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The Role of Swedish Courts in Transnational Commercial Arbitration

JAN PAULSSON*

In the last twenty years, arbitration has become increasingly important as a means of dispute settlement in international commerce.¹ Significantly, the Court of Arbitration of the International Chamber of Commerce (ICC), which has been in existence since 1922, has had a dramatic increase in the number of claims adjudicated in recent years.² That international commerce gives rise to disputes should not be construed as an indication that something is wrong. On the contrary, disputes are a normal part of commer-

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1. On international commercial arbitration generally, see 2 G. DELAUME, *TRANSNATIONAL CONTRACTS* 13 (1980); *HANDBOOK OF INSTITUTIONAL ARBITRATION IN INTERNATIONAL TRADE* (E. Cohn, M. Domke, & F. Eisemann eds. 1977); *INTERNATIONAL COMMERCIAL ARBITRATION* (C. Schmitthoff ed. 1980) (2 vols.) [hereinafter cited as Schmitthoff]; F. MANN, *State Contracts and International Arbitration*, in *STUDIES IN INTERNATIONAL LAW* 256 (1973); J. WETTER, *THE INTERNATIONAL ARBITRAL PROCESS: PUBLIC AND PRIVATE* (4 vols.) (1979); Ehrenhaft, *Effective International Commercial Arbitration*, 9 LAW & POL'Y INT'L BUS. 1191 (1977); McClelland, *International Arbitration: A Practical Guide to the System for the Litigation of Transnational Commercial Disputes*, 17 VA. J. INT'L L. 729 (1977); Sanders, *A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 13 INT'L LAW. 269 (1979) [hereinafter cited as Sanders, *A Twenty Years' Review*]; Sanders, *International Commercial Arbitration*, 20 NETH. INT'L L. REV. 37 (1973); Note, *The Growing Consensus on International Commercial Arbitration*, 68 AM. J. INT'L L. 709 (1974).

2. Thompson, *The Procedure under the Rules of the ICC*, in 1 Schmitthoff, *supra* note 1, at 180, 181.

cial life and become all the more inevitable when trade is dynamic, enterprising, and intense. The challenge thus is not to eliminate disputes, but to provide a fair and efficient mechanism for their settlement.

International commercial arbitration provides one answer.³ From a practitioner's point of view, it is often indispensable. Frequently one cannot close a deal without a provision stipulating arbitration. The unique acceptability of arbitration on the international scene, whatever may be the case in internal legal systems, doubtless does not turn on questions of speed or cost, but on neutrality.⁴ The sole arbitrator, or the chairman of the arbitral tribunal, will be of a neutral nationality; the place of arbitration is neutral, and the unpredictable peculiarities of litigating in a foreign national court, including language problems and unfamiliar procedural rules, are neutralized. Parties are given great flexibility in fashioning by contract the particular mechanism they deem appropriate in view of the circumstances of their agreement. Rigid rules of national law, which might affect the contract negotiated by adding unforeseen implied rights or obligations, or by overriding locally illegal clauses, are greatly attenuated in international proceedings where the terms of the contract as signed, and international trade usage, tend to be paramount.⁵

Additional advantages are the confidentiality of the proceedings and the increasing reliability of awards. The ICC reports voluntary

3. Of course, the more traditional method of private dispute settlement—recourse to national courts—is another mechanism which parties may choose. Arbitration, however, often is a more manageable procedure for the resolution of disputes between parties of different nationalities. The problems of traditional judicial solutions are two-fold. If disputants are allowed to seek recourse in their native courts, they run the risk that any award will be unenforceable against the other party. If, on the other hand, the disputants negotiate a "forum selection clause," the appointed forum may decline to hear the merits of the claim or the dispute may be delayed by overcrowded dockets. In addition, the forum selection clause may not be honored by the enforcing courts (usually the national courts of the disputants). To a large degree, arbitration eliminates these and similar problems. See generally McClelland, *supra* note 1, at 730-33.

4. See generally Mangard, *Arbitration and the Judiciary*, 65 SVEN. JUR. (Swed.) 103, 104 (1980).

5. See, e.g., Rules of Conciliation and Arbitration of the International Chamber of Commerce, ICC Publication No. 291, art. 13(5) (1975), reprinted in 1 Schmitthoff, *supra* note 1, doc. IV.A, at 42 ("[I]n all cases the arbitrator shall take account of the provisions of the contract and the relevant trade usages.") [hereinafter cited as ICC Rules]. See also Goldman, *La Lex Mercatoria dans les contrats et l'arbitrage internationaux: réalités et perspectives*, 106 J. DROIT INT'L [CLUNET] 475 (1979).

compliance with over ninety percent of its awards.⁶ Where awards are resisted, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,⁷ ratified or acceded to by fifty-six countries,⁸ including Sweden, obligates national judges to give full faith and credit to foreign awards with only limited review of what one might call their procedural bona fides.

Although arbitral awards normally can be enforced in countries other than where rendered, the choice of a place of arbitration can be important. For example, under the New York Convention, the validity of the proceedings in the State where the award was rendered may be a prerequisite to enforcement elsewhere.⁹ In recent years, Sweden has arisen increasingly as a forum for the arbitration of international commercial disputes. A major breakthrough was the U.S.-U.S.S.R. Optional Clause Agreement of 1977, by which the American Arbitration Association and the Soviet Chamber of Commerce and Industry agreed on an acceptable text for arbitration clauses to be inserted in contracts between U.S. and Soviet trading or industrial enterprises.¹⁰ According to this agreement, arbitration would take place in Sweden under the chairmanship of a jurist appointed by the Stockholm Chamber of Commerce (SCC) from a published list of eighteen lawyers and judges, six from Eastern countries, six from Western countries, and six from Sweden.¹¹ At the same time, the Arbitration Institute of the SCC, which was created in the mid-1940s, was reorganized with a view to making it more effective as an international arbitration institution generally.¹² A few years later, it became clear that the People's Re-

6. ICC ARBITRATION: THE INTERNATIONAL SOLUTION TO INTERNATIONAL BUSINESS DISPUTES, ICC Publication No. 301, at 11 (1977).

7. Done June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 (effective Dec. 29, 1970) [hereinafter cited as the New York Convention]. The New York Convention supersedes two earlier multilateral treaties adopted by the League of Nations. See Geneva Protocol on Arbitration Clauses, Sept. 24, 1923, 27 L.N.T.S. 157; Geneva Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 301 [hereinafter cited as the Geneva Convention].

8. 2 INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION, pt. VI, at 2-3 (G. Gaja ed. 1980) [hereinafter cited as Gaja].

9. New York Convention, *supra* note 7, art. V(1)(a). See also Part II (B) *infra*.

10. The full text of the clause appears in [1978] Y.B. COMM. ARB. 301-03.

11. See Holtzman, *Dispute Resolution Procedures in East-West Trade*, 13 INT'L LAW. 233, 244 (1979); Lebedev, *The 1977 Optional Clause for Soviet-American Contracts*, 27 AM. J. COMP. L. 469 (1979).

12. See STOCKHOLM CHAMBER OF COMMERCE, ARBITRATION IN SWEDEN 8 (1977) [hereinafter cited as ARBITRATION IN SWEDEN]. This text, an authoritative commentary supervised by leading Swedish jurists, is the result of a 1973 effort to provide potential litigants with a

public of China, notably through its Foreign Investment Commission, would accept arbitration in Stockholm in its international contracts, including loans.¹³ It is thus apparent that Stockholm may be selected frequently as the locale for international arbitrations.¹⁴

It is difficult at this time to predict the extent to which these expectations will be fulfilled. As of November 24, 1980, only four of the arbitral proceedings pending before the SCC's Arbitration Institute involved international matters.¹⁵ The corresponding figure for the ICC in 1977 was 504.¹⁶ This statistic may be misleading, however. In the first place, arbitration in Sweden is by no means limited to that taking place under the aegis of the SCC; it is doubtless impossible to know how many international arbitrations may be pending under the rules of other institutions or even under contractual ad hoc mechanisms.¹⁷ Second, under the hypothesis that the frequency of selecting Sweden as an arbitration forum has increased recently—which reasonably might be assumed, given the fact that the SCC's Arbitration Institute recorded more than 300 inquiries from foreign contract draftsmen during 1980¹⁸—it should be noted that it will take quite some time before clauses being signed today actually become operative. After all, a request for arbitration may be brought years after the signing of a contract. Nonetheless, the SCC's Arbitration Institute surmises from contacts with practitioners that Stockholm is "probably the most frequently chosen place of arbitration" in contracts between Soviet

detailed and readily available explanation of Swedish arbitration law and practice. See Holtzman, *supra* note 11, at 241. The Arbitration Institute of the SCC is an independent body whose decisions are not reviewable by the SCC; its rules were modified in 1976 to be compatible with the Rules of the United Nations Commission on International Trade Law (UNCITRAL), see 31 U.N. GAOR, Supp. (No. 17) 34, U.N. Doc. A/31/17 (1976), and the Rules of the ICC, see note 5 *supra*. For the full text of the SCC Rules, see ARBITRATION IN SWEDEN, *supra*, at 183 app. 1.

13. V. LI, LAW AND POLITICS IN CHINA'S FOREIGN TRADE 242 (1977); Holtzman, *supra* note 11, at 244.

14. Wetter, *East Meets West in Sweden*, 13 INT'L LAW. 261 (1979).

15. Letter from Ulf Franke, Secretary of the SCC Arbitration Institute, to Jan Paulsson (Nov. 24, 1980) (copy on file at the offices of the *Virginia Journal of International Law*).

16. 2 J. WETTER, *supra* note 1, at 145.

17. Other arbitral institutions in addition to the SCC include the International Centre for the Settlement of Investment Disputes, the International Chamber of Commerce, the American Arbitration Association, and the International Commission on International Trade Law Arbitration. See generally McLaughlin, *Arbitration and Developing Countries*, 13 INT'L LAW. 211, 221-30 (1979).

18. Letter, *supra* note 15, at 3.

and Western business entities.¹⁹ Finally, it would be a mistake to think that the impact of the international arbitral process may be measured only by reference to the volume of pending litigation. This impact is—or should be—greater in the prevention than in the cure. In other words, the parties' expectation that a fair and efficient process is available necessarily reduces the temptation of irresponsible behavior and thereby enhances good-faith execution of contractual obligations or amicable settlement without litigation.

The appropriateness of a country as the place of arbitration depends upon many factors. For example, the parties may seek a "neutral" country. In addition, they may prefer the substantive or procedural laws of a country or the method, costs, and speed of the country's arbitration process.²⁰ One of the most important factors is the role of the country's courts in the arbitral process. Where a court retains the authority to scrutinize arbitrators on a wide variety of grounds, or to decide questions of law, the efficacy of the arbitration procedures may be greatly reduced.²¹ It is the aim of this article to cast some light on this relationship between judge and arbitrator in the Swedish system. This relationship is examined from two perspectives of interest to the international commercial community. First, Part I describes the role of the Swedish judiciary in supervising arbitral proceedings. Part II analyzes the extent to which the Swedish legal system accepts the "detachment" of the transnational arbitral process from the municipal legal order. There are two sides to this issue. The first, namely the extent to which the Swedish courts are likely to conclude that the localization of arbitral proceedings within Sweden *ipso facto* gives them jurisdiction to rule on challenges to the proceedings and/or the award, is obviously relevant to the choice of Sweden as a place of arbitration. The second, namely the willingness of the Swedish courts to enforce foreign awards irrespective of the pendency of challenges in their country of origin, is important, although less relevant to the choice of Sweden as the arbitration forum. Nonetheless, a recent Swedish case dealing with this issue is suggestive of the Swedish courts' attitude toward transnational awards rendered in Sweden as well as abroad.

19. *Id.*

20. McLaughlin, *supra* note 17, at 212.

21. Holtzman, *supra* note 11, at 243.

I. THE ROLE OF THE JUDICIARY IN THE ARBITRAL PROCESS

The Swedish arbitration law is contained in the Arbitration Act of 1929,²² and the Act concerning Foreign Arbitration Agreements and Awards of 1929.²³ Both were amended in 1976 in line with the Swedish attempt to increase the number of arbitrations in Sweden. Under these laws, the normal Swedish arbitral tribunal has three arbitrators.²⁴ Each party chooses one, and those two in turn elect a third who will act as chairman.²⁵ Each member of the panel has one vote and the tribunal need not be unanimous.²⁶ The arbitrators act on the basis of presentations—both oral and written—submitted by the parties²⁷ and, under certain circumstances, may compel the production of evidence.²⁸ Unless otherwise agreed, the decision is final and no appeal is permitted on the merits.²⁹ It is possible to impeach the award in the courts for irregularities of form or procedure, if done within sixty days.³⁰

The courts in Sweden are divided into a three-tiered system. The courts of first instance are the district courts, of which there are 100. From these an appeal of right lies to the courts of second instance, the courts of appeal. The Svea Court of Appeal, located in Stockholm, has special jurisdiction with regard to the enforcement of foreign arbitral awards.³¹ The highest court is the Su-

22. *Lag om skiljemän* (Act on Arbitration), June 14, 1929, 1929 Svensk Författnings-samling [SFS] 145, reprinted in *ARBITRATION IN SWEDEN*, *supra* note 12, at 192.

23. *Lag om utländska skiljeavtal och skiljedomar* (Act on Foreign Arbitration Agreements and Awards), June 14, 1929, 1929 SFS 147, reprinted in *ARBITRATION IN SWEDEN*, *supra* note 12, at 202.

24. *Lag om skiljemän* (Act on Arbitration), June 14, 1929, 1929 SFS 145, § 6, reprinted in *ARBITRATION IN SWEDEN*, *supra* note 12, at 192, 194. The parties may choose any other number, however.

25. *Id.* Upon appointment of an arbitrator by one of the parties, the other party—unless otherwise agreed—must exercise his right to appoint an arbitrator within 14 days. *Id.* § 7, reprinted in *ARBITRATION IN SWEDEN*, *supra* note 12, at 192, 194.

26. *Id.* § 16, reprinted in *ARBITRATION IN SWEDEN*, *supra* note 12, at 192, 197.

27. *Id.* § 14, reprinted in *ARBITRATION IN SWEDEN*, *supra* note 12, at 192, 196.

28. *Id.* § 15, reprinted in *ARBITRATION IN SWEDEN*, *supra* note 12, at 192, 196-97. Arbitrators may not, however, employ traditional means of constraint (e.g., fines, penalties, etc.) to compel testimony, nor may they administer oaths. *Id.*

29. *Id.* § 2, reprinted in *ARBITRATION IN SWEDEN*, *supra* note 12, at 192, 192.

30. *Id.* § 21, reprinted in *ARBITRATION IN SWEDEN*, *supra* note 12, at 192, 199. A void award can be set aside at any time, i.e., it is not subject to a 60-day limitation. For a discussion of the difference between void and voidable awards, see Part I(C) *infra*.

31. *Lag om utländska skiljeavtal och skiljedomar* (Act on Foreign Arbitration Agreements and Awards), June 14, 1929, 1929 SFS 147, § 8, reprinted in *ARBITRATION IN SWEDEN*, *supra* note 12, at 202, 204. The Svea Court of Appeal has exclusive jurisdiction over appeals

preme Court from which review may be had only by leave of that Court.

In addition, the Swedish system has a special agency called the *Överexekutor*, or Chief Execution Authority, which is charged with keeping the arbitration machinery functioning by performing many tasks normally done by courts in other countries. For example, the *Överexekutor* enforces awards³² and appoints arbitrators upon the failure of the parties to exercise their rights of appointment.³³ The decisions of the *Överexekutor* can be appealed to one of the courts of appeal and, of course, discretionary review by the Supreme Court is available.

A. Institution of Proceedings

1. Stay of Court Action Pending Arbitration

A Swedish judge will stay an action brought before him if the matter is subject to an arbitration agreement.³⁴ The matter must be arbitrable under Swedish law,³⁵ however, and the arbitration agreement also must be valid.³⁶

to enforce foreign awards. *Id.*

32. R. GINSBURG & A. BRUZELIUS, *CIVIL PROCEDURE IN SWEDEN* 376-86 (1965).

33. *Lag om skiljemän* (Act on Arbitration), June 14, 1929, 1929 SFS 145, § 8, reprinted in *ARBITRATION IN SWEDEN*, *supra* note 12, at 192, 194. The *Överexekutor* may remove an arbitrator for failure to perform duties properly, *id.* §§ 9, 10, reprinted in *ARBITRATION IN SWEDEN*, *supra* note 12, at 192, 195; appoint a chairman when the parties cannot agree, *id.* § 12, reprinted in *ARBITRATION IN SWEDEN*, *supra* note 12, at 192, 196; and extend time for rendition of the award, *id.* § 18, reprinted in *ARBITRATION IN SWEDEN*, *supra* note 12, at 192, 197-98.

34. *ARBITRATION IN SWEDEN*, *supra* note 12, at 27-28, 36.

35. The Arbitration Act provides:

Any question in the nature of a civil matter which may be compromised by agreement, as well as any question of compensation for damage resulting from a crime may, when a dispute has arisen with regard thereto, be referred by agreement between the parties to the decision of one or more arbitrators.

Lag om skiljemän (Act on Arbitration), June 14, 1929, 1929 SFS 145, § 1, reprinted in *ARBITRATION IN SWEDEN*, *supra* note 12, at 192, 192. This definition covers virtually all aspects of a commercial transaction. See also *ARBITRATION IN SWEDEN*, *supra* note 12, at 32-36.

36. In order to have a valid arbitration agreement, the following elements must be present: The parties must have the capacity to conclude the agreement; the agreement may not be tainted by fraud or duress; the agreement must specify the matter to be arbitrated and state that such matter is to be referred to arbitrators for decision; and the subject matter must be "arbitrable," as defined in note 35 *supra*. In addition, the agreement may not provide for the right to appeal to a court for a review of the substantive decision. The agreement, however, need not be in any particular form and may be oral. *ARBITRATION IN SWEDEN*, *supra* note 12, at 28-32.

These principles extend to foreign arbitration agreements, i.e., those where neither party

*Björklund v. Lundquist*³⁷ illustrates the attitude of Swedish courts when requested to defer to the arbitral process. Björklund, an inventor, sued Lundquist for royalties under a license agreement. The agreement had been reached between Björklund and one Malm, but Björklund claimed that Malm merely had been the agent for Lundquist, so that the latter could be sued directly even though he did not appear as signatory to the agreement. Björklund, although he was proceeding on the basis of an agreement containing an arbitration clause, brought his case before the district court. He argued that Lundquist could not invoke the arbitration clause until it had been determined whether he was a party to the license agreement, and also that the issue of whether he was indeed a party to the agreement did not fall within the scope of the arbitration clause.

The court of appeal reversed a ruling in favor of Björklund, holding that the arbitration clause precluded resort to the district court. Whether Lundquist was bound by the arbitration clause necessarily was part of the question of whether he was to be deemed a party to the contract. Since resolution of this issue would involve a decision on the merits of the direct action, the court concluded Lundquist had the right to insist that it be determined by arbitration. The Supreme Court, on appeal, affirmed.³⁸

This decision reflects the basic view of the Swedish courts that the judiciary ordinarily should not interfere with arbitration. It would not be hard to rationalize an opposite result if the judges had wanted to be jealous in restricting the jurisdiction of the arbitrators. The defendant contended that he was not a party to the arbitration agreement, and the plaintiff inventor did not wish to invoke the arbitration clause. As the only party relying on the arbitration clause argued that the contract as a whole was inapplicable to him, certainly one could imagine that the court would refuse to give him the benefit of arbitration.

It seems plausible that the *Björklund* court was not so much giving Lundquist the benefit of arbitration (because after all he was arguing that he had nothing to do with the contract in which the

is Swedish and the agreement neither explicitly nor implicitly makes Sweden the forum. *Lag om utländska skiljeavtal och skiljedomar* (Act on Foreign Arbitration Agreements and Awards), June 14, 1929, 1929 SFS 147, § 3, reprinted in *ARBITRATION IN SWEDEN*, *supra* note 12, at 202, 202 (1977).

37. Judgment of Oct. 11, 1955, Sup. Ct., Swed., [1955] *Nytt Juridiskt Arkiv* [NJA] 500.

38. *Id.*

agreement to arbitrate had been reached) as it was upholding the arbitral process *as an institution*. The Supreme Court's decision thus stands for the proposition that a plaintiff who seeks to enforce an agreement in which arbitration is accepted is bound to submit the dispute to arbitration if the defendant insists on it.³⁹

The issue has arisen as to the probable result where a party brings an ordinary court action on a contract which clearly contains an arbitration clause, and the defendant does not appear. It is unclear whether this attitude of noninterference with the arbitration process would bar district court jurisdiction without the defendant personally raising the arbitration agreement as a bar. Suppose, for example, that a party sues on a contract containing an arbitration clause and the defendant party fails to appear in court to answer the plaintiff's charge. May—or must—the trial judge raise the agreement to arbitrate on his own motion? Justice Ulf Nordenson, a member of the Swedish Supreme Court, has argued that the judge is bound to enter a default judgment in favor of the plaintiff.⁴⁰ He argues that arbitration is merely a nonobligatory bar to suit in the ordinary court because it arises from voluntary agreement of the parties and not imperative norms of law.⁴¹ Since the stipulation is not obligatory on the court, the trial judge should enter the default judgment requested by the complaining party. The SCC, however, takes a different view.⁴² Under the SCC's analysis of the applicable jurisdictional rules, a judge has the discretion to dismiss the plaintiff's suit, at least where it is clear that an arbitration clause governs the dispute.⁴³ The practical course of action, obviously, is to make an appearance for the purpose of asserting the arbitration clause as a bar and compelling dismissal of the plaintiff's claim. It would seem that this course is well-advised since it is uncertain whether a district court would exercise jurisdiction.

39. The posture of the case would have been different had the arguments been reversed, i.e., if it had been the inventor who had brought the arbitration proceedings and the defendant who had resisted arbitration. Under such circumstances, the plaintiff could have asked the ordinary courts to ascertain whether respondent was in fact bound by the contract; arbitration could then proceed only in the event that the court determined that respondent was bound.

40. Nordenson, Book Review, 62 SVEN. JUR. (Swed.) 714, 716 (1977).

41. *Id.*

42. ARBITRATION IN SWEDEN, *supra* note 12, at 37.

43. Holmbäck, *Några skiljedomsrättsliga spörsmål*, 63 SVEN. JUR. (Swed.) 373, 375 (1978).

2. *Interference with Allegedly Wrongful Arbitral Proceedings*

While Swedish courts do not directly halt proceedings before arbitrators by issuing injunctions, under certain circumstances they may make decisions which are binding on arbitrators, on judges involved in subsequent proceedings, and on the *Överexekutor*. Section 18 of the Arbitration Act, for example, permits a party to test the "validity or applicability of the arbitration agreement" in court before arbitration proceedings have been terminated.⁴⁴ Nonetheless, the principle of the autonomy of the arbitration clause, widely accepted today in the major legal systems,⁴⁵ is well established in Sweden. Thus, the very issue of the validity of a contract may be submitted to arbitration; the parties are "normally . . . presumed to have intended that *all aspects* of the legal relationship in question should be tried by arbitrators."⁴⁶ Accordingly, in a 1936 decision,⁴⁷ which was reaffirmed as recently as 1976,⁴⁸ the Supreme Court unanimously decided that the district court properly dismissed a case for lack of jurisdiction—thereby deferring to the contractually agreed arbitration procedure—where a factory sued for rescission of a contract of sale relating to knitting machines. The machines were unsatisfactory, but the seller refused to take them back. When the court action was brought, the seller pleaded the existence of the arbitration clause as a bar to jurisdiction. The buyer retorted that the contract was vitiated by fraud; it was void, and the arbitration clause with it. In language familiar to students of arbitration jurisprudence from other countries, the Supreme Court held that the arbitration clause was binding "regardless of whether the contract could otherwise be enforced or not."⁴⁹

44. *Lag om skiljemän* (Act on Arbitration), June 14, 1929, 1929 SFS 145, § 18, reprinted in *ARBITRATION IN SWEDEN*, *supra* note 12, at 192, 197-98. See also Judgment of Oct. 11, 1955, Sup. Ct., Swed., [1955] NJA 500, 500; *ARBITRATION IN SWEDEN*, *supra* note 12, at 93; P. BOLDING, *SKILJEFÖRFARANDE OCH RATTEGÅNG* 212 (1956).

45. 2 G. DELAUME, *supra* note 1, ¶ 13.06; Sanders, *L'autonomie de la clause compromissoire*, in *Hommage à Frédéric Eisemann*, ICC Publication No. 321, at 31, 42 (1978). The "autonomy," "severability," or "independence" of the arbitration clause permits arbitrators to rule on any dispute arising from a contract containing such a clause. An arbitral tribunal's jurisdiction therefore does not depend on the validity of the agreement supporting the clause. This view was adopted in the European Convention on International Commercial Arbitration, *done* Apr. 21, 1961, art. V(3), 484 U.N.T.S. 364. Sweden is not a party to the European Convention.

46. *ARBITRATION IN SWEDEN*, *supra* note 12, at 29 (emphasis added).

47. Judgment of Oct. 3, 1936, Sup. Ct., Swed., [1936] NJA 521.

48. Judgment of Mar. 24, 1976, Sup. Ct., Swed., [1976] NJA 125.

49. Judgment of Oct. 3, 1936, Sup. Ct., Swed., [1936] NJA 521; *ARBITRATION IN SWEDEN*,

3. *The Appointment of Arbitrators*

Ordinarily, arbitrators are appointed by the parties to a dispute. It occasionally happens, however, that a party will fail to exercise its right of appointment, or the appointed arbitrators will be unable to agree on the appointment of a third member of the tribunal, or, after proceedings are commenced, one or both of the parties conclude that one or more of the arbitrators is unsatisfactory. Rather than having to resort to judicial proceedings to resolve these problems, recourse may be had to the *Överexekutor*.

Frequently, the *Överexekutor* will not need to intervene to resolve these difficulties. Where the parties have stipulated that the rules of the ICC or the SCC are to govern proceedings, there is no need to refer disputes to the *Överexekutor* since those institutions have mechanisms for the resolution of these issues. Where no such mechanisms apply, the Arbitration Act gives the *Överexekutor*, upon application of a party, the power to appoint an arbitrator when the adverse party refuses to do so,⁵⁰ and the power to appoint the chairman of a tribunal when the party-appointed arbitrators are unable to agree on an appointment.⁵¹ The *Överexekutor* also may remove unsatisfactory arbitrators upon proper application of a party.⁵² In these instances, the *Överexekutor* with jurisdiction over the dispute is that of the defendant's domicile or, in the case of a foreign party, the *Överexekutor* of Stockholm.⁵³

It is noteworthy that a party failing to appoint an arbitrator may lose its rights to have the matter decided by arbitration. The aggrieved party may choose to abandon arbitration and bring the dispute before a court of law.⁵⁴ As it penalizes the noncomplying party, this principle is viewed properly as a sanction designed to deter the rejection of arbitration, rather than as the result of a pro-court bias.

In the event that the noncomplying party contests the applica-

supra note 12, at 29. Cf. *Prima Paint Co. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (similarly interpreting the Federal Arbitration Act, 9 U.S.C. § 4 (1976)).

50. *Lag om skiljemän* (Act on Arbitration), June 14, 1929, 1929 SFS 145, § 8, reprinted in ARBITRATION IN SWEDEN, *supra* note 12, at 192, 194.

51. *Id.*

52. *Id.* §§ 8, 9, reprinted in ARBITRATION IN SWEDEN, *supra* note 12, at 192, 194-95.

53. *Id.* § 26, reprinted in ARBITRATION IN SWEDEN, *supra* note 12, at 200-01.

54. *Id.* §§ 3, 8, reprinted in ARBITRATION IN SWEDEN, *supra* note 12, at 192, 194. The failure to appoint an arbitrator, in other words, removes the bar to judicial jurisdiction imposed by the arbitration agreement.

bility or validity of the arbitration agreement, the claimant may sue in a district court under section 18 of the Arbitration Act, and the court in such instance can order the noncomplying party to select an arbitrator.⁵⁵ The advantage of petitioning a judge in such instances is that the court's judgment constitutes *res judicata*, and while court proceedings are more cumbersome than application to the *Överexekutor*, this may be worthwhile in cases where procedural issues are complex or where an adversary demonstrates bad faith.

4. *Interim Measures*

The most important interim measure doubtless is conservatory attachment or *kvarstad*. As in other areas, the power to order such an attachment is held by the *Överexekutor*.⁵⁶ The authority to do so in aid of arbitration has been reaffirmed recently by the Supreme Court.⁵⁷ Generally speaking, three conditions are required to justify such a measure. First, the claim on the merits must appear to have some foundation. Second, the property sought to be attached must be in danger of being destroyed or removed, and finally, the applicant must provide security for any damages caused to his adversary in the event that the claim proves to be unfounded.⁵⁸

While notice of application for *kvarstad* normally is served on the adversary, it may be granted *ex parte*. The applicant has one month within which to commence his action on the merits. The adversary may remove the attached property by posting bond.⁵⁹

It is unclear whether one may obtain *kvarstad* in Sweden pending arbitration elsewhere. No court yet has faced this issue. The Justice Department, however, has taken the position that attachments can be based on suits being brought on the merits "before a foreign court or other foreign authority, if its decision may be en-

55. ARBITRATION IN SWEDEN, *supra* note 12, at 75.

56. *Id.* at 177. The appropriate *Överexekutor* is that having jurisdiction over the county where the defendant's property is located. This is in line with art. 8(5) of the ICC Rules, *see* note 5 *supra*, which allows the parties to arbitral proceedings to apply to "any competent judicial authority for interim or conservatory measures," as well as art. 26(3) of the UNCITRAL rules, *see* note 12 *supra*.

57. Judgment of Nov. 9, 1979, Sup. Ct., Swed. (slip op.).

58. ARBITRATION IN SWEDEN, *supra* note 12, at 177.

59. *Id.*

forced here."⁶⁰

B. *Assisting and Controlling Arbitrators*

1. *Assisting Arbitrators in Gathering Evidence*

One of the few areas where arbitrators are limited in their power is in the production of evidence.⁶¹ In general, in order "to promote the investigation of the matter," a party or a witness may be summoned to testify, an expert may be summoned to testify, and documents or other relevant objects may be ordered to be produced.⁶² Unlike Swedish courts, arbitral tribunals may request the production of these types of evidence on their own motions.⁶³

Arbitrators are constrained, however, in that they may not *compel* the attendance of witnesses or the production of documents.⁶⁴ In order to compel such production of evidence, or to require a witness to testify on oath or "truth affirmation," a party may apply to the district court having jurisdiction over the area where the individual is located.⁶⁵ While the arbitrators may not make such a request, they must concur in its necessity for the district court to grant the motion.⁶⁶ In any event, the arbitral tribunal is "entitled to allocate evidentiary weight to the fact that evidence is not forthcoming."⁶⁷ Thus, where appropriate, adverse inferences may be drawn from a party's failure to cooperate in the production of evidence.

It is noteworthy that, with the exception of orders to compel the production of evidence, Swedish courts may not interfere with ar-

60. Department of Justice (Swed.), *Utsökningsbalk*, in [1973] STATENS OFFENTLIGA UTREDNINGAR, No. 22, at 481. This position was taken in connection with a proposal to reform the statute governing execution measures. Since the proposal was not adopted, it is unclear whether the courts would share this view.

61. *Lag om skiljemän* (Act on Arbitration), June 14, 1929, 1929 SFS 145, § 15, reprinted in ARBITRATION IN SWEDEN, *supra* note 12, at 192, 196-97.

62. *Id.* The power of arbitrators to compel witnesses to appear is limited. Moreover, they may not administer oaths.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* Once a judicial request for the production of evidence has been granted, the requested evidence is produced in accordance with the rules otherwise governing such production in district courts. Failure to comply with the court order may result in fines, arrest, and imprisonment. Ordinarily, both parties are entitled to examine the witness and the resulting testimony is transmitted to the arbitral tribunal in the form of a deposition. ARBITRATION IN SWEDEN, *supra* note 12, at 110.

67. *Id.* at 108-09.

bitral proceedings. Rather, the structure of the process is designed to permit arbitration to proceed swiftly and autonomously. Even in the context of judicial intervention for the production of evidence, the court's role clearly is shaped so as to assist in the resolution of the underlying dispute and not to impede it.

2. *Controlling the Conduct of Arbitrators*

Although arbitrators are not subject to the direct control of the courts in the discharge of their functions, some limits on their discretion do exist. Since the arbitrator occupies his position by agreement of the parties, it may be said that he has contractual obligations.⁶⁸ Accordingly, an arbitrator may be either civilly or criminally liable to the parties for the breach of his duties. Whether civil liability exists for mere negligence, however, is unclear.

The SCC has taken the position that an arbitrator may be liable for civil damages either if he obstructs proceedings (by refusing to act or otherwise) or if he has failed to observe the rules of procedure (which results in tangible damage by reason of delay or the annulment of proceedings).⁶⁹ Otherwise, an arbitrator may be liable by reason of his decision on the merits only if his action was criminal.⁷⁰ According to the SCC, "The fact that the tribunal has misinterpreted the evidence or misapplied the law, however negligently, is no ground for setting the award aside, and far less for making an arbitrator liable in damages."⁷¹

Ulf Nordenson, a member of the Supreme Court of Sweden, has criticized this position:

[T]he relationship between the parties to the proceedings on the one hand and the arbitrators on the other, can hardly be characterized as non-contractual but rather as a mandate. If the arbitrators by negligence fail to perform their part of the contract, they should in principle be liable in damages to their principals. And if the arbitrators by negligence have made a mistake either in law or in fact, and their mistake is of importance to their de-

68. *Id.* at 81-82.

69. *Id.* at 82-83.

70. The SCC states, however, that there is no reported case in which such a claim has been made. *Id.*

71. *Id.* at 83.

cision and has influenced the award, it would seem to me that the arbitrators should be liable for any damage caused thereby, in the same way that a lawyer is liable to his client for giving wrong advice.⁷²

A final, indirect means of controlling arbitrators exists with respect to their compensation. Absent explicit agreement on compensation, the arbitrators are permitted to order payment of reasonable compensation for their services.⁷³ Such an order may be challenged, however, by any party, provided he institutes suit within sixty days of receipt of the award.⁷⁴

C. *Void and Voidable Awards*

Concern for the integrity and autonomy of the arbitral process has resulted in Sweden restricting narrowly the grounds upon which awards may be challenged in the courts. Arbitrators are given wide latitude in deciding issues of fact and law, and unless the parties explicitly stipulate that an award is appealable,⁷⁵ the

72. Nordenson, *supra* note 40, at 716. Justice Nordenson's view has been challenged by other commentators. Prof. Holmbäck, for example, agrees with the SCC that an arbitrator is not to be considered to have the same professional responsibility as does a lawyer, an architect, or an accountant, and noted further:

Theoretically, this result may be grounded on the conclusion that the parties by agreeing to arbitration accepted the consequences of a possible mistake by the arbitrators. Practically, this kind of liability (for "culpable" error of law or fact) would lead to a lessened willingness to accept the mission of arbitrator and to arbitrators' beginning to keep an eye on the party they believe is most likely to cause "trouble" if the result were unfavorable to it. Such liability would also necessitate the review of merits of awards by the ordinary courts of law.

Holmbäck, *Några skiljedomsrättsliga sporsmål*, 63 SVEN. JUR. (Swed.) 373, 375-76 (1978). See also A. HASSLER, *SKILJEÄRFÖRÄRANDE* (1966); Trygger, *Skiljeaftal och Skiljemannaförfarande enligt svensk rätt* (pts. 1-2); 1895 TIDS. RET. (Swed.) 1, 241. Holmbäck cites other countries' practice as support for his opinion. See 2 A. BAUMBACK & K. SCHWAB, *SCHIEDSGERICHTSBARKEIT* 93 (1960) (Federal Republic of Germany); M. DOMKE, *THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION* 225-30 (1968) (United States); A. LINDBOE, *PRIVAT RETTERGANG* 73 (1944) (Norway); 4 J. ROBERT, *ARBITRAGE CIVIL ET COMMERCIAL EN DROIT INTERNE ET INTERNATIONAL PRIVÉ* 118 (1967) (France); T. TIRKKONEN, *SKILJEMANNAFÖRFARENDEN: PROCESSRÄTTLIG UNDERSÖKNING* 90 (Finland); Gill, *National Reports: United Kingdom*, [1977] Y.B. COMM. ARB. 90, 102 (England).

73. *Lag om skiljemän* (Act on Arbitration), June 14, 1929, 1929 SFS 145, § 23, reprinted in *ARBITRATION IN SWEDEN*, *supra* note 12, at 192, 199-200.

74. *Id.* § 25, reprinted in *ARBITRATION IN SWEDEN*, *supra* note 12, at 192, 200. The arbitrators also may challenge the compensation provided by the parties, but this claim also must be brought within 60 days from the date the award is rendered.

75. See *id.* § 2, reprinted in *ARBITRATION IN SWEDEN*, *supra* note 12, at 192, 192. Significantly, if an award is appealable the Arbitration Act is inapplicable to the proceedings. *Id.*

tribunal's determination of all substantive issues is final. In fact, the proffer of false evidence, or the discovery of new evidence, will be insufficient to overturn an award. In a 1976 decision, the Svea Court of Appeal explained:

The legislature has endeavoured to limit (grounds of invalidity) as much as possible. Since criminal conduct or other improper conduct during arbitral proceedings, for instance when a witness—intentionally or not—gives false evidence, is not listed among the grounds of invalidity, and since there is no case law that indicates that other grounds of invalidity may exist, the Court of Appeal is of the opinion that even if . . . [the witness] has given false evidence, this should not be taken into consideration under existing Swedish law when determining whether the award is void or not.⁷⁶

Accordingly, awards may be challenged only for procedural defects. These defects can be classified into two categories: those rendering the award void and those rendering the award voidable. The distinction between the types of defects is that in the latter case, failure to sue promptly to have the award set aside constitutes a waiver of the irregularity.⁷⁷

The class of awards which are void is rather narrow. It includes awards rendered where there was no valid arbitration agreement,⁷⁸ where the matter was not arbitrable,⁷⁹ or where the award was not in writing or signed by at least a majority of the arbitrators.⁸⁰ Although the Arbitration Act is silent as to whether these are the only bases for a determination that an award is void, it is likely that an arbitral decision also may be found to be void where it has been procured improperly,⁸¹ as, for example, by fraud or bribery, or where it purports to bind one who is not a party to the arbitration agreement.⁸²

Awards are voidable, by contrast, (1) to the extent the tribunal

76. Judgment of July 28, 1976, Svea Ct. App., Swed. (slip op.) (*appeal pending*), quoted in 2 J. WETTER, *supra* note 1, at 540.

77. ARBITRATION IN SWEDEN, *supra* note 12, at 154.

78. *Lag om skiljemän* (Act on Arbitration), June 14, 1929, 1929 SFS 145, § 20, reprinted in ARBITRATION IN SWEDEN, *supra* note 12, at 192, 198.

79. *Id.*

80. *Id.*

81. ARBITRATION IN SWEDEN, *supra* note 12, at 149-50.

82. *Id.* at 148.

has acted outside the scope of its mandate; (2) if the award was rendered after the time period for its rendition had expired; (3) if a decision was reached in a case where Sweden was not the proper forum; (4) if an arbitrator was appointed improperly; or (5) if any other procedural irregularity occurred *and*, in all probability, it is likely that such irregularity influenced the decision.⁸³ In addition to the waiver which necessarily results from a party's failure to challenge an award on voidable grounds within sixty days, waiver also will be found where a party takes part in proceedings without objection.⁸⁴ Indeed, actual notice of the irregularity is not necessarily required. According to Justice Nordenson:

[O]ne may consider the factor of whether the party *ought* to have been aware of the irregularity. In other words he ought to lose his right to invoke the irregularity if he through negligence failed to inform himself of it. One shall remember that the prevailing party's interest in the efficacy of the award is great and that it should be set aside only for weighty reasons.⁸⁵

D. *Enforcing Foreign Awards*

As noted earlier,⁸⁶ Sweden is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁸⁷ It has implemented its obligations under this agreement through amendments to the Foreign Arbitration Act.⁸⁸

The Foreign Arbitration Act, like its domestic counterpart,⁸⁹ reflects the legislative judgment that the arbitral process, to the fullest extent possible, should be given the greatest possible effect. Accordingly, Swedish courts are denied jurisdiction over disputes

83. *Lag om skiljemän* (Act on Arbitration), June 14, 1929, 1929 SFS 145, § 21, reprinted in ARBITRATION IN SWEDEN, *supra* note 12, at 192, 199.

84. *Id.*

85. Nordenson, *supra* note 40, at 717. Cf. ARBITRATION IN SWEDEN, *supra* note 12, at 167. ("[M]ere conduct will not amount to waiver unless a party has been conscious of irregularity.")

86. See note 8 *supra* & accompanying text.

87. See note 7 *supra*.

88. *Lag om utländska skiljeavtal och skiljedomar* (Act on Foreign Arbitration Agreements and Awards), June 14, 1929, 1929 SFS 147, reprinted in ARBITRATION IN SWEDEN, *supra* note 12, at 202.

89. *Lag om skiljemän* (Act on Arbitration), June 14, 1929, 1929 SFS 145, reprinted in ARBITRATION IN SWEDEN, *supra* note 12, at 192.

subject to foreign arbitration agreements.⁹⁰ Further, this legislation raises a presumption that foreign awards are enforceable in Sweden⁹¹ and defines narrowly the class of cases where the Svea Court of Appeal, the court with jurisdiction over the enforcement of foreign awards,⁹² may refuse to give effect to an award. Among the grounds upon which a foreign award may be challenged in Sweden are: (1) invalidity of the arbitration agreement under its governing law; (2) inability of the defendant to present its case; (3) ultra vires action by the arbitrators; (4) invalidity or unenforceability of the award in the country where rendered; (5) nonamenability of the subject matter to arbitration under Swedish law; and (6) where enforcement is contrary to Swedish public policy.⁹³

Despite the existence of these various grounds for nonrecognition of foreign awards, the Swedish courts consistently have demonstrated an unwillingness to impair the integrity of the arbitral process by refusing enforcement of foreign awards. In short, these exceptions to the basic rule of enforceability are strictly construed.

For example, in 1934 the Supreme Court upheld an award rendered in the Netherlands in favor of a Dutch company.⁹⁴ The losing party was a Swedish buyer, which had contracted in August 1931 to purchase ammonia, to be delivered in Sweden at a price of 90 Swedish crowns per ton. One month after the contract was concluded, Sweden abandoned the gold standard, and the value of the crown dropped drastically, particularly in relation to the Dutch florin. The Dutch company insisted that it be paid in florins on the basis of the crown's original gold parity; the Swedish buyer refused. The parties brought their dispute before three Dutch arbitrators who found for the Dutch seller. In an action for the enforcement of the award in Sweden by the Dutch company, the Swedish defendant argued that the arbitral tribunal's decision constituted an intentional disregard for applicable principles of law and that its enforcement therefore would violate public policy. It

90. *Lag om utländska skiljeavtal och skiljedomar* (Act on Foreign Arbitration Agreements and Awards), June 14, 1929, 1929 SFS 147, § 3, reprinted in *ARBITRATION IN SWEDEN*, *supra* note 12, at 202, 202. Swedish courts lack jurisdiction to hear these disputes if the arbitration agreement is valid under the applicable foreign law and the dispute is arbitrable under Swedish law. *Id.*

91. *Id.* § 6, reprinted in *ARBITRATION IN SWEDEN*, *supra* note 12, at 202, 203.

92. *Id.* § 8, reprinted in *ARBITRATION IN SWEDEN*, *supra* note 12, at 202, 204.

93. *Id.* § 7, reprinted in *ARBITRATION IN SWEDEN*, *supra* note 12, at 202, 203-04.

94. Judgment of Oct. 5, 1934, Sup. Ct., Swed., [1934] NJA 491.

was argued that the contract had contemplated payment in Swedish crowns without any reference to gold, that the nominalist principle had universally replaced the principle of "actual" value, and that the arbitral award had been subject to great criticism in the Netherlands because of its variance with the holdings of courts and other arbitral tribunals.

The Supreme Court refused to accept defendant's arguments. The report of the Supreme Court's reasoning is worth quoting:

[I]t is an ineluctable basic principle of the institution of arbitration that the degree of correctness of the conclusions of the arbitrators in a case like this is not relevant to the award's legal enforceability. . . . It is understandable that an award is to be deemed invalid if *in the procedure* the most elementary legal principles have been disregarded. . . . However, as to legal issues relating to the merits of the dispute the arbitrators may decide according to their own understanding of the law and their own conscience, without being bound by the prescriptions of one or another legal system or by case law, however firmly established, with respect to a particular question. Under all circumstances, provided that one stays within the bounds of substantive questions of law, the decision of the arbitrators must be binding for the parties.⁹⁵

As the above example aptly illustrates, the Swedish courts, in keeping with the policies enunciated by the Swedish legislature with regard to arbitration, are exceedingly reluctant to disturb the smooth and independent functioning of the arbitral process. Indeed, it is arguable that the Foreign Arbitration Act is more restrictive than the New York Convention.⁹⁶

95. *Id.* at 493.

96. See ARBITRATION IN SWEDEN, *supra* note 12, at 174; Hjerner, *Recourse to Law Courts in International Arbitration in Sweden*, in *Hommage à Frédéric Eisemann*, *supra* note 45, at 61, 75 n.14. The Swedish Supreme Court, however, has questioned whether there are differences between the Foreign Arbitration Act and the New York Convention. See Judgment of Aug. 13, 1979, Sup. Ct., Swed. (slip op.), translation reprinted in Appendix, *infra*, at 244, 246. For other commentaries supporting the latter point of view, see Sanders, *Commentary, Court Decisions on the New York Convention 1958*, [1976] Y.B. COMM. ARB. 207, 214 (1976); Judgment of Feb. 21, 1980, Cour d'appel, Paris, 107 CLUNET 661, 666 note P. Fouchard (1980).

II. JURISDICTION OVER ARBITRAL AWARDS INVOLVING FOREIGN PARTIES

The Swedish courts' unwillingness to intervene so as to disrupt the arbitral process is no more evident than with regard to awards involving foreign parties. Whether the award is rendered within or without Sweden, the desire to maintain the integrity of the institution of arbitration predominates and, as a result, every effort is made to give effect to an award. Still, of course, some grounds exist which a party may raise to block either the institution of arbitral proceedings or the validity of awards. Unlike the domestic context, where prudential concerns relative to arbitration dominate, the international setting is complicated further by the necessary inquiry into whether Swedish courts have jurisdiction over the parties. For present purposes, it may be helpful to distinguish between arbitrations which occur within and those which take place outside of Sweden.

A. *Arbitrations in Sweden*

Three specific issues arise in this setting. First, does an agreement to arbitrate in Sweden confer jurisdiction on Swedish courts to determine the validity of an agreement to arbitrate under Swedish law? Second, assuming that Swedish courts have such authority, what effect, if any, does a judicial decision rendered in Sweden have on a private arbitration? In other words, assuming the invalidity of an arbitration clause—and a decision to that effect—is an arbitral tribunal thereby foreclosed from determining for itself the validity of the clause and proceeding with arbitration? Finally, when an award is rendered in Sweden, do Swedish courts always have jurisdiction—apart from an enforcement proceeding—to resolve challenges to the validity of such awards?

The SCC has taken the position that acceptance of the jurisdiction of Swedish courts for the purpose of challenge to the arbitration clause should be implied whenever it has been agreed that arbitration is to take place in Sweden.⁹⁷ While the Arbitration Act itself does not confer jurisdiction on the courts to determine the validity of an arbitration clause challenged as void under section 20, the statute does provide that the district court having personal

97. ARBITRATION IN SWEDEN, *supra* note 12, at 94. See also Rättegångsbalk (Code of Judicial Procedure), July 18, 1942, 1942 SFS 740, ch. 10, § 16.

jurisdiction over the defendant shall have jurisdiction over actions brought under § 21 (voidable awards).⁹⁸ Section 26 further provides that "[i]f there is no competent court according to these provisions, the action shall be tried by the Stockholm District Court."⁹⁹ It could thus be argued that in any challenge to an arbitral agreement stipulating that the arbitration shall occur in Sweden, the district courts would have jurisdiction. Professor Hjermer, however, disputes this conclusion.¹⁰⁰ While the main Swedish rule of jurisdiction is that the court where the respondent has his habitual residence is competent in all matters, and *with respect to a Swedish resident respondent* the District Court where he resides may hear an action for a declaratory judgment on the validity of an arbitration clause, Hjermer contends that there is no forum rule applicable to foreign respondents for such actions.¹⁰¹ Accordingly, concludes Professor Hjermer, "one may take for granted that a Swedish court would not assume jurisdiction in such respect against a foreigner objecting thereto."¹⁰²

Assuming that the Swedish courts do have jurisdiction by virtue of the arbitration agreement stipulating that the award shall be rendered in Sweden, it is nonetheless still unclear whether a judicial decision would have any effect on a private arbitration. Suppose, for example, that a request for arbitration is made to the ICC Court of Arbitration and the defendant concludes that a Swedish court would determine that the subject matter is not arbitrable under Swedish law. A decision in favor of the defendant likely would be to little avail. The ICC Court of Arbitration does not see its role as going further into these questions than to ascertain the *prima facie* existence of an agreement to arbitrate under its aegis.¹⁰³ The relevance and effect of the Swedish judge's decision as indicative of Swedish law would be a matter to be judged by the arbitrators. Thus, the goal to avoid the constitution of a tribunal would not be reached necessarily.¹⁰⁴ From the defendant's point of

98. *Lag om skiljemän* (Act on Arbitration), June 14, 1929, 1929 SFS 145, § 21, reprinted in ARBITRATION IN SWEDEN, *supra* note 12, at 192, 199.

99. *Id.*

100. Hjermer, *supra* note 96, at 64.

101. *Id.*

102. *Id.*

103. ICC Rules, *supra* note 5, art. 7.

104. This is at least what I *expect* would be the result, given analogous experience with ICC arbitration. Since various international arbitral organizations operate with lesser or greater discretion on such matters, I would venture to make a general statement. Under

view, however, such a decision would not be totally wasted. If the plaintiff were to succeed in the arbitration he would be unable to enforce the award in Sweden because the prior determination would be *res judicata*. Moreover, in an enforcement action in another country, the fact that the award was rendered in Sweden would mean that article V(1)(e) of the New York Convention could raise a bar to enforcement of the subsequent award.¹⁰⁵

The final question which remains to be considered is whether, once an award is rendered, Swedish courts always have jurisdiction to determine if the award is void or voidable under sections 20 and 21 of the Arbitration Act. Apart from the general principles governing the exercise of jurisdiction, consideration of this issue turns on the text and underlying policies of the New York Convention together with the question of whether arbitral awards must have a "nationality."

As for awards which are alleged to be *void*, Professor Hjermer notes that they would be void even without a declaratory judgment, and therefore the general rule applies that

only in the event that the defendant is a resident of Sweden will Swedish courts have jurisdiction. . . . The need for such a forum in Sweden would be still less than in the case of a concurrent action. The invalidity of the award can be invoked in any enforcement action in Sweden, and likewise under the New York Convention all [Swedish] grounds for invalidity . . . can be relied upon against an action for enforcement.¹⁰⁶

As for the case of *challenges* to awards under section 21 of the Arbitration Act, if the challenge is based on the contention that the arbitrators exceeded their authority, Hjermer distinguishes be-

Rule 11 of the SCC Rules, however, *reprinted in* ARBITRATION IN SWEDEN, *supra* note 12, at 184, 188, the dispute goes to the arbitral tribunal "unless it is obvious that jurisdiction is lacking."

105. New York Convention, *supra* note 7, art. V(1)(e). See note 119 *infra* for the text of this provision.

Article V(1)(e) allows a court to refrain from enforcing a foreign decision where the award was set aside or not binding in the country where rendered. Presumably, therefore, a decision directly holding that the arbitration clause was not valid as to the dispute in question would be sufficient to meet this requirement. It is noteworthy, however, that the language of this provision is not mandatory. That is, the New York Convention does not require that the court considering a request for enforcement reject such a request. See notes 119-50 *infra* & accompanying text for a full discussion of the meaning of this provision.

106. Hjermer, *supra* note 96, at 74.

tween three situations:¹⁰⁷

—*If the challenging party is Swedish and the respondent a foreigner*, the action may be brought before the District Court of Stockholm.¹⁰⁸ If the challenging party loses, he is exposed to an enforcement action in Sweden where he would be barred by res judicata from raising the contention that the arbitrators had exceeded their authority. For these reasons, the court action should be allowed.

—*If the challenging party is foreign and the respondent is Swedish*, the possibility of raising the defense under the New York Convention¹⁰⁹ should be a satisfactory substitute for the jurisdiction of Swedish courts to declare the invalidity of the award:

To allow a losing party to challenge the award in a Swedish court in spite of the waiver when he is free at any time, irrespective of what might be the outcome of the proceedings in the Swedish court, to raise the same defence in any enforcement action against him outside Sweden, seems to be an invitation to dilatory tactics.¹¹⁰

—Finally, *if both parties are foreign*, Hjernér states that:

Normally, the Swedish courts . . . (would) have nothing to do with either of the parties and enforcement of the award is most unlikely to take place in Sweden. Normally, the defense of excess of authority would be available to the losing party in an enforcement action taken against him in any country party to the New York Convention which would qualify as an acceptable forum of jurisdiction in substitute to the Swedish courts. Even the courts in the country of either of the parties may be more acceptable to the parties than any Swedish court. It cannot be said that a Swedish court would be particularly qualified to review the interpretation made by the arbitrators of an arbitration clause drawn up in a foreign language under a foreign law by two parties of which neither was from Sweden. If the parties themselves designated

107. *Id.* at 70-72. Hjernér's arguments regarding excess of authority, if applied to challenges based upon technical irregularities, would yield similar results.

108. *Lag om skiljemän* (Act on Arbitration), June 14, 1929, 1929 SFS 145, § 26, reprinted in *ARBITRATION IN SWEDEN*, *supra* note 12, at 192, 200-01.

109. New York Convention, *supra* note 7, art. V(1)(c).

110. Hjernér, *supra* note 96, at 72.

Sweden as place of arbitration, perhaps one might assume that they would prefer the jurisdiction of the Swedish courts to the jurisdiction of the courts in any other country; but if they expressly waived recourse to the courts, it is difficult to see why this waiver should not be effective at least in respect of the jurisdiction of Swedish courts and why the Swedish courts should assume jurisdiction just because the parties happened to find Sweden a convenient place in which to meet for the arbitration proceedings.¹¹¹

Hjerner's view suggests that there may exist such a thing as transnational arbitration, although this view is contested by other Swedish writers. Dr. J. Gillis Wetter, for example, argues that "the main principle on which the New York Convention rests is the application of a territorial test: an award must be valid under the laws of the country where it is rendered in order to be enforceable in other countries."¹¹² This notion of territoriality finds an echo in the position of the SCC which states that "Swedish law regards as Swedish any awards given in Sweden, even when all parties are non-residents of Sweden, the transaction in dispute has no relation to Sweden and Swedish law does not govern the substance of the dispute."¹¹³

Whether this interpretation of the relationship between the Arbitration Act and the Foreign Arbitration Act is correct, and if so whether it obliges Swedish courts to pronounce themselves on requests for declarations of invalidity in all cases where arbitration proceedings have taken place in Sweden, appear to be questions on which the most important authority, namely the Swedish court system itself, has yet to make a definitive pronouncement.¹¹⁴

The positions of Professor Hjerner may be deemed contrary to one of the premises underlying the New York Convention. In the

111. *Id.*

112. 2 J. WETTER, *supra* note 1, at 405.

113. ARBITRATION IN SWEDEN, *supra* note 12, at 145.

114. The issue apparently has been faced squarely only in France, where, on February 21, 1980, the Cour d'appel de Paris decided that an arbitral award concerning two nonresident parties was not a French award even though the contract provided that the locale of the arbitral proceedings was to be Paris. Reference to the Rules of the ICC, *see* note 5 *supra*, which authorize arbitration to proceed without reference to the law of the place of arbitration (article 11), was sufficient to "detach" the arbitration from the French legal order. Accordingly a challenge to the award would not be heard by the French courts. Judgment of Feb. 21, 1980, Cour d'appel, Paris, *reprinted in* 107 CLUNET 660 (1980).

drafting of the Convention, the courts of the place of arbitration were clearly thought to have substantial authority in the process of enforcement.¹¹⁵ The notion of a transnational award would render those courts irrelevant.¹¹⁶

If the New York Convention is being "subverted" in this respect, it may be a good thing. Professor Wetter certainly is correct in thinking that the present Secretary General of the ICC's Court of Arbitration regrets the Convention's emphasis on the law of the locale of arbitration.¹¹⁷ One may even conclude that the draftsmen of the New York Convention showed consummate skill in employing language that would be universally acceptable, thus avoiding what at the time was a difficult concept to digest, namely that of a supranational award, but at the same time letting the nonmandatory nature of the reference to the award's country of origin prepare the advent of such awards. Now that national jurists are becoming more comfortable with the international arbitral process, it may be time for them to disavow control over commercial arbitrations merely because they take place within the territory of their own States.¹¹⁸

B. *Arbitrations Outside Sweden*

The heart of the debate concerning the existence of a transnational award procedure centers on the meaning of article V(1)(e) of the New York Convention.¹¹⁹ Under this provision, foreign awards are enforceable unless the challenging party can show that the award is not "binding" in the country where rendered.¹²⁰ What

115. Comment on the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Note by the Secretary General, U.N. Doc. E/CONF.26/2 (1958).

116. Cf. Hjerner, *supra* note 96, at 62.

117. Y. DERAIS, *Introduction*, in *Hommage à Frédéric Eisemann*, *supra* note 45, at 12-13.

118. This is precisely what the Cour d'appel of Paris did. See note 114 *supra*.

119. Article V(1)(e) provides:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

....

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

New York Convention, *supra* note 7, art. V(1)(e).

120. Enforcement of awards in a country other than where rendered also may be avoided under the New York Convention upon a showing of 1) incapacity; 2) invalidity of the arbitral award.

"binding" precisely means, however, still is subject to some doubt. It is clear that this provision was designed to avoid the problem of "double *exequatur*," that is, the situation where an award, to be valid abroad, had to be enforced first in the forum where rendered. In this respect the New York Convention clearly differs from the Geneva Convention for the Execution of Foreign Arbitral Awards of 1927,¹²¹ which essentially required the double *exequatur*. In the Geneva Convention, an award, to be enforceable abroad, had to be "final"¹²² in the country where rendered.¹²³ The choice of the word "binding" in the New York Convention thus was designed to eliminate this cumbersome procedure. Still, the precise meaning of this term has remained unclear. A recent decision of the Supreme Court of Sweden, however, breaks new ground in clarifying this term—and may be an important step towards the development of transnational commercial awards.

In *General National Maritime Transport Co. v. Götaverken Arendal Aktiebolag*,¹²⁴ the Supreme Court held that the mere pendency of a challenge to the validity of an award in the country where rendered was an insufficient basis for delaying or refusing enforcement of the award in Sweden. Appellant, an agency of the Libyan government, contracted with respondent, a Swedish shipyard, for the construction and delivery of three oil tankers. When respondent sought to deliver the completed vessels, appellant refused to accept them and make final payment on the balance of the purchase price. It argued that the vessels failed to conform to contract specifications in several respects. In particular, it insisted that respondent violated boycott laws of the Libyan Arab Republic which, according to appellant, impliedly were incorporated into the contract. Pursuant to the contract, an arbitral tribunal was convened in March 1977.

In December 1977, the tribunal concluded that Swedish law

tration agreement; 3) failure to give proper notice of the appointment of an arbitrator, or of the arbitration proceedings; 4) *ultra vires* action of the arbitrators; or, 5) defects in the composition of the arbitral tribunal. Finally, if the reviewing court finds that the dispute was not arbitrable under its law or that enforcement of the award would be contrary to public policy, it also may refuse enforcement. *Id.* art. V.

121. See note 7 *supra*.

122. Geneva Convention, *supra* note 7, art. 1(a).

123. *Id.* art. 4(3).

124. Judgment of Aug. 13, 1979, Sup. Ct., Swed., (slip op.) translation reprinted in Appendix, *infra*, at 244.

governed the dispute¹²⁵ and held that the Libyan boycott legislation did not excuse rejection of the vessels when tendered.¹²⁶ The award, as amended,¹²⁷ was confirmed by the ICC Court of Arbitration¹²⁸ and respondent moved to enforce the award in Sweden, attaching the vessels as security. Meanwhile, appellant sought to forestall execution by attacking the validity of the award in France. When respondent sought to enforce the award in the Svea Court of Appeal,¹²⁹ appellant interposed various procedural irregularities¹³⁰ and argued further that respondent's motion ought not to be granted while appellant's challenge was pending in France. The court rejected appellant's arguments and granted respondent's motion to enforce the award.

125. *AB Götaverken v. General National Maritime Transport Co.*, slip op. at 12 (1977) (draft award) (Braekhus, Tashani, & Jolibois, Arb.), *reprinted in* 2 J. WETTER, *supra* note 1, at 193.

126. *Id.* at 12-13, *reprinted in* 2 J. WETTER, *supra* note 1, at 193-94. The arbitrators had appointed an independent expert who had found that the vessels failed to conform to specifications with respect to certain details. Their failure to be met, according to the expert, resulted in a reduction in the value of each vessel of something under \$200,000—less than one-half percent of the \$40 million price of each vessel. Thus, the arbitrators decided that the buyer had to pay the last total payment of \$30 million, but that this amount was to be reduced by some \$189,000 per vessel. This conclusion was expressed in a curious fashion, however. In the dispositive section of the award, the tribunal concluded "that the buyer had good reasons to reject the three vessels, but must take them now with a price reduction, representing the valuation of the deviations." *Id.* at 19, *reprinted in* 2 J. WETTER, *supra* note 1, at 198.

The ICC Court of Arbitration, because of this internal inconsistency in the draft award, declined to confirm the award as drafted. *See* Letter from Yves Derains, Secretary General of the Court of Arbitration, to Messrs. Jolibois, Braekhus and al Tishanny (*sic*) (Jan. 23, 1978), *reprinted in* 2 J. WETTER, *supra* note 1, at 200. Thereafter, the tribunal, over the dissent of Tashani, modified the award.

127. *AB Götaverken v. General National Maritime Transport Co.* (1978) (award) (Jolibois, Braekhus, & Tashani, Arb.), *reprinted in* 2 J. WETTER, *supra* note 1, at 209.

128. Letter from Alexander Schill, Secretary of the Court of Arbitration, to Sverker Albrektson (Apr. 27, 1978), *reprinted in* 2 J. WETTER, *supra* note 1, at 229. It should be noted that the Court of Arbitration does not review awards in the sense that appellate courts review decisions of lower courts. Rather, it merely checks them for conformity with technical requirements.

129. Under the Foreign Arbitration Act, the Svea Court of Appeal has exclusive jurisdiction over the enforcement of foreign arbitral awards. *See Lag om utländska skiljeavtal och skiljedomar* (Act on Foreign Arbitration Agreements and Awards), June 14, 1929, 1929 SFS 147, § 8, *reprinted in* ARBITRATION IN SWEDEN, *supra* note 12, at 202, 204.

130. In particular, appellant contended that the tribunal went beyond the matters submitted to it in reaching its decision; that the failure of Tashani, the Libyan arbitrator, to participate in all decisions of the tribunal, alteration of the draft award after 'pressure' from the ICC Court of Arbitration, and allocation of costs constituted procedural irregularities; and that the ICC action amounted to undue influence. Each of these claims was rejected.

On appeal, the Supreme Court affirmed.¹³¹ Given that an appeal was pending in France, the issue was whether the award had become binding for purposes of the New York Convention and section 7 of the Foreign Arbitration Act.¹³² Appellant adduced evidence that, under French law, institution of a challenge to an award was sufficient to suspend its effectiveness.¹³³ The Supreme Court noted, however, that the word "binding" in the Swedish text and in the New York Convention

was intended to give relief to the party relying on the award. The intent was, *inter alia*, to avoid the need for double *exequatur* or the need for the party relying on the award to prove that it is enforceable according to the authorities of the country in which it was rendered.¹³⁴

Furthermore, the Court noted that in this case the parties' contract had provided for binding arbitration, and that the parties had reaffirmed this by conducting the proceedings under the Rules of the ICC Court of Arbitration, which contain the provision that awards are final.¹³⁵ Accordingly, it held that the award, for the purposes of section 7 of the Foreign Arbitration Act, had become enforceable and binding as between the parties in France. The fact that a subsequent challenge had been brought before the French courts, and that such a challenge may have had an effect on the award's enforceability in France, did not affect this conclusion. Thus, as to the contention that under French law such a challenge *ipso jure* resulted in suspension of enforceability in that country, the Court noted that the Foreign Arbitration Act required positive action, *i.e.*, a decision specifically declaring that the award was set aside or suspended.¹³⁶ In the absence of proof of such a decision by

131. Judgment of Aug. 13, 1979, Sup. Ct., Swed. (slip op.), translation reprinted in Appendix, *infra*, at 244, 244.

132. *Lag om utländska skiljeavtal och skiljedomar* (Act on Foreign Arbitration Agreement and Awards), June 14, 1929, 1929 SFS 147, § 7, reprinted in ARBITRATION IN SWEDEN, *supra* note 12, at 202, 203-04.

133. Letter from J.-M. Lassez to Lars Boman, Counsel for Appellant (Jan. 19, 1979) (copy on file at the offices of the *Virginia Journal of International Law*).

134. Judgment of Aug. 13, 1979, Sup. Ct., Swed. (slip op.), translation reprinted in Appendix, *infra*, at 244, 246.

135. ICC Rules, *supra* note 5, art. 24.

136. Judgment of Aug. 13, 1979, Sup. Ct., Swed. (slip op.), translation reprinted in Appendix, *infra*, at 244, 247. This is consistent with the holding of a pre-New York Convention case, Judgment of Mar. 16, 1931, Sup. Ct., Swed., [1931] NJA 99, in which the Supreme Court rejected a Swedish defendant's resistance to a Belgian award on the grounds that the

a French court, appellant's objection to enforcement of the award in Sweden was rejected.

The Supreme Court's reasoning reaffirms one of the fundamental objectives of the New York Convention: elimination of the "double *exequatur*" principle of the Geneva Convention.¹³⁷ Adoption of the word *binding* in article V(1)(e) of the New York Convention was intended to make an award enforceable as soon as ordinary means of recourse are no longer available in the country where the award is rendered. According to Professor Sanders, "the mere possibility of extraordinary means of recourse, such as an action for setting aside, does not prevent the award from becoming binding."¹³⁸

Indeed, the classification of types of challenges to awards was viewed as critical by the Supreme Court, which reasoned that an award would not be binding if it were subject to an appeal *on the merits* of the arbitrators' decision. When the parties have accepted arbitration as constituting *final* disposition of their dispute, however, the award becomes, as the Court held, binding "as of the moment and by virtue of the very fact that it was rendered,"¹³⁹ the only remaining potential challenges are extraordinary forms of appeals, whose pendency do not affect the binding nature of the award.

The Supreme Court's reading of the New York Convention is in line with the original wording proposed by the ICC during the preparation of the Convention. The ICC proposal, which was diluted in the final text, would have required for execution only that the award had *not been set aside* in its country of origin, a wording less ambiguous than the expression "binding" which was finally

failure of the winning party to obtain *exequatur* in Belgium should bar enforcement. The Supreme Court affirmed the Svea Court of Appeal's holding that *exequatur* "concerned only the execution authorities in Belgium and lacked any significance outside Belgium." *Id.* at 101.

137. See Sanders, *supra* note 96, at 214.

138. Sanders, *Twenty Years' Review*, *supra* note 1, at 275. See also Judgment of June 8, 1967, Landgericht, Bremen, *extract reprinted in* [1977] Y.B. COMM. ARB. 234.

Others have gone further, maintaining that because of the difficulty of distinguishing between "ordinary" and "extraordinary" means of recourse under various national systems, a foreign award is "binding" for the purposes of the New York Convention once it is rendered unless it is either conditional or subject to review by a second level *arbitral* body. See Oppetit, *Le refus d'exécution d'une sentence arbitrale étrangère dans le cadre de la Convention de New York*, [1971] REVUE DE L'ARBITRAGE 97, 101.

139. Judgment of Aug. 13, 1979, Sup. Ct., Swed. (slip op.), translation reprinted in Appendix, *infra*, at 244, 246.

adopted.¹⁴⁰

The bold decisiveness of the Swedish decision stands in clear relief if it is compared with Justice Bengtsson's dissent.¹⁴¹ Opting for a more cautious solution, the dissent called for a stay of any execution in Sweden pending a French decision as to the validity of the award.¹⁴² The flaw of this position is that it does not appear to reflect the progress toward facilitating recognition of awards which the New York Convention is understood to have represented relative to the Geneva Convention. Justice Bengtsson may have been influenced by the proximity of the date set for oral argument in France with respect to appellant's French challenge. In point of fact, no decision, even from the court of first instance, has been rendered in this action in the more than two years following its filing.¹⁴³ If the courts of Sweden were to have waited for a definitive decision, including various appeals, many years might pass before anything could happen in Sweden. Furthermore, Justice Bengtsson's deference to the attitude of the courts of France seems misplaced in a case where the award had very little connection with the place where it was rendered. Neither party was French, and no attempt at execution of the award had been made there. Thus, to give paramount attention to the court having general jurisdiction in the place the award is rendered seems rather artificial. For in the final analysis, it would mean that that court, without having asked for or accepted such a vocation, becomes the indispensable catalyst for an action with which it is not concerned.

Thus, the Swedish Supreme Court's holding clearly indicates that it is the execution judge's prerogative to apply his own notions of what is binding; he need not defer to the courts of the place of arbitration.¹⁴⁴ The only decision of the highest court of another

140. 2 P. FOUCHARD, *L'ARBITRAGE COMMERCIAL INTERNATIONAL* 533 (1965). See generally Gaja, *supra* note 8, pt. I, ¶ C.4.

141. Judgment of Aug. 13, 1979, Sup. Ct., Swed. (slip opinion), translation reprinted in Appendix, *infra*, at 244, 248 (Bengtsson, J., dissenting).

142. *Id.*

143. Appellant actually filed two challenges, one with the *Tribunal de grand instance*, a court of general jurisdiction urging rejection of *exequatur* of the award, and one in the *Cour d'Appel de Paris* seeking nullification of the award. The former action remains to be resolved. In the latter case, however, the court, about six months after the Supreme Court of Sweden's decision, decided that since neither party was French, no challenge would be heard. See Judgment of February 21, 1980, *Cour d'Appel, Paris*, reprinted in 107 *CLUNET* 660 (1980).

144. For a similar decision by a lower court, see Judgment of Oct. 9, 1970, Trib. gr. inst., Strasbourg, extract reprinted in [1977] *Y.B. COMM. ARB.* 244 (an award rendered in Ger-

State which parallels this case is a 1973 decision of the Hoge Raad of the Netherlands.¹⁴⁵ There, an award rendered in Switzerland was enforced by the Dutch courts despite a decision by a Swiss court that the arbitral decision was not a recognizable award under Swiss procedure. The Dutch Court did not seem to be troubled by the fact that the award thus did not have any "nationality." As a commentator particularly experienced in international arbitration has observed, the Court "thus seems logically to have considered that the execution judge may give legal sanction to an award detached from any national law."¹⁴⁶

Although the Dutch Court subsequently, and in rather curious fashion, has moved away from this holding,¹⁴⁷ the import of the Swedish decision is clear: It suggests a detachment of the international arbitral process from the country where the award is rendered.

This approach implies a shift in the control function, away from

many may be executed in France even if no declaration of enforceability has been granted in Germany, and such a declaration is necessary for enforcement in Germany). Interestingly, this concept was given statutory consecration in France through article 36 of French Decree 80-354 of May 14, 1980 (a general reform of that country's arbitration law), which makes explicit that an award is *res judicata* as of the moment it is rendered.

145. Judgment of Oct. 26, 1973, Hoge Raad, the Netherlands, [1974] *Nederlandse Jurisprudentie* (N.J.) 993, *reprinted and translated* in 5 *NETH. Y.B. INT'L L.* 290 (1974). *See also* Judgment of May 15, 1970, Trib. gr. inst., Paris, *reprinted* in 98 *CLUNET* 312 (1971) (French court of general jurisdiction enforcing a foreign arbitral award, rendered in India against a French company, on the basis that the award was "binding" for the purpose of the New York Convention as of the moment it was rendered).

146. Eisemann, *La situation actuelle de l'arbitrage commercial international entre les états ou entités étatiques et personnes physiques ou morales étrangères de droit privé*, [1975] *REVUE DE L'ARBITRAGE* 279, 290.

147. Judgment of Nov. 7, 1975, Hoge Raad, the Netherlands, [1976] *N.J.* 774, *extract reprinted* in 1 *Gaja, supra* note 8, at V.35.1. The 1975 Court seemed to say that it was going further than it had in 1973, *see* note 145 *supra*, because it examined the *consequences* of the decisions of the Swiss courts. As it was determined that these decisions would have rendered execution of the award impossible in Switzerland, the Dutch court concluded that they were an equivalent to a setting aside of the award for the purposes of article V(1)(e) of the New York Convention. Thus, there were grounds to refuse execution of the award in the Netherlands.

This second Dutch decision seems questionable. Under the New York Convention, note 7 *supra*, it is the *binding* nature of the award which is dispositive, and not its *executory force* in the country where it is rendered. Even if the execution judge concludes that the award may not be executed in its country of origin, his own refusal to execute the award is merely permitted, not mandated by art. 5(1) of the New York Convention. Indeed, reasons under local jurisdictional rules not to accept execution in the country of origin may exist (particularly where both parties are foreign, such as absence of contacts with the forum) which do not apply to the other country's judge.

the courts of the country of arbitration to those of the country of execution of awards. This development contradicts a more traditional school of thought which maintains that each arbitration necessarily is governed by the legal system at the place where the award is rendered. The territoriality of sovereign power implies that the legal consequences of any event taking place within a country are subject to the local legal system; the binding force of an arbitral award thus is supposed to be derived from the approval, or at least tolerance, of the local courts.¹⁴⁸ As the Swedish Supreme Court has demonstrated, that is not so. The country where enforcement of an arbitral award is sought may deem the arbitral process to have given rise to binding and enforceable obligations irrespective of the status of the award in the eyes of the country where the award was rendered.

The concerns engendered by this process of detachment do not seem to outweigh the benefits of the more efficient and certain justice which it gives to parties wishing to rely on the international arbitral process. Thus, while it has been objected that it could lead to different results in different countries, this admittedly disturbing phenomenon is not unique to arbitral awards. In any event, it is difficult to imagine that it would occur with great frequency. While it also has been complained that denationalization of arbitral awards leads to the elimination of one single and obvious jurisdiction where an inappropriately rendered award may be challenged conclusively, the fact is that setting aside awards under the New York Convention can take place only in the country in which the award was made.¹⁴⁹ Thus the only possible inconsistency

148. See Mann, *Lex Fecit Arbitrum*, in *INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE* 156, 159-60 (P. Sanders ed. 1967). See also 2 J. WETTER, *supra* note 1, at 403-04, 528-29 n.13A. For proponents of a transnational arbitration system, see, e.g., Fragistas, *Arbitrage étranger et arbitrage international en droit privé*, 49 *REVUE CRITIQUE DE DROIT INT'L PRIVÉ* 1, 15 (referring to "supranational arbitration . . . which escapes from the constraints of any national law"); Goldman, *Les conflits de lois dans l'arbitrage international de droit privé*, [1963] 2 *Rec. des Cours* (Neth.) 347, 380 (advocating an "autonomous, non-national" legal system "corresponding to the nature of international arbitration"); Lalive, *Les règles de conflit des lois appliquées au fond du litige par l'arbitre international siégeant en Suisse*, [1976] *REVUE DE L'ARBITRAGE*, 155, 159 (stating that the international arbitrator "derives his power from the parties to the arbitration clause and does not in any manner fulfill a judicial role in the name of the given State, be that of the arbitral seat or another").

149. Sanders, *Twenty Years' Review*, *supra* note 1, at 276.

of result relates to enforcement actions, and there is nothing inherently shocking in the fact that the possibilities of execution may not be identical in every country. Consider, for instance, the different notions of sovereign immunity from execution whose application makes enforcement of a court judgment or arbitral award possible in some countries and impossible in others. At any rate, the Swedish example clearly illustrates that the system of international commercial arbitration very well may function with little regard for the "nationality" of awards.¹⁵⁰

III. CONCLUSION

Commercial arbitration under Swedish law is characterized by the principle of noninterference by the courts in the arbitral process chosen by the parties. The results of that process are overturned only if the procedure followed by the arbitral tribunal is in contradiction of the parties' agreement, or if it otherwise fails to meet minimum standards of fairness in according each side the opportunity to present its case. Errors in the application of substantive law or the determination of facts are not grounds for setting aside arbitral awards.

The Swedish legal system does provide for the assistance of the courts if the arbitral tribunal requires such intervention in order for the proceedings to be efficacious, especially with respect to conservatory measures and the gathering of evidence. In the context of *international* commercial arbitration, it must be considered an open question whether the courts of Sweden consider themselves always to have jurisdiction to control proceedings whenever Sweden is the place of arbitration. On the other hand, with respect to awards rendered elsewhere and sought to be executed in Sweden, the pendency of a challenge to an award before the courts of the country where it was rendered does not bar immediate enforcement in Sweden. Thus, in both respecting the independence of arbitrations in Sweden and not unduly hampering the enforcement of foreign awards, the Swedish courts illustrate the proper respect needed for the successful operation of international commercial arbitration.

150. If Swedish judges in the future wish to be consistent with the activism of their Supreme Court, as an enforcement forum, they might be expected to be passive in controlling international arbitration which takes place in Sweden between parties having little or no contact with the country. Otherwise it might be difficult to explain why in the *Götaöverkän* case no deference was accorded to the courts of France.

APPENDIX

The Supreme Court's

Decision No. SO 1462

Case No. O 1243/78

rendered in Stockholm on August 13, 1979

Appellant:

General National Maritime Transport Company

Counsel: Lars Boman, Attorney-at-Law, Messrs.
Morssing & Nycander

Respondent:

Gótaverken Arendal Aktiebolag

Counsel: Robert Romlöv, Attorney-at-Law, Messrs.
Vinge & Ramberg

Challenged Decision:

Decision of the Svea Court of Appeal, 5th Department
December 13th, 1978, No. 5: SO 75

Decision

The Supreme Court affirms the order of the Court of Appeal that the arbitral award shall be enforced as a binding Swedish court judgment.

Participating in the decision: Justices Petrén, Hult, Vängby, Bengtsson (dissenting), and Rydin (rapporteur).

Secretary. Falk.

Arguments before the Supreme Court

The buyer on appeal has demanded principally that the Supreme Court should reverse the decision of the Court of Appeal and dismiss the shipyard's application for enforcement, and alternatively that the decision should be postponed until a final decision regarding the complaint filed by the buyer in France has been rendered there. In support of these prayers, the buyer has reaffirmed the grounds it relied upon before the Court of Appeal.

The shipyard has responded that the appeal should be dismissed and that the order for enforcement given by the Court of Appeal

should be affirmed.

Grounds

Under Article 6 of the Act (1929:147) concerning Foreign Arbitration Agreements and Awards, a foreign arbitral award shall be valid in this country subject to certain conditions. These conditions relate to various procedural irregularities. When an application for enforcement of a foreign arbitral award is considered, there should thus in principle be no review of the substantive content of the award.

As for the arguments of the buyer's appeal dealt with under paragraphs 1-3 in the decision of the Court of Appeal,* there is no reason to depart from the judgment of the Court of Appeal concerning the enforceability of the award in this country.

In support of the claim that the award should not be enforced in this country, the buyer has further argued (*cf.* paragraph 4 of the decision of the Court of Appeal): Submitting in France an "Opposition à Ordonnance d'Exequatur de Sentence Arbitrale" (*sic*) under French law automatically prevents and postpones all enforcement until the Tribunal de Grande Instance de Paris has ruled on the enforceability of the award. Under French law the submission of an "opposition" to said authority is the way in which enforcement is postponed until judgment has been rendered on specific alleged grounds for invalidity of the award. It is therefore neither necessary nor possible to obtain a decision of any other kind. It is therefore argued that the award is not yet enforceable in France and/or that its enforceability has been postponed by competent authority there. It follows from section 7, paragraph one, subparagraph 5 of the Act concerning Foreign Arbitration Agreements and Awards that the award under such circumstances is not valid in Sweden.

The buyer has submitted considerable evidence to show that as a consequence of the initiation of the challenge procedure, the award cannot be enforced in France pending the court's decision there.

Under Section 7, paragraph one, subparagraph 5 of the Act concerning Foreign Arbitration Agreements and Awards, a foreign award is not valid in this Kingdom if the party against whom the award is invoked shows that the award "has not yet become en-

* (Footnote omitted).

forceable or otherwise binding" on the parties in the State in which or under the law of which it was made or that the award has been set aside or suspended by a competent authority of said State. This text, which was promulgated in 1971, is based on Article V(1)(e) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The text of the Convention merely reads "not yet become binding" on the parties etc. The wording "enforceable or otherwise" was added at the initiative of *Lagradet* (the "Law Council").[†] As is evident from the legislative history, no material deviation from the Convention was intended (see prop. 1971:131 pages 13, 69 *et. seq.*, and 71). The legislative history contains unequivocal statements to the effect that the fact that there remains the possibility of a motion to set aside the award shall not mean that it is not considered binding. That the rules have this meaning has even been admitted by the buyer. One case in which a foreign award is not binding is when its merits can be subject to appeal to a higher jurisdiction. The choice of the word binding was intended to give relief to the party relying on the award. The intent was, *inter alia*, to avoid the necessity for double *exequatur*, or the need for the party relying on the award to prove that it is enforceable according to the authorities of the country in which it was rendered.

By the arbitration clause of the shipbuilding contracts (Article 13), the parties agreed to comply with the award as finally binding and enforceable in matters submitted to the arbitrators. Further, the ICC rules of arbitration, under which the now relevant proceedings were conducted, contain a provision (Article 24) that the arbitral award shall be final.

In consideration of the aforesaid, the present arbitral award must be considered to have become enforceable and binding on the parties in France, in the meaning intended by Section 7, paragraph one, subparagraph 5 of the Act concerning Foreign Arbitration Agreements and Awards, as of the moment and by virtue of the very fact that it was rendered. The fact that that buyer has subsequently challenged the award in France by "opposition" thereto has no effect in this respect.

As seen, the buyer has further maintained that under French law

[†] The Law council is a body which gives opinions with respect to the most important proposed legislation, comprised normally of three Supreme Court Justices and a Judge of *Regeringsrätten*, the highest administrative court.

the challenge procedure automatically barred and suspended enforceability of the award pending the competent court's judgment on its validity. In the point of view of the buyer, this would constitute such suspension of execution as is referred to in Section 7, paragraph one, subparagraph 5 of said Act. According to the letter of the law as well as its drafting history (prop. 1971:131, page 34), the Article refers in this respect to a situation where the foreign authority after specific consideration of the matter orders that an already binding and enforceable award be set aside or that its enforcement be suspended. The buyer has not even claimed that such a decision has been rendered in the challenge procedure or otherwise.

The buyer has therefore not demonstrated such circumstances as would under Section 7, paragraph one, of the Act concerning Foreign Arbitration Agreements and Award render the award invalid in the Kingdom of Sweden. Nor is there ground for invalidity under the second paragraph of said Section.

The buyer's alternative prayer—that the decision should be suspended—is founded on the disposition of Section 9, paragraph two, of the Act concerning Foreign Arbitration Agreements and Awards. Under this text, the Court of Appeal may postpone the decision if the adversary of the party applying for enforcement makes an objection based on the fact that it has petitioned to an authority such as referred to in Section 7, paragraph one, subparagraph 5, for the award to be set aside or for its enforcement to be suspended. If the applicant so requests, the respondent can be ordered to give security. This provision also builds on the 1958 New York Convention. Whether a decision of postponement shall be given is left to the court's discretion to decide on the basis of appropriateness.

In support of its prayer for postponement, the buyer has referred to the "*Déclaration d'Appel*" (*sic*) as made, the challenge motion, and the new arbitration proceedings, all in France (compare paragraphs 4 and 5 of the decision of the Court of Appeal).

In view of the general purposes of the New York Convention and the legislation of 1971 based thereon, to expedite the enforcement of foreign arbitral awards (see prop. 1971:131, pages 1 and 15, compare pages 14 and 42), it cannot be deemed that such circumstances exist as would justify a suspension of the decision in this enforcement case on the grounds of the procedures initiated by the buyer in France.

Dissenting Opinion Attached to Protocol

Justice *Bengtsson* dissents as per the following opinion. On the grounds given by the majority, I dismiss the principal complaint of the buyer.

As for the alternative demand that the decision should be postponed, the following should be taken into account. In France, the buyer has challenged the award by two procedures: A motion lodged with a court to set aside the award ("*appel nullité*"), and a motion to set aside the recognition order ("*ordonnance d'exequatur*"). The latter procedure apparently has the effect that the enforcement of the award is automatically suspended pending the competent court's ruling on the validity of the award. Under these circumstances, no French court or other authority has yet had reason to decide whether the arbitral award under French law has such defects that its enforcement should be prevented. This calls for particular restraint with regard to an order for immediate enforcement of the award in Sweden.

The grounds invoked by the buyer for challenging the award are, in part, of such a nature that—although invalidity cannot be considered to follow under Swedish law—the possibility that a French court might come to the opposite conclusion cannot be disregarded. The hearings on the merits of the challenge are said to be scheduled for October 16, 1979.

In view of the above and of the great amounts involved in this dispute, I find preponderant reasons in favor of a postponement of the enforcement of the award, in accordance with Article 9, paragraph 2, of the Act concerning Foreign Arbitration Agreements Awards. The shipyard has not argued that bond be posted.

Along with several of the decisions of the Court of Appeal, I would, under said legal text, order that the decision regarding the enforcement be suspended.

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