

# Recognition and Enforcement of Foreign Awards in Sweden



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The New York Convention for Recognition and Enforcement of Foreign Arbitral Awards (the Convention) celebrates its 50th anniversary in 2008. This significant instrument has currently more than 140 signatory countries and is one of the most successful treaties in the international commercial law domain. The Convention has provided a solid ground for enforceable rights and binding commitments in the context of international commercial agreements. Most importantly, it has given confidence to investors and enterprises to make cross-border investments.

Once a dispute between the contracting parties is resolved, the winning party is anxious to recover any awarded amounts. If the losing party does not have any assets in the country where the award was rendered, the winning party would probably apply to a court where the losing party resides or has assets. In this relation the Convention requires courts in contracting states to give effects to private agreements to arbitrate and to recognize and enforce arbitration awards made in another contracting state.

In general, the procedure for the recognition and enforcement is governed by national arbitration laws. As domestic arbitration laws implementing the Convention vary, so do the procedure and court practice on recognition and enforcement of foreign awards. This commentary will consider

Swedish law and its practical application of the requirements stipulated in the Convention.

## Procedure of enforcement of foreign arbitral awards in Sweden

On 27 April 1972 the Convention entered in force in Sweden and since then Sweden has enforced arbitral awards rendered abroad in a consistent and reliable fashion. In 1999, Sweden passed the new Swedish Arbitration Act. Several provisions in the Arbitration Act mirror those in the Convention. In addition, the Swedish Code of Judicial Procedure, the Enforcement Code, the Secrecy Act and case law can come into play in the course of the enforcement.

Parties seeking enforcement of an award bring their applications in Swedish to the Svea Court of Appeal in Stockholm. The original arbitral award or a certified copy thereof must be appended to the application. If the opposing party denies the existence of an arbitration agreement, the application must also provide the arbitration agreement or otherwise prove that an arbitration agreement has been entered into. In this context it should be noted that oral arbitration agreements are recognized in Sweden.

The decision granting or denying recognition and enforcement is subject to *inter partes* proceedings. An application for enforcement may not be granted unless the opposing party has been afforded an opportunity to express its opinion on the application. If an application for enforcement is incomplete or ill-founded, the Court may reject it out of hand.

If the Svea Court of Appeal approves an application for recognition

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and enforcement of a foreign award, the award is immediately enforceable. The judgement is an execution title and the winning party may file an application for execution with the Enforcement Authority. A decision of the Svea Court of Appeal may be appealed to the Supreme Court.

### **Confidentiality**

The documents filed in the enforcement proceedings form part of the public record. However, certain information in the filed documents may be subject to some limitations imposed by the Secrecy Act. For example, secrecy shall apply to information about business or management conditions if it can be assumed that the party concerned would suffer considerable loss should the information be made public.

Judgments on recognition and enforcement are also public documents. In order to protect confidential information in the judgment a party can request that the court removes the names of the parties or avoid publications of confidential information. However, in practice, courts rarely grant such orders, unless the information concerned is subject to disclosure limitations in the Secrecy Act.

### **Grounds for the refusal of recognition and enforcement of a foreign award in Swedish courts**

The circumstances in which the enforcement of an award may be denied under Art.5 of the Convention are carefully reflected in the Swedish Arbitration Act. In fact, these are practically the same as those envisaged in the Convention:

1. that the parties to the arbitration agreement lacked capacity to enter into such an agreement, or were not properly represented; that the arbitration agreement was invalid;

2. that one party was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was unable to present his case;

3. that the arbitrated dispute did not fall within the terms of the arbitration agreement or the award contains decisions on matters which are beyond the scope of the arbitration agreement;

4. that the composition of the arbitral tribunal or the procedure were not in accordance with the agreement of the parties or the law of the country where the arbitration took place; or

5. that the award is not yet binding or has been set aside or suspended by the country in which it was rendered;

6. In addition, while the Swedish Arbitration Act provides that foreign awards *shall* not be enforced when the issue is one that may not be determined by arbitrators under Swedish law (arbitrability), or one that violates Swedish public



policy, the Convention stipulates that awards *may* be refused in these cases.

A party with a potentially valid claim for the non-enforcement of an award faces an arduous task convincing the Court that its claim is well-founded; Swedish courts rarely deny enforcement of foreign arbitral awards.

#### *Excess of mandate*

When a party contests a foreign award, it cannot do so on the merits of the case but must demonstrate that a procedural error has occurred. The Svea

that the relevance of a product's existence at the time of contracting depended on the interpretation given to the definitions in the parties' agreements. This was deemed a substantive matter which consequently could not be challenged.

#### *Was there a valid arbitration agreement?*

As stated above, one ground for non-enforcement is that there is no valid arbitration agreement. The party which alleges that there is such an agreement has the burden of proving its existence.

Usually, this merely requires providing a copy of the arbitration agreement. If that is not possible (when the alleged arbitration agreement is oral rather than written, for example) the Arbitration Act permits the party to establish the existence of an agreement in other ways.

In the *Planavergne S.A. v. Kalle Bergander* case a dispute arose between a French company and a Swedish company, where the French company claimed that the parties lacked a valid arbitration agreement (decision of the Svea Court of Appeal in 2001).

In that case, Planavergne's application to have a French arbitral award enforced in Sweden was contested by Bergander, who claimed that the parties lacked a valid arbitration agreement. As previously stated, under the *Swedish Arbitration Act*, when the existence of an arbitration agreement is in question, the party who maintains that there is such an agreement bears the burden of proof. However, the Svea Court found that while this responsibility had been Planavergne's during the original arbitration proceeding, the fact that a Tribunal seated in France had issued an award granting Planavergne compensation indicated that Planavergne had sufficiently established the existence of an arbitration agreement. Thus, the Court enforced the award.

Bergander appealed to the Swedish Supreme Court on the same grounds, and further claimed that he had not been given the opportunity to present his case (regarding the non-existence of the contract) in the original arbitration proceedings, a prerequisite for the enforcement of awards. However, the Supreme Court determined that both parties had received registered letters in-

viting them to a hearing; thus, there was no reason to believe that Bergander had been denied the opportunity to present his case. Further, the Swedish Supreme Court deferred to the Arbitral Tribunal's findings that an arbitration agreement did exist between the parties and upheld the award.

Thus, in cases where the existence of an arbitration agreement is at issue, the party alleging that there is an agreement must prove this during the original arbitration proceedings. If the arbitration tribunal confirms that such an agreement existed, on enforcement, the burden shifts to the other party to prove that there was no agreement.

#### *Stay of enforcement of a foreign award*

Sometimes one party requests enforcement of a foreign award in Sweden while the other party is challenging the award in another country. Although the challenge is ongoing, Swedish Courts will not typically postpone execution of the award unless the party seeking the postponement can provide convincing reasons for doing so. Typically, this requires demonstrating that there is a compelling basis for challenging the award and that, consequently, the award will probably be set aside.

If the foreign challenge is to be decided in the near future, the Swedish Court may be more likely to grant a postponement. However, whether a challenge will be decided in the near or distant future is not determinative but might, at most, only have a minor influence on the Court's decision. Similarly, the amount of money involved in the award, whether large or small, is not a reason to stay execution.

If the foreign court in which the challenge is pending grants a stay of execution of the award, Swedish courts typically respect the stay and await the outcome of the challenge. This postponement is not automatic; if the Swedish courts believe the challenge is weak or unfounded they will pursue the enforcement procedure without delay. A stay of execution must be decided on a case specific basis. If the foreign court grants a stay as a matter of course whenever there is an arbitral award challenge, Sweden will typically not adhere to the foreign court's decision, as to do so

## Judgments on recognition and enforcement are also public documents

Court decides each case with deference to the original arbitral tribunal; thus, the burden is on the contesting party to prove that a procedural error has taken place.

It is sometimes difficult to determine whether the issue raised addresses a substantive or procedural issue. A recent case, *American Pacific Corporation v. Sudsvensk Produktutveckling* (decision of the Svea Court of Appeal in 2001) exemplifies this problem. In the case *American Pacific* contested an enforcement motion brought before the Court. It was claimed that the arbitration tribunal had exceeded its mandate by rendering an award over three contracts even though one of them lacked an arbitration clause, and by rendering an award regarding a product which did not exist at the time of contracting.

When arbitrators exceed their mandate the losing party has a legitimate procedural reason for contesting the enforcement of an award. In the instant case, however, the Court found that the arbitration tribunal had dismissed all claims not subject to the Agreement that contained the arbitration clause, thereby staying within appropriate bounds of their mandate. The Court also decided

would obstruct the efficiency of the arbitration process.

In a recent postponement case *SwemBalt AB v. Republic of Latvia* (decision of the Svea Court of Appeal in 2002), a Danish award was being enforced in Sweden. Latvia challenged the award in a Danish Court, while Swembalt sought enforcement with the Svea Court in Stockholm. Latvia requested that the Svea Court should postpone the enforcement until the Danish Court had rendered its decision.

The Svea Court of Appeal, which decision was confirmed by the Supreme Court, found that it is unlikely that Latvia would successfully challenge the award and, consequently, Latvia had not shown that its challenge of the award was justified. The enforcement of this award was, therefore, not postponed.

Similarly, in *Forenede Cresco Finans A.S v. Dete-ma AB* (decision of the Swedish Supreme Court in 1992), a company wanted a Norwegian award to be enforced in Sweden, while the award was being challenged in Norway. Nonetheless, the Supreme Court held that, in the absence of some certainty that an award would be set aside, the award must be enforced without delay. The Supreme Court could not predict the outcome of the appeal and granted enforcement.

Finally, in the *Götaverken Arendal v. General Nat's Maritime Transport*, (decision of the Swedish Supreme Court in 1979), a Libyan company challenged a French award given by the arbitrators in an ICC arbitration, by contending that the arbitrators exceeded their mandate. Although the challenge of the award was pending before a French court, the Swedish Supreme Court did not find that a postponement of execution was warranted.

These cases demonstrate that Swedish Courts have adopted a restrictive approach whether to grant a stay of execution of a foreign arbitral award.

## Summary

By and large Swedish courts enforce foreign arbitral awards in a consistent and reliable manner. This is hardly surprising, given that the Swedish Arbitration Act contains certain provisions that closely resemble the articles in the Convention. Both legal instruments facilitate the enforcement of foreign arbitral awards except in a handful of specific instances, including when decisions rendered are contrary to public policy or when significant procedural errors have occurred during the arbitration. Swedish courts interpret these exceptions narrowly, and consequently, only rarely refuse to enforce foreign arbitral awards. When awards are not enforced, the Svea Court of Appeal typically has a convincing reason for refusing enforcement. ■

