Implied Waiver of Right to Challenge an Arbitral Award
An Analysis of the Swedish Approach in Comparison with the UNCITRAL Model Law

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ABSTRACT

Arbitration depends on an effective national legislation and assistance from the national courts to give legal effect to an arbitration agreement or an arbitral award. The purpose of national legislation on arbitration and the assistance from the courts is to secure a minimum standard of objectivity and fairness in the proceedings, resulting in the enforcement of an arbitral award.¹ A party’s right to raise a challenge against award and the state’s interest in objective and fair proceedings must be weighed against the desire for efficient proceedings leading to a final and binding award.

A party may be deemed to have waived the right to challenge an award, by continuing in the arbitral proceedings without an objection, knowing of potential grounds for a challenge.² The purpose of this thesis is to analyse the Swedish approach to the implicit waiver in section 34, paragraph 2 of the Swedish Arbitration Act and how the Swedish approach compares to the waiver in article 4 of the Model Law. The development in international arbitration has been to limit the parties right to challenge an award to further the goal of a final and binding award in compliance with the principle of party autonomy.³ The waiver is closely linked to the principle of party autonomy, as party autonomy may not only bring freedom to custom the arbitral proceedings, but also the responsibility to secure the party’s rights during the arbitral proceedings. Parties have to be clear and object without undue delay to secure that the right to challenge an award is not waived.

² Swedish Arbitration Act, section 34, paragraph 2.
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<td>1929 Act on Arbitrators</td>
<td>sw. Lagen 1929:145 om skiljemän (The Swedish Act on Arbitrators)</td>
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<td>AAA</td>
<td>American Arbitration Association</td>
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<td>CLOUT</td>
<td>Case Law on UNCITRAL Texts</td>
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<td>Govt. Bill</td>
<td>sw. Proposition (Government Bill)</td>
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<td>IBA</td>
<td>International Bar Association</td>
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<td>ICC</td>
<td>International Chamber of Commerce</td>
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<td>JT</td>
<td>sw. Juridisk tidskrift (Law Journal published at the Faculty of Law of Stockholm University)</td>
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<td>LCIA</td>
<td>London Court of International Arbitration</td>
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<td>New York Convention</td>
<td>Convention on the Recognition and Enforcement of Foreign Arbitral Awards</td>
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<td>NJA</td>
<td>sw. Nytt Juridiskt Arkiv avd. I (Swedish Supreme Court cases)</td>
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<td>NJM</td>
<td>sw. Nordiskt juristmöte</td>
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<tr>
<td>RH</td>
<td>sw. Rättsfall från hovrätterna (Court of Appeal cases)</td>
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<td>SCC</td>
<td>The Arbitration Institute of the Stockholm Chamber of Commerce</td>
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<td>SFS</td>
<td>sw. Svensk Författningssamling (The Swedish Gazette)</td>
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<td>SOU</td>
<td>sw. Statens Offentliga Utredningar (Official Swedish Government Reports)</td>
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<td>SvJT ref.</td>
<td>Court of Appeal cases published in Svensk Juristtidning (Swedish Law Review)</td>
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<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
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1 INTRODUCTION

1. The increase in international trade requires an effective system for solving commercial disputes between international parties. Court proceedings in other countries can be difficult, unfamiliar and time consuming. The risk of one party having a “home court advantage” has lead to parties seeking a more neutral forum to settle their disputes. The aim of arbitration is for swift, neutral and confidential proceedings. Because of its flexibility and the freedom for parties to adapt the process after the dispute, arbitration is seen as the only realistic alternative to court proceedings today. Arbitration has become the primary system for international trade disputes and most international commercial contracts will include an arbitration clause.

2. Sweden has become an attractive region for arbitral proceedings. To meet the demands for a modern legislation suitable for both domestic and international parties the Swedish Arbitration Act was enacted in 1999. The Swedish Arbitration Act was influenced by the UNCITRAL Model Law on International Commercial Arbitration (The Model Law) to follow the international standard. The Swedish Arbitration Act formed concise and flexible rules to further the ambition for Sweden to continue as an attractive region for arbitral proceedings for both domestic and international parties.

3. An arbitral award is final and binding when it is rendered by the arbitrators and consequently cannot be appealed on the merits. To secure a minimum standard of objectivity, fairness and justice in the arbitral proceedings the Swedish Arbitration Act allows an award to be set aside if any grounds for challenging an award under section 34 of the Swedish Arbitration Act occurs. This is to secure the interest of objective and fair proceedings. However, the development in international arbitration has been to limit the parties right to challenge an award.

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4. A common occurrence in arbitral proceedings is for a losing party to use the right to challenge an arbitral award in an attempt to delay enforcement of the arbitral award and thereby coercing the opposing party into a settlement. Sensitive information may be revealed in court proceedings, which may force the opposing party to settle. These tactics delay the final outcome of the case and risk the proceedings developing into a several-instance procedure. Consequently, these tactics negatively affect the arbitration process altogether.

5. The implicit waiver in section 34, paragraph 2 of the Swedish Arbitration Act intends to be applied during court proceedings with an action to set aside an award. A party cannot object to a procedural error it may be deemed to have waived by participating in the arbitral proceedings without a clear and unequivocal objection. The purpose of the waiver is to impede parties from strategically “hedging its bets” in the outcome of the arbitral proceedings, by preserving objections in case the party might loose. This thesis focuses on when a party may be deemed to have waived it’s right to challenge an award and how the Swedish approach compares to the Model Law.

1.1 Purpose and Research Inquiries

6. The primary purpose of this thesis is to identify and analyse the Swedish approach regarding the implicit waiver of the right to challenge an award and how this approach compares with the Model Law. The considerations behind section 34, paragraph 2 of the Swedish Arbitration Act will be identified. Furthermore, the requirements to the waiver will be addressed, which may depend on the ground for setting aside the award. A comparison will be made to the waiver in article 4 of the Model Law. The approach of article 31 of the The Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (The SCC Rules) will be discussed as the SCC Rules may influence the courts decisions. The demand for a final and binding award needs to be weighed against a party’s right to challenge an award and a certain need for judicial  

12 NJA 2012 p. 790.
supervision. The subsequent research inquiries are formulated to achieve the purpose of this thesis.

7. My primary research inquiry is:

*What is the Swedish legal position for when a party may be deemed to have waived its right to challenge an award and how does this compare with Model Law?*

To investigate this inquiry, the following issues will be discussed. (1) What is required of a party during the arbitral proceedings when a party suspects grounds for setting aside an award under Swedish law and, (2) How does this compare to the Model Law?

8. To summarise, the purpose of this thesis is to explore and analyse the waiver in section 34, paragraph 2 of the Swedish Arbitration Act. The thesis will analyse how the waiver of right to challenge an award is interpreted under Swedish law when a party has challenged the award and whether this approach is compatible with the Model Law.

1.2 **Methodology and Materials**

1.2.1 *The Legal Dogmatic Method*

9. This thesis applies a legal dogmatic method to investigate the research inquiry. The thesis will investigate the legislation and case law on the waiver of the right to bring a challenge against an award and discuss the reasoning behind the legal standpoint in Sweden. The doctrine on the source of law is applied to establish the legal standpoint in Sweden through statutes and regulations, legislative history, precedent and scholarly writing. Legal sources such as international conventions, treaties, digests and international case law, specifically national courts decisions from Model Law jurisdictions, have been used to analyse the Model Law’s standpoint on the waiver. Swedish legislation seeks to correspond to most of the Model Law provisions. The purpose of the thesis is to compare the Swedish legal position with the Model Law.

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14 Sandgren, *Rättsvetenskap för uppsatsförfattare: ämne, material, metod och argumentation*, p. 36.
10. The thesis focuses primarily on legislative history, doctrine and precedent from the Supreme Court and decisions from the Court of Appeal concerning where a party may be deemed to have waived its right to challenge an award. There is a limited amount of precedent and decisions from the Supreme Court, as the Court of Appeal is deemed the legal body that establishes the legal standing and the court’s interpretation of the law.

1.2.2 The Comparative Method

11. International arbitration has become the norm for dispute resolution in most international business transactions. Many arbitral agreements involve international parties from different countries.\(^{15}\) The Model Law has influenced international arbitration and become the international standard on arbitration.\(^{16}\) Therefore a comparative method has been applied in this thesis, comparing the Swedish approach to the Model Law. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention) and Model Law influence Swedish law and the courts decisions.\(^{17}\) The New York Convention is a primary legal instrument in international arbitration. The New York Convention has had influence on international arbitration and by 2013 was adopted by 149 states.\(^{18}\) The Model Law represents the legislative standard on international arbitration, as over 60 different jurisdictions have amended their legislation on arbitration to follow the Model Law.\(^{19}\) The Swedish legislation seeks to correspond to most of the Model Law provisions. Consequently, an analysis of the international standard is relevant and necessary.

1.2.3 Materials

12. In accordance with the Swedish doctrine on the source of law, the primary legal source is the Swedish Arbitration Act from 1999 and its legislative

\(^{19}\) Binder, International commercial arbitration and conciliation in UNCITRAL model law jurisdictions, p. 11.
history, mainly SOU 1994:81 and Govt. Bill 1998/99:35. The former 1929 Act on Arbitrators and its legislative history, NJA II 1929 has been used for an historic overview of arbitration in Sweden. The provision was not changed when the Swedish Arbitration Act entered into force and therefore earlier precedent may also be of relevance.

13. Relevant precedent is scarce with few cases deemed relevant for this thesis, in particular NJA 2013 p. 578 and RH 2013:30. For a greater understanding of the different interpretations and further analysis scholarly work by, for instance, Heuman, Lindskog, Hober and Madsen have been essential. The courts decisions may be influenced by the SCC Rules and therefore scholarly work on the SCC Rules has been applied.

14. The New York Convention and the Model Law are the primary legal instrument in international arbitration and have been explored in the comparison between the Swedish legal position and Model Law. Furthermore, the UNCITRAL 2012 Digest has been utilised. Scholarly work on international arbitration, such as van den Berg, Holtzman and Binder has been used to reach a greater understanding of international arbitration and the difficulties it may result in.

1.3 DELIMITATIONS

15. The purpose of the thesis is to give a comprehensive analysis on section 34, paragraph 2 of the Swedish Arbitration Act and article 4 of the Model Law. Article 4 of the Model Law was considered in the drafting of Swedish Arbitration Act and when a party may be deemed to have waived its right to challenge an award. A comparative method is used in this thesis but is not an attempt to fully explore all Model Law jurisdictions. Rather a few cases are focused on thus limiting the study to a comparison between the Swedish and the Model Law’s approach to the waiver. The thesis is restricted to the Model Law as the Model Law has been enacted in over 60 countries legislation on arbitration.\textsuperscript{20} The Model Law has also influenced other jurisdictions, which

\textsuperscript{20} UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006- Status
have not adopted a Model Law type legislation, such as Sweden.\(^{21}\) Therefore, it represents the international standard and influence on arbitration.

16. In the Swedish Arbitration Act, a distinction between procedural errors has been made based on the separate interests the statute protects. The grounds in section 33 of the Swedish Arbitration Act are intended to protect public interest and third parties.\(^{22}\) The grounds in section 34 of the Swedish Arbitration Act are intended to protect the parties of the arbitrations interests and rights.\(^{23}\) An invalid award is invalid *ipso facto* and section 33 of the Swedish Arbitration Act does not have an equivalent rule on preclusion, the thesis is limited to grounds for challenging an award in Section 34 of the Swedish Arbitration Act.\(^{24}\)

17. A waiver of right to challenge may be an expressed declaration in an agreement or implicitly if the party has not objected during the arbitral proceedings.\(^{25}\) Section 51 of the Swedish Arbitration Act allows foreign parties to exclude the right to challenge an award in section 34 of the Swedish Arbitration Act.\(^{26}\) Section 51 of the Act appertains to when parties agree beforehand to exclude the applicability of the grounds for challenging an award and not when a party, during the proceedings, has deemed to have waived the right to challenge an award because of the parties omission to object. The thesis is limited to when a party in the arbitral proceedings has deemed to have waived its right to challenge the award. An exclusion agreement is a separate issue and not relevant for this thesis.

1.4 Structure

18. The thesis commences with a short background on arbitration and the legislative history on arbitration in Sweden. This establishes a background into the research inquiry and arbitration proceedings role in Sweden. An under-


standing of the primary international convention and treaties is presented. The thesis also addresses the legal standpoint in Sweden on a party’s right to bring a challenge against an award. The central part of the thesis discusses the requirements concerning where a party may be deemed waived its right to challenge an award under section 34, paragraph 2 of the Swedish Arbitration Act. The Arbitration Institute of the Stockholm Chamber of Commerce’s (The SCC) interpretation of the waiver is also reviewed. In the following chapter, article 4 of the Model Law is explored and how the waiver is interpreted in Model Law jurisdictions. Different approaches to the waiver are examined and analysed in the discussion chapter, specifically how the Swedish approach compares to the Model Law. The conclusion summarizes the Swedish standpoint on the waiver in comparison to the Model Law.

2 A BRIEF BACKGROUND ON ARBITRATION

2.1 General

19. Arbitration has an extensive history and references to arbitration agreements can be found as early as in Roman law. Arbitration is an alternative to litigation, where parties have agreed to resolve any disputes through an arbitral tribunal, consisting of one or several arbitrators. Disputes are resolved by an arbitral tribunal and the proceedings result in an arbitral award. An arbitral award has legal effect and the authorities can enforce the award, which is similar to court decisions. The arbitration agreement establishes a hindrance to court proceedings and national courts are obliged to rule a dispute inadmissible when a dispute is covered by an arbitration agreement.

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20. Arbitration is founded on the principle of party autonomy, enabling party’s freedom to enter into an agreement. For a dispute to be settled by arbitration both parties must have agreed for any potential future dispute to be settled in arbitration, in a so-called arbitration agreement or arbitration clause. Parties can decide the form of the proceedings, the choice of arbitrators, within what time an award should be issued and whether the decision should be based on the application of a particular domestic law or other rules. The arbitrators are bound by the parties’ instructions and the arbitration agreement and mandatory provisions of the lex arbitri (arbitration law of the seat), of which they are few.

21. The objective of arbitration is for effective and flexible proceedings, without public scrutiny and to result in a final and binding award. An arbitral award cannot be appealed substantively and there are therefore risks with arbitration, especially considering parties’ legal security, the fairness on the merits and the correctness of the award. However, one of the few grounds an arbitral award may be appealed upon is if a procedural error has occurred. The purpose is to uphold a minimum standard for formal justice, such as unbiased arbitrators, the right to be heard and equal treatment.

22. Arbitration is the primary system for international trade and other commercial disputes. It is claimed to be the only realistic alternative to court proceedings, especially in regards to disputes between international parties. One reason being in arbitration a party does not have the “home advantage” of a national court settling the dispute. Another reason being that arbitral awards are often recognised and enforced in contract states of the New York

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33 Öhrström, Stockholms handelskammarens skiljedomsswidistut: en handbok och regelkommentar för skiljeförfaranden, p. 21.
34 Lindskog, Skiljeförfarande: en kommentar, p. 63.
Convention, of which there are about 150 contracting states.\textsuperscript{40} Arbitration plays an important role in dispute resolutions within the business world.\textsuperscript{41}

23. There are two types of arbitral proceedings, institutional and \textit{ad hoc} arbitration. Institutional arbitration is administered by a arbitral institution. In general, the institutions have their own arbitral rules for the arbitral proceedings to complement the applicable national arbitration law of the “seat” of arbitration.\textsuperscript{42}

Some of the best-known arbitral institutions are the International Chamber of Commerce (the ICC) in Paris, the London Court of International Arbitration (the LCIA) in London, and the SCC in Stockholm. The advantage with an institutional arbitration, compared with \textit{ad hoc}, is the support of an experienced institution.\textsuperscript{43} In an \textit{ad-hoc} arbitration no institution administers the proceedings. The form of the proceedings will be based on the parties’ agreement and applicable legislative provisions. \textit{Ad hoc} arbitration may be more flexible, as the parties may adapt the proceedings to suit the dispute in question. The parties may also choose to reference arbitration rules, such as the UNCITRAL Arbitration Rules (UNCITRAL Rules) to govern the dispute, without the involvement of an arbitral institution.\textsuperscript{44}

24. There are many reasons for parties to decide to settle their disputes in arbitration, instead of litigation. For example, commercial parties often have other than strictly legal interests in resolving the dispute. Significant economic interests also motivate commercial parties.\textsuperscript{45} Arbitration is a swift process in comparison to litigation. For parties within the business world it is important for disputes to be handled effectively and to reach a final and binding award. In Sweden, arbitral proceedings take on average between 8-9 months, which may
be more efficient than court proceedings. Another advantage is the parties may select the arbitrators for the arbitral tribunal. With the choice of arbitrators, the parties may choose individuals with significant experience in commercial disputes or in other fields of expertise. Therefore, the party’s confidence that the proceedings are correctly resolved increases.

25. The arbitral proceedings are private and to some degree strictly confidential. Court proceedings may lead to negative publicity and sensitive information could be disclosed. In arbitration, third parties do not receive information concerning the proceedings or the final award. However, the confidentiality is not watertight. If a party challenges the award in national court, sensitive information may be revealed.

26. The New York Convention has significantly contributed to international parties appeal to settle their disputes in arbitration. The Convention makes it possible for arbitral awards to be recognized and enforced in the other 148 contracting states of the New York Convention. It is critical for international parties that the award is recognized and enforced in other countries.

27. There are both advantages and disadvantages with arbitration within the national legal system. Arbitration or other alternative dispute resolutions saves costs and reduces the workload for the national courts. However, it also diminishes the national courts’ knowledge and awareness in the area of commercial law and limits the development of precedent in the area of commercial law.

47 Ibid., p. 117.
48 Ibid., p. 182; Heuman, Skiljemannrätt, p. 27-30.
49 Heuman, Skiljemannrätt, p. 37.
51 SOU 1995:65 s. 11.
2.2 ARBITRATION IN SWEDEN

2.2.1 Introduction

28. Sweden has been an attractive venue for arbitral proceedings for international parties since the 1970s. Initially, Sweden became the primary forum for arbitral proceedings in agreements between Soviet trade organisations and other entities. Later, the People’s Republic of China also found Sweden to be an attractive forum. Sweden had a reputation as a highly developed country with experience in international trade and regarded as a neutral country, not influenced by political or financial alliances, and therefore an attractive region for arbitral proceedings.

2.2.2 Legislative History on Arbitration in Sweden

29. Arbitration, as an alternative system to court proceedings for settling disputes, has an extensive history in Sweden. As early as the 14th century a provision can be found in the Visby’s Town Law proclaiming disputes should be settled by “confidence inspiring men”. Today, the 1999 Swedish Arbitration Act governs both domestic and international arbitral proceedings. When the 1999 Swedish Arbitration Act entered into force there were no radical reform to the arbitration provisions in the 1929 Act on Arbitrators, but the Swedish Arbitration Act was improved and adapted for national and international arbitral proceedings.

30. International arbitration has advanced through international conventions and has influenced Swedish arbitration law. In the 1920s the League of Nations adopted two agreements regarding international arbitration, the Geneva Protocol on Arbitration Agreements from 1923 and the 1927 Convention on Enforcement of Foreign Arbitral Awards. The purpose of the treaties was to

52 See the “Optional Arbitration Clause for Use in Contracts in U.S.A.-U.S.S.R Trade 1977” agreed upon by the American Arbitration Association (AAA) and the USSR Chamber of Commerce and Industry.
56 Ibid., p. 71; Madsen, Commercial arbitration in Sweden: a commentary on the Arbitration Act (1999:116) and the rules of the Arbitration Institute of the Stockholm Chamber of Commerce, p. 34.
attain recognition and enforcement of international arbitration agreements and awards in contracting states. In 1958 the United Nations adopted the New York Convention, which replaced the Geneva Conventions from 1923 and 1927.\textsuperscript{58} Today the New York Convention has 149 contracting states.\textsuperscript{59} The convention has been described as "the single most important pillar on which the edifice of international arbitration rests".\textsuperscript{60}

2.2.3 \textit{The Swedish Arbitration Act}

31. The Swedish Arbitration Act emphasises the principle of party autonomy. The Swedish Arbitration Act’s objective is to secure a minimum standard in the arbitral proceedings without a disproportionate interference with party autonomy. This is in line with the general interest for arbitral awards to be recognized and enforced. It is a concise and flexible regulation with many non-mandatory provisions, and parties are free to contract out of most of the provisions of the Swedish Arbitration Act.\textsuperscript{61} The mandatory provisions in the Swedish Arbitration Act are based on legal security reasons.\textsuperscript{62}

32. The Swedish Arbitration Act gives the arbitration agreement three main legal effects. A party can use an arbitration agreement as a procedural hindrance in national court. The provisions in the Swedish Arbitration Act are designed for arbitral awards to be recognized and enforced and lastly, an arbitral award has legal effect and can be enforced by an executive authority.\textsuperscript{63}

33. When drafting the Swedish Arbitration Act the Model Law influenced the provisions and was taken into account on each issue.\textsuperscript{64} The Model Law was developed by the United Nations to harmonise national laws on arbitration.\textsuperscript{65}

\textsuperscript{58} SOU 1994:81 p. 57-58; Govt. Bill 1998/99:35 p. 34.
\textsuperscript{62} \textit{Ibid.}, p. 41.
\textsuperscript{63} \textit{Ibid.}, p. 35; NJA II 1929 s. 5.
The Model Law was not adopted altogether but the intent of the legislator was for the Swedish Arbitration Act to be harmonised with the Model Law. The main reason for not adopting the Model Law was because the Swedish Arbitration Act regulates both domestic and international arbitral proceedings and the Model Law is designed preliminary for international arbitration. The Swedish legislator required one law on domestic and international arbitration.66

2.2.4 The Arbitration Institute of the Stockholm Chamber of Commerce

34. The SCC was founded in 1917 and administers both national and international arbitral proceedings.67 The main function of the SCC is to administer and oversee arbitration proceedings that have agreed to the SCC Rules.68 The SCC is one of the world’s largest arbitration institutions with about 200 new cases every year and parties from 30-40 different countries.69 The SCC has played a prominent role in arbitration proceedings regarding East-West disputes associated with China.70

35. For the SCC to be competent to administer a dispute the parties must have agreed on an arbitration clause, which provides for the SCC Rules to apply or for the SCC to act as the administrator of the arbitration.71 The SCC had an increase of cases registered in 2013. 203 cases were registered, in comparison with 177 cases in 2012. 42% of the cases registered involved international parties. Parties from 36 different countries brought their disputes to the SCC, but Swedish, Russian, German, Norwegian, Finnish and Swiss parties dominated.72

71 Ohrrström, Stockholms handelskammares skiljedomsinstitut: en handbok och regelkommentar för skiljeförfaranden, p. 110.
2.3 **ARBITRATION IN AN INTERNATIONAL PERSPECTIVE**

2.3.1 *The New York Convention*

36. The New York Convention was adopted by the United Nations in 1958 and requires authorities in contracting states to recognise and enforce arbitral awards made in other contracting states, if the arbitral award meets the minimum requirements of the Convention.\(^{73}\) For many countries, being a contracting state to the New York Convention has been a necessity for international trade. Today the New York Convention has 149 contracting states.\(^{74}\) The Secretary of the United Nationals Commission on International Trade Law (UNCITRAL), Renaud Sorieul described the New York Convention as “…one of the most important and successful United Nations treaties in the area of international trade law, and the cornerstone of the international arbitration system”\(^{75}\). Sweden took an active roll in the proceedings of the New York Convention and ratified the Convention in 1972 without any reservations.\(^{76}\)

37. The New York Convention is built upon the notion that international commercial arbitration depends on the assistance of functioning national courts.\(^{77}\) The purpose of the Convention is to provide legislative standards for recognition and enforcement of arbitral agreements and courts recognition and enforcement of arbitral awards. The Convention does not offer a complete regulation on international commercial arbitration and is limited to two elements of arbitration, enforcement of arbitration agreements and enforcement of foreign arbitral awards.\(^{78}\) Furthermore, the scope of the Convention is

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limited to foreign arbitral awards. According to article 1 of the Convention a foreign arbitral award is an award made in the territory of another state.\textsuperscript{79}

38. The Swedish Supreme Court has emphasised the significance of the New York Convention in issues regarding the enforcement of foreign arbitral awards.\textsuperscript{80} Sections 52-60 in the Swedish Arbitration Act on enforcement of arbitral awards should be understood in view of the Convention’s purpose to encourage enforcement of awards.\textsuperscript{81}

2.3.2 \textsc{Uncitral} Model Law on International Commercial Arbitration

39. In the 1980s Uncitral began the ambitious project of creating a model law for international arbitration. After extensive preparations the Model Law was finalised and open for governments to enact. The instigators ambition was that the Model Law would serve as a uniform national legislation and as a set of procedural provisions.\textsuperscript{82} It was developed to harmonise national laws on arbitration and was meant to cover all stages of the arbitral proceedings.\textsuperscript{83} Moreover, it became an instrument for legislation in countries where arbitration has had an obscure role as a dispute resolution system and became a breakthrough for countries where arbitration was uncommon. The Model Law was also widely adopted in developed arbitration jurisdictions, such as Germany, Austria, Australia and Canada.\textsuperscript{84}

40. The Model Law may altogether or partially be adopted by countries, which differs from conventions where a partial ratification is usually not possible. The Model Law does not create obligations between states, as a convention does\textsuperscript{85} The Model Law has been adopted in countries such as Canada, Australia, Hong Kong and Scotland. Other countries such as Bulgaria, Cyprus, Russia and Mexico based their national legislation on the Model Law.

\textsuperscript{79} Ibid., p. 11.
\textsuperscript{81} Andersson, \textit{Arbitration in Sweden}, p. 184.
\textsuperscript{85} Binder, \textit{International commercial arbitration and conciliation in UNCITRAL model law jurisdictions}, p. 12.
Over 60 different jurisdictions have amended their national legislation on arbitration to follow the Model Law. The Model Law was revised in 2006. Today the Model Law represents an accepted international legislative standard for arbitration law.

2.3.3 IBA guidelines

41. The International Bar Association (IBA) has drafted a set of ethical guidelines for commercial arbitrators. They are not directly binding but have been recognized worldwide. The purpose of the IBA Guidelines on Conflict of Interest in International Arbitration is to help the courts in the issue of impartiality and independence of the arbitrators. The guidelines are to be flexible in their interpretation. The IBA Guidelines on Conflict of Interest in International Arbitration have been cited by the Swedish Supreme Court.

42. The International Bar Association has also drafted the IBA Guidelines on Party Representation in International Arbitration. The IBA Council adopted the guidelines in 2013. The purpose of the guidelines is to encourage party representatives to act with integrity and to prevent party representatives from engaging in tactics to delay or obstruct the arbitral proceedings.

3 A PARTIES RIGHT TO CHALLENGE AN AWARD UNDER SECTION 34 OF THE SWEDISH ARBITRATION ACT

3.1 INTRODUCTION

43. The Swedish Arbitration Act has relatively few provisions compared to the Swedish Act on Judicial Procedure. The purpose of the Swedish Arbitration Act is to ensure a minimum level of legal security and to support arbitration. Most of the provisions are non-mandatory and in accordance with the principle

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87 Binder, International commercial arbitration and conciliation in UNCITRAL model law jurisdictions, p. 11.
88 Ibid.
90 Binder, International commercial arbitration and conciliation in UNCITRAL model law jurisdictions, p. 186.
91 IBA Guidelines on Conflict of Interest in International Arbitration, p. 5.
92 See NJA 2007 p. 841.
94 Heuman, Skiljemannarätt, p. 18.

21 (61)
of party autonomy parties can contract out of the provisions to conform the dispute to the dispute at hand and the parties objectives. By agreeing to arbitration the parties are deemed to have waived their right to have the award reviewed on the merits. However, a party can challenge the award on the exhaustive grounds in section 34 of the Swedish Arbitration Act. The grounds for invoking a challengeable error in section 34 of the Swedish Arbitration Act cannot be disclaimed beforehand by domestic parties and are designed to protect the parties of the arbitrations interests and rights.

3.2 **Grounds for Challenging an Award under Section 34 of the Swedish Arbitration Act**

44. An arbitral award is final and binding when it is rendered by the arbitrators. Thereafter an award cannot be challenged on the merits. However, most states have statutes to secure a certain minimum standard in the arbitral proceedings to achieve objectivity, fairness and justice. Under the Swedish Arbitration Act an arbitral award can be appealed to the Court of Appeal if any substantial procedural errors have occurred during the proceedings or if there is reason to question the legitimacy of the arbitral proceedings, such as the lack of an valid arbitration agreement. A parties right to challenge an award and the state’s interest in objective and fair proceedings must be weighed against the interest of swift proceedings leading to a final and binding award.

45. The grounds for challenging an award under section 34 of the Swedish Arbitration Act requires a party to claim the award invalid for the courts to be able to set aside the award. If a party does not challenge the award, the award will remain final and binding. An unsuccessful party may try and use the process of challenging an award to delay enforcement of the award and achieve a settlement. Therefore, the grounds for challenging an award are restricted to secure a final and binding award. Section 34 of the Swedish Arbitration Act

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96 Govt. Bill 1998/99:35 p. 137. However, foreign parties may agree beforehand to exclude the application of section 34 of the Swedish Arbitration Act through an agreement, according to section 51 of the Swedish Arbitration Act.
holds the six exhaustive grounds for setting aside an award. The grounds for setting aside an award are:

(1) if it is not covered by a valid arbitration agreement between the parties;
(2) if the arbitrators have made the award after the expiration of the period decided by the parties, or where the arbitrators have otherwise exceeded their mandate;
(3) if the arbitral proceedings, according to section 47, should not have taken place in Sweden;
(4) if an arbitrator has been appointed contrary to the agreement between the parties or this Act;
(5) if an arbitrator was unauthorized due to any circumstance set forth in section 7 or 8; or
(6) if without fault of the party, there otherwise occurred an irregularity in the course of the proceedings which probably influenced the outcome of the case.100

3.2.1 Jurisdictional Objections
46. Under article 34 (1) of the Swedish Arbitration Act, an award may be set aside if it was not covered by a valid arbitration agreement. If there is no valid arbitration agreement the arbitrators have no jurisdiction to try a dispute.

47. An excess of mandate of the arbitration agreement forms a ground for challenge under section 34(1) of the Swedish Arbitration Act. Under the doctrine of separability, the grounds for setting aside the award must focus specifically on the arbitration agreement, not on the whole contract being invalid.101 If the respondent fails to object to the arbitrator’s jurisdiction in the Statement of Defence, the right is precluded.102 In RH 2009:55, the court stated that a party must make a clear objection on the grounds for challenging the award. The party challenging the award had objected on the merits, and not on the arbitrator’s lack of jurisdiction. There was nothing in the Statement of

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100 Swedish Arbitration Act, section 34, paragraph1.
Defence claiming that the arbitrators did not have jurisdiction to try the dispute. Therefore, the right to challenge the award on the grounds of the arbitrator’s lack of jurisdiction was precluded.

3.2.2 Excess of Mandate

48. Under section 34 (2) of the Swedish Arbitration Act, an award may be set aside if it was rendered after the time-limit had ended, or the arbitrators had exceeded their mandate. Section 34(2) of the Swedish Arbitration Act regulates when the arbitrators exceed the mandate found in the parties’ claims and instructions during the arbitral proceedings, not the arbitration agreement. The ground in section 34(2) and section 34(6) of the Swedish Arbitration Act are closely linked and it may be difficult to decide whether the ground falls under section 34(2) or 34(6). Examples of situations under section 34(2) of the Swedish Arbitration Act are the arbitrator’s failure to apply the law selected by the parties, the award is based on facts that where not claimed by the parties or the arbitrators filled in a gap in the contract without authorisation. In the unpublished case T 8016-04 between IF Skadeförsäkring AB and Securitas AB the Svea Court of Appeal found the arbitrators had gone beyond their mandate, by rejecting IF Skadeförsäkring AB’s claim on grounds that fell outside of the scope of the parties claims and the arbitrators mandate. The error had direct significance for the outcome of the award.

3.2.3 Challenge of an Arbitrator

49. A challenge can be brought against an arbitrator under section 34(5) of the Swedish Arbitration Act where circumstance exists, which may diminish the confidence in the arbitrator’s impartiality. The grounds for setting aside an award due to a arbitrators questionable impartiality corresponds to section 7 and 8 in the Swedish Arbitration Act on the removal of an arbitrator. From section 8 of the Swedish Arbitration Act an arbitrator should be discharged if

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105 T 8016-04.
any circumstance exists which diminishes the confidence in the arbitrator’s impartiality. The challenge should be in writing.\(^{106}\)

50. A potential arbitrator must disclose all circumstances that may impede the person from serving as an arbitrator immediately. A person has to inform the parties as soon as the arbitrators have been appointed or during the proceedings if a new circumstance occurs.\(^{107}\) In NJA 2007 p. 841 between A.J and Ericsson AB, the issue was whether the arbitral award was to be set aside because of circumstances existed which diminished confidence in the arbitrator’s impartiality. The court found that Ericsson AB had not proven that A.J had knowledge of the grounds invoked for setting aside an award due to the arbitrator’s lack of impartiality. A.J. was thereby not precluded from raising a challenge against an award. The assessment of whether circumstances exist which diminish the confidence in the arbitrator are objective and not a question of whether the arbitrator would be biased during the proceedings. The court found that there is a conflict of interest when an employee of a law firm is the arbitrator in arbitral proceedings involving a client to the law firm, regardless of the employee’s position at the law firm. Therefore there were circumstances, which could diminish the confidence in the arbitrator’s impartiality.\(^{108}\) The standpoint is supported by the IBA guidelines on Conflict of Interest in International Arbitration and case-law from the SCC.

3.2.4 Objection on a Procedural Error

If a procedural error occurred during the arbitral proceedings, without fault of the party, which probably affected the outcome of the case, the award is to be set aside.\(^{109}\) Section 34(6) of the Swedish Arbitration Act is a general clause, an exhaustive list of all procedural errors was deemed not possible.\(^{110}\) The rule does not state specific procedural rules but has its origin in the requirements for due process.\(^{111}\) The rule is intended to be used restrictively by the courts when


\(^{107}\) Swedish Arbitration Act, section 9.

\(^{108}\) NJA 2007 p. 841.


significant procedural errors have occurred during the arbitral proceedings. The difference between a procedural error and an error in substance may be difficult to distinguish. However, only errors procedural errors may be challenged. Examples of potential procedural errors under section 34(6) of the Swedish Arbitration Act are a failure for parties to be heard, unequal treatment of the parties; failure to follow the parties’ agreement; failure to examine the parties’ claims or objection or an arbitrator’s conflict of interest. An award may either be partially or completely set aside. The award will only be set-aside to the scope the procedural error has affected the outcome of the award.

3.2.5 The Court of Appeal’s Mandate

51. The Court of Appeal cannot modify the arbitral award or offer a new decision to substitute the errors made by the arbitrators. This would exceed the courts mandate. A court does not *ex officio* try whether grounds for challenge exists and the court can only set aside an award based on the grounds the party stated in its appeal. A party must claim that the arbitral award ought to be set-aside on a specific ground for the courts to consider the challenge. A party may not submit a blanket objection, the grounds for challenging the award must be clear. A party can also decide not to challenge an award, even though grounds for challenge exist that could set aside the award. The provisions are not optional for the court, but mandatory and if the conditions are met the award should be set aside when a party has challenged the award.

52. The general principle in section 43, paragraph 2 of the Swedish Arbitration Act states the Court of Appeal’s ruling cannot be appealed. However, the decision of the Court of Appeal can be appealed to the Supreme Court if the

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116 T 1116-02.
Court of Appeal finds the precedent is of interest and a leave for appeal is granted.120

3.3 The Three Month Time Limit

53. A party must challenge an award on the grounds in section 34, paragraph 3 of the Swedish Arbitration Act within a period of three months, from the date the party received the award in its final wording. If a party fails to commence proceedings to challenge an award within the three-month time limit, the right is precluded.121 A party may not invoke new grounds after the three-month time limit has expired in support of the challenge of the award. Likewise, the grounds are precluded if a party receives knowledge of grounds for challenging an award after the three-month time limit.122 It would not correspond with the purpose of arbitration to allow new grounds for challenging the award after the time limit has ended.123 The court does not ex officio try whether a challenge has been made within the three-month time limit. For the grounds for setting aside the award to be precluded the respondent must make an objection the first time the respondent answers the court.124

3.4 In Dubio Pro Validitate

54. The courts should uphold the decision of the arbitrators when the courts are uncertain whether to sets aside the award, in accordance with the principle of in dubio pro validitate.125 This has partially been recognised by the Supreme Court, as only substantial procedural errors that had significance for the outcome of the arbitral proceedings can serve as grounds for setting aside an award.126 Not every minor procedural error should lead to the award being set aside. The prospect of an award being set aside because of a procedural error is limited. The Swedish courts are in favour of upholding arbitral awards even

121 Andersson, Arbitration in Sweden, p. 165.
123 NJA 1996 p. 751.
126 NJA 1975 p. 536.
though potential procedural errors have occurred and should interpret the arbitral award and procedure to support the validity of an arbitral award.  

55. A court’s decision to set aside an award under section 34 of the Swedish Arbitration Act should be done with moderation and restraint. In the case CME v. Czech Republic the Svea Court of Appeal confirmed the restrictive approach adopted by the Swedish legislator and confirmed the Svea Court of Appeal’s pro-arbitration attitude.  

4 IMPLICIT WAIVER OF RIGHT TO CHALLENGE AN AWARD  

4.1 INTRODUCTION  

56. The 1929 Act on Arbitrators was the predecessor to the current Swedish Arbitration Act. The grounds for challenging an award were not modified when the Swedish Arbitration Act was enacted in 1999 and section 34, paragraph 1 of the Swedish Arbitration Act corresponds with section 21 of the 1929 Act on Arbitrators. The legislator’s intention regarding the waiver in section 21(2) of the 1929 Act on Arbitrators was to prohibit a party with knowledge of a procedural error from speculating in the outcome of the arbitral proceedings. The purpose was to prohibit a party from strategically challenging the award if the party looses or claim the award if the party risks losing the arbitral proceedings.  

57. Under section 34, paragraph 2 of the Swedish Arbitration Act a party may not challenge an award having participated in the arbitral proceedings, without objecting to the error during the proceedings or by refraining from raising a challenge due to the party’s actions. By participating in the proceedings  

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130 NJA II 1929 p. 49. Section 21 of the 1929 Act on Arbitrators provided for when a party may be deemed waived the right to challenge an award.  
without objecting, the party’s right to challenge the award may be precluded.\textsuperscript{133} The waiver in section 34, paragraph 2 of the Swedish Arbitration Act substantially limits a party’s possibility of bringing a successful challenge against an award. The purpose of this rule is to prohibit parties with knowledge from strategically “hedging its bets” in the outcome of the arbitral proceedings by preserving objections in case the party risks losing the arbitral proceedings.\textsuperscript{134}

4.2 **The Knowledge Requirement**

4.2.1 *Actual Knowledge or Constructive Knowledge*

58. A party may only be deemed to have implicitly waived its right to challenge an award if the party had actual knowledge of the procedural error.\textsuperscript{135} The general rule is that only grounds for challenge known to the party can be precluded. In principle, it is not sufficient that the party to ought to have been aware of the procedural error for the waiver to apply.\textsuperscript{136} The reason being a party may not be deemed to have waived its right to challenge an award because of an error the party did not know about.\textsuperscript{137} However, this issue is disputed in legal doctrine.\textsuperscript{138} If a party has no justifiable interest that needs protecting, the party should not be able to challenge the award and this usually requires knowledge of the procedural error.\textsuperscript{139} The legislative history on the Swedish Arbitration Act presents the example of a party participating in the arbitral proceedings knowing there the arbitration agreement is invalid, but refraining from objecting. The right to challenge the award on the grounds of


\textsuperscript{134} Ibid.


an invalid arbitration agreement is thereby waived. However, a party should not lose its right to challenge an award because of negligence. For a party to be deemed to have waived its right to challenge an award because it was unobservant is far-fetched.

59. In contrast, some believe the former rule in section 21(1) of the 1929 Act on Arbitrators allowed room for interpretation including where a party ought to have known about the procedural error. A party’s right to challenge an award is precluded when the party is negligent and omits to gain knowledge of the circumstance. This opinion was founded on the aspiration for a final and binding award. Therefore, a party who has negligently omitted to gain knowledge about a procedural error the party ought to have known about has thereby waived its right to challenge the award.

60. In the case RH 1991:15 the Svea Court of Appeal found an arbitrator’s impartiality questionable. The party challenging the award had appointed the challenged arbitrator and participated in the arbitral proceedings. The party knew about the grounds, which could lead to the arbitrator’s disqualification, but refrained from objecting. Therefore, the court found the party’s right to challenge the award was precluded.

61. In the case RH 2009:55 between State Oil Company of the Republic of Azerbaijan (Socar) and Frontera Resources Azerbaijan Corporation (Frontera) the Svea Court of Appeal concluded the waiver only applied to procedural errors known by the party and not circumstances a party ought to have known. The Svea Court of Appeal found this approach corresponds to article 30 of the UNCITRAL Rules where the party “who knows” of a procedural error and proceeds with the proceedings without objection has waived the right to bring a challenge against the award. One of the main issues was whether Socar’s right to challenge the award on procedural grounds was precluded. The court found

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141 Lindskog, Skiljeförfarande: en kommentar, p. 909.
143 Ibid.
144 RH 1991:15.
that the Socar’s attorney had not gained knowledge or ought to have gained knowledge of the potential error. The right to challenge the award on the grounds of a procedural error was not precluded. However, the court found that no procedural error had actually occurred.145

62. In the unpublished case T 677-99 between Återförsäkringssbolaget Patria (Patria) and Trygg-Hansa Försäkringsaktiebolag (publ.) (Trygg-Hansa) from 2001 the Svea Court of Appeal held the waiver does not apply to circumstances the party ought to have known, it only applies to circumstances known by the parties. Patria claimed one of the arbitrators was biased during the arbitral proceedings. The issue at the Court of Appeal was whether Patria had knowledge of this circumstance during the arbitral proceedings and whether the right to bring a challenge against the award was precluded. The court held that a party may not refrain from investigating if the party has reason to question the arbitrator’s impartiality. Nevertheless, the court stated that evidence of party’s knowledge does not have to directly relate to what the party knew. But it must be possible to conclude from the evidence that the party probably had knowledge of the procedural error or circumstances giving rise to challenge. The court concluded that there were circumstances questioning the arbitrator’s impartiality. However, the challenging party, Patria, had gained information concerning the other arbitrators and therefore the only conclusion was Patria must have suspected the arbitrator may be biased. The lack of further investigation was deemed to constitute a waiver, according to the court.146

4.2.2 Investigative Duty

63. If a party suspects a procedural error has occurred during the arbitral proceedings and intentionally omits to investigate the issue, the party’s right to bring a challenge ought to be precluded, as it can be interpreted as withholding from an objection.147 This would be in line with the purpose of section 34, paragraph 2 of the Swedish Arbitration Act, which prohibits parties from strategi-

146 T 677-99.
147 Heuman, Skiljemannarätt, p. 296.
cally “hedging its bets” on the outcome of the arbitral proceedings by bringing a challenge against the award if it does not benefit the party.148

64. In 1995, Carpatsky Petroleum Corporation (Carpatsky I), founded in Texas, USA, entered into an agreement with SE Poltavaftogaz (PNG), a subsidiary to OJSC Ukraňafta (Ukrnafta), a Ukrainian owned company. The agreement between Carpatsky I and PNG was altered and changed several times. In 1996 Carpatsky Petroleum Corporation (Carpatsky II) was founded in Delaware, USA. The same year Carpatsky II and I merged. An additional agreement was entered into in 1998 and Ukrnafta entered as a contractor instead of PNG. In 2007 Carpatsky II commenced arbitration at the Stockholm Chamber of Commerce. Carpatsky I was written as contractor. An arbitral award was announced in 2010. Ukrnafta challenged the award and claimed the arbitrators lacked jurisdiction to try the dispute between Ukrnafta and Carpatsky II. The district court dismissed the claim. Ukrnafta appealed the district courts decision to the Svea Court of Appeal.149

65. The main issue in the case was whether Ukrnafta’s right to object to the award on the grounds of the arbitrators lack of jurisdiction was precluded because the objection was made too late. The Svea Court of Appeal examined whether Ukrnafta had knowledge that the opponent in the arbitral proceedings was a different legal entity than that entered into the arbitration agreement. The Svea Court of Appeal found Carpatsky II had not proven Ukrnafta had actual insight into the fact that the opponent in the arbitral proceedings was a different legal entity than Carpatsky I.150

66. The Svea Court of Appeal went on to examine whether it was sufficient that Ukrnafta ought to have known about the different legal entity in the arbitral proceedings.151 The court found actual knowledge was required for a party to be deemed to have waived the right to bring a challenge against an award, according to the legislative history.152 However, different interpretations

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148 Nerep Fs Hjerner, studies in international law p. 433; Cars, Lagen om skiljeförfarande: en kommentar, p. 173.
149 RH 2013:30.
150 Ibid.
151 Ibid.
can be found in the legal doctrine whether it is sufficient for the waiver to apply if a party ought to have known about the circumstance. Certain legal scholars claim that it in principle it is not enough for a party to ought have known about the grounds for challenging an award. They argue that the actual knowledge requirement should not be strictly interpreted. A party may not intentionally refrain from investigating a procedural error maintaining the right to challenge the award.

67. The Svea Court of Appeal examined whether there was grounds for modifying the general rule concerning questions of the opponent’s identity. The court held that a party may have a responsibility to ensure the opponent is duly represented when arbitral proceedings are initiated. A party may be required to verify certain formalities, such as whether the opponent is duly represented. If anything remarkable or out of the ordinary comes to light the party is obliged to further investigations.\textsuperscript{153}

68. The Svea Court of Appeal found that although Ukrnafta did not have actual knowledge of the different identity of the legal entities, the information on Carpatsky II’s identity indicated a change from when the agreement was entered into. This indication should have instigated further investigations of Carpatsky’s identity and an investigation would have lead to knowledge of the different legal entities and the grounds Ukrnafta claimed to set aside the award.\textsuperscript{154}

69. Finally, the Svea Court of Appeal tried whether Ukrnafta’s objection was submitted too late and therefore precluded. There is no time limit in the Swedish Arbitration Act and the question of whether the right to challenge an award is precluded is decided case-by-case. An objection to the arbitrator’s jurisdiction should be made at the latest in the Statement of Defence. The court reviewed article 24 (2)(ii) of the SCC Rules, where a party should object to the arbitration agreement’s validity at the latest in the Statement of Defence. This rule had relevance determining whether the objection was precluded. Therefore the objection of the arbitrator’s jurisdiction should have been made at the latest

\textsuperscript{153} RH 2013:30.
\textsuperscript{154} Ibid.
in the Statement of Defence. Since this was not done the objection was precluded.\textsuperscript{155}

70. In NJA 2013 p. 578, \textit{Joint Stock Company Technopromexport} (Technopromexport), a Russian company, entered into an agreement with \textit{Mir’s Limited} (Mir’s), an Afghan company, in 2005. The agreement included an arbitration clause. When a dispute arose Mir’s commenced arbitral proceedings and the award in favour of Mir’s was made. Technopromexport challenged the award on the grounds of an invalid arbitration clause. Technopromexport claimed Mir’s lacked a “business license” required by Afghan law and therefore the company did not exist under Afghan law. According to Russian law, agreements with a company, which does not exist under law, are invalid. The main issue at the Supreme Court was whether Technopromexport had waived its right to challenge the award by participating in the proceedings or in any other way deemed to have waived its right to challenge the award on the grounds of an invalid arbitration agreement.\textsuperscript{156}

71. The Supreme Court began by affirming the general rule that a party must have knowledge of a procedural error during the arbitral proceedings for a party to have deemed to have waived its right to challenge an award. The Supreme Court acknowledged that in principle it is not sufficient for a party to ought to have known about the circumstance error. However, if a party has a reason to suspect that the arbitration clause may be invalid, the right to challenge an award should not be preserved when a party deliberately refrains from further investigation. The Supreme Court stated in that situation a party does not have a judicial interest that needs protecting.\textsuperscript{157}

72. The Supreme Court found Technopromexport had reasons to suspect the arbitration clause was invalid. Technopromexport had not objected to the invalid arbitration clause or requested a decision from the arbitral tribunal regarding the business license. Technopromexport did not make a clear objection regarding the invalid arbitration clause. Therefore, as Technopromexport had participated in the arbitral proceedings without object-

\textsuperscript{155} RH 2013:30.
\textsuperscript{156} NJA 2013 p. 578.
ing, the Supreme Court ruled that Technopromexport’s right to challenge the award on the grounds of an invalid arbitration clause was precluded.  

4.3 TIME LIMIT FOR WHEN AN OBJECTION MUST BE MADE

73. There is no specific time limit in the Swedish Arbitration Act for when a party must make an objection to the arbitral tribunal regarding a procedural error. However, a party ought to object promptly during the arbitral proceedings to secure the right to challenge the award from being precluded.  

74. The arbitrators should not consider an objection to a procedural error made with undue delay. However, the waiver should not be interpreted too strictly. This could result in the right to challenge an award being precluded because a party did not object immediately, unless supported by the law. However, it is clear from the legislative history that an objection to the arbitral tribunal’s jurisdiction should be made immediately before the Statement of Defence.  

75. Under section 34, second paragraph and section 10, first paragraph of the Swedish Arbitration Act a challenge against an arbitrator must be brought within 15 days from when the party became aware of the existence of the circumstance giving rise to a challenge. The time limit does not begin until the arbitrators have been appointed in accordance with article 13(2) of the Model Law. If the party fails to bring a challenge against the award on the grounds of a biased arbitrator within 15 days, the right is precluded.  

4.4 A CLEAR AND UNEQUIVOCAL OBJECTION

76. An omission to act does not necessarily entail that a party loses its right to raise a challenge against an award, the passiveness has to be perceived as a waiver. However, it is stated in the legislative history that passiveness is often perceived as a waiver and the party has often waived the right to invoke a chal-
lenceable error through passiveness. A party may be deemed to have waived its right to challenge an award if the arbitrators have no reason to interpret a statement as an objection to the procedure. Consequently, an objection to the procedure must be clear and unconditional to avoid misconceptions. If the arbitrators find a statement unclear they ought to investigate whether the statement was a formal objection or not.

77. In the case NJA 2012 p. 790 two parties, Moscow City Golf Club OOO (City Golf) and Nordea Bank AB (Nordea), entered into a loan agreement, which included an arbitration clause stating all disputes will be referred to arbitration in accordance with the SCC Rules. One of the issues at the Supreme Court was whether the arbitral award should be set aside because the arbitration clause was invalid. The court stated that it is important the objection is made clearly during the arbitral proceedings. Otherwise the question of the arbitration clauses legitimacy might go unanswered. This could lead to the question of whether the arbitral award is final or not. Consequently, if a party has not made a clear and explicit objection on the grounds of an invalid arbitration clause during the arbitral proceedings the right to bring a challenge against the award on the grounds of an invalid arbitration clause is precluded. The Supreme Court found City Golf alleged objection could not be perceived as a clear and explicit objection.

4.5 **Burden of Proof**

78. The Swedish Arbitration Act does not explicitly determine the burden of proof regarding challenges of arbitral awards. However, the general principle is that the plaintiff has the burden to prove the grounds for setting aside the award. The claimant has the burden to prove its objections. However, if the claimant claims the right to challenge an award is precluded due to passivity of the opposing party, it is up to the opposing party to prove when and why the

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165 Heuman, Skiljemannarätt, p. 301.
166 NJA 2012 p. 790; Heuman, Skiljemannarätt, p. 301.
167 NJA 2012 p. 790.
168 Heuman, Skiljemannarätt, p. 592.
right is not precluded. The reasoning is that a dissatisfied party may secure evidence of the objection. If the objection is not documented in the protocol of the arbitration a party may have difficulties fulfilling the burden of proof.\textsuperscript{169}

79. To prove the party had knowledge of the grounds for setting aside an award is often difficult. For this reason a low evidence requirement or the principle of preponderance is used to decide the knowledge requirement.\textsuperscript{170} Another opinion is the party claiming that the opposing party knew of a procedural error, but did not object, then has the burden of proof to establish that the opposing party had required knowledge during the proceedings.\textsuperscript{171} It has been emphasised in doctrine that the proof does not have to directly relate to what the party had knowledge of. Instead a court can consider the circumstances and draw the conclusion that the party must have had knowledge of the procedural error.\textsuperscript{172}

4.6 **Waiver in Article 31 of the SCC Rules**

80. Article 31 of the SCC Rules states a party must object without undue delay to any failure to comply with the arbitration agreement, the SCC Rules or other rules applicable to the proceedings, if a procedural error has occurred during the arbitral proceedings.\textsuperscript{173} A party “who during the arbitration fails to object without delay to any failure to comply with the arbitration agreement, these Rules or other rules applicable to the proceedings shall be deemed to have waived the right to object such failure.”\textsuperscript{174} If the objection is submitted with undue delay the party has waived its right to challenge the award. The time limit begins when the party has knowledge of the procedural error.\textsuperscript{175}

81. Article 31 of the SCC Rules avoids the issue of whether actual or constructive knowledge is required for a party to may be deemed to have

\textsuperscript{169} Ibid., p. 593.
\textsuperscript{170} Ibid., p. 298.
\textsuperscript{173} SCC Rules, article 31.
\textsuperscript{174} SCC Arbitration Rules, article 31.
waived the right to bring a challenge against an award. The rule does not express any requirement of knowledge and focuses on when a party “fails to object without undue delay”. The rule indicates that whether the party had actual or constructive knowledge is irrelevant and a party may be deemed to have waived the right to object regardless of actual or constructive knowledge.176

4.6.1 Challenge of arbitrator

82. Under the SCC Rules an arbitrator must be impartial and independent.177 A party may challenge an award if a circumstance gives justifiable doubts to an arbitrator’s impartiality or independence under article 15 of the SCC Rules.178 A party must submit a written challenge within 15 days from when the party received knowledge of the circumstance, giving rise to the challenge, or else the right is deemed precluded. An arbitrator has a duty to disclose any circumstances, which could give justifiable doubts to the arbitrator’s impartiality or independence.179

5 THE MODEL LAW AND THE SWEDISH ARBITRATION ACT

5.1 Introduction

83. The Model Law has had an important role in unifying different states arbitration laws. In the legislative history to the Swedish Arbitration Act the legislator was of the opinion that the Swedish Arbitration Act had to be applicable to both domestic and international arbitration.180 The Model Law focuses only on international arbitration and therefore the Swedish Arbitration Act does not directly follow the disposition of the Model Law.181 However, the Swedish Arbitration Act is harmonised with the Model Law.182 The Model Law has had a significant influence in the preparation of the Swedish Arbitration Act.183

177 SCC Rules, article 14.
179 Ibid., p.4.
84. Under article 34(2) of the Model Law the party challenging the award has the burden to furnish proof of a ground for setting aside an award.\textsuperscript{184} The Model Law does not make a distinction between invalid and challengeable procedural errors, unlike the Swedish Arbitration Act.\textsuperscript{185} In the Model Law, the grounds for setting aside an award are facultative, in contrast to the Swedish Arbitration where the rules are mandatory and court has to set aside the award if a party claims a ground for challenging the award and the claim is proven.\textsuperscript{186} The waiver in article 4 of the Model Law also applies to court proceedings.

5.2 \textbf{WAIVER OF RIGHT TO OBJECT}

5.2.1 \textit{Introduction}

85. The waiver of right to object has its origin in the common law of estoppel and the civil law principle of \textit{venire contra factum proprium}.\textsuperscript{187} The New York Convention and the Model Law have a restrictive approach regarding setting aside arbitral awards, similar to the Swedish Arbitration Act.\textsuperscript{188} There was wide support during the drafting of the New York Convention to adopt either a general rule of estoppel or an implied waiver as a qualification to article V (1) of the Convention, the grounds for setting aside an award.\textsuperscript{189}

86. Article 4 of the Model Law was modeled on article 32 of the UNCITRAL Rules.\textsuperscript{190} However, article 4 of the Model Law was “softened” in comparison to article 30 of the UNCITRAL Rules, to be a more narrow and flexible rule and to apply only when the prerequisites are met.\textsuperscript{191}

\textsuperscript{184} Heuman, \textit{Skiljemannarätt}, p. 591.
\textsuperscript{187} Mistelis, \textit{Concise International Arbitration}, p. 593.
\textsuperscript{190} The UNCITRAL Rules were revised in 2010. Article 32 corresponds to article 30 of the 1976 UNCITRAL Rules.
\textsuperscript{191} Holtzman, \textit{A guide to the UNCITRAL Model Law on International Commercial Arbitration: legislative history and commentary}, p. 196.
5.2.2 Article 4 - Implied Waiver of Right to Object

87. The waiver of the right to object can be found in article 4 of the Model Law. If a party does not object to a breach, without undue delay of a non-obligatory provision of the Model Law or a non-mandatory provision of the arbitration agreement then the party loses its right to challenge the award. The purpose of article 4 is for the award to be final and binding, for efficiency and good faith in the proceedings and to prohibit the losing party from using tactics to delay enforcement of the award.\textsuperscript{192} The principle behind article 4 of the Model Law coincides with the principle behind section 34, paragraph 2 of the Swedish Arbitration Act. A party should not be allowed to strategically “hedge its bets” by preserving an objection where the party may risk losing the award. The desire for swift arbitral proceedings must be weighed against the risk of a party’s right to object being restricted in an unjustified manner and the threat to legal security.\textsuperscript{193}

88. Article 4 has been adopted in whole or with minor changes almost unanimously by Model Law jurisdictions, creating a universal law on the waiver of right to object.\textsuperscript{194} For an implied waiver to apply four requisites have been identified:

(1) Non-compliance with arbitration agreement or non-mandatory provision of the Model Law;
(2) Knowledge;
(3) Undue delay;
(4) Proceeding with the arbitration.\textsuperscript{195}

89. The first requisite states the breach of a procedural requirement must be found in a non-mandatory provision of the Model Law or in the arbitration agreement. The non-mandatory provisions allow parties to agree otherwise. The purpose was to “soften” the effect of the waiver. The non-mandatory provisions are clearly indicated by explicitly stating a freedom for the parties to

\textsuperscript{192} Ibid., 208-209; Binder, \textit{International commercial arbitration and conciliation in UNCITRAL model law jurisdictions}, p. 54-55.
\textsuperscript{193} Binder, \textit{International commercial arbitration and conciliation in UNCITRAL model law jurisdictions}, p. 54-55.
\textsuperscript{194} Ibid., p. 64.
decide on the issue or by stating a rule of procedure specifying that the parties can agree otherwise. 196

90. There were conflicting views in the Working group regarding the scope of the waiver in article 4, whether it should include mandatory and non-mandatory provisions or if only fundamental procedural error should be excluded. In the end the provision was limited to non-mandatory provisions only. 197 Examples of provisions deemed to be mandatory that cannot be waived are parties must be treated equally and both parties have the right to present their case (article 7(2)), article 18, notice to party of any hearing (article 18), that an award shall be in writing (article 24(2) and (3)). 198

91. Secondly, the party must have known about the non-compliance for a party to be deemed to have waived its right to challenge an award on that ground. Until the fifth draft, article 4 of the Model Law included the words “a party knows or ought to have known”. 199 However, it was perceived as vague or going to far and the wording “ought to have known” was excluded. 200 The Commission Report stated that including constructive knowledge would probably create more problems than it solved. 201 Furthermore, before the words were deleted a report of the Secretariat stated that the wording should be interpreted restrictively and should not include where a party was unaware of the error. 202 The requisite of knowledge may often be proved by proof of circumstances from where such knowledge can be deduced, and not proven directly. 203

92. The third requisite is the party has to object to the breach of the procedural requirement without undue delay or within the time limit provided for an

199 Ibid., p. 206.
201 Ibid.
203 Ibid., p. 199.
objection in the Model Law or in the arbitration agreement. At first article 4 of
the Model Law used the wording “promptly”, as article 30 of the
UNCITRAL Rules, but to soften the provision the wording “without delay
was used.\textsuperscript{204} An exact time limit was not set because no time limit would be
suitable for all cases.\textsuperscript{205} When the Model Law was adopted in Hong Kong the
requirement was changed to “immediately”, in Tunisia it was changed to
“promptly” and in Oman it is required the objection is made “within 60 days
from the date of knowledge.”\textsuperscript{206}

93. A German court interpreted “without undue delay” so that a party must
state its objection at the next schedule oral hearing or in an immediate written
submission if no oral hearing is scheduled.\textsuperscript{207} In another German case, the court
held that an objection to an infringement of due process must be raised at the
latest with the closing plea.\textsuperscript{208} An arbitral tribunal in Egypt held in a case that if
an objection were raised “within a reasonable period” the waiver would be
undone.\textsuperscript{209}

94. The final requisite requires the party to have continued in the arbitral
proceedings without objecting.\textsuperscript{210} If a party appeared at a hearing or communi-
cated to the arbitral tribunal or to the opponent, a party would be deemed to
have continued with the arbitral proceedings.\textsuperscript{211}

95. There were conflicting views during the drafting of the Model Law
whether the waiver should extend to judicial proceedings where a party
challenges an award or whether it only applies to arbitral proceedings. How-

\begin{footnotesize}
\begin{itemize}
\item[204] Ibid., p. 199, 203.
\item[205] Ibid., p. 199, 213.
\item[206] Sanders, \textit{UNCITRAL’s Model Law on International and Commercial Arbitration: present
Situation and Future}, p. 445.
\item[207] 10 Sch 08/01, 21 February 2002, also available on the Internet at
\texttt{<http://www.dis-arb.de/de/47/datenbanken/rspr/olg-naumburg-az-10-sch-08-01-datum-2002-
02-21-id166> (retrieved July 31, 2014)}.
\item[208] 10 Sch 08/01, 21 February 2002, also available on the Internet at
\texttt{<http://www.dis-arb.de/de/47/datenbanken/rspr/olg-naumburg-az-10-sch-08-01-datum-2002-
02-21-id166> (retrieved July 31, 2014)}.
\item[209] No. 312/200, Cairo Regional Center for International Commercial Arbitration, 28
November 2004, also available on the Internet at
\texttt{<http://www.uncitral.org/pdf/english/clout/MAL-
digest-2012-e.pdf> (retrieved July 31, 2014)}.
\item[210] Binder, \textit{International commercial arbitration and conciliation in UNCITRAL model law
jurisdictions}, p. 60.
\item[211] Ibid.
\end{itemize}
\end{footnotesize}
ever, the majority view found the provision should extend to court proceed-

ings. Therefore, the waiver in article 4 of the Model Law extends to court
proceedings to set aside an award under article 34 of the Model Law or to
recognize or enforce an award in article 36 of the Model Law. The Model
Law provisions on recognition and enforcement of arbitral awards correspon-
to article V of the New York Convention.

214 Binder, *International commercial arbitration and conciliation in UNCITRAL model law jurisdictions*, p. 405. See also, Van den Berg, *The New York arbitration convention of 1958: towards a uniform judicial interpretation*, p. 265-266. The issue of the waiver may come up during proceedings to refuse enforcement of an arbitral award where the respondent is deemed to be estopped from invoking the grounds for refusal, according to article V of the New York Convention.

96. A party may not invoke non-compliance with the arbitral procedure or
agreement as a ground for setting a side an award after the award is issued,
which the party has deemed have waived during the arbitral proceedings. The
national court may come to another conclusion on whether the objection was
timely than the arbitrator’s, but the courts should respect the arbitrator’s
decision because they knew all the facts and circumstances surrounding the
arbitral proceedings.

97. In a case from the Russian Federation in 1999, a losing party sought to
have an award set aside on the grounds that the arbitral tribunal did not have
jurisdiction to hear the dispute. The Supreme Court of the Russian Federation
held that the right to challenge the award was precluded because the party did
not object to the arbitral tribunal’s jurisdiction during the proceedings.

98. In a case from Germany a claimant requested an oral hearing but the arbi-
trator decided that the case should be decided only on the documents. The
respondent did not submit any documents and the arbitrator rendered an award
in favour of the claimant. In the enforcement proceedings the respondent

43 (61)
objected and raised the issue of procedural wrongdoings in violation of article 24(1) of the Model Law. The Court held that the respondent was precluded from challenging the award on the grounds of procedural wrongdoings since he did not object when the arbitrator decided to have the proceeding in written form only.218

99. A German court held that when a party was deemed to have waived its right to object, the party would be precluded from raising the objection later on in the arbitral proceedings or uses the non-compliance as a ground for setting aside the award.219

5.2.3 Challenge of an arbitrator

100. A party may challenge the appointment of an arbitrator if circumstances exist that are likely to give rise to justifiable doubts of the arbitrator’s impartiality or independence under article 12(2) of the Model Law. There is no list of grounds to question an arbitrator’s impartiality, instead a general test was made to cover all relevant cases. A challenge is only allowed if the circumstances give rise to a justifiable doubt of the arbitrator’s impartiality or independence.220 If the parties have not agreed on a challenge procedure, a party must challenge an arbitrator on the ground of justifiable doubts to the arbitrator’s impartiality or independence within 15 days.221 The time limit begins when the party challenging the award becomes aware of the ground for challenge or the composition of the arbitral tribunal. The party has to write a written statement with the reasons for the challenge.222 A party is precluded from invoking a challenge against an arbitrator, which the party had knowledge

219 1 Sch 08/02, July 16, 2002, see also Presidium of the Supreme Court, Russian Federation, 24 November 1999.
220 Binder, International commercial arbitration and conciliation in UNCITRAL model law jurisdictions, p. 188.
221 Model Law, article 13(2).
222 Binder, International commercial arbitration and conciliation in UNCITRAL model law jurisdictions, p. 194.
of when the arbitrator was appointed. 223 This issue is also included in the general waiver in article 4 of the Model Law. 224

101. A person approached for a possible appointment as an arbitrator must disclose any circumstances, which may cause justifiable doubts as to the person’s impartiality and independence under article 12(1) of the Model Law. 225 The arbitrators have duty to disclose any circumstances that could question the impartiality and independence of the arbitrator from the appointment and throughout the arbitral proceedings. In a German case the court stated that an arbitrators failure to disclose circumstances, which could raise justifiable doubts to his impartiality and independence, is not in it self a ground for challenge. 226

5.2.3.1 IBA Guidelines

102. The IBA Guidelines for commercial arbitrators have categorised the different potential circumstances depending on their severity, which may lead to disqualification. There is “the non-waivable Red List”, “the waivable Red List”, “the Orange List” and “the Green List”. 227 The Red Lists give rise to justifiable doubts as to the arbitrator’s impartiality and independence and an objective conflict of interests is deemed to exist. The circumstances on the non-waivable Red List may not be cured. The parties may only be deemed to waived the circumstances on the Red List when the parties expressly state their acceptance of the arbitrator. The Orange List may give justifiable doubts as to the arbitrator’s impartiality and independence. If no timely objection has been made after disclosure, the party is deemed to waived its right. The circum-

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224 Binder, International commercial arbitration and conciliation in UNCITRAL model law jurisdictions, p. 190.
227 IBA Guidelines on Conflict of Interest in International Arbitration, p. 17.
stances in the Green List are not required to be disclosed because there is no appearance of a conflict of interest.\textsuperscript{228}

103. The standard is consistent with the Model Law, if a circumstance leads to justifiable doubts as to the impartiality and independence of an arbitrator, the arbitrator should be disqualified.\textsuperscript{229} It is an objective test for disqualification but the test of disclosure is subjective, to reflect the views of the parties. The time limit in the IBA guidelines is 30 days after disclosure or after the party learns of the circumstances, which potentially could question the arbitrator’s impartiality or independence. If an expressed objection is not made within 30 days, the party is deemed waived its right to challenge an award.

5.2.4 Jurisdictional objection

104. Under the principle of Kompetenz-Kompetenz, the arbitral tribunal may rule on its own jurisdiction. However, the national courts have the final control of the arbitrator’s jurisdiction.\textsuperscript{230} A claim on the arbitral tribunal’s lack of jurisdiction can be found in article 16(2) of the Model Law. A claim against the tribunal’s jurisdiction should be made at the latest in the Statement of Defence to the arbitral tribunal. However, an arbitral tribunal may admit a late claim if it finds the delay justified. The waiver in article 4 of the Model Law does not apply to article 16(2), as it is a mandatory provision in the Model Law. Article 16(2) of the Model Law does not explicitly state that a failure to raise an objection against the tribunal’s jurisdiction leads to preclusion. However, the working group of the Model Law observed that this should be result and a party should be precluded from raising an objection later in the proceedings, but also in setting aside proceedings.\textsuperscript{231} In a German case, the claimant was not precluded from challenging the jurisdiction of the arbitral tribunal, even though the time limit in article 16(2) of the Model Law had expired. The claimant was

\textsuperscript{228} Ibid.
\textsuperscript{229} Ibid., p. 8.
\textsuperscript{230} Binder, \textit{International commercial arbitration and conciliation in UNCITRAL model law jurisdictions}, p. 231.
\textsuperscript{231} Ibid. p.218.
not properly informed about the commencement of the arbitral proceedings and 
therefore the court granted the claimant the right to bring a challenge.232

105. In the fifth report for the Model Law, the working group stated that a party 
who fails to raise an objection under article 16(2) of the Model Law should be 
precluded from raising the same objection during the proceedings or in setting 
aside proceedings.233

5.2.5  *Excess of Mandate*

106. Under article 16(2) of the Model Law, a claim of excess of mandate 
should be made as soon as the circumstance for the excess of mandate is dealt 
with during the proceedings.234 However, a claim may be permissible later if 
the arbitral tribunal finds it justified. A failure to bring such a claim does not 
necessary entail that a party may be precluded from raising the same claim in 
proceedings to set aside the award or enforcement proceedings.235

6   DISCUSSION

6.1  INTRODUCTION

107. Sweden has become an attractive region for arbitration due to its reputa-
tion as a neutral state and its modern legislation on arbitration.236 Today, one of 
the main reasons for parties’ choice of seat for arbitration is efficiency.237 This 
requires an arbitration legislation, which is flexible, modern and adopts the 
principle of party autonomy. The purpose of the Swedish legislation on 
arbitration is to secure a minimum standard of objectivity and fairness in the 
arbitral proceedings and to result in a final arbitral award that can be enforced 
under the New York Convention.238

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232 6 Sch 4/01, November 8, 2001, also available on the internet at <http://daaccess-dds- 
August 8, 2014).
233 Holtzman, *A guide to the UNCITRAL Model Law on International Commercial Arbitration: 
legislative history and commentary*, p. 482.
234 Binder, *International commercial arbitration and conciliation in UNCITRAL model law 
Commercial Arbitration: legislative history and commentary*, p. 481.
235 Binder, *International commercial arbitration and conciliation in UNCITRAL model law 
jurisdictions*, p. 218.
237 *Ibid*.
108. Sweden is not seen as a Model Law jurisdiction. However, the Swedish legislation is harmonised with the Model Law, to follow the international standard. The provision on the waiver in section 34, paragraph 2 of the Swedish Arbitration resembles much to the waiver in article 4 of the Model Law, but has a few differences in the wording. However the principle of the waiver is alike, to further the goal of efficient proceedings without a disproportionate restriction of the parties procedural rights.

109. The arbitral proceedings do generally not involve the national courts. But the existence of supporting national legislation on arbitration and assistance from the national courts may secure objective and fair proceedings leading to the enforcement of an arbitral award.\(^\text{239}\) This interaction between arbitration and national courts also arises where a party claims a procedural error has occurred, or the party questions the legitimacy of the arbitral proceedings.

110. The Swedish Arbitration Act emphasises the principle of party autonomy and the desire for a final and binding award. However, the legislator and the national courts have to balance these goals against the need for law and order during the arbitral proceedings and to protect parties from an unforeseen loss of the right to challenge an award.\(^\text{240}\) A restrictive approach to the right to challenge an award may be offensive from a law and order aspect, as it could lead to the enforcement of arbitral awards afflicted with grave procedural errors. However, if arbitral awards are set aside too freely it may undermine the main reasons why parties decide to arbitrate.

111. The development in arbitration has been to limit the right to challenge an award and emphasise the principle of party autonomy.\(^\text{241}\) By agreeing to arbitrate the parties’ waiver the right to challenge an award on the merits.\(^\text{242}\) Parties often have other than strictly legal interests in resolving a dispute in arbitration. Parties are often motivated by financial aspects, having the dispute


\(^{242}\) Heuman, *Skiljemannarätt*, p. 17.
decided swiftly and efficiently. Therefore, a restrictive approach to the grounds for setting aside the award may be more in line with the parties’ intentions.

6.2 **The Principle of the Waiver**

112. Arbitration is founded on the principle of party autonomy, meaning the parties control the arbitral proceedings. The parties elect the arbitrators, choose the place for arbitration and the governing law of the proceedings. The Swedish Arbitration Act emphasises the principle of party autonomy and the parties are free to contract out of most of the provisions. The principle of party autonomy brings freedom for parties to custom the arbitral proceedings after the issue in dispute. However, this freedom may also entail obligations and duties on the parties. The waiver is closely linked to the principle of party autonomy. The parties control the proceeding, which means the parties are responsible to object to any potential errors in the procedure and to make sure that their rights are secured. This approach has to some extent been confirmed in Swedish case-law. In RH 2013:30, the Svea Court of Appeal found that the party had a duty to ensure the opponent’s identity and other formalities.

113. The Swedish Arbitration Act includes provisions to prohibit parties from obstructing the arbitral proceedings. The purpose of the waiver in section 34, paragraph 2 of the Swedish Arbitration Act and article 4 of the Model Law is to prohibit parties from speculating in the outcome of the proceedings, using the right to challenge an award as a tactic to delay enforcement. The waiver furthers the purpose of the parties acting in good faith during the proceedings. It requires a party to put forward its objections promptly, instead of saving the objections in case the award goes against the party. Thereby preventing the arbitral proceedings from becoming a several-instance process. The new IBA guidelines on Party Representation in International Arbitration emphasises that party representatives should act with integrity and honesty. Parties should not

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245 *Cf. RH 2013:30; NJA 2013* p. 578.
246 RH 2013:30.
contribute to unnecessary delays or tactics to obstruct the arbitral proceedings.

114. The objective of the waiver is to further the goal of a final and binding award, and efficiency during the arbitral proceedings. The waiver in article 4 of the Model Law emphasises the waiver’s role as a pre-emptive measure, for parties to object promptly. Thus allowing the arbitrators to correct potential errors during the proceedings and securing the enforcement of an award, without a need to raise a challenge in national courts. The waiver is part of the goal of efficient arbitral proceedings. If parties object promptly and clearly during the proceedings, the arbitrators may correct potential errors immediately, thereby saving both time and costs.

6.3 **Requirements of the Waiver**

6.3.1 **Knowledge**

115. Actual knowledge is generally required for a party to be deemed to have waived its right to challenge an award. However, the rule has partially been modified through Swedish case law. In RH 2013:30, the court stated that a party has a duty to verify certain formalities, such as that the opponent is duly represented. If there are indications of an error, the party is required to further investigations. In NJA 2013 p. 578 the court stated that when a party suspects an arbitration agreement may be invalid, the party has an investigative duty. In the unpublished case 677-99 the court also found that a party should not be able to intentionally refrain from investigating whether there are circumstances, which may diminish the confidence in the arbitrator’s impartiality. This corresponds to the waivers link to party autonomy and the parties responsibility to secure its rights and that the proceedings are conducted correctly.

116. The modification of the knowledge requirement may apply generally to the grounds in section 34 of the Swedish Arbitration Act for setting aside an award. It is in line with the idea that a party should not be able to save

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248 IBA guidelines on Party Representation in International Arbitration, p. 2.
250 Heuman, Skiljemannarät, p. 296.
251 See T 677-99; RH 2013:50; NJA 2013 p. 578.
objections, using the right to challenge an award as a tactic in case the party may lose. If the party suspects an error in the proceedings or any other grounds for setting aside an award the party should have a duty to investigate to secure the right to challenge an award. Legal scholars find constructive knowledge far-fetched, as a party who is unaware of an error should not lose the right to challenge an award. However, the parties’ passivity to investigate suggests the party does not regard the potential error relevant and that there is no right that needs protecting. The investigative duty exists when a party intentionally omits to investigate, not when a party has been negligent. The case-law is in line with the general development in arbitration law of a restricted approach to the right to challenge an award. A negligent party, without knowledge of a potential error may have justifiable interests that may need protecting. But a party who suspects an error and deliberately refrains from investigating should not be able to challenge an award later.

6.3.2 The Arbitrators’ Duty to Disclose

117. The arbitrators have a duty to disclose any circumstances that could leave justifiable doubts to the arbitrator’s impartiality under section 9 of the Swedish Arbitration Act. It’s an objective test and not whether the arbitrator would actually be biased during the arbitral proceedings. The parties control the proceedings, it is the parties who elect the arbitrators and the parties are responsible to object if the party finds out about a circumstance, which leaves justifiable doubts to the arbitrator’s impartiality. A party may not solely rely on the arbitrator’s duty to disclose all circumstances, which may give justifiable doubts to the arbitrator’s impartiality, when a party suspects a circumstance, which leaves justifiable doubts to the arbitrator’s impartiality.

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6.3.3 Time-Limit

118. Section 34 of the Swedish Arbitration Act deviates from article 4 of the Model Law, as the Model Law has a time limit for when a party may be deemed to have waived its right to challenge an award.\textsuperscript{253} An objection should be made without undue delay under article 4 of the Model law, which increases predictability for the parties. The Swedish Arbitration Act leaves discretion to the courts and arbitral tribunal to decide whether an objection was made too late. A set time limit applicable on all grounds for setting aside an award is not possible, as the grounds for setting aside are diverse. For more severe errors, it may be reasonable for a party to have time to investigate, while a simple error should be objected to promptly. Therefore it is necessary that the time limit is open-ended and varies depending on the situation. However, this is also accomplished in the Model Law. Discretion is left to the courts and arbitral tribunal regarding what constitutes an undue delay. Different national courts interpret the time limit differently and the Swedish approach also requires an objection to be made promptly.

119. Certain grounds for challenging an award do however have a set time limit to make sure the issue is addressed before the proceedings begin. An objection to the arbitral tribunal’s jurisdiction should be made at the latest in the Statement of Defence, according to Swedish case-law and article 16 of the Model Law. Under article 16 of the Model Law, an exception may be made if it is justified. In a German case, the claimant was not precluded from bringing a jurisdictional challenge against an award because the party had not been correctly informed of the commencement of the arbitral proceedings. In RH 2013:30 and RH 2009:55 the courts stated that there is room for an exception to the time limit, similar to the Model Law.

120. Arbitration is founded on the arbitration agreement. If a dispute is not covered by a valid arbitration agreement the arbitral tribunal has no jurisdiction to try the dispute. Therefore, the question of whether the arbitral tribunal has jurisdiction should be tried as soon as possible. However, the Swedish Arbi-

The Model Law has a specific time limit for an objection to an arbitral tribunal’s excess of mandate. An objection must be brought as soon as the potential excess of mandate is dealt with during the arbitral proceedings. Under article 16 of the Model Law, an exception may be made if it is justified. There is no specific time limit in the Swedish Arbitration Act for excess of mandate.

122. An objection against an arbitrator must be brought within 15 days from when the party became aware of a circumstance giving rise to diminished confidence in the arbitrator’s impartiality under section 34(5) of the Swedish Arbitration Act and article 12(2) of the Model Law. Otherwise, the right is deemed precluded. The Model Law uses a general test. A challenge can be made if there are justifiable doubts to the arbitrator’s impartiality and independence. The wording of the Swedish Arbitration Act and the Model Law deviates, as the Swedish Arbitration Act only states an arbitrator should be impartial. However, it is assumed that it covers both impartiality and independence, as in the Model Law.

123. The objective of the Swedish Arbitration Act and Model Law is to secure a minimum standard of objectivity and fairness on the arbitral proceedings. A biased arbitrator would not further that goal. A biased arbitrator can affect the whole proceedings and therefore it is crucial for an objection to be made as soon as possible. At the same time, party autonomy allows parties to allow a biased arbitrator and if the parties do not object the right will be precluded.
6.3.4 *A Clear and Unequivocal Objection*

124. An objection has to be timely, clear and unequivocal for a party to avoid to be deemed to have waived the right to challenge an award. In the balance between party autonomy and the desire for objective and fair proceedings, the Swedish courts support a pro-arbitration approach, upholding arbitral awards and restricting the right to challenge an award. This requires the parties to state their objections promptly, clearly during the arbitral proceedings to secure the right to be able to challenge the award. In NJA 2012 p. 790 the party objected to the validity of the loan agreement and not specifically the arbitration agreement. The party had not made a clear and unequivocal objection because it did not regard the validity of the arbitration agreement under the separability doctrine. If the parties are not clear in their objection, the tribunal may not interpret it as an objection and correct the potential error. The tribunal and opposing party may continue the proceedings assuming there is no issue.

6.3.5 *Burden of proof*

125. The party challenging the award has the burden of proof. If the opposing party claims the right is precluded, the party must also prove how and when the party made its objection. The reason being a displeased party is more likely to secure evidence. If the objection is not documented in the arbitrator’s protocol it will be difficult for the party to fulfil the burden of proof. Therefore, it is important for the parties to clearly object and make sure the objection is documented.

126. To prove actual knowledge, or lack of actual knowledge, is difficult for a party. Because of the difficulties a low evidence requirement may be used. One opinion is that the party claiming the right to object is waived has the burden to prove the other party knew. The drafters of the Model Law state the requisite of knowledge can be proved through circumstances from where knowledge can be deduced. It does not have to be proven directly. This is similar to the Swedish standpoint in the case Återförsäkringsbolaget Patria v.

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255 Ibid., p. 298.
Trygg-hansa where the court held that the knowledge requirement does not have to be proven directly, it is enough if it is possible to conclude that the party must have known about the procedural error.257

7 CONCLUSION

127. Arbitration requires an effective national legislation to give legal effect to an arbitration agreement or arbitral award. The New York Convention and the Model Law have provided legislative standards, which have become the accepted international standards in arbitration law. The development in international arbitration has been to facilitate dispute resolution in international trade. One of the main objectives with international arbitration is to offer an effective system to settle disputes.

128. The Swedish Arbitration Act and the Model Law emphasises the principle of party autonomy and the desire for a final and binding award. However, the desire for a final and binding award has to be balanced against the need for law and order during the arbitral proceedings and to protect parties from an unforeseen loss of the right to challenge an award. A restrictive approach to the right to challenge an award may disproportionally impede law and order. However, if arbitral awards are set aside too freely the efficiency of the proceedings is at risk.

129. Arbitration is founded on the principle of party autonomy. The parties control the arbitral proceedings and may form the proceedings as they choose. However, this freedom also entails responsibilities. The waiver of right to object is linked to the principle of party autonomy, obligating parties to object during the arbitral proceedings and for the parties to secure their rights, or else they may be deemed waived.

130. The primary purpose of the waiver is to influence the party’s behaviour and prevent parties from acting in bad faith. The waiver aims to prevent a party from speculating in the outcome of the award, using the right to challenge an award as a tactic to delay enforcement. These tactics affect the main reasons why parties decide to arbitrate and the efficiency of arbitration. The waiver

257 See 1677-99.
works as a limitation to the parties right to challenge an award when parties do not have a justifiable interest that needs protecting and to further the purpose of final and binding awards.

131. The waiver also has a pre-emptive purpose, to require parties to state their objections promptly during the arbitral proceedings. Thereby allowing the arbitral tribunal to correct potential error during the proceedings and securing enforcement of the arbitral award, without the need to bring a challenge in national courts. Therefore, the waiver’s pre-emptive purpose may lower the costs, further the goal of swift proceedings and may avoid delays in the enforcement of the arbitral award.

132. To secure the right an objection should be prompt without delay. If parties object promptly and clearly during the proceedings, the arbitrators may correct potential errors immediately, thereby saving both time and costs. For a party to be deemed to have waived its right to challenge an award, the party is generally required to have actual knowledge of the ground for challenge. However, this rule has been partially modified through case law, setting an investigative duty on a party who suspects that an arbitral agreement is invalid, or there is an indication of an error. This corresponds to the waiver’s link to party autonomy and the parties responsibility to secure its rights and that the proceedings are conducted correctly.

133. Sweden is not seen as a Model Law jurisdiction. However, the Swedish legislation is clearly influenced by the Model Law, to follow the international standard. There are few differences in the wording of the waiver in the two provisions. The provision on the waiver in section 34, paragraph 2 of the Swedish Arbitration corresponds much to the waiver in article 4 of the Model Law. However the principle of the waiver is alike, to further the goal of efficient proceedings without a disproportionate restriction of the parties procedural rights.
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