regarding the authorized recipient of the Swedish Service of Documents Act by *analogy*. In this case, an award had been delivered by registered mail and the recipient had signed the delivery acknowledgement although a messenger authorized by the recipient physically received the document. Personal service was considered to have been effected. *See also E. O. & Henry Trading AB v. ICA Handlarnas AB,* the Supreme Court, 12 Dec. 2001, NJA 2001 p. 855 (Ö 4237-99), and *AB Akron-Maskiner v. N. G. G,* the Supreme Court, 27 Jun. 2002, NJA 2002 p. 377 (Ö 3631-01).
47) *Scanax Aktiebolag v. Svensk Filmtjänst Aktiebolag*, the Supreme Court, 24 May 1996, NJA 1996 p. 330 (Ö 5023-94). *See also* Heuman, *supra* n. 46, 459–464. In *Jan A. v. John D.*, the Supreme Court, 10 Jun. 1993, NJA 1993 p. 252 (T 296-89), a request for arbitration had first been received by counsel for the respondent in the arbitral proceedings and, after several months, by the respondent personally. With reference to the circumstances of the case, the Supreme Court held that the request for arbitration had been made at the later date when the respondent in the arbitral proceedings had received the request personally.
48) *Kenneth O v. Motor Union Assuransfirma AB, supra*n. 11.
49) Peter Seipel, *Telefaxad Vadeinlaga*, 2 Juridisk Tidskrift, 374–376 (1993/04); Heuman, *supra*n. 11, 306 et seq.

50) Cf., e.g., *Subway International B.V. v. A.E.*, the Supreme Court, 2 Jun. 2015, NJA 2015 p. 315 (Ö 6354-13), concerning an application for enforcement of a foreign arbitral award in Sweden. In this case, A.E. took the position that he had not been informed about the arbitral proceedings (in which A.E. had not participated). Since the evidence before the Supreme Court indicated that A.E. had used the e-mail account in question after the point in time when the communication regarding the arbitration had been sent to the account, the Supreme Court found that A.E. had been given proper notice of the arbitral proceedings (and thereby a reasonable opportunity to present his case). Hence, the court found that no impediment to enforcement existed. *See also Nomus Fastighets AB v. AKC and SEC*, the Supreme Court, 14 Jun. 2018, NJA 2018 p. 487 (Ö 4798-17), in which the Supreme Court expressed that when assessing the 'reasonableness' of sending a message to a certain e-mail address, it is relevant to consider whether the recipient has indicated that messages may be sent to that address, either in the specific case or *generally*. It could be argued on that basis that a message sent to an address which an authorized representative of the respondent has indicated that he or she uses (e.g., by indicating that address on the respondent's website) should suffice (provided – as indicated above – that receipt can be confirmed in the form of an automatic e-mail delivery receipt or an acknowledgement of the recipient reading an e-mail).

51) A notices provision in an agreement states how (e-mail, letter or fax) and to whom notices may validly be sent under the agreement.

52) In *Lenmorniiproekt OAO v. Arne Larsson Partner Leasing AB*, the Supreme Court, 16 Apr. 2010, NJA 2010 p. 219 (Ö 13-09), enforcement in Sweden of a Russian arbitral award was refused by the Supreme Court because the party against which the award was invoked had not been given proper notice of the arbitration. In this case the request for arbitration had been sent to the designated address for sending notices to the respondent under the main contract. But the respondent had changed its address, officially registered its new address with the Swedish Companies Registration Office and moved offices before the arbitration was initiated and had not participated in any stage of the arbitration. *See also Nomus Fastighets AB v. AKC and SEC*, *supra* n. 50, concerning a message sent by a court to an e-mail address to which Nomus Fastighets AB had no reason to believe that court communication would be sent. The Supreme Court found that the message had no legal effect in the circumstances.

53) *See* discussion in Kaj Hobér, *International Commercial Arbitration in Sweden*, 208 (Oxford U. Press 2011). *See also* Lindskog, *supra*n. 11, Chapter 0, s. 0, para. 5.2.5.

54) Ragnwaldh et al., *supra* n. 38, 25.

55) Öhrström, *supra* n. 44, 127 and 133. *See also* Ragnwaldh et al., *supra* n. 38, 24 et seq.

56) As of the time of this contribution, however, it is not possible to initiate arbitration by uploading a request for arbitration to the SCC Platform.

57) Ragnwaldh et al., *supra* n. 38, 25.

58) Section 14 of the Act. If the respondent fails to appoint its arbitrator within thirty days, the arbitrator will, upon the claimant's application, be appointed by the district court of competent jurisdiction; *see* s. 14(2) of the Act.

59) Section 13 of the Act. Should the two party-appointed arbitrators fail to appoint a chairperson within thirty days, any of the parties may, under s. 15(1) of the Act, apply to the district court that the court appoints the chairperson.

60) Ragnwaldh et al., *supra* n. 38, 25.

61) *See* Nathalie Voser, *Multi-party Disputes and Joinder of Third Parties*, *in 50 Years of the New York Convention: ICCA International Arbitration Congress*, 14 ICCA Congress Series, 346 (van den Berg ed., Kluwer Law International 2009).

62) Ragnwaldh et al., *supra* n. 38, 39.

63) *Ibid*., 40.

64) The compatibility requirement for arbitration agreements does not mean that arbitration agreements must be identical. *See* Ragnwaldh et al., *supra* n. 38, 40 et seq.

65) Article 14(4) of the SCC Rules. Ragnwaldh et al., *supra* n. 38, 42.

66) *Ibid*, 40 et seq.

67) *Joint Stock Company Belgorkhimprom v. Koca Inaat Sanayi Ihracat Anonim irketi*, the Supreme Court, 20 Mar. 2019, NJA 2019 p. 171 (T5437-17) *(Belgor*).

68) For a fuller account of the judgment, *see* Kristoffer Löf & Julia Fermbäck, *Supreme Court Establishes High Threshold for Annulment of Arbitral Awards,* 2 ICC Dispute Resolution Bulletin, 13 et seq. (2019).

69) Our translation. The judgment is available in English at the SCC Portal. *See*https://www.arbitration.sccinstitute.com/Swedish-Arbitration-Portal/sok/?q=Belgor&dn=&s=aW5tZXRhOlNv....

70) Article II(1) of the New York Convention provides: 'Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.'

71) The Supreme Court also made clear that considerable weight should be given to the arbitral tribunal's jurisdictional decision as the arbitral tribunal is typically best suited to determine issues of its own mandate. The arbitral tribunal's interpretation and assessment should therefore be presumed to be accurate and it is thus for the party contesting jurisdiction to establish before the court that the arbitral tribunal's decision is incorrect, rather than for the court to make a new full and independent assessment with regard to jurisdiction. *See also* section IV.A.2 *infra*.

72) It is not always the case that multiparty arbitration saves costs compared to the alternative of having claims adjudicated separately. Complexity may increase to an extent that a single proceeding delays more than it expedites. For an individual party with a straightforward and simple case, the time and costs associated with resolution of that party's case may increase if the case be combined with other, less simple, claims. There may even be an issue of denied access to justice for a party with a simple case if resolution be delayed because of being made contingent on another more complex and time-consuming case.

73) *See* Gary B. Born, *International Arbitration Cases and Materials*, 933 (Wolters Kluwer Law 2d ed. 2015).

74) *See* Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 150 (Oxford U. Press 6th ed. 2015); Hobér, *supra* n. 53, 149.

75) *See* Voser, *supra* n. 61, 348 et seq.

76) An example might be a construction project with Contract 1 between project owners (a shareholders' agreement), Contract 2 between project owners and a joint venture company set up for the project (the project agreement), Contract 3 between the project company and the Engineering, Production and Construction (EPC) contractor (the EPC Contract), and several contracts between the EPC contractor and its subcontractors. Since the final risk allocation for a certain event will eventually end up in one of these contract tiers, there may be benefits in having all parties to all these contracts involved in the same arbitration. However, such a consolidation must be made with caution, since the very purpose of separating responsibilities into several tiers, under several layers of contracts, may be precisely to avoid ending up in the same arbitration. *See also* Hobér, *supra* n. 53, 149. *See also* Blackaby et al., *supra* n. 74, 142–145.

77) *See* Conejero Roos, *Multi-party Arbitration and Rule-Making: Same Issues, in 50 Years of the New York Convention: ICCA International Arbitration Congress*, 14 ICCA Congress Series, 419 (van den Berg ed., Kluwer Law International 2009).

78) *See* Bernad Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions*, 176 (Kluwer Law International 2006).

79) *See* Gary B. Born, *International Commercial Arbitration*, 2074 (Kluwer Law International 2d ed. 2014): 'In the context of recognizing arbitral awards, Article V(1)(d) of the Convention provides for the non-recognition of awards that are rendered following arbitral proceedings where *consolidation, joinder, or intervention* was ordered, notwithstanding an arbitration agreement that did not permit such actions' (emphasis added).

80) Ragnwaldh et al., *supra* n. 38, 36.

81) Section 1 of the Act.

82) Section 23 a of the Act: 'An arbitration may be consolidated with another arbitration, if the parties agree to such consolidation, if it benefits the administration of the arbitration, and if the same arbitrators have been appointed in both cases. The arbitrations may be separated, if there are reasons for it.'

83) Ragnwaldh et al., *supra* n. 38, 43.

84) Article 15 of the SCC Rules.

85) Ragnwaldh et al., *supra* n. 38, 44.

86) *Ibid.*, 45.

87) *Ibid.*, 45 et seq. *See* the example in *supra* n. 76 in which all the contracts are part of the same series of transactions, but the parties to the different contracts have not agreed to arbitrate with the parties to the other contracts. In the absence of such an agreement, it is the authors' view that consolidation without the parties' consent should be avoided entirely since the ramifications of consolidation on both substantive issues and procedure may be impossible to anticipate and assess. Parties who want to be certain that they only end up in arbitration with parties that they have actually contracted with are well advised to make this clear in their arbitration agreement.

88) *See* Ragnwaldh et al., *supra* n. 38, 46 et seq.

89) International Bar Association, *IBA Guidelines for Drafting International Arbitration Clauses* (ibanet.org, adopted 7 Oct. 2010).

90) (*Sw: Rättegångsbalk* (*1942:740*)) Govt. bill 1998/99: 35, 47; SOU 1994:81, p. 74.

91) Case law that predates the Act provides various examples of the Code of Judicial Procedure influencing arbitrations. In *Bertil B. v. AB Bonnierföretagen*, the Supreme Court, 2 Jun. 1989, NJA 1989 p. 247 (Ö 502-88), the Supreme Court declared that it was natural to seek guidance in the Code of Judicial Procedure with respect to legal costs in arbitrations. *See also Esselte AB v. Allmänna Pensionsfonden*, the Supreme Court, 3 Apr. 1998, NJA 1998 p. 189 (T 5685-96), where the Supreme Court found that the principles of res judicata in civil proceedings apply to arbitrations unless there are strong reasons to the contrary. The Code of Judicial Procedure may also be of indirect importance insofar as Swedish lawyers engaging in arbitral proceedings are accustomed to its governing principles, *see*, e.g., Hobér, *supra* n. 53, 199.

92) International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration* (ibanet.org, adopted 29 May 2010).
93) Govt. bill 1998/99:35, 110. *See also* Madsen, *supra* n. 23, 241 et seq. This is also the case pursuant to the SCC Rules, *see* Ragnwaldh et al., *supra* n. 38, 75.
94) Article 23(1) of the SCC Rules.
95) *See*, e.g., Lindskog, *supra*n. 11, Chapter III, s. 0, para. 2.1.2; Heuman, *supra*n. 11, 260; Thomas E. Carbonneau, *The Law and Practice of Arbitration*, 8 (JurisNet 3d ed. 2009).
96) Lindskog, *supra*n. 11, Chapter III, s. 0, para. 2.1.2.
97) Section 24(1) of the Act: 'The arbitrators shall afford the parties, to the extent necessary, an opportunity to present their case in writing or orally.' Art. 23(2) of the SCC Rules comprises the requirement of impartiality as well as the principle of equal treatment and the right for the parties to present their respective cases: 'In all cases, the Arbitral Tribunal shall conduct the arbitration in an impartial, practical and expeditious manner, giving each party an equal and reasonable opportunity to present its case.'
98) Ragnwaldh et al., *supra* n. 38, 77. *See also* Born, *supra* n. 79, 2179 et seq., where Born gives an account of internationally accepted negative standards, which rhyme with the position of Swedish law, with respect to a party's right to be heard: '[T]he right to be heard does not generally include: (a) a substantively correct decision, including a decision applying the correct substantive law; (b) a reasoned award; (c) arbitral procedures that resemble those of a party's home jurisdiction; (d) disclosure or discovery; (e) hearings open to the public; (f) advance notice of the contents of the tribunal's decision and an opportunity to comment thereon; (g) unlimited time to prepare or present a party's case; (h) a verbatim transcript; or (i) financial assistance to ensure that a party has resources equivalent to those of a counter-party to present its case. Although parties not infrequently demand one or more of these procedural protections (and are sometimes granted them), they are not ordinarily regarded as essential to an opportunity to be heard.'
99) The option to conduct the hearing by virtual means is discussed in section IV.G.5 *infra*.
100) *See* Oskar Gentele, *Combating Due Process Paranoia in Swedish Arbitration, in Stockholm Arbitration Yearbook*, 167 (Calissendorff, Schöldström eds, Wolters Kluwer 2019), regarding erroneous decisions to allow material submitted late.
101) *Belgor, supra* n. 67.
102) *Belaya Ptitsa – Kursk v. Robot Grader AB*; the Supreme Court, 4 May 2018, NJA 2018 p. 291 (Ö 3626-17).
103) *Lenmorniiproekt OAO v. A.L. & Partner Leasing AB*, *supra* n. 52.
104) Heuman, *supra*n. 11, 260; Blackaby et al., *supra* n. 74, 356.
105) Govt. bill 1998/99:35, 110. *See also* Madsen, *supra* n. 23, 241 et seq. Regarding arbitrations under the SCC Rules, *see* Ragnwaldh et al., *supra* n. 38, 75. This is generally the case also in international arbitrations. *See* Born, *supra* n. 79, 2142: '[T]he arbitrator is generally required to give effect to the parties' agreements regarding arbitral procedures, even if he or she considers them unwise or inefficient; only in the circumstances discussed *infra*, where the parties' agreement violates applicable mandatory law or where the parties have agreed to grant the arbitral tribunal the authority to override their joint procedural agreements, is a contrary result permitted.'
106) *See* Jernej Sekolec & Nils Eliasson, *The UNCITRAL Model Law on Arbitration and the Swedish Arbitration Act: A Comparison*, *in The Swedish Arbitration Act of 1999, Five Years On: A Critical Review of Strengths and Weaknesses*, 214 et seq. (Heuman & Jarvin eds, JurisNet 2006). *See also* Ragnwaldh et al., *supra* n. 38, 75.
107) Born, *supra* n. 79, 2241: 'Having fixed a procedural timetable, it is also essential that the tribunal enforce it.'
108) Born, *supra* n. 79, 2014.
109) Section 34(3) of the Act.

110) The *travaux préparatoires* to the Act do not explain the purpose of the rule, which also exists under the Model Law, but the corresponding documents in relation to the old Arbitration Act of 1929 indicate that one important function was to prevent a party from being able to speculate on the outcome of the arbitral proceedings, *see* NJA II 1929 p. 49. It has been suggested that the rule serves an even more important corrective purpose since it may enable the arbitral tribunal to correct the effects of wrongful procedural decisions, *see* Heuman, *supra*n. 11, 271 and Lindskog, *supra*n. 11, Chapter V, s. 34, para. 6.1.2. *See also Globe Nuclear Services and Supply GNSS, Limited v. AO Techsnabexport*, the Svea Court of Appeal, 18 Dec. 2009, T 5883-07. In this case the court found that a party had not objected to the arbitral tribunal's handling of the case. That party was therefore prevented from challenging the arbitral award in this regard.

111) *See* Heuman, *supra*n. 11, 270 et seq.

112) *Ibid.*, 276.

113) *Ibid.*

114) It is viewed as a basic element of procedural fairness and equality of treatment, so that each party will be granted (and held to) a prescribed timetable for presenting its case. *See* Born, *supra* n. 79, 2235.

115) *See also* Blackaby et al., *supra* n. 74, 366 and David St. John Sutton et al., *Russell on Arbitration*, 221 (Sweet & Maxwell 23rd ed. 2007).

116) Pursuant to Art. 28 of the SCC Rules, the arbitral tribunal is required promptly to consult with the parties with a view to establishing a timetable for the conduct of the arbitration and to send the timetable to the parties and the Secretariat.

117) A best practice on how to tailor arbitral proceedings has developed in international arbitration. *See* Robin Oldenstam & Kristoffer Löf, *Best Practise in International Arbitration, in Avtalt prosess – Voldgift i praksis*, s. 3.2 (Berg & Nisja eds, Universitetforlaget 2015).

118) These principles are enshrined in Art. 29 of the SCC Rules. *See also* Oldenstam & Löf, *supra* n. 117, 292.

119) Oldenstam & Löf, *supra* n. 117, s. 3.2.3.

120) Born, *supra* n. 79, 2263.

121) For examples of wording of such provisions, *see* Oldenstam & Löf, *supra* n. 117, s. 3.2.3.

122) *See* the IBA Rules on the Taking of Evidence, *supra* n. 92.

123) Arbitration Institute of the Stockholm Chamber of Commerce, *Guidelines to the SCC Platform*, 4 (sccinstitute.com, latest revision 25 May 2020).

124) According to the SCC Rules, '[t]he Arbitral Tribunal may not delegate any decision-making authority to the administrative secretary'. *See* Art. 24 of the SCC Rules.

125) Section 22 of the Act. *See also* Heuman, *supra*n. 11, 707–711.

126) Article 25 of the SCC Rules.

127) Govt. bill 1998/99:35, 132.

128) Ragnwaldh et al., *supra* n. 38, 138: 'Before deciding to bifurcate the dispute and decide an issue separately, the Arbitral Tribunal should consult the parties and consider whether it makes sense from the perspective of efficiency and procedural economy to render a separate award.'

129) *See* s. 25(4) of the Act and Art. 37 of the SCC Rules.

130) Govt. bill 1998/99:35, 229. According to Heuman, there is nothing to prevent the arbitral tribunal from requesting the voluntary participation of a third party in this regard, *see* Heuman, *supra*n. 11, 333.

131) Under the Model Law, the main rule is that an interim measure issued by an arbitral tribunal should be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, Art. 17H(1). Legislation based on the Model Law has been adopted in eighty states in a total of 111 jurisdictions (*see*www.UNCITRAL.org).

132) SOU 1994:81, 102 and 285. *See also* Govt. bill 1998/99:35, 74.

133) *See* Chapter 7.

134) Ragnwaldh et al., *supra* n. 38, 124 et seq.

135) *Ibid.*, 125.

136) Article 39(3) of the SCC Rules.

137) Ragnwaldh et al., *supra* n. 38, 126 et seq.

138) Article 39(5) of the SCC Rules.

139) Ragnwaldh et al., *supra* n. 38, 125 et seq.

140) Article 39(1) of the Rules.

141) According to the *Cambridge Dictionary* (https://dictionary.cambridge.org/dictionary/english/summary-judgment), a summary judgment is a legal process in which a court makes a decision based on the facts that have been provided, without ordering a trial.

142) Article 32(1) of the SCC Rules.

143) Articles 6 and 9 of the SCC Rules for expedited arbitration.

144) Article 30 of the SCC Rules for expedited arbitration.

145) Section 21 of the Act, and Art. 23(2) of the SCC Rules.

146) Ragnwaldh et al., *supra* n. 38, 92.

147) Section 23 of the Act.

148) However, how prayers for relief affect a specific mandate has been subject to discussion. *See* Lars Heuman, *Skiljemäns rätt att komplettera avtal, in Festskrift till Ulf K. Nordenson*, 192–194 (Carlsson Law Network 1999); Hobér, *supra* n. 53, 118.
149) Hobér, *supra* n. 53, 313 et seq.
150) Lars Heuman, *Skiljemannarätt,* 336 (Norstedts 1999).
151) In the Supreme Court case NJA 1977 p. 415, the court ordered the respondent to either change or destroy goods marked with a certain trademark. The claimant had only requested that the goods be destroyed. That the respondent was ordered to change the goods was accordingly considered as 'less' than the goods being destroyed. *See also* Peter Westberg, *Domstols officialprövning*, 316 et seq. (Juristförlaget i Lund 1988). The case and the commentary concern Swedish court proceedings, in which a claim must be sufficiently precise to be mirrored in the court's ruling without any extensive rephrasing being made by the court. In arbitral proceedings, there is no such requirement. *See*, e.g., Heuman, *supra* n. 150, 336.
152) Section 1(1) reads 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.'
153) *See* Heuman, *supra* n. 148, 191 et seq.
154) A contractual right to obtain a price revision through arbitration is viewed as a typical example of such a mandate. *See* the *travaux préparatoires* to the Act, Government Bill 1998/99:35, 61. *See also* Heuman, *supra* n. 150, 169; Lindskog, *supra*n. 11, Chapter I, s. 1, para. 6.2.2.
155) *See* Heuman, *supra* n. 148, 194. *See also* Lindskog, *supra*n. 11, Chapter I, s. 1, para. 6.2.4; Hobér, *supra* n. 53, 118.
156) *See* Lindskog, *supra*n. 11, Chapter I, s. 1, para. 6.2.4; Hobér, *supra* n. 53, 118, and Heuman, *supra* n. 148, 194.
157) Lindskog, *supra*n. 11, Chapter I, s. 1, para. 6.2.2.
158) *Ibid.*, para. 6.2.4.
159) *Ibid.,* para. 4.1.2.
160) Hobér, *supra* n. 53, 215; Lindskog, *supra*n. 11, Chapter III, s. 23, para. 4.1.2.
161) The requirement to specify the facts relied upon was interpreted strictly in a domestic challenge case before the Svea Court of Appeal in *Systembolaget AB v. V&S Vin & Sprit AB*, the Svea Court of Appeal, 1 Dec. 2009, T 4548-08. In this case, Systembolaget AB requested an arbitral award to be set aside, arguing that the arbitral tribunal had exceeded the scope of its mandate by basing its ruling on facts that, in Systembolaget AB's view, had not been relied on by V&S Vin & Sprit AB. The Svea Court of Appeal granted the challenge and set aside the arbitral award in its entirety. The ruling, which is based on a strict application of domestic procedural rules, has been criticized and should not be considered to express any general rule applicable in international arbitration.
162) Lindskog, *supra*n. 11, Chapter III, s. 21, para. 6.1.1.
163) Ulf K. Nordenson, *Materiell processledning i skiljeförfarande*, 1 Juridisk Tidskrift, 213 et seq. (1993/94).
164) Lindskog, *supra*n. 11, Chapter III, s. 21, para. 6.1.2.
165) Govt. bill 1998/99:35, 119 et seq.
166) J. Gillis Wetter, *Procedures for Avoiding Unexpected Legal Issues, in Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration*, 7 ICCA Congress Series, 89 (van den Berg ed., ICC Publishing 1999).
167) *Ibid.*, 98.
168) *Refaat el-Sayed v. Aktiebolaget Industrivärden*, the Svea Court of Appeal, 13 Apr. 2018, T 1992-17.
169) It should be noted that the SCC Rules set a time limit for amendments of claims. Claims may only be adjusted prior to close of proceedings under Art. 30 of the SCC Rules. The proceedings are to be declared closed by the arbitral tribunal when each party has had a reasonable opportunity to present its case. However, in exceptional circumstances and prior to issuing the final award, the proceedings may be reopened by the arbitral tribunal of its own motion or on a request by a party.
170) Govt. bill 1998/99:35, 108 and 226. An arbitral tribunal's decision to dismiss a new claim can be a ground for challenge, *see* Lindskog, *supra*n. 11, Chapter III, s. 23, para. 4.2.2.
171) *See* Govt. bill 1998/99:35, 227.
172) *Ibid.*, 226.
173) *See* Gentele, *supra* n. 100, 157, where preclusion rules are described as 'pillar stones of due process, enabling arbitral tribunals to render more factually correct awards; far more than the few incorrect awards they may cause'. *See also* 159 et seq.
174) Robin Oldenstam, *Due Process Paranoia or Prudence?, in Stockholm Arbitration Yearbook*, 125 (Calissendorff, Schöldström eds, Wolters Kluwer 2019).
175) *Ibid.*, 126.
176) Govt. bill 1998/99:35, 109 and 226.
177) *Ibid.*, 109 and 227.

178) *See, Håkan Hedenstierna v. Handelshögskolan i Stockholm*, the Supreme Court, 30 Nov. 2010, NJA 2010 p. 600 (T 3258-09). In this case, the claimant had initiated arbitration regarding certain claims in 2004. One claim was later withdrawn by the claimant without reason. The respondent did not request a ruling on the withdrawn claim and the arbitration proceeded on the remaining claims and an arbitral award was rendered in 2006. About six months later, the claimant initiated a new arbitration regarding the same claim that had previously been withdrawn in the first arbitration. The respondent objected and asserted that the arbitration agreement was no longer valid regarding the claim. The arbitral tribunal agreed with the respondent and dismissed the claim. However, the tribunal's decision was reversed by the Svea Court of Appeal, which reasoned that, since the respondent did not use its right to request a ruling on the withdrawn claim, the claimant was at liberty to raise that claim again. As to the validity of the arbitration agreement, mere withdrawal of a claim was not considered enough to alter or terminate the arbitration agreement. The court therefore found that the arbitration agreement was still valid between the parties. The Supreme Court reached the same conclusion as the Svea Court of Appeal.

179) Section 24(1) of the Act, which also provides that '[t]he arbitrators shall afford the parties, to the extent necessary, an opportunity to present their cases in writing and orally'. The same principle is expressed in Art. 32(1) of the SCC Rules, under which a hearing 'shall be held if requested by a party, or if the Arbitral Tribunal deems it appropriate'.

180) Govt. bill 1998/99:35, 112 and 227. *See also* Hobér, *supra* n. 53, 250; Lindskog, *supra* n. 11, Chapter III, s. 24, para. 4.2.1.

181) Govt. bill 1998/99:35, 112. *See also*, e.g., Lindskog, *supra* n. 11, Chapter III, s. 24, para. 4.2.2.

182) Such a hearing shall, however, be arranged by joint request from both parties, in accordance with the principle of party autonomy, or if the arbitral tribunal otherwise considers it appropriate, in accordance with the principle that the arbitral tribunal determines the conduct of the proceedings. *See also* Lindskog *supra* n. 11, Chapter III, s. 23, para. 5.2.2.

183) Govt. bill 1998/99:35, 227. *See also* Madsen, *supra* n. 23, 272.

184) *See*, e.g., the IBA Rules on the Taking of Evidence, *supra* n. 92.

185) Section 22 of the Act. *See also* Govt. bill 1998/99:35, 113 et seq. The same applies under Art. 25(2) of the SCC Rules, which provides: 'The Arbitral Tribunal may, after consultation with the parties, conduct hearings at any place which it considers appropriate.' In a much-criticized case concerning a challenge to an arbitral award (*Titan Corporation v. Alcatel CIT SA*, the Svea Court of Appeal, 28 Feb. 2005, RH 2005:1 (T 1038-05)), the court ruled that the arbitration in question lacked connection to Sweden due to the fact, among others, that no meetings had been held in Sweden. Despite the fact that the seat of arbitration was Sweden, the court therefore declined to try the challenge. The parties then settled and the case was therefore never tried by the Supreme Court. The *Titan* ruling has generally been viewed as incorrect. In 2011, in its ruling in *RosInvestCO v. The Russian Federation*, the Supreme Court, 12 Nov. 2010, NJA 2010 p. 508 (Ö 2301-09), the Supreme Court removed the doubts created by the *Titan* case, stating that: 'where the parties have agreed that the proceedings shall take place in Sweden, it lacks importance [for the purposes of Swedish courts' jurisdiction] that the parties or the arbitrators have chosen to locate meetings in a different country, that the arbitrators are not Swedish, that they have performed their work in a different country, or that the dispute concerns an agreement that otherwise has no connection to Sweden' (our translation). Accordingly, if Sweden is the seat of arbitration, meetings and hearings may be held outside of Sweden, without the jurisdiction of Swedish courts being affected.

186) *See* section IV.G.5 *infra*.

187) Under Art. 32(2) of the SCC Rules, it is an explicit requirement that the arbitral tribunal consults with the parties before making any decisions in these respects. Although not expressly provided for, the same requirement must be understood to apply under the Act. If the parties are in disagreement as to the location of the hearing, it is submitted that the arbitral tribunal as the default location should order the hearing to take place at the seat of arbitration, unless compelling practical considerations point at another hearing location.

188) Article 28 of the SCC Rules.

189) Absent the parties' agreement, the arbitral tribunal determines the seat of arbitration under s. 22 of the Act. If it is a SCC arbitration, however, the seat of arbitration is determined by the SCC Board, under Art. 25(1) of the SCC Rules. As noted above, hearings and meetings may be conducted at other places than the seat of arbitration; *see* s. 22(2) of the Act and Art. 25(2) of the SCC Rules. The seat of arbitration is thus fictional but is of importance because it determines which district court and Court of Appeal has jurisdiction to try actions concerning, e.g., challenges to and appointment of arbitrators, as well as challenges and other proceedings against the award and the arbitral tribunal's jurisdiction.

190) *See*, e.g., Madsen, *supra* n. 23, 271 et seq.; Hobér, *supra* n. 53, 245.

191) The preparatory hearing in this sense has its equivalent in Swedish court proceedings. This is the reason why it is often seen in domestic Swedish arbitrations.

192) As is the case with 'preparatory meetings', this practice stems from domestic arbitrations. The Swedish word then used for the case summary is *recit* and, because of this, the case summary is sometimes referred to as a 'recital' in international arbitrations in Sweden.
193) *OAO Tyumenneftegaz v. First National Petroleum Corporation*, the Svea Court of Appeal, 25 Jun. 2015, T 2289-14.
194) Section 24(1) of the Act. Emphasis added.
195) *See* Ragnwaldh et al., *supra* n. 38, 106.
196) Blackaby et al., *supra* n. 74, s. 6.161 and s. 6.168–6.169. Daniel Girsberger & Nathalie Voser, *International Arbitration: Comparative and Swiss Perspectives* 1059 (Schulthess Verlag 3d ed. 2016): 'In most cases, the arbitral tribunal tries to keep the length of the hearing short, particularly in order to save costs. The trend in international arbitration is to hold short hearings and to rely to a great degree on documentary evidence.'
197) *Poland v. PL Holding*, the Svea Court of Appeal, 22 Feb. 2019, T 8538-17 and T 12033-17. The case has been appealed to the Supreme Court and has not been finally decided at the time of this contribution.
198) Heuman, *supra*n. 11, 476.
199) Hobér, *supra* n. 53, 251.
200) Blackaby et al., *supra* n. 74, s. 6.172.
201) Hobér, *supra* n. 53, 251. *See also* Girsberger and Voser, *supra* n. 196, 1056: 'As parties usually file extensive written submissions in advance, the parties will, as a rule, make relatively brief opening statements, if any.'
202) Heuman, *supra*n. 11, 477.
203) Usually, there is a cut-off date for submitting evidence well in advance of the hearing. *See* section IV.B *supra* with respect to the specific procedural rules laid down for the arbitration.
204) Such pictures, PowerPoint slides, etc., used to explain and demonstrate facts already in the case, are referred to as 'demonstrative exhibits'. It is advisable that the arbitral tribunal, already in its first procedural order, sets a date for the parties to exchange demonstrative exhibits intended to be used at the hearing, preferably a few days before the hearing starts. In this way, the parties will have time to review the demonstratives so as to ascertain that no new information is included, and to object if new information is found to be included, thus avoiding time-consuming arguments over this at the merits hearing.
205) Hobér, *supra* n. 53, 251.
206) Heuman, *supra*n. 11, 478.
207) *Ibid*.
208) Article 40 of the SCC Rules.
209) Such as during the 2020 COVID-19 pandemic, which is ongoing at the time of writing this contribution.
210) Lindskog, *supra*n. 11, Chapter III, s. 24, para. 4.2.4.
211) Govt. bill 1998/99:35, 114.
212) According to the *travaux préparatoires*, when deciding whether a person may participate by telephone or video, the court is to have regard to the costs and discomfort that may arise if a person must be physically present at the meeting. It is also stated that such remote participation should not be allowed if it is deemed inappropriate in the particular case. *See* Govt. bill 2018/19:81, 28–31. In a criminal case, NJA 2017 p. 955, 24 Nov. 2017, case no. B 279-17, the Supreme Court stated that the court has the ultimate responsibility for ensuring due process in these respects. In this regard, the court should consider the requirements for a fair trial under the European Convention for Human Rights. In the case, the Supreme Court found that the court's decision to allow for the victim to participate in the hearing by telephone had not violated the prosecuted person's right to a fair trial. *See also* the Supreme Court's decision in Ö1023-20, pursuant to which the requirement of a 'hearing' under the Extradition Act (1957:668) was deemed satisfied by a video hearing.
213) For the *travaux préparatoires*, *see* Govt. bill 2018/19:81, 27–32. *See also* Govt. bill 2004/05:131, 98–90, and Govt. bill 1998/99:65, 18.
214) Article 6.3 of the European Convention on Human Rights. *See, Schatschaschwili v. Germany*, case no. 9154/10, and *Al-Khawaja and Tahery v. The United Kingdom*, case nos 26766/05 and 22228/06.
215) In September 2020, the Court of Appeal for Western Sweden ruled that a district court erred when cancelling a hearing with reference to the COVID-19 pandemic. In its decision, the Court of Appeal pointed to the district court's obligation to conduct the proceedings in an expeditious manner and the court's authority to allow for participation in meetings through telephone or videoconference. The Court of Appeal concluded that, instead of cancelling the hearing, the district court should have consulted the parties and taken the appropriate measures to proceed with the hearing, using technology that allows for remote participation if necessary. *See Valbruna Nordic AB v. Consto AB*, the Court of Appeal for Western Sweden, 4 Sep. 2020, Ö 4485-20. The Court of Appeal's reasoning ought to be equally applicable to arbitrations in Sweden and, in the authors' view, the ruling confirms that under Swedish law an electronic hearing fulfils a requirement that a hearing be held.

216) *See* Hobér, *supra* n. 53, 250 et seq.
217) Ragnwaldh et al., *supra* n. 38, 114.
218) Govt. bill 1998/99:35, 112. Cf. Lindskog, *supra*n. 11, Chapter III, s. 24, para. 6.1.2.
219) Hobér, *supra* n. 53, 205 and 265; Heuman, *supra*n. 11, 404 et seq., Madsen, *supra* n. 23 273; Cars, *supra* n. 17, 113–115.
220) Govt. bill 1998/99:35, 112. The requirement for a 'valid cause' depends on the actual circumstances. Guidance can be found in Chapter 32 s. 8 of the Swedish Code of Judicial Procedure regarding 'legal excuse'. Under the Swedish Code of Judicial Procedure, legal excuse mainly exists when a person is impeded from doing what is required by reason of a breakdown in general modes of communication, sickness or another circumstance that they did not have reason to anticipate. However, the requirement for 'valid cause' should not be as strict as 'legal excuse' that applies in court proceedings. *See* Lindskog, *supra*n. 11, Chapter III, s. 24, para. 6.1.2; Heuman, *supra*n. 11, 398 et seq.; Kaj Hobér, *Party Substitution under Swedish Arbitration Law*, *in Swedish and International Arbitration* (Franke ed., The Arbitration Institute of the Stockholm Chamber of Commerce 1983) 48 et seq., on 'valid cause'.
221) Govt. bill 1998/99:35, 112–113; Heuman, *supra*n. 11, 397.
222) It is debated how strictly the adversarial principle should be upheld in the case of new arguments being submitted at the final hearing. According to Lindskog, there is scope for the arbitral tribunal's discretion in this regard. It should not be necessary to communicate arguments that are considered not to be critical to the outcome of the dispute. However, a new claim, new evidence or new factual allegations should always be communicated to the absent party and the party should be given the opportunity to comment on the claim. *See* Govt. bill 1998/99:35, 113; Cars, *supra* n. 17, 115; Lindskog, *supra*n. 11, Chapter III, s. 24, para. 6.3.3; Heuman, *supra*n. 11, 385–390.
223) Nordenson, *supra* n. 163, 219 et seq. *See also* Lindskog, *supra*n. 11, Chapter III, s. 24, para. 6.3.2.
224) Hobér, *supra* n. 53, 265.
225) It has been estimated that the eventual outcomes in perhaps 60% to 70% of international arbitrations turn on the facts rather than application of relevant principles of law, whereas a good proportion of the remainder turn on a combination of facts and law, *see* Blackaby et al., *supra* n. 74, 375 et seq.
226) Issues of fact and opinion are not always easily distinguishable. As an example, the content of foreign law applicable in international arbitrations in Sweden is normally treated as an issue of fact. But since interpretation of law is often the crux of the matter, the parties may wish to rely on different expert opinions and/or the writings of legal authorities, *see* Hobér, *supra* n. 53, 220.
227) IBA Rules on the Taking of Evidence, *supra* n. 92.
228) As mentioned in section IV.B *supra*, in practice, it is probably more common that the parties agree that the arbitral tribunal may seek guidance therein, thus making the IBA Rules on the Taking of Evidence, *supra* n. 92, become applicable by way of non-mandatory reference. *See* Hobér, *supra* n. 53, 221. *See also* Oldenstam & Löf, *supra* n. 117, 295.
229) Article 31(1) of the SCC Rules.
230) Ragnwaldh et al., *supra* n. 38, 102.
231) This basic tenet is also authoritative in civil and criminal proceedings in Sweden.
232) Ragnwaldh et al., *supra* n. 38, 102.
233) Cf. Hobér, *supra* n. 53, 222.
234) Govt. bill 1998/99:35, 226. Regarding arbitrations under the SCC Rules, *see* Ragnwaldh et al., *supra* n. 38, 102 et seq.
235) Govt. bill 1998/99:35, 228. Notably, it is not uncommon that a party attempts to introduce new evidence at or immediately prior to the final hearing.
236) Cf. Madsen, *supra* n. 23, 281 et seq.; Hobér, *supra* n. 53, 223.
237) *Belgor*, *supra* n. 67.
238) *See further* section IV.A.2 *supra*.
239) Cf. Heuman, *supra*n. 11, 427.
240) Cf. Blackaby et al., *supra* n. 74, 380; Hobér, *supra* n. 53, 224; Heuman, *supra*n. 11, 445.
241) Article 29 of the SCC Rules. *See also*, e.g., Yves Derains, *Towards Greater Efficiency in Document Production Before Arbitral Tribunals – A Continental Viewpoint*, 676 International Court of Arbitration Bulletin 2006 Special Bulletin, Document Production in International Arbitration, 88 (2006).
242) *See*, e.g., Born, *supra* n. 79, 2263; Oldenstam & Löf, *supra* n. 117, s. 3.2.3.
243) Meaning, e.g., in a separate written pleading or separate list or section towards the end of one of the submissions on the merits.
244) In Swedish civil proceedings, the parties are required to specify the circumstances which they intend to prove with respect to both documentary evidence and witnesses (so-called *evidentiary themes*) in a 'statement of evidence', the final version of which is often submitted towards the end of the written phase of the proceedings.

245) According to the Supreme Court an arbitral tribunal, when determining whether a document is relevant as evidence in the proceedings, can seek guidance in the Swedish Code of Judicial Procedure as well as in the IBA Rules on the Taking of Evidence, *supra* n. 92; *see Euroflon Tekniska Produkter AB v. Flexiboys i Motala AB,* the Supreme Court, 10 May 2012, NJA 2012 p. 289 (Ö 1590-11) (*Flexiboys*). In international arbitration, however, there are compelling reasons not to base decisions on document production requests on Swedish law, but rather to place reliance on the principles enshrined in the IBA Rules on the Taking of Evidence, *supra* n. 92.
246) Stefan Brocker, *Discovery in International Arbitration: The Swedish Approach*, 2 Stockholm Arbitration Report, 22 (2001). *See also* Hobér, *supra* n. 53, 225; Heuman, *supra*n. 11, 448. It may be noted that under s. 15 of the old Arbitration Act of 1929, this power was explicitly given to arbitrators.
247) Hobér, *supra* n. 53, 226.
248) Cf. Heuman, *supra* n. 150, 306.
249) Article 3.3(b) of the IBA Rules on the Taking of Evidence, *supra* n. 92.
250) *See* Stefan Brocker, *The New IBA Rules on the Taking of Evidence in International Arbitration: From a Cost-Efficiency Perspective,* 5 et seq., paper at conference arranged by the Swedish Arbitration Association (Stockholm 27 Jan. 2011).
251) In the authors' experience, the use of Redfern Schedules has become so widespread that many procedural orders in international arbitrations in Sweden merely refer to 'Redfern Schedules' without offering much more guidance as to their contents. *See also* Hobér, *supra* n. 53, 228.
252) It may be noted that, since for practical reasons the table is only suitable for providing a summary of objections, the objections are often also set out in a separate document, referred to in the Redfern Schedule and explaining the objections in more detail.
253) *See* Derains, *supra* n. 241, 90. Cf. Blackaby et al., *supra* n. 74, 384.
254) For sources on the tradition under Swedish procedural law, *see* Per Olof Ekelöf et al., *Rättegång IV*, 263 et seq. (Jure Förlag AB 7th ed. 2009) and Lindell, *supra* n. 13, 566; NJA 1959 p. 230, the Supreme Court, 24 Apr. 1959. The Swedish tradition in this respect aligns with the practice in international arbitrations in general; cf. Born, *supra* n. 79, 2361.
255) Cf. Ekelöf et al., *supra* n. 254, 264. *See also* Peter Westberg, *'Fishing Expeditions' – ett 'inbrott' i själ och rum?*, *in Festskrift till Per Ole Träskman*, 507 (Jure Förlag AB 2011).
256) Article 9.2(c) of the IBA Rules on the Taking of Evidence, *supra* n. 92.
257) Article 9.2(g) of the IBA Rules on the Taking of Evidence, *supra* n. 92.
258) *See* Brocker, *supra* n. 250, 6.
259) *See* Westberg, *supra* n. 255, 504.
260) It is generally held that the rules of privilege contained in the Code of Judicial Procedure are analogously applicable in this regard.
261) Under Swedish procedural law, this exemption relates only to notes and memoranda intended exclusively for personal use. Consequently, if a person at some point shares such notes with other individuals, the notes may be subject to production. *See* Ekelöf et al., *supra* n. 254, 270.
262) Ekelöf et al., *supra* n. 254, 270 et seq.; NJA 1975 p. 693. *See also* Heuman, *supra* n. 150, 464.
263) Pursuant to Art. 5(b) of the IBA Rules on the Taking of Evidence, *supra* n. 92, '[d]ocuments on which the witness relies that have not already been submitted shall be provided'. According to the *travaux préparatoires* of the Code of Judicial Procedure, the same principle applies under Swedish procedural law such that a party who relies on personal notes in support of a factual statement should be obliged to produce said notes. *See* SOU 1938:44, 414. This principle has been applied in arbitral decisions on requests to produce documents, as well as in a judgment by the Övre Norrland Court of Appeal, *see* NJA 1963 C 1070.
264) Section 26(1) of the Act.
265) Article 3.12(b) of the IBA Rules on the Taking of Evidence, *supra* n. 92.
266) *R.G. AB v. Securitas Teknik AB*, the Supreme Court, 17 Dec. 1998, NJA 1998 p. 829 (Ö 4522-97).
267) *Idre Fjällrestauranger AB v. Stiftelsen Idre Fjäll*, the Supreme Court, 2 Apr. 2020, (Ö 2232-19).
268) The use of written witness statements is explicitly recognized in Art. 33(2) of the SCC Rules. Moreover, Art. 4(5) of the IBA Rules on the Taking of Evidence, *supra* n. 92, provides widely accepted guidelines as to the contents and form of witness statements.
269) *See* Art. 33(3) of the SCC Rules and Art; 8(1) of the IBA Rules on the Taking of Evidence, *supra* n. 92.
270) Article 33(1) of the SCC Rules. *See* Ragnwaldh et al., *supra* n. 38, 109. *See also* Art. 31(2) of the SCC Rules regarding such identification of documentary evidence.
271) *See* Hobér, *supra* n. 53, 229.
272) SOU 1994:81, 146–147; Govt. bill 1998/99:35, 115.

273) However, arbitral tribunals in Sweden tend to distinguish between party representatives and witnesses insofar as only the former are entitled to be present during the entire hearing, i.e., also before they testify, *see* Hobér, *supra* n. 53, 229. Cf. Heuman, *supra*n. 11, 435. In the authors' view, however, it should be carefully considered by the party relying on the testimony of a party representative whether the evidentiary weight of the representative's testimony may be affected by its presence during previous examinations.
274) Cf. Govt. bill 1998/99:35, 116 et seq. *See also* Hobér, *supra* n. 53, 227 et seq.; Heuman, *supra*n. 11, 450.
275) Chapter 36, s. 5 of the Code of Judicial Procedure.
276) *Ibid.*, s. 6.
277) Heuman, *supra* n. 150, 463.
278) *See*, e.g., Claes Lundblad, *Något om vittnesbeviset i domstol och skiljeförfarande, in Festskrift till Jan Sandström*, 332 (Ramberg ed. Nerenius & Santérus Förlag AB 1997); Hobér, *supra* n. 53, 230.
279) Article 4(3) of the IBA Rules on the Taking of Evidence, *supra* n. 92. The same follows from International Bar Association, *IBA Guidelines on Party Representation in International Arbitration*, *see*, e.g., Guideline 20 (ibanet.org, adopted 25 May 2013).
280) Blackaby et al., *supra* n. 74, ss 6.173 et seq.
281) ICC Bulletin 2020:1, The Accuracy of Fact Witness Memory in International Arbitration, 55–81.
282) *Ibid.*, 79–81.
283) *See* s. 25(3) of the Act.
284) *See* Chapter 36, s. 17 of the Code of Judicial Procedure.
285) *See* Hobér, *supra* n. 53, 232; Lundblad, *supra* n. 278, 337. Cf. Heuman, *supra*n. 11, 438. Art. 8(2) of the IBA Rules on the Taking of Evidence, *supra* n. 92, stipulates that questions to a witness during direct and re-direct testimony may not be 'unreasonably leading'.
286) *See* Heuman, *supra*n. 11, 438.
287) *See* Lundblad, *supra* n. 278, 338; Hobér, *supra* n. 53, 232.
288) Kaj Hobér, *Cross-Examination in International Arbitration, in Stockholm Arbitration Yearbook*, 44 (Calissendorff, Schöldström eds, Wolters Kluwer 2019).
289) Cf. Hobér, *supra* n. 53, 233.
290) *See* Blackaby et al., *supra* n. 74, s. 6.133; Born, *supra* n. 79, 2277.
291) *See* Blackaby et al., *supra* n. 74, s. 6.139.
292) *Ibid.*, s. 6.148.
293) Cf. Art. 7 of the IBA Rules on the Taking of Evidence, *supra* n. 92. *See also* Hobér, *supra* n. 53, 237.

294) Cf. Hobér, *supra* n. 53, 237; Blackaby et al., *supra* n. 74, 391–393.
295) SOU 1994:81, 285; Govt. bill 1998/99:35, 74. *See also* Heuman, *supra*n. 11, 405.
296) Bo G.H. Nilsson, *Negative Inferences: An Arbitral Tribunal's Powers to Draw Adverse Conclusions from a Party's Failure to Comply with the Tribunal's Orders*, *in Between East and West: Essays in Honour of Ulf Franke,* 362–363 (Hobér et al. eds, JurisNet 2010).
297) Article 35(3) of the SCC Rules.
298) Article 9(5) of the IBA Rules on the Taking of Evidence, *supra* n. 92.
299) Ragnwaldh et al., *supra* n. 38, 115 et seq.
300) Hobér, *supra* n. 53, 238.
301) *See* Art. 18(1) of the Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 Jun. 2008 on the Laws Applicable to Contractual Obligations). *See also* SOU 1994:81, 153; Hobér, *supra* n. 53, 238.
302) Blackaby et al., *supra* n. 74, 378.
303) Article 27(1) of the UNCITRAL Arbitration Rules.
304) Hobér, *supra* n. 53, 238.
305) *See,* e.g., case *Elektrobyrån AB v. BTH Bygg AB*, the Supreme Court, 27 Mar. 2001, NJA 2001 p. 177 (T 5001-98), where the court ruled that a party who asserts that a fixed price was agreed for a construction project has the burden of proving this assertion.
306) Section 26 of the Act.
307) There is some uncertainty as to whether the parties can agree that the district court is to assist with taking evidence at a party's request without the arbitral tribunal's consent being required, *see* Heuman, *supra*n. 11, 458.
308) Govt. bill 1998/99:35, 118.
309) *See* Hobér, *supra* n. 53, 240. Cf. Madsen, *supra* n. 23 at 295 et seq.; Heuman, *supra*n. 11, 459 et seq.
310) SOU 1994:81, 149; Govt. bill 1998/99:35, 118.
311) *See* ss 26 and 44(2) of the Act.

312) *Flexiboys, supra* n. 245. *See also Karin F. v. Sparbanken Sverige AB*, the Supreme Court, 23 Oct. 1998, NJA 1998 p. 590 (II) (Ö 3507-96), where the respondent requested that the claimant be ordered to disclose 'all written documentation' in relation to certain credits that were relevant in the case. The Supreme Court found that the documents were not sufficiently specified, nor were they identifiable in the sense that the party had explained which factual allegation the documents were intended to prove. *See also* Per Olof Ekelöf et al., *Rättegång IV*, 2009, 7 u., 263; Lars Heuman, *Editionsföreläggande i civilprocesser och skiljetvister. Del II*, Juridisk Tidskrift, nos 2–3, 1989/90, 259, on the importance for the court to consider whether a document is sufficiently specified.

313) Trade secrets are defined in s. 2 of the Trade Secrets Act *(Sw: Lag (2018:558) om företagshemligheter)*. In the Code of Judicial Procedure, the term 'professional secrets' is used. However, the Supreme Court has concluded that the two terms have essentially the same meaning, *see*, *Sparbanken Sverige AB v. Marcus A. et al.*, the Supreme Court, 6 Jun. 1995, NJA 1995 p. 347 (Ö 4372-94).

314) When assessing whether there is extraordinary reason for disclosure, the court weighs the interests between the evidentiary value of the trade secret and its economic value and considers the likelihood of damage in case of disclosure, *see* Peter Fitger, *The Code of Judicial Procedure*, commentary to Chapter 36, s. 6 (Norstedts Juridik AB 1984).

315) *See* Govt. bill 1998/99:35, 229.

316) *Flexiboys, supra* n. 245, para. 17.

317) *RosInvestCO v. The Russian Federation*, *supra* n. 185.

318) *See,* e.g., *Yara International ASA v. Joint Stock Company Acron,* the Svea Court of Appeal, 9 Mar. 2011, Ö 8181-10.

319) *Ibid.*

320) *See* Hobér, *supra* n. 53, 239, who submits that this is probably an important reason why such applications are rare in international arbitrations taking place in Sweden.

321) *See* Heuman, *supra*n. 11, 30. In *Bulgarian Foreign Trade Bank Ltd (Bulbank) v. A.I Trade Finance Inc (AIT)*, the Supreme Court, 27 Oct. 2000, NJA 2000 p. 538 (T 1881-99) (*Bulbank*), the Supreme Court stated that arbitrations (in general) are of a private nature and that third parties do not have the right to attend arbitration hearings.

322) Article 32(3) of the SCC Rules provides that hearings should be held in private, unless otherwise agreed by the parties. *See also* Ragnwaldh et al., *supra* n. 38, 108.

323) *Bulbank, supra* n. 321.

324) A confidentiality provision in the main agreement in which the arbitration clause is included may in principle be interpreted as covering an arbitration arising out of the agreement. However, since such provisions are often broadly worded, it is often difficult to delineate the exact scope of the parties' confidentiality undertakings with respect to arbitration proceedings. *See further* Sigvard Jarvin, *Sekretess i svenska och internationella skiljeförfaranden*, 1 Juridisk Tidskrift, 152 (1996/97); Kristofer Magnusson, *Avtal om sekretess i skiljeförfarande*, 1 Juridisk Tidskrift, 169 (2002/03).

325) Article 52 of the SCC Rules.

326) Ragnwaldh et al., *supra* n. 38, 165 et seq.

327) *See* SOU 1994:81, 195; and discussion in Heuman, *supra*n. 11, 17.

328) Excerpt from quotation from the Supreme Court, translated and given in 2 Stockholm Arbitration Report, 144 (2000), *Bulbank*, *supra* n. 321.

329) *See* Cars, *supra* n. 17, 110.

330) *Partrederiet för M/S Red Sea v. Götaverken Sölvesborg Aktiebolag*, the Supreme Court, 13 Jul. 1990, NJA 1990 p. 419 (T 80-89).

331) *See* Arts 2, 5 and 6 in the Reg. (EU) 2016/679 General Data Protection Regulation (GDPR).

332) *See* Art. 44 and recitals 101–102; Art. 49 and recitals 111–112 in the GDPR.

333) The provisions regarding costs in the Act are non-mandatory. Accordingly, if the parties have agreed on the SCC Rules, the SCC Rules take precedence over the Act if there is a conflict between the two sets of regulations.

334) The presentation in this section follows the enumeration of arbitration costs in Art. 49(1) of the SCC Rules, i.e.: (i) the fees of the arbitral tribunal, (ii) the administrative fee, and (iii) the expenses of the arbitral tribunal and the SCC. Thereafter the costs of each party are discussed.

335) *See* Art. 2(1) in App. IV Schedule of Costs of the SCC Rules and Ragnwaldh et al., *supra* n. 38, 148 et seq.

336) *See* Annette Magnusson, *The Practice of the Arbitration Institute of Stockholm Chamber of Commerce: An Inside View*, 2 Stockholm Arbitration Report, 56 (2001).

337) *Ibid. See also* Ragnwaldh et al., *supra* n. 38, 149 et seq.

338) Ragnwaldh et al., *supra* n. 38, 150.

339) Article 2(3) App. IV of the SCC Rules.

340) Ragnwaldh et al., *supra* n. 38, 150.

341) *NEMU Mitt i Sverige AB v. Jan H, Gunnar B and Bo N (the arbitrators)*, the Supreme Court, 22 Oct. 1998, NJA 1998 p. 574 (T 105-98) (*NEMU*).

342) However, the Supreme Court declared that such notes were no prerequisite for the right to compensation.

343) *NEMU, supra* n. 341, 580.

344) *Ibid*., 579 et seq.

345) *Ibid.*, 580 et seq.
346) *See* Heuman, *supra*n. 11, 552.
347) *See* Patrik Schöldström, *The Arbitrator's Mandate: A Comparative Study of Relationships in Commercial Arbitration under the Laws of England, Germany, Sweden and Switzerland*, 693 (Jure Förlag AB 1998).
348) Section 39 of the Act. It may also be noted that an arbitrator who receives, or agrees to receive, compensation from only one of the parties may be disqualified under s. 8(4) of the Act; *see* discussion in Hobér, *supra* n. 53, 173.
349) SOU 1994:81, 299; Govt. bill 1998/99:35, 240; Johan Kvart & Bengt Olsson, *Tvistlösning genom skiljeförfarande: en handledning till lagen om skiljeförfarande,* 152 (Norstedts Juridik AB 2d ed. 2007).
350) The absence of such an instruction does not render the award invalid. However, it has been held that time for submitting an application to the district court will not start running until the arbitral tribunal has provided such an instruction, in writing, *see* Lindskog, *supra*n. 11, Chapter VI, s. 41, para. 4.1.3.
351) *Soyak International Construction & Investment Inc. v. Werner Melis, Kaj Hobér and Steffen Kraus*, the Supreme Court, NJA 2008 p. 1118 (Ö 4227-06) (*Soyak v. WM et al.*). It may be noted, however, that a decision by the arbitral tribunal regarding security for the arbitral tribunal's fees according to s. 38 of the Act cannot be challenged under s. 41; *see, Scheme Ltd v. Ann Zetterberg Littorin*, the Supreme Court, 27 Oct. 2017, NJA 2017 p. 760 (T 3564-16).
352) *See* Jan Ramberg & Serge Lazareff, '*Challenging Arbitrators' Fees Determined by Arbitration Institutions', in Between East and West: Essays in Honour of Ulf Franke*, *supra* n. 296.
353) Govt. bill 2017/18:257, 64–67.
354) In the same way as determination of fees to the arbitral tribunal, the amount in dispute should (in accordance with Art. 3(2) in App. IV to the SCC Rules) be the aggregated value of all claims, counterclaims and set-offs. Where the amount in dispute cannot be ascertained, the Board of the SCC determines the administrative fee taking all relevant circumstances into account. According to Art. 3(3) in App. IV to the SCC Rules the Board may, in exceptional circumstances, deviate from the amounts set out in the schedule and may, e.g., reduce the administrative fee in case of early termination. *See* Ragnwaldh et al., *supra* n. 38, 219.
355) *See* Art. 7(1) of the SCC Rules. The registration fee amounts to EUR 3,000, *see* Art. 1(1) in Appendix IV to the SCC Rules.
356) *See* Art. 7(2) of the SCC Rules and Art. 1(2) in App. IV to the SCC Rules.
357) Section 37 of the Act.
358) Article 49(1) and (7) of the SCC Rules. Notably, under Art. 24(6) of the SCC Rules, the fee payable to any administrative secretary shall be paid from the fees of the arbitral tribunal. Thus, the appointment of an administrative secretary should not increase the costs of the proceedings.
359) Including climate compensation in connection herewith.
360) *See* Madsen, *supra* n. 23, 414 n. 1309.
361) Article 4 in App. IV to the SCC Rules.
362) *See* Heuman, *supra*n. 11, 554 et seq.
363) Section 42 of the Act and Art. 50 of the SCC Rules.
364) *Bertil B. v. AB Bonnierföretagen*, *supra* n. 91.
365) *Sala International AB v. Alliance Assurance Co Ltd among others*, the Supreme Court, 29 Dec. 1997, NJA 1997 p. 854 (Ö 75-96).
366) *See* Madsen, *supra* n. 23, 433.
367) *Ibid.*
368) (*Sw: räntelag* (*1975:635*)).
369) In the Act, the term 'security' is used. In the following the term 'advance on costs' (which is used in the SCC Rules) will be used in relation to both the SCC Rules and the Act.
370) *See* s. 38 of the Act and Art. 51 of the SCC Rules.
371) Section 39 of the Act. The provision in the SCC Rules applies if the parties have agreed to apply the rules, without excluding the provision of advance on costs.
372) Article 51(2) of the SCC Rules.
373) Cf. Art. 49(1) of the SCC Rules and Magnusson, *supra* n. 336, 56.
374) *See* Magnusson, *supra* n. 336, 56.
375) *Ibid.*
376) Section 38(1) of the Act only mentions that the arbitral tribunal may fix separate security for individual cases. Art. 51(3) of the SCC Rules is more exhaustive stating that '[w]here counterclaims or set-offs are submitted, the Board may decide that each party shall pay advances corresponding to its claim'.
377) SOU 1994:81, 198; Heuman, *supra*n. 11, 565.
378) SOU 1994:81, 199; Madsen, *supra* n. 23, 418.

379) Under Art. 51(4) of the SCC Rules, such additional advance during the course of the arbitration requires a request from the arbitral tribunal to the Board of the SCC, which may order the parties to pay additional advances. In arbitrations under the Act, the arbitral tribunal's right to request security for costs is found in s. 38(1) of the Act. This provision entitles the arbitral tribunal to request security at any time during the arbitral proceeding; *see* Heuman, *supra*n. 11, 564. *See also* Govt. bill 1998/99:35, 164.

380) Section 38(1) of the Act. The same applies under Art. 51(5) of the SCC Rules, pursuant to which, however, the words 'shall dismiss the case' are used. If one of the parties does not pay its part of the advance on costs, the arbitral tribunal should first give the other party an opportunity to do so within a specified deadline.

381) Article 51(3) of the SCC Rules. The Act does not contain such an explicit provision, but the corresponding provisions should also apply under the Act; *see* Kvart & Olsson, *supra* n. 349, 155.

382) Section 38(1) of the Act.

383) Section 5(3) of the Act.

384) *Swedish Special Supplier AB v. Sky Park AB*, the Supreme Court, 29 Dec. 2000, NJA 2000 p. 773 (T 5119-99).

385) *See also* Gretta Walters, *SCC Practice: Separate Awards for Advance of Costs 1 January 2007–31 Dec.mber 2011*, Arbitration Institute of the Stockholm Chamber of Commerce (published on the SCC website in 2012), regarding the use of separate awards for advance of costs in practice.

386) *See* Kvart & Olsson, *supra* n. 349, 152.

387) Section 38(2) of the Act.

388) *See* Madsen, *supra* n. 23, 421 et seq.

389) Ragnwaldh et al., *supra* n. 38, 164.

390) SOU 1994:81, 298; Govt. bill 1998/99:35, 240; Heuman, *supra*n. 11, 561.

391) Section 39(2) of the Act.

392) Section 37 of the Act, and Art. 49(7) of the SCC Rules.

393) Section 37, second sentence, of the Act.

394) *See* Heuman, *supra*n. 11, 557.

395) This is expressly provided for in Art. 49 of the SCC Rules, under which the allocation of costs is to be made with 'regard to the outcome of the case, each party's contribution to the efficiency and expeditiousness of the arbitration and any other relevant circumstances'. Although not expressly provided for under the Act, the principle that costs follow the event is the general principle under Swedish law, codified in the Code of Judicial Procedure (Chapter 18, s. 1). The principle is also applied in ad hoc arbitrations in Sweden, unless the parties have agreed otherwise.

396) *See*, e.g., Linda Lundin, *Fördelningen av kostnader i kommersiella tvister*, 1 Juridisk Tidskrift, 221 (2013/14).

397) *See Scheme Ltd v. Ann Zetterberg Littorin*, *supra* n. 351.

398) Ragnwaldh et al., *supra* n. 38, 156. In 2016, the SCC published a report focusing on the costs of commercial arbitrations and the manner in which SCC tribunals allocate costs on the basis of the outcome of the case. The report furthermore describes how party conduct influences the tribunal's decisions on both the allocation of costs and the recoverability of costs, *see*https://sccinstitute.com/media/93440/costs-of-arbitration_scc-report_2016.pdf.

399) Article 38 of the SCC Rules.

400) Ragnwaldh et al., *supra* n. 38, 121 et seq.

401) Article 38(2) of the SCC Rules. *See* Ragnwaldh et al., *supra* n. 38, 122 et seq.

402) Article 38(3) of the SCC Rules.

403) Ragnwaldh et al., *supra* n. 38, 122 et seq. Arguably, however, 'exceptional circumstances' are unlikely to be at hand absent evidence establishing that the opposing party has a weak balance sheet.

404) Cf., *The Russian Federation v. Quasar de Valores SICAV S.A et al.*; Stockholm District Court, case no. T 15045 09, 11 Sep. 2014.

405) *See*, e.g., *Joint Stock Company Acron v. Yara International ASA*, the Svea Court of Appeal, 12 Apr. 2010, RH 2010:75 (Ö 9250-09). In this case, the arbitral tribunal found, after a jurisdictional hearing, that it had jurisdiction. To this effect, the arbitral tribunal rendered a 'Partial Award on Jurisdiction'. The respondent in the arbitration brought a challenge against the partial award. The court explained that, although styled 'Partial Award on Jurisdiction', it was in fact a procedural decision. As such, it could not be challenged.

406) *See* s. 2(2) of the Act. In *Belgor*, *supra* n. 67, the Supreme Court clarified that, when a court reviews an arbitral tribunal's positive jurisdictional decision, there is a presumption that the arbitral tribunal's assessment is correct. It is, thus, for the party contesting jurisdiction to show that the decision is incorrect, rather than for the court to make a full assessment independent of the arbitral tribunal's decision. *Belgor* concerned a challenge to an award, but is arguably applicable also with respect to an action under s. 2(2) of the Act.

407) Govt. bill 1998/99:35, 77 and 124. Notwithstanding this, it is possible to achieve a court review of the arbitral tribunal's jurisdiction *during* the arbitral proceedings, namely by bringing an action under s. 2(2) of the Act, requesting declaratory relief to the effect that the arbitral tribunal lacks jurisdiction or competence to adjudicate the dispute. *See further, RosInvestCo UK Ltd v. The Russian Federation*, *supra* n. 185.

408) Govt. bill 1998/99:35, 124. *See also* Heuman, *supra*n. 11, 525, Lindskog, *supra*n. 11, Chapter IV, s. 27, para. 4.3.2; Madsen, *supra* n. 23, 309.

409) As Lindskog notes, a decision whereby an arbitrator is removed on the grounds of bias under s. 10 of the Act cannot be changed by the arbitral tribunal. The reason for this is not, however, that the decision acquires legal force, but rather that the decision is irreversible. *See* Lindskog, *supra*n. 11, Chapter IV, s. 27, para. 4.3.2. *See also* Govt. bill 1998/99:35, 124.

410) To this effect, *see also* Heuman, *supra*n. 11, 525.

411) *NeuroVive Pharmaceutical AB v. CicloMulsion AG*, the Supreme Court, 30 Apr. 2019, NJA 2019 p. 382 (T 796-18). In the arbitration, the tribunal had decided a preliminary issue pertaining to the intention behind a certain clause in the agreement. The decision was made by way of a procedural order. In the same procedural order, the tribunal noted that the proceedings were closed with respect to the issue of the intention behind the clause in question. The tribunal also noted that it would not deviate from its preliminary determination without informing the parties and inviting them to comment. The arbitral tribunal also reserved its right to resume the proceedings with respect to the issue. In a submission later in the proceedings, one of the parties touched upon the issue of the intention behind the clause in question and the tribunal invited the other party to comment. However, the tribunal did not indicate that it considered deviating from its findings in the procedural order. In a separate award some two years after the procedural order, the tribunal found in favour of another interpretation of the clause than the one established in the procedural order. Both the Svea Court of Appeal and the Supreme Court found that this was a grave procedural error sufficient to vacate the award (it may be noted, although not discussed in the judgments, that the arbitral tribunal's determination in the procedural order related to an issue on the merits of the case and could thus have been made in the form of a separate award, rather than as a decision).

412) *Ibid*.

413) Section 27(1) and (3) of the Act. Also provided for in Art. 45 of the SCC Rules.

414) Final awards without any ruling on the merits may contain decisions in respect of the arbitrators' compensation and the allocation of costs between the parties. *See*, e.g., Madsen, *supra* n. 23, 306.

415) Section 29(1) of the Act and Art. 44 of the SCC Rules. Unlike s. 29(1) of the Act, Art. 44 of the SCC Rules does not contain the provision 'unless both parties object thereto'. Needless to say, however, this also applies under the SCC Rules, as a function of the principle of party autonomy.

416) The Swedish term used in the Act is *särskild skiljedom*.

417) A simpler way of describing the two different kinds of separate awards could be to call them 'partial awards' and 'interim awards'. In this contribution, however, we refer to them as 'dispositive separate awards' and 'determinative separate awards' in order not to confuse 'interim awards' with orders on interim measures. As discussed below, such orders are sometimes referred to as 'interim awards' or 'awards on interim measures'.

418) *See* Heuman, *supra*n. 11, 527; Lindskog, *supra*n. 11, Chapter IV, s. 29, para. 3.1. The enforceability of an award requires, of course, that the claim is such that enforcement can be sought. If the award provides merely for declaratory relief it cannot, with a few exceptions that will not be discussed here, be enforced.

419) Cf. s. 29(2) of the Act.

420) Section 29(1) of the Act.

421) *See* Madsen, *supra* n. 23, 332.

422) Govt. bill 1998/99:35, 130.

423) Per Olof Ekelöf et al., *Rättegång V*, 231 and 235 (Norstedts Juridik AB 8th ed. 2011). *See also* Born, *supra* n. 79, 2243 et seq.

424) According to the *travaux préparatoires* to the Act, procedural economy is the main purpose of the possibility to bifurcate. Issues relating to procedural economy should therefore be carefully considered before deciding on bifurcation. *See* Govt. bill 1998/99:35, 130. *See also* Ragnwaldh et al., *supra* n. 38, 138; Heuman, *supra*n. 11, 527; Ekelöf et al., *supra* n. 423, 232.

425) *See* Born, *supra* n. 79, 2244; Heuman, *supra*n. 11, 527.

426) *See*, e.g., Heuman, *supra*n. 11, 533; Hobér, *supra* n. 53, 263.

427) Govt. bill 1998/99:35, 236.

428) *See*, e.g., Hobér, *supra* n. 53, 262.

429) Section 21 of the Act; Art. 23(2) of the SCC Rules.

430) Section 27(2) of the Act; Art. 45(1) of the SCC Rules.

431) It is thus possible for the parties to reach a settlement and have it confirmed in a consent award even after the point in time when the proceedings have been formally closed. *See* Hobér, *supra* n. 53, 264.

432) Notably, the Singapore Convention, in force as of 12 Sep. 2020, provides a process for direct enforcement of cross-border settlement agreements between parties resulting from mediation. At the time of this contribution, the Singapore Convention had been signed by fifty-two states, and ratified by four.
433) Govt. bill 1998/99:35, 133.
434) *See* s. 33 of the Act; Govt. bill 1998/99:35, 133. *See also* Ragnwaldh et al., *supra* n. 38, 139; Hobér, *supra* n. 53, 265.
435) Section 24(3) of the Act; Art. 35(2) of the SCC Rules.
436) Section 24(3) of the Act.
437) Hobér, *supra* n. 53, 265.
438) Section 25(4) of the Act.
439) Article 37(3) of the SCC Rules.
440) There may of course be situations where, even if the arbitration is seated in Sweden, it is appropriate to designate an order on interim measures as an award, e.g. for reasons of enforceability of the order in another jurisdiction.
441) Cf. Art. 42 of the SCC Rules.
442) It is sufficient that the arbitrators sign the last page of the award. There is no obligation for the arbitrators to indicate the place and date of signing. It should also be noted that the award does not have to be signed at the seat of arbitration. *See* Govt. bill 1998/99:35, 232 and 242; Heuman, *supra*n. 11, 501; Hobér, *supra* n. 53, 266.
443) Section 31(1) of the Act.
444) Govt. bill 1998/99:35, 232. *See also* Madsen, *supra* n. 23, 347. In this connection, it is noteworthy that s. 31(1) of the Act does not authorize the parties to instruct any other arbitrator than the chair to sign the award.
445) Section 33(1), item 3, of the Act.
446) Govt. bill 1998/99:35, 232.
447) Section 34(1), item 6, of the Act.
448) The *travaux préparatoires* explain that the requirements in s. 31(2) of the Act – as opposed to the requirements concerning written form and signing – are 'unsanctioned'. *See* Govt. bill 1998/99:35, 232. *See also* Hobér, *supra* n. 53, 266.
449) Govt. bill 1998/99:35, 242. *See also* Heuman, *supra*n. 11, 513; Hobér, *supra* n. 53, 266.
450) Section 43(1) of the Act.
451) Section 36(1) *in fine* of the Act.
452) Section 41(1) of the Act. In this connection, it should be noted that the Supreme Court has ruled that s. 41 of the Act is also applicable when an arbitral institution has made the decision on compensation to the arbitrators. *See* discussion about *Soyak, supra* n. 351, in section VII.A.2 *supra*.
453) The guidelines are available at the SCC website (http://www.sccinstitute.com).
454) Govt. bill 1998/99:35, 232.
455) *See*, e.g., Hobér, *supra* n. 53, 270.
456) *See* Govt. bill 1998/99:35, 135. With respect to challenge proceedings, the legislator has thus accepted that, with very scarce reasons, it is more difficult to prove what errors the arbitral tribunal has committed in reaching its conclusions and, consequently, an unreasoned award may be more difficult to challenge. It may be noted that the ability to check and control what the arbitral tribunal has done is *the very reason* for a requirement that the award is to be reasoned. However, the Swedish legislator and, as will be discussed below, the Supreme Court have laid emphasis on ensuring the finality of the award, rather than on facilitating challenges to it.
457) *See*, e.g., Heuman, *supra*n. 11, 498.
458) *See*, e.g., Govt. bill 1998/99:35, 135; Lindskog, *supra*n. 11, Chapter IV, s. 0, para. 4.3.1 et seq.; Hobér, *supra* n. 53, 267.
459) Article 42(1) of the SCC Rules.
460) *See*, e.g., Art. 32(2) of the Rules of Arbitration of the International Chamber of Commerce (ICC Rules); Art. 26(2) of the Arbitration Rules of the London Court of International Arbitration (LCIA Rules); Art. 31(2) of the Model Law.
461) Jakob Ragnwaldh, *Need for Speed: An Expert's View on Fast Track Arbitration*, Commercial Dispute Resolution, 41 (March 2012).
462) Article 42(1) of the SCC Rules for Expedited Arbitration 2017.
463) *Soyak International Construction & Investment Inc v. Hochtief AG*, the Supreme Court, 31 Mar. 2009, NJA 2009 p. 128 (T 4387-07).
464) In more detail, the Supreme Court concluded that a total lack of reasons, or reasons so poor that they must be considered equivalent to non-existing, constitutes an irregularity in the course of the proceedings of such a severe nature that it will be presumed that it has influenced the outcome of the case (cf. s. 34(1), item 7, of the Act). It is also noteworthy that the Supreme Court emphasized that a violation of an instruction to include reasons in the award is to be classified as a procedural irregularity and not an excess of mandate (cf. s. 34(1), item 3, of the Act).

465) A previous version of the SCC Rules contained a provision explicitly stating that a dissenting opinion *may* be included in the award. This provision was considered by the SCC to be redundant and was excluded from future versions of the SCC Rules solely on this basis. The fact that the SCC Rules currently in force do not encompass an express provision on dissenting opinions should thus not be interpreted as an indication that the SCC has intended any change in respect of the admissibility of disclosing an arbitrator's dissenting opinion in awards under the SCC Rules. *See* Ragnwaldh et al., *supra* n. 38, 132.
466) *See*, e.g., Hobér, *supra* n. 53, 271. Heuman takes a slightly different view from Hobér in this respect, saying that it is not 'altogether clear whether an arbitrator is unconditionally entitled to declare a dissenting opinion or whether the majority may forbid him to do so', but concludes that 'Swedish legal tradition suggests if anything that the dissenting arbitrator is entitled to have his opinion appended to the award.' *See* Heuman, *supra*n. 11, 500.
467) *See*, e.g., Madsen, *supra* n. 23, 349; Hobér, *supra* n. 53, 271. Cf. Lindskog, who argues that although preferable, there is no absolute obligation incumbent upon an arbitrator to provide the reasons for its dissenting opinion. *See* Lindskog, *supra*n. 11, Chapter IV, s. 0, para. 4.1.6.
468) Cf. Heuman, *supra*n. 11, 499 on the confidentiality of deliberations.
469) This does not mean that the dissenting arbitrator should under all circumstances refrain from criticizing the majority. For example, a dissenting opinion may serve the useful purpose of shedding light on a severe procedural flaw committed by the majority. However, it is imperative that a dissenting arbitrator uses their opinion responsibly and does not – whether intentionally or not – invite the losing party to initiate an improper challenge to the award. *See* Heuman, *supra*n. 11, 500; Madsen, *supra* n. 23, 349 et seq.
470) *See*, e.g., Lindskog, *supra*n. 11, Chapter IV, s. 0, para. 4.1.6.
471) Cf. s. 31(1) of the Act. If the dissenting arbitrator does not sign the award and no indication as to the reason for this is given in the award, it can be questioned whether the award fulfils the mandatory requirement pertaining to signing the award set out in s. 31(1) of the Act. *See* Hobér, *supra* n. 53, 271.
472) *See*, e.g., Heuman, *supra*n. 11, 500 and Lindskog, *supra*n. 11, Chapter IV, s. 0, para. 4.1.6.
473) Govt. bill 1998/99:35, 134.
474) The principle of party autonomy allows the parties to agree that the arbitral tribunal should decide the dispute as *amiable compositeur* or *ex aequo et bono*. *See* s. 21 of the Act and Govt. bill 1998/99:35, 122. *See also*, e.g., Hobér, *supra* n. 53, 256.
475) *See* Hobér, *supra* n. 53, 256.
476) *See* Madsen, *supra* n. 23, 376; Hobér, *supra* n. 53, 257.
477) *See*, e.g., *OAO Tyumenneftegaz v. First National Petroleum Corporation*, *supra* n. 193.
478) *See* Hobér, *supra* n. 53, 257.
479) *See* Heuman, *supra*n. 11, 484.
480) A provision of similar purport can be found in Art. 42(5) of the SCC Rules.
481) Govt. bill 1998/99:35, 231.
482) *See* Heuman, *supra*n. 11, 488.
483) *Åsbacka Trävaruaktiebolag v. E Hedberg*, the Supreme Court, 20 Nov. 1924, NJA 1924 p. 569. If the chair consults only one arbitrator before describing – what they jointly perceive as – non-contentious issues in a draft award, the losing party cannot have the award set aside if the third arbitrator omits to raise objections or demand further deliberations because of issues regarded as non-contentious by the other two arbitrators.
484) *Moelven Valåsens Sågverk AB v. Mikko V*, the Supreme Court, 8 Mar. 1996, NJA 1996 C 21 (SÖ 47).
485) *See* Heuman, *supra*n. 11, 485. *See also The Czech republic v. CME Czech Republic BV*, the Svea Court of Appeal, 15 May 2003, RH 2003:55 (T 8735-01), regarding alleged exclusion of an arbitrator from the deliberations.
486) Govt. bill 1998/99:35, 128 et seq.
487) *See* Lindskog, *supra*n. 11, Chapter IV, s. 30, para. 4.1.1.
488) Govt. bill 1998/99:35, 231.
489) *See* Heuman, *supra*n. 11, 490–493.
490) *Ibid*., 486 et seq.
491) Article 24(1) of the SCC Rules.
492) Article 24(3) of the SCC Rules.
493) Article 24(1) and 24(2) of the SCC Rules.
494) Article 24(2) of the SCC Rules.
495) *See* Heuman, *supra*n. 11, 493 et seq.
496) One way of doing this is for the arbitral tribunal to instruct its expert in writing, after having invited the parties to comment on the instructions. The expert's findings should then also be reported in writing, with a possibility for the parties to comment on the report and to challenge the findings of the tribunal-appointed expert at the merits hearing.
497) Govt. bill 1998/99:35, 128.

498) *See* s. 30(2) of the Act and Art. 41(1) of the SCC Rules. The Act is based on the assumption that the arbitral tribunal consists of three arbitrators. If the number of arbitrators were five, a literal interpretation of s. 30(2) of the Act might have undesirable effects. Assume that two party-appointed arbitrators are of one opinion and two of another opinion, while the chair is of a third opinion; in such a situation, no majority can be reached. A literal interpretation of s. 30(2) of the Act would in this situation lead to the chair's minority opinion deciding the dispute. This is, for obvious reasons, not desirable. Similar to the opinion expressed by Lindskog, *see* Lindskog, *supra* n. 11, Chapter IV, s. 30, para. 5.2.2, s. 30(2) of the Act should therefore, in the given context and for reasons of efficiency, be considered to provide that the chair has the casting vote in deciding between the two alternatives proffered by the four co-arbitrators.

499) Govt. bill 1998/99:35, 128. *See also* Heuman, *supra* n. 11, 495 et seq.

500) *Frida Charlotta Wall v. Försäkringsaktiebolaget Fylgia*, the Supreme Court, 11 Nov. 1918, NJA 1918 p. 478.

501) Govt. bill 1998/99:35, 128. *See also* Heuman, *supra* n. 11, 495 et seq.; Hobér, *supra* n. 53, 258. Lindskog, however, appears to be of a different opinion, suggesting that the 'voting theme' is indicated by the Act as the dispositive section of the award and that it may not be changed by the arbitral tribunal. *See* Lindskog, *supra* n. 11, Chapter IV, s. 30, para. 5.1.1 et seq.

502) *See* Hobér, *supra* n. 53, 258; Heuman, *supra* n. 11, 496.

503) Article 43 of the SCC Rules.

504) An extension that exceeds two months is normally not granted, unless both parties agree or exceptional circumstances prevail. *See* Ragnwaldh et al., *supra* n. 38, 136.

505) *Ibid.*

506) *Ibid.*, 136 et seq.

507) *Ibid.*, 137.

508) *See* Lindskog, *supra* n. 11, Chapter IV, s. 31, para. 5.2.1.

509) Article 42(4) of the SCC Rules. *See* Ragnwaldh et al., *supra* n. 38, 135.

510) Govt. bill 1998/99:35, 232 et seq.

511) *See* Heuman, *supra* n. 11, 509.

512) Article 42(4) of the SCC Rules.

513) *See* Madsen, *supra* n. 23, 350. As noted in section VII.A.2 *supra*, it has been held that time for submitting an application to the district court will not start running until the arbitral tribunal has provided an instruction relevant to a challenge under s. 41, *see* Lindskog, *supra* n. 11, Chapter IV, s. 30, para. 5.1.1.

514) *See E. O. & Henry Trading AB v. ICA Handlarnas AB*, *supra* n. 46. *See also* Heuman, *supra* n. 11, 509.

515) *Ibid.*

516) Ragnwaldh et al., *supra* n. 38, 135.

517) *See* Lindskog, *supra* n. 11, Chapter IV, s. 30, para. 5.2.1.

518) Govt. bill 1998/99:35, 164; Madsen, *supra* n. 23, 427. *See further* section VII.B *supra*.

519) Govt. bill 1998/99:35, 241.

520) Cf. Ragnwaldh et al., *supra* n. 38, 157 et seq.

521) Section 27(4) of the Act.

522) Section 32 of the Act and Arts 47–48 of the SCC Rules. It follows explicitly from s. 27(4) of the Act that the arbitral tribunal's mandate also covers correction, supplementation and interpretation of the award, notwithstanding that the mandate is formally completed with rendering the award.

523) Section 32 of the Act. *See also* Govt. bill 1998/99:35, 136; Madsen, *supra* n. 23, 354. Art. 47(1) of the SCC Rules states explicitly what kind of corrections and supplements may be made: 'Within 30 days of receiving the award, a party may, upon notice to the other party, request that the Arbitral Tribunal correct any clerical, typographical or computational errors in the award, or provide an interpretation of a specific point or part of the award.' *See also* Ragnwaldh et al., *supra* n. 38, 143.

524) Govt. bill 1998/99:35, 136. Under Art. 48 of the SCC Rules, such a correction is to be made in the form of an additional award.

525) *See* Heuman, *supra* n. 11, 543.

526) Lindskog, *supra* n. 11, Chapter IV, s. 32, para. 4.1.1.

527) If the arbitral tribunal chooses to correct or amend the award of its own volition, the arbitral tribunal should carefully explain the purpose of and reasons for the correction or supplementation. *See* Govt. bill 1998/99:35, 233.

528) *See* Art. 47(2) of the SCC Rules.

529) *See* Madsen, *supra* n. 23, 354; Hobér, *supra* n. 53, 291.

530) Govt. bill 1998/99:35, 137. *See also* Madsen, *supra* n. 23, 354. Similarly, Arts 47–48 of the SCC Rules stipulate that the arbitral tribunal need only correct, amend or interpret the award if the arbitral tribunal considers that the request for such a measure is 'justified'.

531) Section 32(3) of the Act. Cf. Arts 47(1) and 48 of the SCC Rules.

532) *See* Lindskog, *supra* n. 11, Chapter IV, s. 32, para. 4.2.1.

533) *See* Hobér, *supra* n. 53, 289; Heuman, *supra* n. 11, 545.

534) *See* Heuman, *supra* n. 11, 545.

535) Govt. bill 1998/99:35, 137 and 233.

536) This follows from the wording of s. 32(1), last sentence, of the Act. *See further* Hobér, *supra* n. 53, 290.

537) *See* Hobér, *supra* n. 53, 291.

538) Ragnwaldh et al., *supra* n. 38, 143.
539) Section 32(1) of the Act; Art. 47(2) of the SCC Rules.
540) Section 32(1) of the Act; Art. 47(1) of the SCC Rules.
541) Section 32(1) of the Act; Arts 47(1) and 48 of the SCC Rules. Under Art. 48 of the SCC Rules, the SCC Board may grant extensions of the arbitral tribunal's respite to issue an additional award.
542) Govt. bill 1998/99:35, 233.
543) *See* Heuman, *supra*n. 11, 539.
544) *Ibid.*
545) *See* Ragnwaldh et al., *supra* n. 38, 143.
546) Govt. bill 1998/99:35, 233. For practical reasons, however, a new document is usually drafted and issued by the arbitral tribunal. *See* Hobér, *supra* n. 53, 288. The same formal requirements apply with respect to such a document, as with respect to the award; *see* Art. 47(3) of the SCC Rules. In other words, it must be signed, state the seat of arbitration, etc.
547) *See* Heuman, *supra*n. 11, 542.
548) *Ibid.*
549) *See*, e.g., Hobér, *supra* n. 53, 288; Heuman, *supra*n. 11, 542. The authors share this view.
550) *Aktiebolaget Skånska Cementgjuteriet v. Motoraktiebolaget I Karlstad*, the Supreme Court, 30 Dec. 1953, NJA 1953, p. 751; *Esselte AB v. Allmänna Pensionsfonden*, *supra* n. 91.
551) *See*, e.g., Hobér, *supra* n. 53, 279; Heuman, *supra*n. 11, 536.
552) *See The Czech republic v. CME Czech Republic BV*, *supra* n. 485; *Esselte AB v. Allmänna Pensionsfonden*, *supra* n. 91.
553) *Esselte AB v. Allmänna Pensionsfonden*, *supra* n. 91.
554) *See* Heuman, *supra*n. 11, 385.
555) Ekelöf et al., *supra* n. 254, 194 et seq.
556) *See* Fitger, *supra* n. 314, 17:41–17:47.
557) Ekelöf et al., *supra* n. 254, 160–167.
558) *Ibid.*, 167 et seq.
559) *See also* Heuman, *supra*n. 11, 358.
560) *See* Hobér, *supra* n. 53, 282.
561) Section 27(4) of the Act.
562) Cf. Art. 47 of the SCC Rules.
563) Section 35 of the Act.
564) Under the SCC Rules, the time limit for a party to request correction or interpretation of an award, and for the arbitral tribunal to correct or interpret an award on its own motion, is thirty days. In turn, the time limit for the parties to request an additional award is thirty days. *See* Arts 47–48 of the SCC Rules.
565) *See* Hobér, *supra* n. 53, 277.