

# DISCOVERY IN INTERNATIONAL ARBITRATION— THE SWEDISH APPROACH

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*By Stefan Brocker\**

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## Table of Contents

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1. INTRODUCTION
2. THE PROCEDURAL BACKGROUND
  - 2.1. The Swedish arbitration regime
  - 2.2. Evidence
3. DOCUMENTARY PRODUCTION ORDERS
  - 3.1. The powers of the arbitrators under the Act
  - 3.2. Court ordered documentary production
4. ENFORCEMENT OF DOCUMENT PRODUCTION ORDERS  
IN INTERNATIONAL ARBITRATION
  - 4.1. Enforcement of arbitral awards/orders
  - 4.2. Assistance by the Swedish courts—jurisdiction and enforcement

## 1. INTRODUCTION

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The presentation of documentary evidence will be of major importance to the outcome of almost every commercial dispute and one of the key aspects in any international arbitration is the manner in which evidence is gathered and presented to the arbitral tribunal. Normally the production of documents does not present any problems; the parties submit the documents they wish to rely on. However, where a party is in possession of documents, which are unfavourable to his case and the other party wishes to rely on them, problems may arise.

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\*Partner, Mannheimer Swartling, Gothenburg.

In many developed countries the domestic court system provides a party with an effective—and enforceable—mechanism for obtaining documents relevant for a certain dispute from the other party. Most key institutional arbitration rules also grant the arbitral tribunal the right to order production of documents.<sup>1</sup> So do the national arbitration laws of many countries, such as for example, England, Finland, France, Sweden and the United States. But the scope of discovery<sup>2</sup> available to parties varies and this is often a delicate issue in an international arbitration, as parties from different legal backgrounds frequently have very different expectations as to how the evidence-gathering process should be conducted. In many civil law countries there appears to be a somewhat restrictive attitude towards discovery whilst in common law countries, especially in the United States, a party may have an almost unlimited access to the opposing party’s documents. The 1999 IBA Rules of Evidence offer a compromise trying to bridge the built in conflicts between extensive and restrictive access to documents in the possession of the opposing party.<sup>3</sup>

As discussed below, Swedish law offers extensive possibilities to obtain documentary evidence in the possession of the opposing party or a third party through the arbitrators or with the assistance of Swedish courts—in which case there is an enforceable right. This applies also in international arbitration proceedings taking place abroad but only insofar as the person against whom the decision is rendered is resident in Sweden.<sup>4</sup>

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## 2. THE PROCEDURAL BACKGROUND

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### 2.1. The Swedish arbitration regime

In 1999 a new Arbitration Act (the “Act”) entered into force in Sweden replacing the old Act from 1929. Before the Act, only minor amendments had been made to the 1929 legislation. The most important amendments were enacted in 1971 and resulted from Sweden’s accession to the 1958 New York Convention. The Act is a modern, internationally oriented piece of legislation. It is based on the 1929 legislation but adapts and improves the old legislation

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<sup>1</sup> See for example Article 20 (5) of the 1998 ICC Arbitration Rules, Article 24 (3) or the UNCITRAL Arbitration Rules and Article 22.1(c) (e) of the LCIA Rules. See also Article 3 of the 1999 IBA Rules of Evidence. Apart from the IBA Rules the arbitration rules mentioned above do not provide for production of third party evidence.

<sup>2</sup> The term “discovery”, in its broadest sense, describes the mechanism available in some legal systems—usually with a common law tradition—whereby parties can obtain the production of documents and/or other evidence from their opponent or from third parties.

<sup>3</sup> See Article 3 of the IBA Rules.

<sup>4</sup> Compare the English Arbitration Act of 1996, which focuses solely on enforcing orders of tribunals sitting in the country in which the legislation was enacted.

by incorporating principles from practice and case law as well as developments in international arbitration. The Act applies equally to domestic and international arbitration. The 1999 arbitration reform in Sweden also introduces a number of dispute settlement procedures developed by the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), such as the SCC Arbitration Rules, Rules for Expedited Arbitrations, Insurance Arbitration Rules, Mediation Rules and Procedures and Services under the UNCITRAL Arbitration Rules.<sup>5</sup>

## 2.2. Evidence

Under the Swedish arbitration regime party autonomy, the will of the parties, is paramount with respect to conduct of the proceedings. The initiative as regards evidence is exclusively in the hands of the parties meaning, among other things, that the arbitrators are not allowed to provide for evidence *ex officio*.<sup>6</sup> Although the arbitrators may advise a party that it has the burden of proof with respect to a certain fact it is always for that party to decide what evidence to produce. The only exception to this rule is that the arbitrators may appoint experts, unless both parties are opposed thereto.

### *Admissibility of evidence*

The Swedish law of evidence foresees four basic methods of presenting evidence, namely:

1. production of documents;
2. hearing of witnesses;
3. hearing of experts; and
4. inspection “at site” of the subject matter of the dispute.

The Swedish law of evidence allows the parties to rely on virtually all kinds of documents, statements and occurrences in attempting to prove their case. The tribunal in its discretion may freely evaluate the evidence presented by the parties. It is important for lawyers coming from common law countries to appreciate this freedom from restrictions as regards the admissibility of evidence. Consequently, reliance cannot successfully be placed on any technical rules concerning admissibility of evidence. Instead, most arbitrators would be

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<sup>5</sup> For an overview of the Act and the new SCC Rules see Ulf Franke, “A New Arbitration Regime in Sweden”, *Stockholm Arbitration Report 1999:1*, pp 13-21.

<sup>6</sup> Article 25 of the Act provides that “The parties shall supply the evidence. ...”. The parties may, however, appoint experts, unless both parties are opposed thereto. Article 15 of the old Act empowered the arbitrators to gather evidence on their own initiative, unless otherwise decided by the parties. This power was, however, rarely used by arbitrators sitting in Sweden.

reluctant to accept any restrictive rule of evidence that prevent them from establishing the facts they deem necessary for deciding the dispute.

### 3. DOCUMENTARY PRODUCTION ORDERS

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#### 3.1. The powers of the arbitrators under the Act

Even though there is no explicit rule to this extent in the Act, it is submitted that the arbitrators under the Swedish arbitration regime, at the request of one party, may order the opposing party or a third party to produce documents that may be of importance as evidence in the proceedings and that the requesting party therefore wishes to rely on.<sup>7</sup> The first step to take for a party who wishes to obtain documents in the hands of the opponent or a third party is to request that the arbitrators order the opponent or third party to produce such documents. He should also explain why the document is relevant to the case. A request for such a documentary production order should be granted by the arbitrators if the document requested might be of importance as evidence in the proceedings. The arbitrators may refuse a request to produce if the document requested is considered *prima facie* to be irrelevant to the case or were such refusal is justified having regard to the time at which the request is made.<sup>8</sup> To my knowledge this is rarely done in practice and there are good reasons for that. It is difficult to make a judgement beforehand as to whether the evidence is unnecessary. If the arbitrators have reasons to believe that the documents sought are of probative value, they should grant the request. A refusal increases the risk of a subsequent challenge to the award.<sup>9</sup> However, the decision of the arbitrators cannot itself be challenged.

#### *Arbitrators and the Swedish Code of Judicial Procedure*

The arbitrators in an arbitration under the Act are in general not bound by the Swedish Code of Judicial Procedure. The arbitrators may therefore issue a more extensive documentary production order than that which a court can issue through a subpoena.<sup>10</sup> There is nothing to prevent arbitrators from ordering a party to present a large number of unspecified documents. But it is nevertheless not recommendable to do so. The party against which such an order is made may—on good grounds—argue that it is not possible to identify the requested documents and that the request therefore cannot be complied

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<sup>7</sup> Under Article 15 of the old Act this power was explicitly given to the arbitrators.

<sup>8</sup> Compare Article 25 of the Act. This which applies to all evidence, be it oral or in writing.

<sup>9</sup> See Heuman, *Current issues in Swedish Arbitration* 1990, Juristförlaget, Stockholm, p. 131. But it has yet to be tested in Swedish court.

<sup>10</sup> Concerning the powers granted to the Swedish courts, see section 3.2 below.

with. The arbitrators should therefore not issue orders for production of unspecified documents although they may be of importance for the case. Even though there is no need for each and every document to be identified and specified the order must enable the party subject to the request to identify the documents so requested. This could be done by referring to categories of documents, such as invoices, offers, letters etc issued under a specific time and containing certain information. Examples hereof are: “Invoices issued by company X in the period January—June 2000 for the sale of product A” or “Letter exchanged between company A and B relating to the sale of company C during the period June—August 2001”.

Even though the arbitrators in an arbitration under the Act are not bound by the Code of Judicial Procedure it may sometimes be advisable that by analogy they adhere to some of the important rules of protective nature laid down in the Code of Judicial Procedure. An example hereof could be mandatory rules on confidentiality. A party being subject to a confidentiality obligation based on mandatory rules of law should be entitled to rely thereon also in the arbitral proceedings. Another example could be opinions rendered by expert witnesses. It has been held by Sweden’s Supreme Court (Högsta domstolen) that such opinions are not subject to disclosure under the Code of Judicial Procedure<sup>11</sup> and there may be reasons to uphold this principle also in arbitral proceedings under the Act. The same principle should be applied to all procedural rules, which deal with the core of due process provision as enacted in Sweden. Arbitrators sitting in Sweden should regard at least mandatory rules as part of the procedural background law also for the arbitral proceedings.

*Restrictive or extensive access to discovery*

Parties from different legal backgrounds frequently have very different expectations as to how the evidence gathering process should be conducted. For example, a party from a common law background is more likely to be familiar with compulsory document production and a very wide scope of discovery. It sometimes happens, especially when the discovery applicant is represented by US lawyers, that the Request to Produce seeks to embrace numerous documents of no relevance to their case albeit sometimes in support of the non-requesting party’s allegations. The requesting party thus seeks disclosure of documents on which the other party may or may not rely. Requests like this—where the requesting party anticipates the Statement of Evidence<sup>12</sup> to

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<sup>11</sup> See NJA 1963 p. 72 (NJA is a law report series publishing decisions by the Swedish Supreme Court.)

<sup>12</sup> It is a well-established rule in the Swedish court system and also in the SCC Rules, *see* Article 26, that a party must specify what it intends to prove with each piece of document. It is not sufficient merely to submit bundles of documents.

be submitted by the non-requesting party—should in my opinion not be granted by arbitrators in proceedings under the Act (unless of course both parties agree differently). It is up to the parties to present evidence in support of their case and they do so at their own peril.

### *IBA Rules of Evidence*

In an international arbitration between parties, from a civil and a common law country, there is a need to bridge the built in contrast between restrictive and extensive access to discovery and the practice of international arbitral tribunals is—and should be—to seek a workable compromise between various techniques. To this end I believe that the 1999 IBA Rules of Evidence may—albeit rather Anglo-Saxon in nature—well serve as guidelines as to how arbitrators should deal with a request vis-à-vis the opponent or a third party as these rules are in this respect not far from the current position under Swedish law (and also the tendency of current international commercial arbitration).

In my opinion the IBA Rules contains the most useful common law rules while adapting them to be more flexible and less disconcerting for parties from other legal backgrounds. The scope and procedure for documentary production is dealt with in Article 3, section 3 of the 1999 IBA Rules of Evidence in the following terms:

“3. A request to Produce shall contain:

- (a) (i) a description of a requested document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist;
- (b) a description of how the documents requested are relevant and material to the outcome of the case; and
- (c) a statement that the documents requested are not in the possession, custody or control of the requesting Party, and of the reason why that Party assumes the documents requested to be in the possession, custody or control of the other Party”.

In respect of (b) above I would believe that the document requested should have a probable evidentiary value in support of an allegation made by the requesting party and further that this allegation is of relevance to the requesting party’s case.

### *Limitations of arbitral powers under the Act*

The arbitrators’ powers are restricted. They cannot compel a witness to attend or document to be produced since they cannot stipulate a penalty or use other means of constraint. Nor can they exert pressure on a witness to speak if he does attend, for again they have no means of constraint. And finally they cannot administer oaths and truth affirmations and accordingly the perjury laws are

not applicable so that there is no criminal sanction if a witness fails to speak the truth.<sup>13</sup> In spite of the restrictions described above the production of reliable evidence is assisted by two factors. First, the arbitrators are entitled to allocate evidentiary weight to the fact that evidence is not forthcoming.<sup>14</sup> Thus, if a document ordered to be produced by the arbitrators is not handed in, conclusions may, depending on the circumstances, be drawn by the arbitrators by inference from the failure or neglect to co-operate. Another method of dealing with obstructive parties could be to shift the burden of proof in the proceedings. The following hypothetical case could serve as an example. Assume that we have a software related dispute where the purchaser of a particular software system has instituted proceedings against the seller of the software claiming damages for alleged defects in the software. Let us further assume that the purchaser in the proceedings has requested the seller to produce software related documentation, such as for example the source code, in support of the purchaser's allegation that the software was defect, something that the purchaser has to prove. Assuming further that the arbitral tribunal has requested the seller to provide such documentation, but that the latter has refused to do so. In such a case it may be reasonable for the arbitrators to place the burden of proof for the defectiveness of the software upon the seller instead of the purchaser. The reason being (i) the refusal by the seller to provide the requested documentation and (ii) that the seller is the only one who could provide evidence in respect of the status of the software.

The sanctions described above are rather delicate to apply and my impression is that they are seldom applied as such at least not by Swedish arbitrators. It is nevertheless in most cases probable that a party will comply with the order and take the measure considered necessary by the arbitrators who, after all, will be the ones to decide the case. Moreover, arbitration is a consensual process between the parties. The same reasons do not apply to third parties being requested to produce certain documents, as they are not subject to or involved in the proceedings.

The determination of the arbitrators is limited to the question of whether the request is justified. The arbitrators may for example not refuse a request for documentary production on grounds that a court order, because of its sanctions, would cause great expense to the party against which such an order

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<sup>13</sup> Section 25 of the Act.

<sup>14</sup> See *Arbitration in Sweden*, second revised edition, Stockholm 1984 p. 118. See also the 1999 IBA Rules of Evidence Article 9.4 which provides that if a party fails without satisfactory explanation to comply with a procedural order of an arbitral tribunal concerning the production of documents, then the arbitral tribunal may infer from this failure to comply that the content of the document would be adverse to the interests of that party. In my opinion this reflects also the general practice in most international arbitrations.

is made. On the other hand there are strong reasons for the arbitrators, when determining whether to give approval, to consider whether the application may be granted by the court. For example it may be that the requested documents are insufficiently identified. It may also be that it is clear that the person subject to the request actually does not have the documents requested in his possession. A permission would be meaningless and would only cause delay to the proceedings if the arbitrators would give leave to apply to the court knowing that the application stands no chance of being granted.

The arbitrators themselves may not administer oaths or truth affirmations. Nor may they impose conditional fines or otherwise use compulsory measures in order to obtain requested evidence. Should a party or third person refuse to abide an order rendered by the arbitrators to produce certain documents, the party who wishes to obtain such documents may, after obtaining the consent of the arbitrators, submit an application to such effect to the District court.<sup>15</sup> The powers of the Swedish courts will be discussed below.

### **3.2. Court ordered documentary production**

If a party or third person refuses to produce certain documents pursuant to another party's request, means of compulsion may be needed. A party therefore, after obtaining consent of the arbitrators, may submit an application to the District court to effect that the opposing party or any other party be ordered to produce as evidence a document<sup>16</sup> or object. This also applies if a party wishes witness examinations to be held under oath or party examinations to be held under truth affirmation. Applications concerning the taking of evidence as aforesaid shall be considered by the District court determined by the arbitrators.<sup>17</sup>

#### *Powers of the arbitrators*

The arbitrators should approve a documentary request from either party if they consider that the measure is justified having regard to the evidence in the case. It is thus for the arbitrators to decide the need and appropriateness of court assistance and they have a certain freedom in this respect. In the legislative

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<sup>15</sup> Section 26 of the Act.

<sup>16</sup> Neither the Act nor the Swedish Code of Judicial Procedure deals with the important question whether a party may be requested to produce evidence stored in a computer and thus not available in documentary form. According to a recent court case (NJA 1998 p. 829) it has been held that a Swedish court may order a party to provide printouts of evidence stored in a computer (even though it was argued by the non requesting party that it would take considerable time and effort to do so).

<sup>17</sup> Section 44 of the Act.

history it is stated that the arbitrators should require that the measure sought should have relevance as evidence.<sup>18</sup> The arbitrators may also reject the request if they consider that the evidence presented to them is sufficient or if they believe that the costs involved would be exorbitant.

If the arbitrators reject the request there is no right to appeal and the requesting party is not entitled to submit an application to the court. Could the parties agree that the court should assist in obtaining evidence without the need for consent by the arbitrators? Considering that party autonomy is paramount with respect to the conduct of the proceedings under the Act, Sweden's positive attitude towards legal co-operation between states and the fact that arbitration today is a widely recognised and accepted way of settling disputes I submit that such an agreement in most cases should be accepted by the Swedish courts.

#### *The review by the court*

The review by the court is limited to the question of lawfulness. Where the measure may be lawfully taken, the court shall grant the request provided the arbitrators have given their consent. The court should not evaluate whether such measure is justified having regard to the evidence in the case. So, if the arbitrators consider a certain document to be relevant to the case and therefore decide to grant the request the court should not thereafter refuse the application on grounds that such document is not of importance for the case. In this respect the court is bound by the arbitrators' findings.<sup>19</sup> Nor should the court reject an application for documentary production because it considers that the assistance by the court would delay the arbitral proceedings or that evidence could be produced in another less time consuming way.

#### *Orders available under the Code of Judicial Procedure*

As the provisions of the Code of Judicial Procedure apply with respect to the legality of a documentary production order it is necessary to investigate what kind of orders are available under the Code. According to the Code anyone possessing a document that can be assumed as proof is obliged to produce it. Exceptions are made in respect of personal notes and also to situations where the documents requested include trade secrets. The concept of trade secrets should be interpreted in the same way as in court practice. The arbitrators should not make a more extensive interpretation of the concept of trade secrets, since the court after determining whether there are any legal obstacles

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<sup>18</sup> Governmental Bill (1998/99:35) p. 229.

<sup>19</sup> Governmental Bill (1998/99:35) p. 229.

can reject such a determination made by the arbitrators and refuse to issue a subpoena.<sup>20</sup>

Swedish courts will have to carefully examine whether a Request to Produce is sufficiently specified so that it may result in an enforceable decision. Swedish case law is somewhat unclear in this respect but it seems that it is not necessary for an applicant party to identify each individual document requested. As long as the party against which the application is directed is able to identify the documents so requested and as long as the court's decision is capable of enforcement it should not be necessary that each individual document requested be specifically identified.

The person obliged to produce the document may be compelled to perform his duty on penalty of a fine.<sup>21</sup> It is also possible to request the person from whom production is sought to give an oral testimony with the aim of identifying relevant documents and in whose possession they are.<sup>22</sup>

The respondent to a Request to Produce should be given an opportunity to respond in writing. If the applicant requests to obtain documents from a third party the opposing party in the arbitration should nevertheless be given an opportunity to comment on the application. An exception applies in extreme situations such as where the applicant may demonstrate that it is probable that the documents will be transferred to another unidentified party or be destroyed. In such case the court could grant the application *ex parte*.

### *Arbitration proceedings abroad*

The above described possibilities of obtaining documentary production orders by Swedish courts during arbitral proceedings apply also in respect of arbitration proceedings taking place outside Sweden in so far as the proceedings are based upon an arbitration agreement, and pursuant to Swedish law, the issues are arbitrable.<sup>23</sup>

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<sup>20</sup> *Supra* note 9, p. 145.

<sup>21</sup> Swedish Code of Judicial Procedure Chapter 38, Section 5.

<sup>22</sup> Swedish Code of Judicial Procedure Chapter 38, Section: 4.

<sup>23</sup> Section 50 of the Act. The provision is based on the Geneva Protocol on Arbitration Clauses (1923), where it is provided that contracting states should facilitate procedural actions in a contracting state on grounds of arbitral proceedings taking place abroad in another contracting state. Sweden has, however, expanded the scope so as to apply also in respect of states that have not acceded to the Geneva Protocol. The provision also reflects Sweden's positive attitude to legal co-operation between states even in cases where the other state(s) have not made the same commitments as Sweden.

### *Contractual rights to obtain documents*

To the extent that a party can rely on a contractual right to obtain documents from the other side the party should be able to enforce that right under Swedish law. If the obligation to produce is contractual, the arbitrators ought not be required to analyse if a request to produce is justified having regard to the evidence in the case.

## **4. ENFORCEMENT OF DOCUMENT PRODUCTION ORDERS IN INTERNATIONAL ARBITRATION**

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### **4.1. Enforcement of arbitral awards/orders**

One of the main advantages of arbitration over litigation is the existence of multilateral and bilateral international conventions on the recognition and enforcement of foreign arbitral awards, the most important being the New York Convention of 1958. The Convention is generally considered as the most successful international convention in the field of international private law. Based on my own experience most of the arbitral awards are spontaneously complied with by the parties. Having said this, it is important to consider what remedies are available to one party in the circumstances in which the other party does not comply with the arbitration award. In Sweden, the only provisions dealing with the enforcement of foreign arbitral awards are the Swedish enactment of the New York convention.

#### *Application of the New York Convention*

The Convention does not define the term “award”. By its terms, the Convention applies only to awards that are “binding” on the parties. There is for example nothing in the legislative history of the Convention that suggests that it excludes the enforcement of interim or partial awards. According to one of the leading commentators on the Convention, Albert Jan van den Berg, the Convention does not preclude the recognition and enforcement of *partial* awards, meaning awards in which part of the dispute is finally resolved.<sup>24</sup>

#### *International Case law*

Most authors seem to take the view that it is doubtful whether the drafters of the Convention intended to include in the term “award”, awards or orders of a procedural nature (at least if such orders may be subsequently varied by the

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<sup>24</sup> Van den Berg, “The New-York Convention: Summary of Court Decisions” in (1996) ASA Special Series No. 9 p. 46 58.

arbitrators). In a recent Australian court case<sup>25</sup> an arbitrator had issued what he called an “interim arbitration order and award” in which he granted certain injunctions although these orders did in no way purport to finally resolve the dispute. The award was expressed to apply “during the pendency of this arbitration”. The applicant sought to enforce the measure in Australia under the New York Convention. The Australian court noted that the New York Convention does not define the term “award” and concluded in particular that there is nothing in the legislative history of the Convention to suggest that it excludes the enforcement of interim awards *i.e.* awards which resolve some part of the dispute referred to arbitration. The Australian court held that the orders issued by the arbitrator were interlocutory and procedural in nature and in no way purported to finally resolve the dispute or legal rights between the parties. The “interim arbitration order and award” was not considered by the court to be an arbitral award within the meaning of the New York Convention. The court therefore declined to enforce the measure on grounds that the award was not final and binding on the parties.

In a recent case from the US<sup>26</sup> the issue was the order of an arbitral tribunal to produce tax records relating to a joint venture. The order referred to a specific category of documents and was signed by the chairman. The order clearly stated that it should be complied with prior to resolution of the other disputes subject to arbitration. The issue under appeal before the US Court of Appeals for the Seventh Circuit was whether this order to produce was enforceable in the United States under the New York Convention. The court held that this was the case. The court considered that as long as the arbitral ruling is final in every respect it is not necessary that the document tenor the word “award”. Synonyms such as decisions, opinions, orders or rulings could also be final and it is the content of a decision—not its nomenclature—that determines finality. The court considered that “*the tribunals’ order resolved the dispute or, was supposed to, ... Producing the documents was not just some procedural matter—it was the very issue True North wanted arbitrated*”.

#### *The situation in Sweden*

There are no Swedish court cases dealing with this specific issue. In my opinion the Swedish courts are unlikely to take the position that an arbitral ruling is unenforceable merely because it does not include the word “award”. Swedish courts, it is submitted, would look to the substance of the ruling under review rather than the designation of the measure. As long as the ruling finally resolves the dispute, or part thereof, it is likely to be enforceable under the New York

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<sup>25</sup> *Resort Condominiums International Inc. v. Bolwell and another* (1993) 118 ALR 655 (Lexis).

<sup>26</sup> *Publicis Commun v. True North Communs Inc.* 206 F.3d 725 (7th Cir. III.2000).

Convention. To the extent a party can rely on a contractual right to obtain documents from the other side, that party should be able to enforce that right under Swedish law.

#### **4.2. Assistance by the Swedish courts— jurisdiction and enforcement**

##### *Orders against a person resident in Sweden*

As stated above it is possible to obtain documentary production orders by Swedish courts even if the arbitral proceedings take place abroad. Parties engaged in arbitral proceedings outside Sweden may thus, after having obtained the consent of the arbitrators, apply to the Swedish court for a documentary production order. If the person against whom the decision rendered by the Swedish court is resident in Sweden such a decision may be enforced, if needed with the assistance by the Swedish enforcement authorities.

##### *Orders against a person resident abroad*

If the party against whom the order is directed is resident abroad, for example in another European country, the questions arise (i) whether the Swedish courts would have jurisdiction to consider a Request to Produce and (ii) whether an eventual order issued by a Swedish court is enforceable in such foreign country.

As described above, Sections 26 and 50 of the Act authorise the Swedish courts to assist in obtaining evidentiary documentation from a party or third person, even if the arbitral proceedings take place abroad. The origin of these provisions is derived i.a. from the old Act that preceded the new Act. In order to determine if the Swedish courts are competent to assist in obtaining documentation from a person who resides abroad, one has to pay attention to the preparatory legislative material pertaining to the former regulations.<sup>27</sup> The preparatory material clarifies that the purpose of the provisions was to promote and facilitate the use of arbitral proceedings in accordance to the UN Protocol on Arbitration Clauses (Geneva, 1923). However, it is in my opinion most likely that the Swedish courts are not competent to consider a Request to Produce directed against someone resident abroad. This issue has, however, yet to be tested in Swedish court.

Even if a Swedish court would have jurisdiction to consider a Request to Produce directed against a person resident abroad, an order to that effect

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<sup>27</sup> *Nytt juridiskt arkiv II*, 1929, nr. 1-2 (Nytt Juridiskt arkiv II is a law report series publishing preparatory legislative material).

rendered by the Swedish court would in my opinion not be enforceable in the country where the person against whom the order is directed is located.

The Brussels and Lugano Conventions (the “Conventions”) do not apply to the recognition and enforcement of arbitral awards. The Conventions do further not apply for the purpose of determining the jurisdiction of courts and tribunals in respect of litigation ancillary to arbitration and, finally, they do not apply to the recognition of judgements given in such proceedings. According to the opinion expressed by the experts in the report drawn up by the member states at the time of the accession of Denmark, Ireland and the United Kingdom to the Brussels Convention court proceedings which are ancillary to arbitration proceedings are for example the appointment or dismissal of arbitrators, the fixing of the place of arbitration, the extension of the time limit for making awards or the obtaining of a preliminary ruling on questions of substance as provided for under English law.<sup>28</sup> There appears not to be any European Court cases concerning documentary production orders in this context. It is, however, submitted that such orders do not fall within the scope of the Convention, as they should be regarded as ancillary to arbitration proceedings. Thus, it appears not to be possible to enforce a documentary production order issued by a Swedish court in accordance with the provisions of the Act in another country under the Convention. This further means that enforceable decisions may only be obtained if the person against whom the decision rendered is resident in Sweden.

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<sup>28</sup> Official Journal 1979 C 59 p. 93. See also [1991] ECR I—3855, *Rich v. Impianti*, where it was held that the exclusion provided for in the Convention extends to litigation pending before a national court concerning the appointment of an arbitrator.