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Quick Answers on Drafting Agreements – Sweden

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Definition of an Arbitration Agreement

How, if at all, is the concept of 'arbitration agreement', 'agreement to arbitrate' or similar concept defined within this legal system?

The term 'arbitration agreement' is not defined in the Swedish Arbitration Act (the 'Arbitration Act'). However, section 1 of the Arbitration Act stipulates that 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. In case law, it has been established that the agreement must indicate that the question or questions to which it refers is/are to be decided by arbitrators and the parties must also have made clear that they have chosen arbitration as the means to solve disputes rather than some other method (NJA 1974 section 573). It should be noted that the Arbitration Act does not require that the agreement be in writing.

How does this legal system distinguish an arbitration agreement from agreements for adjudication or expert determination?

There are no formal requirements, but according to case law (RH 1982:102), in order to constitute an arbitration agreement, it should be clear that the parties have agreed on arbitration and not on any other kind of dispute resolution. Swedish legal principles for contract interpretation will apply, which aim to establish the common intention of the parties at the time when they entered into the agreement.

Format and Content of an Arbitration Agreement

What matters are commonly dealt with in an arbitration agreement governed by the laws of this country?

Provisions commonly include the procedural rules to be applied in the conduct of an arbitration and, in many instances, reference to an arbitral institution, the seat of arbitration and the language of the proceedings. It is less typical to include the governing law of the arbitration agreement, even if this of course is possible. Clauses often also include a stipulation as to the number of arbitrators, specify whether certain of the arbitrators are to be appointed by the parties and a mechanism for the appointment of a chairman or sole arbitrator.

What is a specimen clause of such an agreement?

The following is a typical example of an arbitration clause: 'Any dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. The arbitral tribunal shall be composed of three arbitrators/a sole arbitrator. The seat of arbitration shall be Stockholm. The language of the arbitration shall be English.' The clause can, however, be very briefly worded, such as 'All disputes arising out of this contract shall be settled by arbitrators.' Such a clause would provide for ad hoc arbitration.

Of the matters that are commonly dealt with in an arbitration agreement, what approach is taken to determining the parties' intentions, or otherwise filling the gap in their agreement, in the absence of an express term?

Ordinary rules of contract interpretation shall be applied when determining the parties' intention. This entails a free assessment of all evidence which may be of assistance for determining the common intention of the parties. It has further been suggested that an arbitration agreement which has not clearly restricted the jurisdiction of the arbitrators is to be given maximum scope, regardless of the wording chosen. The Arbitration Act sets out certain default provisions that apply in the absence of an express agreement between the parties (section 12 of the Arbitration Act). For instance, where an arbitration agreement fails to stipulate the number of arbitrators, the arbitrators shall be three in number (section 13 of the Arbitration Act).

What principles apply to determine the scope of an arbitration agreement (i.e., which disputes the parties intended to refer to arbitration)?

An arbitral tribunal has discretion to determine whether or not a matter in dispute falls within the scope of the arbitration agreement (Kompetenz-Kompetenz).

What examples of clauses have been held to be pathological?

In the case NJA 1958 section 654, the Supreme Court held that a dispute resolution clause in the statutes of a union, which stated that disputes concerning the interpretation or application of the statutes were to be resolved by the union board or referred by a local sub-department of the union to arbitration, did not constitute a bar to court proceedings. The statutes also stated that 'disputes of this kind may not be referred to court'. The Supreme Court held that this clause did not prevent a former union member from bringing proceedings against the union concerning the exclusion of him as a member. In the Swedish Labour Court case AD 1931 no. 64, a clause in an agreement between an employer and a union, which stipulated that disputes were not to be brought before a court, was held to be invalid as the agreement did not provide for any other means for resolving such a dispute. By these decisions, the courts have established that a clause which is construed so as to only have derogative effect is not to be regarded as a valid arbitration clause. In this context, it is also worth mentioning a judgment of the Svea Court of Appeal (rendered on 23 January 2015 in case no. T2454-14). The case concerned an arbitration agreement which stated that the arbitral proceedings should be administered by the SCC Institute, but in accordance with the rules of the International Chamber of Commerce (ICC). Although the Svea Court of Appeal found that the arbitration agreement was inconsistent (as the SCC lacked the required organizational structure to administer an arbitration fully compliant with the ICC Rules), the court held that the arbitration agreement was enforceable and valid.

Breach of an Arbitration Agreement

Stay of Legal Proceedings

May a party apply for a stay of legal proceedings in breach of an arbitration agreement?

Under section 4 of the Arbitration Act, an arbitration agreement constitutes a bar to court proceedings (not ground for a stay of proceedings) and, thus, ground for dismissal. The respondent must invoke the arbitration agreement on the first occasion that it pleads its case on the merits in the court. To raise the arbitration agreement as a bar to court proceedings at a later stage has no effect, unless the respondent had a valid excuse and invokes the excuse as soon as it ceased to exist. According to section 5 of the Arbitration Act, a party forfeits its right to rely on the arbitration agreement as a bar to court proceedings where the party (i) has opposed a request for arbitration; (ii) fails to appoint an arbitrator in due time; or (iii) fails in due time to provide its share of the requested security for the compensation to the arbitrators.

Is this jurisdiction a party to the New York Convention?

Yes.

Does this jurisdiction apply Article 2 of the New York Convention?

Yes.

What grounds exist for refusing a stay?

Under section 4 of the Arbitration Act, an arbitration agreement constitutes a bar to court proceedings and, thus, ground for dismissal without prejudice, provided that a party so requests in its first motion to the court. However, the court is to refrain from dismissing the suit if the arbitration agreement does not cover the dispute in question (because the arbitration agreement is invalid or the dispute is not arbitrable). This applies for both domestic and international disputes. Further, pursuant to section 49 of the Arbitration Act, where foreign law is applicable to the arbitration agreement, section 4 shall not apply when (i) in accordance with the applicable law, the agreement is invalid, inoperative, or incapable of being performed; or (ii) in accordance with Swedish law, the dispute may not be determined by arbitrators. Please also note that according to section 5 of the Arbitration Act, a party forfeits its right to rely on the arbitration agreement as a bar to court proceedings where the party (i) has opposed a request for arbitration; (ii) fails to appoint an arbitrator in due time; or (iii) fails in due time to provide its share of the requested security for the compensation to the arbitrators.

How is 'null and void' interpreted?

Pursuant to section 49 of the Arbitration Act, where foreign law is applicable to the arbitration agreement, the court is to dismiss the dispute except when (i) in accordance with the applicable law, the agreement is invalid, inoperative, or incapable of being performed; or (ii) in accordance with Swedish law, the dispute may not be determined by arbitrators. The criteria 'invalid, inoperative or incapable of being performed' is to be interpreted in accordance with the relevant foreign law.

How is 'inoperative' interpreted?

Pursuant to section 49 of the Arbitration Act, where foreign law is applicable to the arbitration agreement, the court is to dismiss the dispute except when (i) in accordance with the applicable law, the agreement is invalid, inoperative, or incapable of being performed; or (ii) in accordance with Swedish law, the dispute may not be determined by arbitrators. The criteria 'invalid, inoperative or incapable of being performed' is to be interpreted in accordance with the relevant foreign law.

How is 'incapable of being performed' interpreted?

Pursuant to section 49 of the Arbitration Act, where foreign law is applicable to the arbitration agreement, the court is to dismiss the dispute except when (i) in accordance with the applicable law, the agreement is invalid, inoperative, or incapable of being performed; or (ii) in accordance with Swedish law, the dispute may not be determined by arbitrators. The criteria 'invalid, inoperative or incapable of being performed' is to be interpreted in accordance with the relevant foreign law.

Does the court have a residual discretion?

No. An arbitration agreement is only to be taken into account by the court as a bar to judicial proceedings where a party makes such an objection (Chapter 10, section 17-a of the Swedish Code of Judicial Procedure).

Is a distinction made between international arbitrations and domestic arbitrations?

Yes. The Arbitration Act contains specific provisions applicable to international disputes where one or both parties are domiciled abroad, which supplement and modify the rules that apply to both domestic and international disputes in respect of international matters (sections 46–51 of the Arbitration Act).

Where arbitration has also been commenced by the applicant for a stay, will the court await a determination by the arbitral tribunal on its jurisdiction?

According to section 4a of the Arbitration Act, where an arbitral proceeding has been initiated and where one of the parties object, the court is prevented from ruling upon the jurisdiction of the tribunal, except in consumer disputes. However, if the arbitral tribunal during the procedure holds that it has jurisdiction, a party has the right to request that the question of jurisdiction be tried in court (the Court of Appeal). Such a request is to be submitted within thirty days following the day on which the party received the decision (section 2 of the Arbitration Act).

Anti-Suit Injunctions

May a party apply to court for an injunction ordering another party to cease from commencing or pursuing legal proceedings in breach of an arbitration agreement?

No. An arbitration clause constitutes itself a bar to judicial proceedings and thus grounds for dismissal.

What are the requirements for granting an anti-suit injunction?

Anti-suit injunctions are not available.

Are there any limitations on the granting of anti-suit injunctions by the courts in this country?

Anti-suit injunctions are not available.

What sanctions exist for disobeying an anti-suit injunction?

Anti-suit injunctions are not available.

Declarations

May a party apply to court for a declaration that an arbitration agreement is valid and binding? If so, what are the requirements?

Under section 4a of the Arbitration Act, the court is prevented from ruling upon the jurisdiction of the tribunal where an arbitration has been initiated and one of the parties object, except in consumer disputes. However, if the arbitral tribunal during the procedure holds that it has jurisdiction, a party has the right to request that the question of jurisdiction be tried in court (the Court of Appeal). Such a request must be submitted within thirty days following the day on which the party received the decision (section 2 of the Arbitration Act).

Prior to the initiation of an arbitration, a party may rely on Chapter 13, section 2 of the Swedish Code of Judicial Procedure for a declaratory judgment. The general requirements under Swedish law for a declaratory judgment are that there exists uncertainty regarding the legal circumstances and that the uncertainty exposes the claimant to a detriment.

Are there any limitations on the granting of such declarations by the courts in this country?

Under section 4a of the Arbitration Act, the court is prevented from ruling upon the jurisdiction of the tribunal where an arbitration has been initiated and one of the parties object, except in consumer disputes. However, if the arbitral tribunal during the procedure holds that it has jurisdiction, a party has the right to request that the question of jurisdiction be tried in court (the Court of Appeal). Such a request must be submitted within thirty days following the day on which the party received the decision (section 2 of the Arbitration Act).

Prior to the initiation of an arbitration, a party may rely on Chapter 13, section 2 of the Swedish Code of Judicial Procedure for a declaratory judgment. The general requirements under Swedish law for a declaratory judgment are that there exists uncertainty regarding the legal circumstances and that the uncertainty exposes the claimant to a detriment.

Validity of an Arbitration Agreement

Damages

Under this jurisdiction's law, could an arbitral tribunal award damages to compensate for any harm caused by commencing legal proceedings in breach of an arbitration agreement?

No. The recoverable costs for such legal proceedings will be determined by the relevant court.

General Validity

Are there restrictions on the ability of contracting parties to oust the jurisdiction of national courts by means of an arbitration agreement? If so, what are the general terms of the restrictions?

Yes. This applies to certain consumer and employment contracts. Section 6 of the Arbitration Act provides that an arbitration agreement between a business enterprise and a consumer concerning products principally supplied for private use may not be invoked should the agreement have been entered into prior to the dispute. Other examples of situations where the possibility of parties to conclude a valid arbitration agreement before a dispute has arisen is limited can be found in the Swedish Labour Disputes (Judicial Procedure) Act, Chapter 1, section 3, which also refers to section 31, paragraphs 1 and 3 of the Employment (Co-determination in the Workplace) Act.

Are there restrictions on the time at which an arbitration agreement is binding, e.g. only after a dispute arises? If so, when?

No, save for certain consumer and employment disputes. An arbitration agreement between a business enterprise and a consumer concerning products principally supplied for private use may not be invoked should the agreement have been entered into before the dispute arose (section 6 of the Arbitration Act). Likewise, in certain employment disputes, an arbitration agreement may not be invoked if it was entered into before the dispute arose (Chapter 1, section 3 of the Swedish Labour Disputes (Judicial Procedure) Act).

Does this legal system permit 'one-sided' arbitration agreements, in which one or more, but not all, parties may elect to refer particular disputes to arbitration? If so, under what conditions?

Yes. However, in cases where the inferior party (e.g., an employee in an employee-employer relationship) is not provided with the same options of referring disputes to arbitration as the superior party, such arbitration agreements may be set aside by the court under section 36 of the Swedish Contracts Act as being 'unreasonable' or ‘unconscionable’.

Does this legal system permit arbitration agreements to be qualified by an option vested in one or more, but not all, parties to exclude particular disputes from the scope of the agreement and to have those disputes determined by other means? If so, under what conditions?

Yes. The fundamental principle of 'freedom of contract' applies. The limited exception would be if the agreement could be shown to be unconscionable or unreasonable (which most often becomes relevant in a consumer or employment context), in which case such agreement could be set aside under section 36 of the Swedish Contracts Act.

Are there any restrictions on the ability of contracting parties to enter into an arbitration agreement with respect to particular types or categories of contract? If so, what type of contracts (e.g., consumer contracts, employment contracts)?

Yes. This applies to certain consumer and employment contracts. Section 6 of the Arbitration Act provides that an arbitration agreement in a consumer agreement entered into prior to the dispute may not be invoked. Other examples of situations where the possibility of parties to conclude a valid arbitration agreement before a dispute has arisen is limited can be found in the Swedish Labour Disputes (Judicial Procedure) Act. In

addition, certain issues involving a gross breach of a collective bargaining agreement may not be subject to arbitration (Swedish Labour Disputes (Judicial Procedure) Act, Chapter 1, section 3, which refers to section 31, paragraphs 1 and 3 in the Swedish Employment (Co-determination in the Workplace) Act).

Are there any restrictions (on the grounds of 'arbitrability' or otherwise) on the ability of contracting parties to refer particular disputes or issues to arbitration on the basis of their subject matter? If so, what are the restrictions?

Yes. Parties are entitled to enter into arbitration agreements concerning matters in relation to which they are at liberty to reach an out-of-court settlement (section 1 of the Arbitration Act). Substantive law indicates which questions are arbitrable. Thus, if mandatory law prevents the parties from reaching a settlement with binding effect on a particular issue, that particular issue cannot be subject to arbitration. Examples hereof can be taken from family law (such as custody cases) and labour law.

Are there types of disputes where arbitration is mandatory, e.g. statutory arbitration? If so, which?

Yes. One example is the Swedish Companies Act, Chapter 22, section 5, which provides that a dispute concerning the right or obligation to buy out minority shareholders shall be determined by three arbitrators and that applicable provisions in the Arbitration Act shall apply to such proceedings.

What test is applied to determine whether there is a sufficient 'agreement' between the parties to arbitrate particular disputes?

There are no special provisions. General rules and principles of the formation of contracts apply (*see* the travaux préparatoires of the Arbitration Act, Swedish Government Bill 1998/99:35, p. 48), meaning that there must be a valid offer and acceptance. Ordinary rules of contract interpretation apply when determining the validity and scope of the arbitration agreement. This means that the interpretation focuses on the parties' common intention. If the parties' common intention cannot be established, the interpretation will be based on the wording as well as the overall purpose of the agreement.

How is the test applied (or adapted) in situations where there is a 'battle of the forms' (i.e. the parties are exchanging communications, each of which refers to its own standard terms and conditions)?

In legal literature, there is disagreement as to how a 'battle of the forms' is to be resolved. There is yet no Swedish case law which provides a clear answer to this question. Where necessary and possible, a court or an arbitral tribunal faced with the problem would have to interpret and supplement the agreement between the parties using ordinary rules of contract interpretation. It has been argued that, in a situation where neither of two forms conquers the other and both forms contain identical arbitration clauses, the procedure stipulated in the identically worded arbitration clauses shall be applied. In cases where the dispute resolution clauses differ, non-mandatory rules shall be applied. Thus, if both forms include an arbitration clause, but such clauses differ in some aspects, disputes arising out of the agreement are to be resolved by arbitration. However, in cases where only one of the forms include an arbitration clause, disputes arising out of the agreement are to be resolved in court (*see* Lindskog: Skiljeförfarande – En kommentar, section 3.2.6.)

Formal Validity (Including Agreements, Registration, and Other Requirements)

Does this legal system impose formal requirements for the effectiveness of an arbitration agreement? If so, what?

No, general contractual rules and principles apply to the conclusion of an arbitration agreement. It need not be in writing to be valid and enforceable.

Does this legal system distinguish between agreements in writing and oral agreements?

No, except for certain statutes relating to specific types of contracts (such as agreements on the transfer of real property), no distinction is made between oral and written agreements under Swedish law. Arbitration agreements need not be in writing to be valid and enforceable.

What is the writing requirement?

Swedish law does not make express provision for this.

If this legal system imposes formal requirements for the effectiveness of an arbitration agreement, how do those requirements apply to contracts concluded by electronic means?

Swedish law does not make express provision for this.

Does this legal system impose any other requirements for the effectiveness of an

arbitration agreement, or its admission in legal proceedings (e.g. registration, payment of tax/duty)? If so, what?

No.

Incorporation by Reference

How is the test applied (or adapted) where the parties refer in their agreement to another agreement between the same parties containing an arbitration provision?

From case law, it can be concluded that when two parties in a contract between them make reference to another individually drafted contract between them containing an arbitration clause, the arbitration clause is binding between them as long as both parties have been provided with a copy of the other contract or have become aware of its content in some other way.

How is the test applied (or adapted) where the parties refer in their agreement to an agreement between different parties containing an arbitration provision?

From case law it can be concluded that binding effect can occur regardless of whether the contract with the arbitration clause to which reference is made has been concluded between the same parties or between one of them and a third party, as long as the parties have been provided with a copy of the other contract or have been made aware of its content in some other way (e.g. by its subsidiary being a party to the contract to which reference is made).

How is the test applied (or adapted) where the parties refer in their agreement to a document other than an agreement (e.g. the rules or standard terms of a professional or other body) containing reference to arbitration?

The parties would generally be bound to standard terms to which reference is made, as long as the parties have had a reasonable opportunity to take part of the standard agreement before the principal agreement was concluded. This principle has been confirmed in the Swedish Supreme Court case NJA 1980 section 46, where it also was established that arbitration agreements cannot be regarded as unexpected or burdensome in commercial relations.

What matters (e.g. identity of, or mechanism for determining, Arbitral Insitution) must be agreed between the parties in order for an arbitration agreement to be valid on grounds of legal certainty?

There are no statutory requirements as to the content of the arbitration agreement. However, from section 1 of the Arbitration Act it follows that it is not sufficient for the parties to simply state that all future disputes between them are to be referred to arbitration. Instead, in order to be effective, the dispute must be individualized to a particular and specified legal relationship (such as a certain agreement or all agreements in a certain transaction). It is also clear from the travaux préparatoires and case law that the agreement must indicate that the question or questions to which it refers is/are to be decided by arbitrators. The parties must also have made clear that they have chosen arbitration as the means to solve disputes rather than some other method (NJA 1974 section 573).

In a decision issued by the Swedish Supreme Court in 2018 (NJA 2017 section 226), the Supreme Court concluded that an arbitration clause in an agreement between two parties did not cover the specified legal relationship of the action at hand, when the claim was liability for damages resulting from criminal activity. Although the Supreme Court held that the agreement, including the arbitration clause, had a certain connection to the claim, and that the purpose of the action was to force performance under the agreement, these circumstances were not deemed sufficient for the agreement to cover a claim for damages resulting from criminal activity. The Supreme Court concluded that the court was competent to proceed with the claim.

Material Validity

Does this legal system recognise the separability of an arbitration agreement from any other agreement in which it is incorporated (the 'principal agreement')?

Yes. The doctrine of separability is expressed in section 3 of the Arbitration Act.

On what grounds (e.g. fraud, duress, misrepresentation, mistake, illegality) may the material validity of an arbitration agreement be challenged?

In addition to general grounds of invalidity under contract law, including fraud, duress, coercion and mistake, an arbitration agreement can be challenged on grounds of unreasonableness or unconscionability pursuant to section 36 of the Swedish Contracts Act. In case law, courts have been restrictive in their application of section 36, and the provision is generally not viewed to apply to arbitration agreements entered into between commercial parties. However, there are examples of an arbitration agreement entered into between commercial parties having been deemed invalid, where one of the parties is in an inferior position. For instance, in the Swedish Supreme Court case NJA 1979

section 666, the commercial parties were not of equal standing and the superior party was given the unilateral possibility to choose whether a dispute was to be settled in court or through arbitration. The Supreme Court held that the dispute resolution clause between the parties was unreasonable under section 36 of the Swedish Contracts Act. The court emphasized that the clause was included in the seller's general terms and conditions which were printed on the back of an offer and confirmation form and that there had been no discussions regarding the consequences of it when the agreement was concluded.

Who bears the burden of proof in establishing the existence of an arbitration agreement?

A party that seeks to invoke an arbitration agreement in its favour must be able to demonstrate the existence and content of the arbitration agreement. There is no specific provision in the Arbitration Act that regulates the burden of proof. The balance of probability under general evidentiary rules applies.

What standard of proof is applied in establishing the existence of an arbitration agreement?

The balance of probability under general evidentiary rules applies. In short, Swedish evidentiary rules provide that the party alleging the existence of the agreement has the burden of proof for this assertion. The facts invoked to demonstrate the existence of the agreement must lead to the conclusion that the existence of the agreement has been 'established' (Sw: 'styrkt'). The term 'styrkt' does not (as in criminal law) translate to 'beyond reasonable doubt'. It is not sufficient, however, to reach a level where the existence of the agreement is found to be simply more probable than its non-existence. Thus, the requirement 'established' is a burden of proof somewhere in between 'more probable' and 'beyond reasonable doubt'. An agreement in writing containing an arbitration clause generally constitutes sufficient evidence of the existence of an arbitration agreement. If one of the parties claims that the arbitration clause is invalid, this party has the burden of proving the invalidity.

Capacity of the Parties Involved

Arbitrator's Power to Rule on Questions of Validity and Scope

Does an arbitral tribunal having its seat in this country have the power to determine questions relating to the validity of the arbitration agreement from which it claims to derive jurisdiction? If so, what are the limits of that power?

Yes, pursuant to section 2 of the Arbitration Act, arbitrators may rule on their own jurisdiction.

To what extent may a party apply to the court instead of the tribunal to determine questions of validity and scope?

Where an arbitral proceeding has been initiated and one of the parties object, the court is prevented from ruling upon the jurisdiction of the tribunal, except in consumer disputes (section 4a of the Arbitration Act). However, if the arbitral tribunal during the procedure holds that it has jurisdiction, a party has the right to request that the question of jurisdiction be tried in court. Such a request must be submitted within thirty days following the day on which the party received the decision (section 2 of the Arbitration Act).

Prior to the initiation of the arbitration, a party may rely on Chapter 13, section 2 of the Swedish Code of Judicial Procedure for a declaratory judgment on the validity and applicability of an arbitration agreement. The general requirements under Swedish law for a declaratory judgment are that there exists uncertainty regarding the legal circumstances and that the uncertainty exposes the claimant to a detriment.

In what circumstances may the tribunal's decision on questions of validity and scope be reviewed by the courts of this jurisdiction?

Where an arbitral proceeding has been initiated and one of the parties object, the court is prevented from ruling upon the jurisdiction of the tribunal, except in consumer disputes (section 4a of the Arbitration Act). However, if the arbitral tribunal during the procedure holds that it has jurisdiction, a party has the right to request that the question of jurisdiction be tried in court. Such a request must be submitted within thirty days following the day on which the party received the decision (section 2 of the Arbitration Act).

Where a court is reviewing validity or scope and legal proceedings have been commenced abroad, will the court await a determination by a foreign court on the same issues?

Where the outcome of a judgment or decision in another proceeding is of extraordinary importance for the case at hand, the court may stay the proceedings and await the outcome in this other proceeding (Chapter 32, section 5 of the Swedish Code of Judicial

Procedure). This may apply to judgments or decisions by foreign courts.

Does this legal system impose restrictions on the capacity of individuals to enter into arbitration agreements? If so, what?

No, there are no specific restrictions as regards arbitration agreements. As for any agreement, the relevant individuals must have legal capacity under ordinary rules of private law.

Does this legal system impose restrictions on the capacity of companies or other bodies corporate incorporated under its laws, or unincorporated bodies established there, to enter into arbitration agreements? If so, what?

No, there are no specific restrictions as regards arbitration agreements. As for any agreement, the parties must have legal capacity under ordinary rules of private law.

Does this legal system impose restrictions on the capacity of departments of government, governmental bodies, public and local authorities established under its laws to enter into arbitration agreements? If so, what?

No.

Does this legal system recognize that foreign states, and entities related to foreign states, may be parties to arbitration agreements? If so, under what conditions?

Yes. It is generally understood and accepted in Swedish case law that foreign states may be parties to arbitration agreements, and also that a valid arbitration agreement may constitute a waiver to the foreign state's immunity from jurisdiction.

Discharge of Arbitration

Is an arbitration agreement discharged in case of death of one of the parties?

No, not automatically. An arbitration clause in an agreement concluded by the deceased would bind the estate unless the parties have agreed otherwise or it is clear from the agreement that the arbitration clause were to cease in effect following the death of one of the parties.

Is an arbitration agreement discharged in case of the bankruptcy of an individual?

No. In case of bankruptcy, the physical or legal person in question may no longer pursue litigation. This capacity is taken over by the trustee representing the bankruptcy estate. In case law (NJA 1993 section 641), it has been established that a bankruptcy estate is bound by an arbitration clause in an agreement made by the bankruptcy debtor before the bankruptcy. The arbitration agreement would, however, not cover matters on which the parties are not authorized to reach an out-of-court settlement. In legal literature it has been suggested that the trustee is to have a choice of whether to invoke the arbitration agreement. This is, however, disputed, since such a possibility would entail an imbalance between the parties to the arbitration agreement which was not originally intended when the contract was concluded.

Is an arbitration agreement discharged in case of insolvency, winding-up, or dissolution of a company or other body corporate or unincorporated body?

No. In case of dissolution or insolvency, the validity of the arbitration agreement will depend on and correspond to the continued existence and validity of the principal agreement. Where one company is dissolved as a consequence of a merger between two companies, the absorbing company will be bound to arbitration agreements entered into by the absorbed company.

Is an arbitration agreement discharged in case of impossibility of performance (including force majeure)?

No. Impossibility is not a statutory ground for invalidity under the Swedish Contracts Act. However, in cases where it is impossible for a party to perform the arbitration agreement, the party may argue that the arbitration agreement is to be declared invalid or adjusted on grounds of unconscionability pursuant to section 36 of the Swedish Contracts Act. According to the travaux préparatoires of the Swedish Contracts Act, section 36 of the Swedish Contracts Act should generally not be applied when an arbitration clause has been included in an agreement between two equally strong commercial parties. The courts' interpretation of this clause has been rather restrictive in practice.

Is an arbitration agreement discharged on any other grounds? If so, on what grounds?

No (except for general contractual grounds, such as where one of the parties is granted a right to termination as a consequence of a material breach of contract by the other

party).

Third Parties

In what circumstances may persons claiming under or through one of the parties to an arbitration agreement (e.g., successors-in-title, executors, bankruptcy representatives) rely on an arbitration agreement?

There is no rule in the Arbitration Act concerning the effect of succession of an arbitration agreement and the question is thus to be solved on a case-by-case basis by the courts, pursuant to general rules and principles of contract law. As regards the transfer of contractual rights, there is support in case law (NJA 1997 section 866) for an arbitration agreement to be valid and given effect after succession to contractual rights and obligations by a new party. In this case, the Swedish Supreme Court stated that a party which had acquired rights and obligations under an agreement was bound to an arbitration clause in the agreement in relation to the remaining counter-party and that in the absence of special circumstances, an arbitration agreement is to be binding between two parties even after such succession. A similar issue was raised in the Bulbank case (NJA 2000 section 538) where the District Court and the Court of Appeal found that an arbitration agreement remained valid after a transfer of contractual rights and obligations and that no such special circumstances that would render the arbitration agreement invalid as between the new parties had been shown to exist (it should be noted that this particular part of the case was not tried by the Supreme Court). As regards the effect of bankruptcy by one of the contracting parties to an arbitration agreement, the predominant view is that a bankruptcy estate is bound by an arbitration clause in an agreement which the debtor and his contracting counterparty executed prior to the bankruptcy.

In what circumstances will persons claiming under one of the parties to an arbitration agreement (e.g., successors-in-title, executors, bankruptcy representatives) be held to be bound by an arbitration agreement?

There is no rule in the Arbitration Act concerning the effect of succession on an arbitration agreement and the question is thus to be solved on a case by case basis by the courts, pursuant to general rules and principles of contract law. As regards the transfer of contractual rights, there is support in case law (NJA 1997 section 866) for an arbitration agreement to be valid and given effect after succession to contractual rights and obligations by a new party. In this case, the Swedish Supreme Court stated that a party which had acquired rights and obligations under an agreement was bound to an arbitration clause in the agreement in relation to the remaining counter-party and that in the absence of special circumstances, an arbitration agreement is to be binding between two parties even after such succession. A similar issue was raised in the Bulbank case (NJA 2000 section 538) where the District Court and the Court of Appeal found that an arbitration agreement remained valid after a transfer of contractual rights and obligations and that no such special circumstances that would render the arbitration agreement invalid as between the new parties had been shown to exist (it should be noted that this particular part of the case was not tried by the Supreme Court). As regards the effect of bankruptcy by one of the contracting parties to an arbitration agreement, the predominant view is that a bankruptcy estate is bound by an arbitration clause in an agreement which the debtor and his contracting counterparty executed prior to the bankruptcy.

In what circumstances may non-signatories (e.g., persons not named in the agreement containing the arbitration agreement, employees or agents of one of the parties) claim the benefit of an arbitration agreement?

As is the general principle in contract law, a third party may not rely on an arbitration agreement to which he is not a party or intervene in the arbitration without consent from the other parties.

In what circumstances will non-signatories (e.g., persons not named in the agreement containing the arbitration agreement, employees or agents of one of the parties) be held to be bound by an arbitration agreement?

As a general principle, an arbitration clause applies only as between the contracting parties and does not bind third parties. In legal literature it has been suggested that an arbitration agreement may sometimes bind a party who was not originally a party to the principal agreement if that party later has become a party to the agreement by concrete actions and where it can be concluded that the party has tacitly accepted all the contractual terms.

Applicable Law (Private International Law Rules)

Court Proceedings on the Validity of an Arbitration Agreement & Applicable Laws

How would the court determine what law should apply to interpretation of the arbitration agreement?

The Arbitration Act applies to arbitral proceedings which have their seat in Sweden notwithstanding that the dispute has an international connection (section 46 of the Arbitration Act). Where an arbitration agreement has an international connection, the agreement shall be governed by the law agreed upon by the parties. Where the parties have not agreed upon the governing law, the arbitration agreement shall be governed by the law of the country in which, by virtue of the agreement, the arbitration had or shall have its seat (section 48 of the Arbitration Act). An agreement between the parties as to the law applicable to the arbitration agreement should only be accepted if it has been made expressly. If it is not possible to determine the intention of the parties as to the place of arbitration, the governing law may be determined by applying Swedish conflict of law rules. Where the arbitration agreement has no international connection, Swedish mandatory law will apply to the agreement, irrespective of what the parties have agreed. In such cases the parties may, however, agree to replace the Swedish non-mandatory rules with foreign rules of their choice.

How would the court determine what law should apply to the material validity of the arbitration agreement?

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How would the court determine what law should apply to the formal validity of the arbitration agreement?

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How would the court determine what law should apply to the capacity of the parties to agree to arbitration?

Section 48, paragraph 1 of the Arbitration Act, concerning the applicable law governing the arbitration agreement, does not apply to questions of whether a party was authorized to enter into an arbitration agreement or was duly represented (section 48, paragraph 2 of the Arbitration Act). Instead, such questions of authority will be decided by the legal order that is to be applied pursuant to Swedish conflict of law rules, most likely the legal system to which a party has a permanent connection through citizenship or domicile.

How would the court determine what law should apply to the discharge of the arbitration agreement?

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How would the court determine what law should apply to any question concerning the application of the arbitration agreement to claims by, or against, persons other than the original parties?

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Arbitration Proceedings & Applicable Laws

How would an arbitration tribunal having its seat in this country determine what law should apply to interpretation of the arbitration agreement?

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