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Swedish Arbitration Act

Should it be able to determine multi-party arbitration?

Bachelor's thesis in Commercial and Tax Law

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Abstract

Arbitration is commonly used when commercial parties wants to settle a cross-border dispute. The reason why parties use an arbitration instead of a regular court may be because the arbitration is more flexible and have more secrecy. Arbitration is based on a contract between the parties, therefore it becomes difficult when a third party wants to participate in the arbitration. Because international trade have become more complex, it is common that a third party wants to participate in an ongoing arbitration so their claim could be answered quicker. Sweden is frequently used as the location for cross-border arbitration, but Sweden's Arbitration Act does not legislate when a third party wants to participate in an arbitration. Therefore will this thesis discuss if the Swedish Arbitration Act should include when a third party wants to participate in an ongoing arbitration. There are international rules that determine when a third party could participate in an arbitration. The Swedish Arbitration Act should be influenced by these rules if the Government decide to include when a third party wants to participate in an arbitration. Swedish Law of Contract and case-law have tried to solve the problem when a third party wants to participate in an arbitration, but the Swedish legal position is not exhaustive. Therefore it is time for the Swedish Arbitration Act to develop a rule that could determine when a third party wants to participate in an ongoing arbitration.

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Abbreviations

ICC	International Chamber of Commerce
LCIA	London Court of International Arbitration
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
SAA	Swiss Arbitration Association
UNCITRAL	The United Nations Commission on International Trade law

1 Introduction

1.1 Background

Today many of the commercial disputes between companies are settled in arbitration instead of a court of law. The reason why companies often uses arbitration instead of a regular court is because arbitration is supposed to be faster, have more secrecy, more flexible, less formal and the parties can choose who they want to judge the arbitration.[1] Parties can also decide the location for the arbitration. This means that even if the dispute or parties are not connected to a third country, parties can still decide that the arbitration shall be located in that country.[2]

Sweden has a long history of using arbitration. Some sort of arbitration rule have been used in Sweden since the 14th century and because of the long time use of arbitration rules, Sweden has not harmonized their Arbitration Act with international rules and Conventions.[3] Sweden has instead used the rules and Conventions as an inspiration. In 1999 Sweden modernized their Arbitration Act, mainly because arbitration becoming more international than before.[4] Arbitration is not affected by Sweden's integration with the European Union.[5] This means that arbitration is excluded from the provisions of the Brussel Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.[6]

The New York Convention from 1958, the United Nations Commission on International Trade Law (UNCITRAL), model law on International Commercial Arbitration (model law) and UNCITRAL rules of arbitration are different international rules and Conventions that tries to harmonize different countries Arbitration Acts. One of the problems these rules tries to harmonize is the problem with multi-party arbitration.[7] The problem with multi-party arbitration have been discussed for decades, without any solution to the problem.[8]

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1 Ramberg, *Affärstvister och konfliktlösning*, p. 51- 52.
2 Kvart och Olsson*, Tvistlösning genom skiljeförfarande*, p. 31-33.
3 Swedish Government bill 1998/99:35, p. 33.
4 Swedish Government bill 1998/99:35, p. 47.
5 Heuman, *Skiljemannarätt*, p. 685.
6 Swedish Government bill 1998/99:35, p. 38-39.
7 Redfern and Hunter, *Redfern and Hunter on international arbitration*, p. 37.
8 Ramberg, *Affärstvister och konfliktlösning*, p. 52.

1.2 Aim and limitation

The aim of this thesis is to investigate if multi-party arbitration should be included in the Swedish Arbitration Act. The subsidiary aim is to investigate when a third party wants to participate in an ongoing arbitration tribunal.

This thesis will only discuss when a third party wants to participate in an ongoing arbitration, other problems with multi-party arbitration will not be included. International arbitration rules from UNCITRAL, London Court of International Arbitration (LCIA) and Swiss Arbitration Association (SAA) will be discussed in the thesis, because these international rules determine when a third party could participate in an ongoing arbitration. The author assume the reader have implicit knowledge about Swedish legislation, therefore no basic terms will be explained.

1.3 Method and material

The author will describe Sweden's legal position when a third party wants to participate in an ongoing arbitration. Swedish arbitration is then compared with international arbitration rules and other countries Arbitration Acts. The material for this thesis consists of different sources of legislation, both Swedish domestic law and international rules. This might give the reader better knowledge about today's legal situation when a third party wants to participate in a Swedish arbitration.

There are three methods used in this thesis; descriptive method, traditional legal method and comparative method. The descriptive method is used to explain the international and Swedish arbitration rules. The traditional legal method is used to describe present legal sources to present the applicable legal situation.[9] The material for the legal method, concerning Sweden, is; law, Government bill, case-law and doctrine.[10] The comparative method is used in chapter four to compare Swedish Arbitration Act with international arbitration rules.[11]

A comparison between Sweden and international rules is made to show the reader if Swedish Arbitration Act should be influenced by international rules. The comparative method explain the essential in the different legal systems, then a comparison will be made between

[9] Zweigert, Konrad, Kötz, Hein, *Introduction to comparative law*, p. 35-36.
[10] Sandgren, *Rättsvetenskap för uppsatsförfattare*, p. 37.
[11] Zweigert, Konrad, Kötz, Hein, *Introduction to comparative law*, p. 2.

Sweden's arbitration rules and international rules.[12]

In chapter two, an introduction about the problem when a third party wants to participate in an ongoing arbitration tribunal will be presented. Then an explanation how England, Switzerland and UNCITRAL have legislated when a third party wants to participate in an ongoing arbitration will follow.

[12] Zweigert, Konrad, Kötz, Hein, *Introduction to comparative law*, p. 6.

2 International legislations when a third party wants to participate in an ongoing arbitration

2.1 Introduction

When parties use the arbitration tribunal to settle disputes, the arbitration procedure works most easily when there are two parties. It is not a problem if there are two companies that are the plaintiff and three companies that are the respondents, as long they are all bound by the arbitration contract when the process begins.[13] When companies decide if they are going to use arbitration or a regular court to settle the dispute, five advantages often gives the arbitration an advantage compared to a regular court. It is said that an arbitration process is; faster, have more secrecy, more flexible, less formal and the parties can also decide which arbitrators shall settle the dispute. Another advantage with arbitration is secrecy from the public. This makes it easier for companies to hide possible company secrets from the public.[14]

The arbitration does not only have advantages compared to a regular court. Costs for lawyers are often higher when parties use an arbitration tribunal instead of a regular court. It is also more complicated to settle disputes when there are more than two parties in the arbitration tribunal, unless all parties are bound by the contract from the beginning. It is not possible to overrule an arbitration award, unless the award violate legislation. This makes the arbitration process faster than a regular court were you usually can overrule a judgment. When it is not possible to overrule a regular arbitration award, it may jeopardize the legal security.[15]

In arbitration tribunals where there are several parties, it is common that the arbitrators have to settle many different claims, so called multi-claims. When there are multi-claims for the arbitrators to settle, the best way to do this is to settle the claims in one consisting process, instead of splitting them up in a series of different processes. When the arbitrators uses one process instead of several processes, the parties save both money and time. However the most important consequence of using one arbitration process instead of several, is that it avoids that the parties gets two or more awards that are in conflict with each other.[16]

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[13] Redfern and Hunter, *Redfern and Hunter on international arbitration*, p. 36.
[14] Redfern and Hunter, *Redfern and Hunter on international arbitration*, p. 36.
[15] Ramberg, *Affärstvister och konfliktlösning*, p. 51- 52.
[16] Redfern and Hunter, *Redfern and Hunter on international arbitration*, p. 149-150.

In a regular national court it is possible for a third party to join additional parties.[17] If a third party wants to join additional parties in an arbitration tribunal they are facing difficulties, because the arbitrational tribunal is based on an agreement between the parties.[18]

There are different relationships in a multi-party arbitration that are not very problematic. An example when it is not very complicated is when there are two or more parties in one contract. This situation is common in international trade. Usually companies join together in a joint venture and then the joint venture enters a contract with another party or parties.[19]

A situation where multi-party becomes complicated, is when a third party or a non-signatory wants to participate or avoid arbitration that already is in process. A non-signatory is a company or a person who may become a party in the arbitration. Despite that the non-signatory have not signed the arbitration contract or a document that contains a clause about arbitration.[20]

A common question is if the arbitrators can bring in a third party into an arbitration tribunal, who is 'less then obvious'? This situation is common when a company in a corporation wants to participate or avoid an arbitration contract that another company of the corporation has entered. Another problematic situation arise when a party in an arbitration tribunal seeks intellectual property rights from the respondent, but discovers during the arbitration tribunal that the intellectual rights is owned by a third party.[21] If the arbitrators should decide to allow a third party to participate in an ongoing arbitration, the arbitrators would not justify two main principles of arbitration: maintaining arbitration's nature and increasing the arbitration award's effect of binding related parties. [22]

One problem that arises when a party of the arbitration wants to bind a non-signatory party to an arbitration contract is that the basis of the arbitration contract is lacking, there is no contract about arbitration between the parties in the contract and the third party. This is a common challenge from the non-signatory party, the non-signatory party have never entered a contract about arbitration. If the non-signatory party uses this angel, the arbitrators

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17 Swedish Code of Judicial Procedure, (*Rättegångsbalk*) (SFS 1942:740), chapter. 14, article 4.
18 Redfern and Hunter, *Redfern and Hunter on international arbitration*, p. 150.
19 Redfern and Hunter, *Redfern and Hunter on international arbitration*, p. 150-152.
20 Redfern and Hunter, *Redfern and Hunter on international arbitration*, p. 16, footnote 59.
21 Redfern and Hunter, *Redfern and Hunter on international arbitration*, p. 38-39.
22 Park, *Non-signatories and International contracts – an arbitration dilemma*, p. 3.

have to look for strong evidence that the non-signatory party did agree to use arbitration in one way or another.[23]

The problem of a non-signatory wanting to participate in an ongoing arbitration has become more and more common, mainly because the modern international trade is more complex than before. An effect of the increased complexity in modern international trade have made parties wanting to participate in an arbitration, even though they are not a party of the original arbitration contract. An example of complexity in international trade is when an international arbitration refer to different countries legislations, these countries legislation may be based on different rules and Conventions. When the arbitration is located in a third country, the arbitration award is almost different from the laws that govern the arbitral tribunal.[24]

When a third party or a non-signatory wants to participate in a domestic ongoing arbitration process, the arbitrators often uses domestic legislation to solve this problem. As mentioned earlier, arbitration is often used in international disputes and when there are cross-border parties in the arbitration, which law should the arbitrators use? These types of cross-border disputes have become more difficult to solve for the arbitrators, mainly because the arbitrators can not look at one specific legislation. This because the parties are from two different countries and because of that, the arbitration contract do not usually have a stronger link to one or another legislation.[25]

The bryssel regulation is made for members within the European Union. The regulation makes it possible for a member state to enforce a court judgment in another member state of the European Union. This regulation does not include arbitration awards, therefore is it not possible to use the regulation when a party wants to execute or acknowledge an arbitration award in another state within the EU.[26]

The problem with multi-party arbitrations have been discussed for decades, without finding a particular solution,[27]which have resulted in that countries have not legislated arbitration when a third party wants to participate in an ongoing arbitration. Sweden is one of the

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[23] Park, *Non-signatories and International contracts – an arbitration dilemma*, p. 22.
[24] Redfern and Hunter, *Redfern and Hunter on international arbitration*, p. 3-4 and 16.
[25] Park, *Non-signatories and International contracts – an arbitration dilemma*, p. 2.
[26] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, article 1, paragraph 2, (d).
[27] Ramberg, *Affärstvister och konfliktlösning*, p. 52.

countries that have not legislated multi-party arbitration.[28] Some of the international arbitration institutes have tried to legislate when a third party or a non-signatory wants to participate or avoid an ongoing arbitration, without succeeding. The following quote comes from the former secretary-general of International Chamber of Commerce(ICC), it was stated back in 1998, but it shows that multi-party situations are a problem and that few regulations have succeeded to solve;

> "No generally acceptable solution to the manifold issues arising from multiparty relationships has yet been found by either the ICC or any of the dozens of other scholars, lawyers and arbitral institutes working on this issue."[29]

To give the reader a better knowledge about international Conventions, rules and countries legislation when a third party wants to participate in an ongoing arbitration, a presentation will follow.

2.2 International arbitration rules

2.2.1 Background

There are rules and Conventions that have had a big impact on international arbitration. To mention a few; the Geneva protocol from 1923, the Geneva Convention from 1927, the New York Convention from 1958, the UNICITRAL model law and UNCITRAL arbitration rules. These rules and Conventions are a big part of the international commercial arbitration.[30]

In the 1920s, the Geneva protocol and the Geneva Convention were created. The Geneva protocol and the Geneva Convention was a breakthrough in international validity for arbitration awards. Both the Geneva protocol and the Geneva Convention gave arbitration awards a greater extent than what domestic laws gave.[31] In 1958 the New York Convention was created. The New York Convention was an improvement of the Geneva protocol and the Geneva Convention. The New York Convention was easier and more effective than the Geneva protocol and Convention to recognize and enforce foreign arbitration awards.[32]

An innovation that the New York Convention contributed to international commercial arbitration was free movement of arbitration awards. The New York Convention legislate

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28 The Swedish Arbitration Act, (*Lag om skiljeförfarande*) (SFS 1999:116).
29 Redfern and Hunter, *Law and practice of international commercial arbitration*, p. 172.
30 Redfern and Hunter, *Redfern and Hunter on international arbitration*, p. 7.
31 The Swedish Government bill 1998/99:35, p. 37.
32 Redfern and Hunter, *Redfern and Hunter on international arbitration*, p. 70-74.

when the arbitrators have decided the outcome in a dispute, the award then have free movement and can be enforced in another member state.[33] Even awards from countries that are not members of the New York Convention can be enforced, as long the countries have not implemented another treaty that regulates enforcement of court selection agreements and foreign awards.[34]

There is a way for members of the New York Convention to refuse foreign arbitration awards. A member of the New York Convention is able to make two reservations about enforcing a foreign arbitration award. A country can by using article 1, paragraph 3, of the New York Convention limit the enforcement of a foreign arbitration award, that only awards from another member of the Convention can be enforced. A member of the Convention can also decide that the Convention shall only be applicable on commercial disputes.[35] Sweden has not done any of these reservations.[36] The New York Convention has had an impact on Swedish Arbitration Act because Sweden has used the New York Convention when developing and considering developments in their Arbitration Act.[37]

2.2.2 UNCITRAL model law

UNCITRAL is an instrument for the United Nations to play a bigger part on the international trade market. The UNCITRAL was created in 1966. The United Nations created UNCITRAL because the United Nations wanted to remove legal obstacles that were slowing international trade down. Some of these legal obstacles in international trade market had risen because countries had different rules about international trade, which made it difficult for companies to work cross-border. The aim with the UNCITRAL was to harmonize countries international trade laws. When UNCITRAL was created it did not get a specific assignment to work with. UNCITRAL decides itself which areas it should consider. One of the topics UNCITRAL decided to work with, among others, was international commercial arbitration.[38]

In 1985 the UNCITRAL created a model law for international arbitration. The model law assist countries in making their Arbitration Act more international.[39] The model law was created to harmonize countries arbitration laws. It would be easier for countries to har-

[33] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, article 1, paragraph. 1.
[34] Park, *Arbitration of International Business Disputes*, p. 299.
[35] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, article 1, paragraph. 3.
[36] The Swedish Government bill 1998/99:35, p. 37.
[37] The Swedish Government bill 1998/99:35, p. 140.
[38] UNCITRAL, *The United Nations Commission on International Trade Law*, p. 3 and 7.
[39] UNCITRAL, *The United Nations Commission on International Trade Law*, p. 30.

monize their Arbitration Acts if there were a model law that they could take influences from or implement completely. The text in the model law is simple and it describes, from beginning to end, an arbitration process and that is probably why so many have implemented the model law completely (for example; Australia, Scotland and Bermuda)[40] or with minor changes into their own national Arbitration Acts (for example; Russia and Mexico)[41].[42]

As mentioned earlier, Sweden has not harmonized their Arbitration Act with international rules and Conventions. Sweden reasoned that since they have used arbitration for such a long time, they could use international rules and Conventions as an influence and not completely implement them into Swedish Arbitration Act. Therefore would not the Swedish Arbitration Act be completely different from the model law, the Swedish Arbitration Act was designed with particular regards to the model laws provisions in each sub-question.[43]

The UNCITRAL model law has been used successfully in those countries that have not used arbitration before and have given them a good model to use when they have legislated their domestic Arbitration Act.[44] The model law has not legislated when a third party wants to participate in an ongoing arbitration.[45]

2.2.3 UNCITRAL arbitration rules

The original arbitration rules UNCITRAL created was adopted in 1976 and has since then been used in many different disputes. The UNCITRAL arbitration rules provide parties with procedural rules that parties can decide to follow in an arbitration tribunal.[46]

The UNCITRAL arbitration rules cover aspects such as; where the appointment of the arbitrators shall be, example on an arbitration clause, give rules about the award and which form it should have. Disputes were these rules can be assumed to be used are; dispute between commercial private parties where no arbitral institution is involved, state vs. state and commercial disputes administered by an arbitral institution.[47]

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40 The Swedish Government bill 1998/99:35, p. 38.
41 The Swedish Government bill 1998/99:35, p. 38.
42 Redfern and Hunter, *Redfern and Hunter on international arbitration*, p. 75.
43 The Swedish Government bill 1998/99:35, p. 47.
44 The Swedish Government bill 1998/99:35, p. 38.
45 UNCITRAL Model Law on International Commercial Arbitration.
46 http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules, 11 April 2011.
47 http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules, 11 April 2011.

In 2006 UNCITRAL decided to renew the arbitrational rules because of the development arbitration had the last 30 years. Some of the rules new arbitration rules contributed with were; dealing with multiple parties, make arbitration more efficient, reasonable costs for procedure and more detailed provisions on interim awards.[48] Parties have been able to use these new arbitration rules since August 15 2010.[49]

The UNCITRAL arbitration rules are, unlike the model Law, rules about procedural rules.[50] Because of the changes in the revised arbitration rules, it has become easier for a third party to participate in an ongoing arbitration tribunal, compared with the original arbitration rules from 1976. The new revised arbitration rules states:

> "The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration." [51]

In the draft to article 17, paragraph. 5, the working group stated that the best time for a third party to participate in an ongoing arbitration was early in the arbitration. Before a third party can participate in the ongoing arbitration, the arbitration tribunal has the power to deny the entrance of the party.[52]

This section was supposed to give the reader an insight about which international rules and Conventions could be used in international arbitration and an explanation how the problem occurred when a third party wants to participate in an ongoing arbitration. The upcoming section will describe how countries have legislated the problem when a third party wants to participate in an ongoing arbitration.

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48 http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules, 11 April 2011.
49 UNCITRAL arbitration rules, article 1, paragraph. 2.
50 The Swedish Government bill 1998/99:35, p. 47.
51 UNCITRAL arbitration rules, article 17, paragraph. 5.
52 Report of Working Group II, p. 16.

2.3 Countries and institutions legislation

2.3.1 England

In 1996 the English Arbitration Act replaced random judicial decisions and legislation. The new Arbitration Act is the first legal framework in England that is systematic and comprehensive for commercial disputes. When England decided to develop a new Arbitration Act, England considered if they should adopt the UNCITRAL model law or not. England came to the conclusion that the new Arbitration Act should not adopt the UNCITRAL model law, but the new Arbitration Act should be influenced, concerning language and structure from the UNCITRAL model law.[53]

England's arbitration rules do not legislate when a third party wants to participate in an ongoing arbitration.[54] Instead have the LCIA legislated how a third party could enter a ongoing arbitration;

> "Unless the parties at any time agree otherwise in writing, the Arbitral Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views;[…]to allow, only upon the application of a party, one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented thereto in writing, and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration."[55]

2.3.2 Switzerland

Switzerland has been, for a long time, a location where parties wants to settle their international arbitration. The reason why parties want to settle their international arbitration in Switzerland may be because of the developed legal system.[56] The Swiss national arbitration code was created in 1987 and does not have any rules about when a third party wants to participate in an ongoing arbitration.[57] Unlike the Swiss federal code chapter 12, the SAA has legislated when a third party wants to participate in an ongoing arbitration;

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53 Park, *Arbitration of International Business Disputes*, p. 206.
54 English Arbitration Act, 1996, c. 23.
55 London Court of International Arbitration, article 22, paragraph. 1, (h).
56 http://www.arbitration-ch.org/about-asa, 11 April 2011.
57 Switzerland's Federal Code on Private International Law, of December 18, 1987, chapter 12.

> "Where a third party requests to participate in arbitral proceedings already pending under these Rules or where a party to arbitral proceedings under these Rules intends to cause a third party to participate in the arbitration, the arbitral tribunal shall decide on such request, after consulting with all parties, taking into account all circumstances it deems relevant and applicable."[58]

Chapter two has described how the problem occurs when a third party wants to participate in an ongoing arbitration and how countries and international rules have tried to legislate this problem. Chapter three will describe how Sweden's legal position when a third party wants to participate in an ongoing arbitration. The chapter will begin with an introduction of the Swedish Government bill and then describe if it is possible to use Swedish Law of Contract or case-law to allow a third party into an ongoing arbitration.

[58] Swiss Rules of International Arbitration, article 4, paragraph. 2.

3 Sweden – Is it time for a change?

3.1 Swedish legislation

3.1.1 Swedish Government bill

As mentioned, Sweden's Arbitration Act was renewed in 1999. One of the reasons why the Swedish Government felt that the Swedish Arbitration Act should be renewed was because the last development was made in 1929. Since the last development of the Arbitration Act, there had been a lot of changes on the arbitration area. The aim for the Swedish Government with the new improvement of the Arbitration Act was to create an Arbitration Act that was modern and could meet the demands for efficiently, legal security and speed. This was also the core in the old Arbitration Act, but the new arbitration needed to be updated and consider international arbitration. Before the new Arbitration Act Sweden had two different Acts about arbitration, one for arbitration in Sweden and one for international arbitration. Even though Sweden had an Act about international arbitration, it was not up to date because the Swedish international Arbitration Act was also created in 1929.[59]

The Swedish Government considered a development of the Swedish Arbitration Act necessary, because Sweden is involved in a lot of international arbitration contracts where Sweden is the forum for solving the disputes. A question that the Swedish Government had to deal with before a new Arbitration Act could be created, was if the new Act should be harmonized with international rules and Conventions. The answer to the question if Sweden should harmonize their Arbitration Act with UNCITRAL model law was no, Sweden should not harmonize their Arbitration Act with international rules and Conventions.

The Swedish Government found that most of the countries that had harmonized their Arbitration Acts with the UNCITRAL model law was countries that had not used arbitration as long as Sweden and did not have the same tradition of using arbitration as Sweden. Nevertheless should the Swedish Arbitration Act respect the UNCITRAL model law when determining a problematic situation. Because the Swedish Arbitration Act was not harmonized with UNCITRAL model law, it takes effort for foreign parties to learn the Swedish arbitration code. Therefore the new Arbitration Act is more informative than before.[60]

[59] The Swedish Government bill 1998/99, p. 43-44.
[60] The Swedish Government bill 1998/99, p. 47-48.

3.1.2 Swedish Arbitration Act

If parties want to use arbitration instead of a regular court, they have to enter a contract with the other party about an arbitration clause. This clause can be entered before, during and after a dispute.[61] Sweden's Arbitration Act includes basic rules about an arbitration clause and how an arbitration procedure shall be executed. The Swedish Arbitration Act determines when an arbitration clause is valid and when a party can overrule the award to a regular court.[62]

The Swedish Government support parties to settle a dispute in arbitration, because it is not the Swedish Government's wish that all disputes should be determined by a Swedish court. One of Sweden's contractual principles is *pacta sunt servanda* and that is also applied to contracts about arbitration,[63] with some exceptions.[64] The Swedish arbitration code have three fundamental parts; the arbitration agreement makes a regular court invalid to settle the dispute, one of the parties can force the other party to complete its arbitration agreement and the Act gives an arbitration award legal effect.[65]

Even though Swedish Arbitration Act, after the development, does not make any difference between a Swedish arbitration or an international arbitration, the Arbitration Act is divided in one international section and one for domestic arbitration.[66] In the international section the Arbitration Act states when an international award can be executed and acknowledged[67].

3.1.3 Stockholm Chamber of Commerce

Stockholm Chamber of Commerce (SCC) deals with approximately 200 disputes every year. A party who uses this institute is usually from Sweden or from another Nordic country.[68] As the other institutes mentioned above, the SCC have their own arbitration rules. The SCC's arbitration rules have been developed several times and the latest development was made in January 2010.[69] The SCC have also alternative to their own rules, for example, arbitration rules on how to administer the UNCITRAL arbitration rules.[70] The SCC arbitra-

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61 Madsen, *Commercial arbitration in Sweden: a commentary on the Arbitration Act*, p. 15.
62 Kvart och Olsson, *Tvistlösning genom skiljeförfarande. En presentation av den nya lagen om skiljeförfarande*, p. 17.
63 Olsson, *Kvart, Lagen om skiljeförfarande - en kommentar*, p. 18.
64 Swedish Arbitration Act, article 1.
65 Olsson, *Kvart, Lagen om skiljeförfarande - en kommentar*, p. 19.
66 Olsson, *Kvart, Lagen om skiljeförfarande - en kommentar*, p. 19.
67 Swedish Arbitration Act, article 53.
68 Tweeddale, *Arbitration of commercial disputes - International and English law and practice*, p. 65.
69 SCC - Arbitration rules of the Arbitration Institute of the Stockholm Chamber of Commerce.
70 SCC – Procedures and services under the UNCITRAL arbitration rules.

tion rules do not legislate situations where a third party wants to participate in an ongoing arbitration.[71]

Perhaps one reason why SCC is so popular is because few of the awards from the SCC are challenged.[72] The reason why few awards are challenged is because an award is considered to be binding and final for both parties in the dispute.[73]

3.2 Third party participating in a Swedish ongoing arbitration

3.2.1 Legislation

The Swedish Arbitration Act does not legislate when a third party wants to participate in an ongoing arbitration tribunal. The Swedish Government did not legislate this problem, even though Swedish doctrine wished that the new Swedish Arbitration Act could determine when a third party wanted to participate in an ongoing arbitration tribunal.[74] The Swedish Government bill, for the Swedish Arbitration Act, states that an arbitration contract and its validity shall be determined by Swedish contractual principles. Therefore the Swedish Law of Contract is applicable on arbitration contracts.[75] In the Swedish Law of Contracts, there was a principle that only made the parties who entered a contract bound. Because of this principle, it was not possible for the parties in a contract to decide about a third party's legal capacity.[76]

This principle of a third party not being bound by contract have been developed over the years. Today it is possible for parties in a contract to bind a third party, this is possible if the parties in the contract have given the third party rights and not obligations.[77] If the parties in a contract have only given a third party rights, the contract is given legal effect.[78]

A party in a contract has the right to trade the contract to another party and this can be done without the remaining party of the contract knowing or approving the trade.[79] This principle has gotten some critique from the Swedish doctrine. In situations when a party has traded its rights in a contract to a third party, without the remaining party's approval or knowledge, it is hard to claim that there is a declaration of intent between the new parties

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71 SCC - Arbitration rules of the Arbitration Institute of the Stockholm Chamber of Commerce.
72 Tweeddale, *Arbitration of commercial disputes - International and English law and practice*, p. 65.
73 Tweeddale, *Arbitration of commercial disputes - International and English law and practice*, p. 65.
74 Edlund, *Skiljeklausul och singularsuccession, dags för lagstiftning!*, SvJT. 1993, s. 905.
75 The Swedish Government bill 1998/99, p. 48.
76 Adlecreutz, *Avtalsrätt-I*, p. 142-144.
77 Rodhe, *Obligationsrätt*, p. 642.
78 Case-law, NJA, 1956 p. 209.
79 Heuman, *Specialprocess Utsökning och konkurs*, p. 31.

in the contract about using arbitration. In this situation the old arbitration clause is probably not valid between the remaining part and the third party, at least not by Swedish contractual principles.[80]

There have been suggestions for how to make a situation valid between the remaining party and the third party when a contract have been traded to a third party, without the remaining party knowing or approving the trade. The first suggestion is that the arbitration clause shall not be binding between the new parties, unless there is a declaration of intent that the old arbitration clause shall be valid. A problem with this suggestion is that the remaining party of the contract would get a weaker legal position, because the old arbitration clause is not longer valid. Contracts being traded is common in commercial relationships, therefore should the parties of a contract always keep in mind that the other party may trade the rights in a contract to a third party. If the parties want to prevent the other party trading its rights of a contract to a third party, a clause should be written in the contract. The clause should determine that a party of the contract could trade its rights to a third party, if the remaining party approve.[81] The other suggestion is that the acquirer has to agree to use the arbitration clause that follows with the contract and if the acquirer does not like the arbitration clause, then the acquirer does not have to take over the contract.[82]

3.2.2 Case-law

3.2.2.1 NJA 1997 p. 866

This case law concerns a situation when a company has taken over a contract with an arbitration clause. Company A and B had entered an agreement about building a ship. Company C entered the contract instead of the previously owner B. Company A hired company D as a sub-contractor. Company D hired then company E to install an engine to the ship. When the ship had been delivered to company C, a problem with the engine arose on the delivered ship. Both company A and D transferred their rights to company E when the engine problem arose. Company C sued company E in the District Court, company E challenged the legal action and claimed that the parties were bound by an arbitration clause.[83]

The District Court did not allow company C to continue the progress, since the contract both parties was bounded to, had an arbitration clause. In the District Court's reasoning,

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[80] Heuman, *Singularsuccessor bunden av skiljeklausul enligt nytt HD-fall*, JT 1997/98 s. 534.
[81] Heuman, *Fråga om skiljeavtals giltighet vid singularsuccession* i Festskrift till Sveriges advokatsamfund 1887-1987, p. 248.
[82] Vahlén, *Avtal och tolkning*, s. 153.
[83] Case-law, NJA 1997 p. 866.

the court stated that company E was not late to challenge that an arbitration should be used instead of the District Court, therefore was not company C's claim approved. Company C appealed to the Court of Appeal.[84]

In the Court of Appeal company C claimed that the parties had not agreed to use an arbitration tribunal. The arbitration clause had been between the original parties of the contract, therefore should not the arbitration clause have legal effect between company C and E. The Court of Appeal did not support company C arguments and did not approve their claim. Company C appealed to the Supreme Court for another ruling and the Supreme Court settled the dispute.[85]

The Supreme Courts reasoning will follow: The problem that the Supreme Court first had to settle was if company C was legally bound by the arbitration clause in the contract. The Supreme Court reasoned that company C would be bound by the arbitration clause, if it was proved that company C knew or should have known that the contract held a clause about arbitration. To support this thesis, the Supreme Court held that if company C would not be bound by the arbitration clause, it would give company E a disadvantage. It was assumed that the wish between company E and the original parties of the contract, was to use an arbitration tribunal to settle a possible future dispute instead of a regular court. The Supreme Court reasoned that it would be too easy for company E to avoid an arbitration clause, if the arbitration clause was not valid when company C took over the contract. The Supreme Court stated that if company C did not want to use the arbitration clause in the contract, then company C did not have to take over the contract.[86]

If the Supreme Court would decide that the arbitration clause would not be legally binding for company C, company E would get a serious degradation if they had to use a regular court instead of an arbitration tribunal. Company E could not prohibit the transaction between the original party and company C. The Supreme Court stated that a principle in the Swedish civil law, was that a third party can not get better rights than the previous party.[87] This principle is primarily used in civil law, but there are strong reasons why this principle should be used when an arbitration clause have been transferred to a third party.[88]

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84 Case-law, NJA 1997 p. 866.
85 Case-law, NJA 1997 p. 866.
86 Case-law, NJA 1997 p. 866.
87 Swedish Promissory Notes Act, (*Lag om skuldebrev*) (SFS 1936:81), article 27.
88 Case-law, NJA 1997 p. 866.

The Supreme Court reasoned that company C should be bound by the arbitration clause, while company E could decide if they want to use an arbitration tribunal or a regular court. This statement from the Supreme Court had a downside, if company E would be able to choose if an arbitration tribunal or a regular court should determine the dispute, company E could have the option to speculate in which form of court or tribunal that would be used. This made the Supreme Court change their mind. The new statement from the Supreme Court was that company E would also be bound by the arbitration clause, unless there were any special circumstances. In this case, the Supreme Court could not find any special circumstances that would not bind company C and E to the arbitration clause. The Supreme Court ruled that company C was bound by the arbitration agreement.[89]

Doctrine: Professor Lars Heuman stated in his article that the case-law NJA 1997 s. 866 had some questions that needed to be answered. For example, it is not clear what the Supreme Court considers to be a special circumstance, for when a party does not have to use the arbitration clause.[90]

This case-law regulates when a party has taken over a contract with an arbitration clause and when it is possible for the parties to start an arbitration tribunal against the other party. It also indicates when a third party could participate in an ongoing arbitration. The Supreme Courts reasoning indicates that it is not possible for a third party to participate in an ongoing arbitration, unless the parties of the arbitration contract allow the third party.[91]

The Supreme Court reasoning about a party breaking free from the arbitration clause, is when a party is trying to use a regular court instead of an arbitration. If parties could make the decision to use a regular court instead of an arbitration tribunal, it would breach the parties' autonomy. Another reason why a party should not be able to break free from an arbitration clause is because it is not fair if one party can speculate against the other party and on the other party's expense. An example is when the plaintiff could wait until all the evidence have been presented and then decide if the process should be continued in a arbitration or start all over in a regular court. It could be tempting for the plaintiff to let another underfinanced company to take over the plaintiff's part in the arbitration, in cases where the plaintiff think they would loose the dispute.[92]

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89 Case-law, NJA 1997 p. 866.
90 Heuman, *Kan ett utomstående rättsjubjekt träda in eller tvingas in i ett pågående skiljeförfarande?*, p. 152 - 153.
91 Heuman, *Kan ett utomstående rättsjubjekt träda in eller tvingas in i ett pågående skiljeförfarande?*, p. 152.
92 Heuman, *Kan ett utomstående rättsjubjekt träda in eller tvingas in i ett pågående skiljeförfarande?*, p. 152 - 153.

3.2.2.2 NJA 2000 p. 202

This case-law considers compulsory purchase of stocks in a bankrupted company. A minority shareholder had sold stocks that were the property in an ongoing arbitration dispute. The shareholder bought the stocks back before the arbitrators had given an award about the dispute.[93] The question was if the shareholder, who during an arbitration bought back the stocks that the arbitration concerned, was legitimate to enter the ongoing arbitration as a party.[94]

The District Court approved the shareholders claim and said that the shareholder was legitimate to enter the arbitration after the arbitration had started. In the Court of Appeal, the parties had not come with any new information or grounds. Therefore the Court of Appeal ruled as the District Court; the shareholder was legitimate to enter the ongoing arbitration. Even under the circumstances that the shareholder had bought the stocks after the arbitration tribunal had started.[95]

The Swedish Supreme Court settled the dispute. The Supreme Court stated that the shareholder had lost its right to litigate in the arbitration tribunal. The Supreme Court had to decide if the shareholder had won back its right to litigate when it bought back the stocks.[96]

In the Swedish companies act[97] there is no guidance for how to solve this situation. Because this dispute should be solved in an arbitration, the Swedish Arbitration Act was applicable. The Swedish Arbitration Act did not give any guidance when a party during the arbitration bought the object for discussion and if the shareholder could enter the ongoing arbitration as a legitimate party. In a normal arbitration tribunal, it is preferable that a party should be able to enter an ongoing arbitration, as long the party is bound by the arbitration clause.[98]

The Swedish Supreme Court thought it was possible to use an analogue comparison with the Swedish Code of Judicial Procedure, where it is possible for a third party to enter an ongoing court process. According to chapter 13, article 7, in Sweden's Code of Judicial

[93] Case-law, NJA 2000 p. 202.
[94] Case-law, NJA 2000 p. 202.
[95] Case-law, NJA 2000 p. 202.
[96] Case-law, NJA 2000 p. 202.
[97] The Swedish Companie Act (*Aktiebolagslagen*) (SFS 2005:551).
[98] Case-law, NJA 2000 p. 202.

Procedure, a party of the process can give another party the right to finish the court procedure.[99]

Arbitration based on compulsory purchase of stocks is based on law, opposed to a regular arbitration where the arbitration clause is based on a contract. Arbitration based on law, do not have the same problem to decide who is bound by the arbitration clause or who should pay for the costs that the arbitration bring. The Supreme Court asked them selves if there were any other reasons why the shareholder should not be able to litigate.[100]

The Supreme Court stated that when the party who bought the stocks from the shareholder could take the shareholders place in the arbitration, but did not, the shareholder should not be punished because the party who bought the stocks first, did not enter the arbitration tribunal. Therefore should the shareholder win back the right to litigate in the arbitration tribunal.[101]

Doctrine about this case-law states that this case-law regulates compulsory purchase of stocks, but it is a guiding case-law for arbitration. The Supreme Court stated that Swedish Arbitration Act did not regulate when a third party wanted to participate in an ongoing arbitration. The Supreme Court did not consider it would be a problem in regular cases as long the third is bound by the arbitration clause.[102]

If the statements from the doctrine are read each individually, they can be misleading. These statements can give the conclusion that a third party could participate in an ongoing arbitration tribunal in regular situations. The reasoning implicates that the Swedish Arbitration Act does not contain a direct refuse for a third party to participate in an ongoing arbitration tribunal.[103]

3.2.3 Swedish doctrine about a third party participating in an ongoing arbitration.

What does the doctrine state when a third party wants to participate in an ongoing arbitration? The Swedish professor Lars Heuman states in his article that the arbitrators can not include a third party to the arbitration, unless the parties, who is bound by the arbitration clause, approve. Probably it is also necessary that the arbitrators approve that a third party

[99] Case-law, NJA 2000 p. 202.
[100] Case-law, NJA 2000 p. 202.
[101] Case-law, NJA 2000 p. 202.
[102] Heuman, *Kan ett utomstående rättsjubjekt träda in eller tvingas in i ett pågående skiljeförfarande?*, p. 153.
[103] Heuman, *Kan ett utomstående rättsjubjekt träda in eller tvingas in i ett pågående skiljeförfarande?*, p. 154.

would enter, since it would increase the arbitrators work load if a third party would enter the ongoing arbitration. Because when the arbitrators accepted to settle the dispute, it was only a dispute between the original parties.[104]

When a third party wants to participate in an ongoing arbitration, the arbitrators have to consider both, parties in the arbitration and the party who wants to participate in the arbitration, interests. It is common that the parties in an arbitration tribunal want to exclude the third party from entering. One reason why the parties in the arbitration do not want to let the third party into the arbitration tribunal is because it makes it harder for the arbitrators to decide an award.[105]

The most common reason for a third party to participate in an ongoing arbitration is because it would make their process faster. If a third party could participate in an ongoing arbitration, the tribunal would answer their claim quicker, it would be easier and to a lower cost, because the arbitrators are well informed about the situation.[106] This advantage is common if the parties in the arbitration and the third party are closely connected so their evidence is mutual. If the third party is not allowed into an arbitration tribunal, it is important that arbitration award is not given legal effect or a negative proving for the third party. This because the third party could not look after their claim in the first arbitration.[107]

One reason why a party might want to include a third party to their ongoing arbitration is because it would save money and time. An example when this can occur is when a party demands a partner to the other party, who is joint liability, to pay an amount of money or when a creditor wants to claim more money from the debtor and its bailsman. If it would be too easy for the parties in an arbitration to force a third party into the arbitration, it may result in the original arbitration becomes more expensive, time-consuming and more difficult to settle.[108]

Another prospect when a third party would participate in an ongoing arbitration is that the procedure will be longer and cost more. If a new party would enter an ongoing arbitration, the arbitrators have to consider if they will become challengeable or not. If an arbitrator considers itself to be challengeable when the third party enters the arbitration, usually it has

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104 Heuman, *Kan ett utomstående rättsjubjekt träda in eller tvingas in i ett pågående skiljeförfarande?*, p. 146.
105 Heuman, *Kan ett utomstående rättsjubjekt träda in eller tvingas in i ett pågående skiljeförfarande?*, p. 147.
106 Heuman, *Kan ett utomstående rättsjubjekt träda in eller tvingas in i ett pågående skiljeförfarande?*, p. 147.
107 Heuman, *Kan ett utomstående rättsjubjekt träda in eller tvingas in i ett pågående skiljeförfarande?*, p. 147.
108 Heuman, *Kan ett utomstående rättsjubjekt träda in eller tvingas in i ett pågående skiljeförfarande?*, p. 146-147.

to resign from its assignment.[109] This will be time consuming, especially if the third party enters the ongoing arbitration in the end. If one arbitrator resign, the other arbitrators have to inform the new arbitrator about what have happened and which evidence that the parties have presented.[110]

Article 24 in Sweden's Arbitration Act states that all parties shall have been given an opportunity to declare their evidence and meaning in oral or in writing, this should also apply when a third party enters an ongoing arbitration. With this article, the third party should be informed by the arbitrators what the other parties have claimed and which evidence they have presented. It is not certain that the third party could successfully demand to remake all the evidence parties have presented earlier in the arbitration.[111]

Chapter 2 and 3 have described both international and Swedish arbitration concerning when a third party wants to participate in an ongoing arbitration. The following chapter will contain the authors thoughts about international arbitration when a third party wants to participate in an ongoing arbitration. The chapter will also describe Sweden's legal position and how they could legislate multi-party arbitration.

[109] Swedish Arbitration Act, article 8.
[110] Heuman, *Kan ett utomstående rättsjubjekt träda in eller tvingas in i ett pågående skiljeförfarande?*, p. 157.
[111] Heuman, *Kan ett utomstående rättsjubjekt träda in eller tvingas in i ett pågående skiljeförfarande?*, p. 159.

4 Analysis and conclusion

4.1 Introduction

Arbitration with multi-parties is a problem that several legislations have tried to solve. Multi-party arbitration becomes more difficult when the parties are from two different countries. Multi-party arbitration is not usually legislated in countries Arbitration Acts. Because multi-party arbitration does not have a lot of written rules, it have been legislated by case-laws and arbitration rules from domestic arbitration institutes. The following section will discuss the arbitration rules that determine when a third party wants to participate in an ongoing arbitration and how Sweden could legislate this problem in their Arbitration Act.

4.2 International arbitration rules

4.2.1 Background

Since parties in a civil dispute have the right to choose which law and where they want the arbitration tribunal to be located, it is beneficial for the parties to know which legislation is able to determine when a third part wants to participate in an ongoing arbitration. The Swedish Arbitration Act does not legislate multi-party in an arbitration tribunal. Should the Swedish Arbitration Act be able to determine these problems? Or should the parties choose a legislation that already determines multi-party arbitration? A problem for the parties are that they not always know before they choose a legislation if a third party wants to participate in their ongoing arbitration tribunal or not.

In the following, the author will discuss UNCITRAL and the other countries arbitration rules that earlier was described in the thesis. The author will discuss what is positive and what is negative with international arbitrations rules and if Sweden should be influenced by them.

4.2.2 UNCITRAL

UNCTRAL model law is, as mentioned earlier, a model law to help countries with their domestic Arbitration Act. Countries can either apply the entire model law as their own, or take some parts and influences from it and make their own domestic Arbitration Act. This model law is considered good for those countries that have not used a domestic Arbitration Act before and for countries that wants to make their Arbitration Act more international. The author considers the model law a good help for countries, because the model law is

pedagogical and easy to apply, therefore becomes the arbitration tribunal faster and cheaper.

If a country would make a completely new Arbitration Act, without any help or take any influences from the model law, it would probably take time to change all the eventual parts that are inferior. That is why the model law is a good choice for countries to take influences from, the model law have been used since 1985 and have been modified recently. Sweden has used the model law when they developed their domestic Arbitration Act. The author consider therefore a completely harmonization with the model law unnecessary because Sweden has a well developed Arbitration Act, with regards for international arbitration. Another reason why Sweden should not harmonize their Arbitration Act completely with the model law is because it would not make the Swedish act better, especially when the model law does not legislate when a third party wants to participate in an ongoing arbitration tribunal.

The UNCITRAL arbitration rules is a good choice for parties in an arbitration, if they want arbitration rules that could determine when a third party wants to participate in an arbitration. The development that has been made in the arbitration rules, is one step in the right direction. The arbitration rules enables a third party to enter an ongoing arbitration tribunal, the criterion is that the third party is bound by the arbitration contract.

A good regulation in the UNCITRAL arbitration rules is when a request is done by one of the parties in the arbitration, the arbitration tribunal shall give both parties in the arbitration and the third party a chance to be heard on why or why not the third party should participate in the arbitration. This is a good rule because when one party requires a third party to enter, all parties have a chance to explain why the third party should participate or not in the arbitration.

A weakness with the UNCITRAL arbitration rules is that it does not legislate if the parties shall request in writing or in oral. When the request is oral, it would probably take longer time to let all parties be heard, than if the request was in writing. That would make the arbitration slower and cost more money, especially if there are a lot of third parties who wants to participate in the ongoing arbitration. A slower process could be abused by an assuming losing party that could try to request a lot of third parties to enter to slow the arbitration down. This is a problem since arbitration is supposed to be fast.

In the UNCITRAL arbitration rules, it is the arbitration tribunal who decides if a third party should be allowed into the arbitration tribunal. With the arbitration rules, the parties of the original arbitration contract does not have the power to allow or deny a third party to participate in their ongoing arbitration. When the arbitration tribunal allows a third party into the ongoing arbitration, the arbitration tribunal breaches two arbitration principles; maintaining arbitrations nature and increasing the arbitration award's effect of binding related parties. Arbitration is based on a contract between the parties. This means that the arbitration tribunal is able to expand the original arbitration contract. The author does not consider this particular part of the rule, a good influence if Sweden should develop a rule when a third party wants to participate. Mainly because as stated before, the arbitration is based on a contract.

One way to settle this is by using one of the parties' domestic Law of Contract, to decide if a party could enter an ongoing arbitration. This would make it legally safer for the parties in arbitration, since the decision is based on a law and not what the arbitration tribunal considers. The question is how the arbitrators decide which Law of Contract they should use when it is a cross-border arbitration. If the parties have not decided which law that should be applicable, then the arbitration tribunal should use the domestic Law of Contract in the country where the arbitration is located. This would be the easiest way to foresee which law that should be used for the parties if they have not agreed which law should be applicable.

4.2.3 England

England's Arbitration Act does not legislate when and if a third party could participate in an ongoing arbitration tribunal. This seems to be common for the countries the author has researched, there are only the institutes that have legislated multi-party arbitration in their arbitration rules. LCIA, have decided that the arbitration tribunal have the power to allow a third party to participate in an ongoing arbitration. The arbitration tribunal has the power to allow a third party into the ongoing arbitration, after a request from any of the parties or by its own, unless the parties have decided something else. The request from a party shall be in writing.

When the request shall be in writing, it is easier and less time consuming for the parties to decide if they want to allow a third party to participate in their arbitration. To make it faster, the author think that the arbitration tribunal should prepare the facts and then do a brief presentation on the third party and their claim. This would probably increase the original

work load for the arbitrators, unless parties have written in the arbitrators contracts that they shall handle the requests. If the research obligation for the arbitration tribunal would not be in the contract, an obligation like this would not be within their assignment. The author do not think it would be possible for parties that use LCIA arbitration rules to demand that the arbitration tribunal does this kind of research. The arbitration tribunal shall settle the dispute and it would probably be hard for the parties to claim that the arbitration tribunal should also research the third party, unless the arbitration tribunal have agreed to do that. This problem would be something for the Swedish Government to consider if the Arbitration Act would include multi-party arbitration.

In arbitrations when the arbitration tribunal requires that a third party should be allowed into the arbitration, it would probably slow the arbitration down. When the parties of the arbitration have not requested a third party to participate, the author assumes that the third party have no connection to the arbitration tribunal. The author assumes this because if it would be possible for one of the parties in the arbitration to save money or time, by allowing or requesting the third party to enter, the author assumes that the parties would already have requested the entrance of the third party. The request from the arbitration tribunal would result in the third party is allowed into the ongoing arbitration, a question of rule of law arises for the author. If the arbitration tribunal allows a third party, with no connection to the arbitration tribunal or its parties, to participate in the ongoing arbitration, the original parties of the arbitration would probably get the award annulled. The parties would probably annul the award because the arbitration tribunal have expanded the arbitration contract and the annulment would be time consuming and cost more for the original arbitration parties.

The author consider the LCIA arbitration rules one of the best, if not the best, rules about third party participating in an ongoing arbitration. The LCIA rules are good because the request is in writing and it is not only the parties in the arbitration that can request a third party to enter. A down side is that it may cost more money and take a longer time if the arbitration tribunal have allowed a third party that have no connection to neither of the parties or the arbitration claim. This will make an arbitration more legally unsafe, since not the parties in the contract decide if a new party could enter their arbitration. This makes it uncertain who could participate in their ongoing arbitration.

This problem, when the parties of the contract is not the ones who decides if a third party should be allowed into the arbitration, is rather easy to solve. The parties could write in the contract with the arbitrators that it is only the parties of the contract who is able to allow a third party into the arbitration tribunal. This discussion shows that it could be a problem when parties have not concerned this in their arbitration contract.

4.2.4 Switzerland

Switzerland's domestic arbitration association have legislated when a third party wants to an ongoing arbitration tribunal, it can be found in SAAs arbitration rules article 4, paragraph 2. The author considers the SAA's arbitration rules about a third party participate in an ongoing arbitration good, but it has some flaws.

One flaw, as stated before by the author, is that arbitration rule does not legislate if the request shall be in oral or in writing. Another flaw, is that the arbitration tribunal is the one who will allow a third party into the arbitration, problems that this could bring is discussed in 4.2.3. If the request is in writing, it would probably be quicker to decide if the third party should be allowed into the arbitration, especially if there is no chance for the third party or another party to overrule this request so they could explain in oral. One good regulation that the SAA have succeeded in, considered by the author, is when a request about a third party should participate in the arbitration have been sent to the arbitration tribunal, all parties shall get a chance to explain their opinion about the third party participating.

When the parties explain their opinion, they shall consider all circumstances that are relevant and applicable for the situation. This regulation gives the parties a concrete subject to discuss. However, it may be discussed which circumstances that is considered to be relevant and applicable.

Circumstances that are relevant and applicable, according to the author, is if the third party is bound by the arbitration contract, how long the arbitration procedure have been going on and if the parties would benefit from allowing the third party into the arbitration. Considering if a third party is bound by the arbitration contract may be problematic. It would be easy to decide if a third party is bound by a contract if the third party has signed the arbitration contract. In situations when the third party has not signed a contract, but wants to participate in the arbitration it becomes problematic. An example on this may be if the third party would be bound by the contract because of contractual principles. Perhaps the third party has implicit agreed to use an arbitration. When this problem occur, it is impor-

tant that all parties get to explain why they consider the third party to be bound by the contract, so the arbitration tribunal could make a correct decision.

The other circumstance that could be vital for the parties is how far the arbitration procedure have been going on. It may be positive to allow a third party into an arbitration when the arbitration proceeding has just begun. Then it would not be hard to give the third party a chance to catch up about what have happened earlier in the arbitration. If the arbitration procedure gone too far, it would probably take a long time for the third party to catch up on what have been discussed and proved earlier in the arbitration.

The last circumstance may be a mix of the two previous. If none of the parties would benefit from allowing a third party to participate, the author does not see a reason why the arbitration tribunal should allow the third party to participate. The only reason why a third party should be let into the arbitration would be if the parties of the arbitration would save money and time by allowing the third party to participate in their arbitration procedure.

4.2.5 Should Sweden be influenced by other arbitration rules?

As seen above, there are no arbitration rules about third party participating in an ongoing arbitration that is perfect. There are arbitration rules that are better than others, as the author mentioned earlier, the LCIA probably has the best arbitration rules about third party entering an ongoing arbitration. The reason why this thesis have researched different arbitration rules is to give the reader awareness that legislation about third party participating in an ongoing arbitration is not very common and when the situation is legislated, the rules are not always exhaustive.

There are some parts that the Swedish Government could use and there are some parts that the Government should not use. Since the Swedish Arbitration Act is built on Swedish contractual principles, it would be very hard to create an article that is completely exhaustive, unless the Swedish Government makes it very long. The author will present a suggestion how the Swedish Government could structure an arbitration rule when a third party wants to participate in an ongoing arbitration tribunal. The suggestion follows;

> Parties of the arbitration, third party or the arbitrators, can in writing require to allow the third party to enter an ongoing arbitration, unless the parties of the contract agrees otherwise. The arbitration tribunal shall decide if the third party has a connection to the arbitration procedure and its parties. If the third party

> has a connection to the arbitration procedure and its parties, the arbitration tribunal shall give the parties a reasonable opportunity to state their views in writing and taking in account all relevant circumstances and facts. If the parties can not agree, the arbitration tribunal shall have the casting vote.

The suggestion from the author is a combination of arbitration rules that have been researched in this thesis. An explanation will follow why the author consider the suggestion a good guideline for the Swedish Arbitration Act. The reason why the request shall be in writing instead of oral, is because it would probably be faster. See discussion above. To make the request even faster, it should contain a detailed explanation on which grounds the third party should be allowed into the arbitration. A detailed request would make it easier for the arbitration tribunal to decide if there is a chance for the third party to enter the arbitration or not. When a request is detailed with facts that concerns the third party's legal position with the arbitration and its parties, it takes less research from the arbitration tribunal and that would save money for the parties in the arbitration. The question is how thoroughly should the arbitration tribunal research the third party and its legal position with the arbitration and its parties. It is not the intention that the arbitration tribunal shall do an exhaustive research that could determine for certain if the third party have a legal connection to the arbitration and its parties. The arbitration tribunal research should prove if it is possible for the third party to enter the arbitration. The aim with this research is to screen the most obvious parties away from entering the tribunal. A larger demand on the arbitration tribunals research would not be supported, since their main assignment is to settle the arbitrations dispute.

The new increased research obligation that the arbitration tribunal would get with this suggestion, is used when the arbitration tribunal shall decide if the third party have any connection to the tribunal or the parties. The arbitration tribunals research would make it quicker and more accurate when the parties of the arbitration shall decide if a third party should be allowed to participate in the arbitration. If the arbitration tribunal does a good research about the third party, it would not slow the arbitration down very much. Naturally it is possible that the parties of the contract do not consider the third party to be legitimate to enter. When the research is succeeded, the parties in the arbitration do not have to do such a thoroughly research if the third party is legitimate to participate in their arbitration and this would save time for the parties in the arbitration.

When the arbitrators are given a research obligation, does not this increase the arbitration tribunal work load sufficiently? Yes, it would increase the arbitration tribunals work load sufficiently. Todays arbitration tribunal do not have such a comprehensive research obligation, as the one suggested. The author see two options to increase the arbitration tribunals assignment on legitimate base, by law or by contract. The increasing assignment for the arbitration tribunal will not be discussed further in this thesis since the suggestion is just an idea from the author, but if a suggestion like this would be realized, a change in the Swedish Arbitration Act would be necessary to increase the arbitration tribunals work load.

The author has stated that if the parties are not the ones who allow the third party to participate in the ongoing arbitration, it will not be legally secure for the parties in the arbitration. The parties in the arbitration shall decide if they want to let a third party into the arbitration, with arbitrators having the casting vote. This situation can come in handy when one party wants a third party to participate in the arbitration and the other party does not. This suggestion is not giving the arbitration tribunal the power to determine if a third party should be allowed into the arbitration. It is the parties that have all the power to allow or deny a third party from participate in the arbitration. This part of legislation should only be applicable when it is a discrepancy between the parties and they can not agree upon whether a third party should be allowed into the arbitration or not. The effect of giving the arbitration tribunal the casting vote in these situations could result in that the question is answered quicker, instead of the parties arguing with each other about whether a the third party should participate or not.

An important question concerning the authors suggestion that needs to be answered is how legally safe it is when a third party could participate in an ongoing arbitration? The author have already discussed the parties legally status in the contracts when a third party could participate in the ongoing arbitration, but is it safe for the third party to be forced into an arbitration? If a third party is forced into an ongoing arbitration tribunal, approved by parties and the arbitration tribunal, with no grounds in Swedish contractual principles, the third party can use article 33 in the Swedish Arbitration Act. Article 33 in the Swedish Arbitration Act states that an arbitration award shall not be valid when it violates Swedish constitution. The Swedish Arbitration Act do not legislate what a Swedish legal constitution is, but the author would consider an arbitration award which is not based on any contractual principles or law, a violation of Swedish constitution.

The author's intention with this discussion is to show that Sweden should take influences from other arbitration rules, if they decide that the Swedish Arbitration Act should be able to determine when a third party wants to participate in an ongoing arbitration. One reason why the author would not recommend Sweden to completely use another arbitration rule and use it as it own, is because there is no arbitration rules that is exhaustive when a third party wants to participate in an ongoing arbitration. The suggestion may not either be exhaustive, but it have taken the best parts from the arbitrations rules that can determine when a third party wants to participate in an ongoing arbitration and combined them.

This section shows that if a development of the Swedish Arbitration Act would occur, the Swedish Government should take some influences from other arbitration rules. Next section will discuss if Swedish Law of Contract and case-law already could determine when a third party wants to participate in an ongoing arbitration and therefore make a development unnecessary.

4.3 Does the Swedish legal position determine multi-party arbitration?

4.3.1 Background

The Swedish Supreme Court has ruled in cases were a third party wanted to participate in an ongoing arbitration tribunal. Swedish doctrine has also given its point of view when and if a third party could participate in an ongoing arbitration and which criterions that have to be fulfilled. The Arbitration Act in Sweden does not legislate when a third party wants to participate in an ongoing arbitration, the reason is because the Swedish Arbitration Act is built on Swedish Law of Contracts and its principles. The Swedish Law of Contracts describes when a third party can become bound to a contract, therefore will also a discussion be held about these principles.

4.3.2 Case-law NJA 1997 p. 688

In section 3.2.1, an explanation about Swedish Law of Contract was made and how it is possible to bind a third party to a contract. Parties in a contract can bind a third party only if the parties have given the third party rights and not obligations. It seems to be pretty obvious why parties could not bound a third party to obligations in a contract, then it would be possible to bound a third party to a contract where the third party shall sell its car for a low price.

Another principle in Swedish Law of Contract is when a party is bound by a contract and offers a third party its rights in the contract, the remaining party do not need to approve this transaction or even know that a third party is the new party in the contract. Lars Heuman is of the opinion that when this happens, the arbitration clause should not be valid between the remaining party and the new party in the contract. A reason why the arbitration clause is not valid between the remaining party and the third party, is because there is no declaration of intent between the parties of using an arbitral tribunal. When neither the remaining party or the third party is bound to the arbitration clause, the remaining party would get a weaker position.

When a third party has taken over a contract with an arbitration clause, it could bring some complications if the new parties have not agreed to use the original arbitration clause. This leaves us with the question; is the arbitration clause valid between the remaining party and the third part when the remaining party did not approve the transaction? The Supreme Court stated in case-law NJA 1997 p. 688, that when a third party have taken over a contract, the original arbitration clause shall bound the remaining party and the third party, if the transaction was traded, bought or given to/by the third party. The remaining party is not bound to the arbitration clause, if there are special circumstances that indicates that the remaining party should not be bound by arbitration clause. This case-law prove the doctrine wrong, the arbitration clause is valid, even though the remaining party and the third party have not made a declaration of intent of using the arbitration clause. One of the Supreme Court's reasoning was if the third party would not like to use an arbitration tribunal to settle the dispute, the third party should not take over a contract with an arbitration clause. This statement from the Supreme Court seems a little bit tough since the third party have to accept an arbitration clause without any chance of discussing it. This statement could reduce the trade between companies, this problem is more a judicial political problem and should not therefore be considered more in this thesis.

The Swedish doctrine argued that the remaining party would get a weaker position if the arbitration clause would not be valid when third party had taken over the contract. The Supreme Court also discussed this argument. The Supreme Court stated that even if a remaining party would get a new "opponent" in the contract, the remaining party still would like to use the arbitration clause.

This reasoning from the Supreme Court is just an assumption. When a third party enters a contract with the remaining party, the author would also assume that the remaining party would like to use the arbitration clause in the contract. Even if there is a new party in the contract, the remaining party would still get the benefits from using an arbitration, such as speed and secrecy. When it is assumed in most cases the remaining party would like to use the arbitration clause, which circumstances are so special that the remaining party would not have to use the arbitration clause?

The Supreme Court stated in their reasoning that the remaining party of the contract is not bound to the contract when there are special circumstances. In the reasoning from the Supreme Court, it is not explained what a special circumstances is. A situation that the author assumes when the remaining party does not want to be bound by an arbitration clause is probably when the third party is insolvent. This could be problematic when a party in a contract is transferring its rights in a contract to a third party, especially if the party who is transferring its rights is likely to loose. If a party in the arbitration contract knows that the third party is insolvent and gives its rights to the third party, it would create a loophole in the system if this were legal. The party who is likely to lose could then give the rights to an insolvent party and give the remaining party a weaker position.

4.3.3 Case-law NJA 2000 p. 202

In case-law, NJA 2000 p. 202, a shareholder wanted to participate in an ongoing arbitration, because the shareholder had bought stocks that was the concern in the ongoing arbitration. The Swedish Supreme Court stated that in a regular arbitration tribunal, a party should be able to enter the ongoing arbitration if the party was bound by the arbitration contract. The Supreme Court considered that it was possible to use chapter 13, article 7 in the Swedish Code of Judicial Procedure analogue, when a third party wants to participate in an ongoing arbitration procedure. In this scenario, when the arbitration clause was based on law, it did not have the same problem to determine if a third party is bound to the contract and who should pay for the costs in the arbitration procedure.

The Supreme Court stated, there is nothing that shows in the Swedish Arbitration Act, that a third party is not allowed to participate in an ongoing arbitration proceeding. The Supreme Court stated that it was easier to participate in an ongoing arbitration when it was based on law. When it is based on law, it becomes easier to see who is bound to the contract and who should pay for the arbitration proceedings. When a party is bound to the ar-

bitration by law, it becomes easier to see if the party is bound or not to the arbitration clause. When it is legislated in a law who is bound to a contract it should be faster to determine who should be able to litigate in the proceeding.

This statement could be used in a situation when a third party wants to participate in an ongoing arbitration and bases its claim on a contract. The case-law should at least be guidance for situations when it is obvious that a third party is bound by a contract with an arbitration clause. This statement is based on principles in Swedish Law of Contract. If a third party is bound by a Swedish contractual principle, it tends to be at least in the regular cases, relatively easy to determine if a third party is bound by an arbitration clause or not. At least it should not be much more difficult to determine when a party is bound by a contract than when a party is bound by a law.

In chapter 13, article 7, the Swedish code of Judicial was also discussed. As mentioned before, it is possible for third parties to enter a regular proceeding in a Court. The Supreme Court stated that this ruling should be able to be used analogue in an arbitral tribunal, but only when in situations that concern compulsory purchase of stocks. The author do not consider article 7, chapter 13 in the Swedish Code of Judicial to be applicable on a regular arbitration proceeding. Mainly because the arbitration is based on contractual terms between the parties and if the third party who wants to use article 7 do not have any right to enter, it should not be allowed into the arbitration since this is a settlement parties need to agree on.

The Swedish doctrine and its statements when and if a third party is bound to an arbitration clause is answered with the case-law NJA 1997 p. 688, at least the statements that are discussed in section 4.3.2. The case law concerns when a party have transferred its rights to a third party before an arbitration tribunal have started, therefore is this case-law not exhaustive when a third party wants to participate in an ongoing arbitration. Usually when a third party wants to participate in an ongoing arbitration, it has not taken over a parties rights about using the arbitration clause. The case-law NJA 2000 p. 202 determine when a third party have bought back a property that is the concern in an arbitration. This case is based on law and not a contract as in a regular arbitration. This shows that these case-laws is not exhaustive in Sweden, when it comes to determine when a third party can participate in an ongoing arbitration.

5 Should multi-party arbitration be included in the Swedish Arbitration Act?

If parties are bound by the arbitration clause from the beginning, usually there is no problem when there are more than two parties in an arbitration. When a third party wants to participate in an ongoing arbitration, it is more difficult. This thesis have discussed different arbitration rules that determine when a third party wants to participate in an ongoing arbitration. Meanwhile have the Swedish Arbitration Act not legislated this problem, instead it is legislated by case-law and with the Swedish Law of Contract.

The Author shows in chapter 2, that arbitration when a third party wants to participate have become more common, mainly because the international trade have become more complex. Sweden needs to consider this development since Sweden is used in international arbitration as the location for the arbitration tribunal. Sweden should take influences from the arbitration rules that determine when a third party wants to participate in an ongoing arbitration, but still make it their own. A suggestion would be that Sweden would do as they did when they considered if they should harmonize their Arbitration Act with UNCITRAL model law, they should consider the rules and take influences from them when they legislate difficult problems.

The Swedish Supreme Court has settled case-law where a third party wants to participate in an arbitration. In case-law, NJA 1997 p. 688, the Supreme Court stated that a third party is bound to the arbitration clause in a contract it took over, unless there are certain circumstances that shows otherwise. In case-law, NJA 2000 p. 202, the situation was suitable for this thesis, a third party wanted to participate in an ongoing arbitration. This case-law concerned compulsory purchase of stocks, which is based on law, that made it easier for the Supreme Court to know who was bound by the arbitration clause and who should pay for the arbitration.

None of these case-laws or the Swedish Law of Contract can completely determine when a third party could participate in an ongoing arbitration, based on a contract. Therefore is the legal position in Sweden concerning this situation not completely legislated. Therefore it is time for the Swedish Arbitration Act to develop a rule that could determine when a third party wants to participate in an ongoing arbitration.

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