Chapter 2

COMMENT ON SECTION 2 OF THE SWEDISH ARBITRATION ACT OF 1999 DEALING WITH THE RIGHT OF ARBITRATORS TO RULE ON THEIR OWN JURISDICTION [1]

Christopher R. Seppälä
Partner, White & Case LLP, Paris

I propose to limit my comments on "The Arbitration Agreement" in the Swedish Arbitration Act of 1999 (the "**Act**") to Section 2 of the Act dealing with the right of a party to apply to a court for a ruling on arbitrators' jurisdiction, notwithstanding the express right of the arbitrators in the Act to rule on their own jurisdiction.

I. SECTION 2 OF THE SWEDISH ARBITRATION ACT

The ability of an arbitral tribunal to decide on its own jurisdiction, which is recognized in Article 16(1) of the UNCITRAL Model Law (the "**Model Law**"), is expressly enshrined on Section 2, first paragraph, first sentence, of the Swedish Arbitration Act of 1999 (the "**Act**"). This sentence provides (in English translation):

> "The arbitrators may rule on their own jurisdiction to decide the dispute."

According to a Swedish commentator, this means that arbitrators may rule on their own jurisdiction whenever the existence or validity of the arbitration agreement is challenged.[2]

However, the same paragraph of Section 2 then provides for something which is not in the Model Law, namely, that the power of arbitrators to rule on their own jurisdiction (translation):

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[1] The author gratefully acknowledges the comments on a draft of this paper of Bengt-Ake Johnsson (White & Case, Stockholm), Laurent Lévy (Schellenberg Wittmer, Geneva), Anke Kaul (White & Case, Frankfurt), and Rebecca Stephenson (White & Case, London) with respect notably to Swedish, Swiss, German and English law, respectively. But any inaccuracies that remain are the author's own.

[2] Kaj Hobér, *Arbitration Reform in Sweden*, Arb. Int'l. Vol. 17, No. 4 (2001) (hereinafter cited as "**Hobér**"), 351, 357.

> "shall not prevent a court from determining such a question at the request of a party. The arbitrators may continue the arbitral proceedings pending the determination by the court."

Thus, unlike the situation under the Model Law, a party is entitled to apply directly to a court (in Sweden, where the place of arbitration is in Sweden) for a determination as to whether the arbitral tribunal has jurisdiction. The court could apparently rule not merely on the issue of the validity of the arbitration agreement but also, for example, on whether any condition precedent to arbitration had been satisfied or whether the dispute being submitted to arbitration was within the scope of an admittedly valid arbitration agreement, as all these are issues related to arbitrator's jurisdiction.

The second paragraph then provides that:

> "Notwithstanding that the arbitrators have, in a decision, ... determined that they possess jurisdiction ..."

such decision is "not binding", either on the parties or on the arbitrators.[3]

Section 2 further provides that the provisions of Section 34 (providing for an action to set aside an award, which must be brought within 3 months of receiving an award) and Section 36 (providing for the possibility of an "appeal on the merits" of an award whereby the arbitrators concluded the proceedings without ruling on the substantive issues, *e.g.* when they have found they lack jurisdiction) are to apply in respect of an action to challenge an arbitration award which entails a decision in respect of jurisdiction.

It should be noted that a party may apply to a Swedish court <u>at any time</u> for such a ruling. There need only be a dispute between the parties one of whom claims that the parties are bound by an arbitration

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[3] A commentator on the Act has thus described the situation to be as follows:

"... If other circumstances come to light during the proceedings which cause the arbitrators to reverse their previous decision on jurisdiction, they are free to do so. The fact that a decision on jurisdiction is not final and binding also means that there is no need for a party to initiate a court action with respect to the decision with a view to preserving its right to challenge the resulting arbitral award. [<u>Note</u>: Under Section 34, a court action to challenge an award must be brought within three months of receiving the award.] The party will have the right anyway."

Hobér, 358. If a party chooses only to challenge the decision when it is embodied in a final award, he would need to have filed a protest of the decision during the arbitration to avoid being deemed to have waived his right under the second paragraph of Section 34. Hobér, 358.

agreement. A party may apply to a court either before or after arbitration proceedings have begun. Even after the arbitral tribunal has been constituted and/or "seized" of the dispute, it does not necessarily have the first word on its competence.[4]

Similarly, under Section 2, the Swedish court is expected to make a full review of the existence and validity of an arbitration agreement. I understand that the action would be initiated before a district court (that is, a court of first instance) in Sweden having domicile over the defendant and, if there were no such court, before the Stockholm District Court (also a court of first instance). The ruling of the district court could be appealed to a court of appeal.[5] The ruling of the court of appeal could, in turn but subject to leave, be appealed to the Supreme Court. I also understand that, depending on the complexity of the case, the court review may take one or more years at each level.

II. THE QUESTION RAISED BY SECTION 2

The question which I would like to address is: should a party be entitled, at any time, whether before or after arbitration proceedings have commenced and before or after a decision by the arbitrators on their jurisdiction has been rendered, to apply to a state court for a ruling on whether arbitrators have jurisdiction?

No one disputes that a state court should finally have the power to decide the issue of the existence and validity of an arbitration agreement. But at what point in time should that review by a state court be exercised? For example, should state courts and arbitrators have concurrent jurisdiction to decide this dispute, as provided for by the Act, or should one of them have priority and, if so, to what extent?

III. MAIN ADVANTAGES OF ALLOWING A PARTY TO APPLY TO A STATE COURT FOR A RULING ON ARBITRATORS' JURISDICTION

As only a state court can definitively decide that arbitrators have jurisdiction,[6] the obvious advantage of a right to go immediately to a state court, whether before or after arbitration proceedings have

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[4] Klaus Peter Berger, *The Arbitration Agreement Under the Swedish 1999 Arbitration Act and the German 1998 Arbitration Act*, Arb. Int'l, Vol 17, No. 4 (2001) (hereinafter cited as "**Berger**"), 389, 398.

[5] Before an award is rendered, I understand the action is before a district court, and, after an award is rendered, the action is before a court of appeal.

[6] *See* Article V.1 of the New York Convention allowing a contracting state to refuse enforcement of an award on this ground among other limited grounds.

begun, is to find out whether the parties should proceed with arbitration.

Where a court decides definitively (by a decision no longer subject to appeal) that the arbitrators do not have jurisdiction, then both parties will be relieved, by a court decision on this question, of the time and expense of an arbitration proceeding. They will know that, if they are to proceed anywhere, they must do so in the courts, that is, in a court which is competent in accordance with the relevant rules on jurisdiction.

On the other hand, where the court decides that the arbitrators have jurisdiction, that decision will have *res judicata* effect, at least in the country concerned (in Sweden, I understand, that a court's ruling would have legally binding effect and, hence, the jurisdictional issue could not be re-litigated before arbitrators sitting in Sweden), and the parties can proceed (assuming the time for any appeals has run) confident in the knowledge that the arbitrators' award cannot be annulled in that country on this ground.

While court proceedings (with appeals) may take some time, arguably, time and money can be saved by this approach, as the jurisdictional issue is being addressed immediately by the courts, who alone have the power to decide the issue conclusively.

Furthermore, it may be considered that a state court will take a completely impartial view on the issue of the arbitrators' jurisdiction whereas arbitrators may be considered by some to be self-interested and inclined to assume jurisdiction even where it is not justified.

IV. MAIN DISADVANTAGES OF ALLOWING A PARTY TO APPLY TO A STATE COURT FOR A RULING ON ARBITRATORS' JURISDICTION

Although, as we have seen, under Section 2 of the Act an immediate court action will not necessarily prevent the arbitrators from continuing with the arbitration ("(t)he arbitrators may continue the arbitral proceedings pending the determination by the court"), the fact that a party challenging an arbitration can immediately bring its claim to a court may interfere with the progress of the arbitration. Once the issue of the arbitrators' jurisdiction is before a state court, with the power to decide definitively whether the arbitrators have jurisdiction, neither the parties nor the arbitrators may be inclined to press ahead with the arbitration before the outcome of the court proceedings.[7] Accordingly, defendants may be tempted to try to delay

[7] Kaj Hobér has acknowledged this risk:

and disrupt arbitral proceedings by systematically challenging the jurisdiction of the arbitral tribunal before the courts.[8]

Furthermore, one may ask whether today, in the case of international arbitration, it is right to assume that a state court would decide the issue of arbitrators' jurisdiction more disinterestedly and correctly than an arbitral tribunal? At least, in my experience, in international arbitration, arbitrators tend to be very careful not to overstep their jurisdiction precisely because they are conscious that this is one of those areas where their award can be annulled.

V. ALTERNATIVE SOLUTIONS (TO THE SWEDISH SOLUTION)

What alternative solutions are there to the Swedish solution?

A. MODEL LAW

As you know, under Article II.3 of the New York Convention:

"... by proceeding with the arbitration, the arbitrators do take a certain risk, i.e. that time and money will have been spent in vain, if a court rules that the arbitration agreement is invalid or inapplicable."

Hobér, 358.

[8] As an illustration of the delay that can arise, at least, in another jurisdiction, one may refer to a U.S. court case (SMG Swedish Machine Group and Schooley v. Swedish Machine Group *et al.*, No. 90C 6081, 1991 U.S. Dist. LEXIS 780 (N.D. Ill. Jan 4, 1991) involving a dispute between various Swedish and/or U.S. parties over whether the parties had agreed to arbitration. The relevant contract was governed by Swedish law and contained an arbitration clause providing for arbitration under the ICC Arbitration Rules in London.

The issue before a United States District Court in Illinois was whether the arbitration clause was mandatory, which would require the court to compel arbitration, or permissive, which would not. The arbitration clause was not explicit on this point. It simply provided as follows:

"This agreement shall be governed in accordance with Swedish Law. The arbitration proceedings shall be conducted in the English Language and shall take place in London in accordance with the Rules of Conciliation and arbitration of the International Chamber of Commerce."

To resolve this issue, each party had submitted several briefs as well as an affidavit from an expert on Swedish law. However, the expert opinions contradicted one another, even after the experts had submitted "reply affidavits", and the Judge concluded they did not help him resolve the matter. Accordingly, he decided to refer the issue of whether the parties had concluded an arbitration agreement to a trial which, in the United States, might mean a jury trial.

So, this is an example, from the United States, of what may be involved, if the issue of arbitrators' jurisdiction may be referred to a state court before arbitrators decide the matter.

> "The court of a Contracting State, when seized of an action [in a matter that is the subject of an arbitration agreement shall], at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed".

Not surprisingly, Article 8(1) of the Model Law is to the same effect. In addition, Article 8(2) provides that where such a state court action has been brought, "arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court".

Thus, in this sense, under the Model Law (as under the Act), the arbitrators and state courts may have concurrent jurisdiction.

On the other hand, as explained above, under the Model Law (unlike Section 2 of the Act), a party does not have the right to apply directly to a court for the sole purpose of obtaining a declaration whether arbitrators have jurisdiction.

Under the Model Law, where an arbitral tribunal's jurisdiction is in issue, the tribunal may decide on its jurisdiction either as a preliminary question or in an award on the merits.[9] If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within 30 days, that a competent court rule on the matter by a decision that is subject to no appeal. While the request is pending, the arbitral tribunal may continue the proceedings and make an award.[10]

Thus, under the Model Law, where the arbitrators have ruled on the matter of their jurisdiction as a preliminary question, a party is entitled to obtain an early ruling on the matter from a state court by a decision that is not subject to appeal. This limits somewhat the risk that a party will be prevented for an unreasonably long time from obtaining a ruling from the courts on the arbitrators' jurisdiction.

Thus, the Model Law is more favorable to arbitration than Section 2 of the Act in two respects:

(1) by not providing a party with the right to apply directly to a court for a declaration on whether arbitrators have jurisdiction, and
(2) by providing that any preliminary ruling by arbitrators on their jurisdiction be subject to prompt review by a competent court by a decision that is not subject to appeal.

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[9] Article 16(3) of the Model Law.
[10] *Idem.*

B. German Position

Section 1032(1) of the German Code of Civil Procedure[11] provides essentially for the same solution as Article 8(1) of the Model Law (and effectively Swedish law), as discussed earlier. Where an action is brought before a court in respect of a matter which is the subject of an arbitration agreement, the court must dismiss the action if the respondent objects unless it finds the agreement is "null and void, inoperative or incapable of being performed".

As in Sweden, under German law, a party may bring an action in a state court for a declaration as to the existence or validity of an arbitration agreement but (unlike in Sweden) he may only do so if the arbitral tribunal is not yet constituted.[12] This provision is intended to allow both parties to receive a court decision on the jurisdiction of the arbitral tribunal as soon as possible.[13]

Once the arbitral tribunal is constituted, the arbitrators always have the first word on their jurisdiction. If the arbitral tribunal decides that it has jurisdiction, Section 1040(3) provides that this shall "usually [be] by means of an interim award". In such case, either party may request, within one month after receiving notice of that decision, that a court rule on the issue of the jurisdiction of the arbitral tribunal.[14] While such request is pending, the arbitral tribunal may proceed with the arbitration.[15]

Thus, German law is more favorable to arbitration than Section 2 of the Act in that an action before a state court for a declaration as to arbitrators' jurisdiction may only be brought before the arbitral tribunal is constituted.

C. English Solution

Three sections of the English Arbitration Act of 1996 are relevant: Sections 9 which is similar to Article II.3 of the New York Convention,[16] and Sections 32 and 72.

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[11] *See* Michael Bühler, *The German Arbitration Act 1997, Text and Notes*, English, Français Deutsch, Kluwer, The Hague 1998.

[12] German Code of Civil Procedure, Section 1032(2).

[13] Berger, 398.

[14] German Code of Civil Procedure, Section 1040(3). While Article 16(3) of the Model Law says this decision shall not be subject to appeal under German law, apparently, this decision would be subject to appeal in certain cases.

[15] German Code of Civil Procedure, Section 1040(3).

[16] Thus, Section 9(4) provides that a party to an arbitration agreement against whom legal proceedings are brought in respect of a matter which is to be referred to arbitration may apply to the same court to stay the proceedings, in which case,

Like Section 2 of the Act, Sections 32 and 72 of the English Act allow a party, under specified circumstances, to apply directly to a court for a determination as to whether arbitrators have jurisdiction.

Under Section 32, the conditions for such an application are quite strict. A party to arbitral proceedings may not apply to a court to determine the substantive jurisdiction of an arbitral tribunal except where either:

(1) all the parties to the proceedings agree, or
(2) the arbitral tribunal agrees and the court is satisfied that the court's decision will produce substantial savings of costs, the application was made without delay and there is good reason why the matter should be decided by the court.

According to the legislative history, use of this procedure is intended to be "exceptional" and should not become the ordinary method for challenging jurisdiction.[17] In addition, a party's right to appeal the court's decision is restricted.[18]

On the other hand, under Section 72, a person alleged to be a party to arbitral proceedings "who takes no part in the proceedings" may contest the jurisdiction of the arbitrators at any stage by a court action seeking a declaration, an injunction or other appropriate relief.[19] Unlike the case for Section 32, a party's right to appeal the court's decision is not restricted.[20]

Thus, the position in England (especially in light of Section 72) may be considered to be not so different from the position in Sweden. Under certain conditions, a party has the right to commence a court action for the sole purpose of obtaining a declaration (or other remedy) as to the validity and existence of an arbitration agreement.

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the court must do so unless satisfied that "the arbitration agreement is null and void, inoperative or incapable of being performed".

[17] Report on the Arbitration Bill of the Departmental Advisory Committee on Arbitration Law, February 1996 (the "**DAC Report**"), para. 147.

[18] Section 32(6) of the English Arbitration Act.

[19] Such party also has the same right as a party to the arbitral proceedings to challenge (after proceedings are concluded) an award on the ground of lack of substantive jurisdiction as to him or of "serious irregularity", as defined (in Section 68), affecting him.

[20] Jean-François Poudret and Sébastien Besson, *Droit Comparé de l'Arbitrage International*, Schulthess, Zürich, 2002 (hereinafter cited as "**Poudret and Besson**"), 435.

D. Swiss Solution[21]

Contrary to Section 2 of the [Swedish] Act, German law in a limited way,[22] and English law,[23] under Swiss law a party does not appear to be entitled to apply directly to a court for a determination as to whether an arbitration agreement is valid.[24]

Article 7 of the Swiss Federal Private International Law Act relating to International Arbitration ("**PILA**") provides in part, like Article II.3 of the New York Convention,[25] that where parties have concluded an arbitration agreement covering an arbitrable dispute, a Swiss court must decline jurisdiction unless the court finds that the arbitral agreement is null and void, inoperative or incapable of being performed.[26]

However, the Swiss position is more favorable to arbitration than the New York Convention, as where the arbitration agreement provides for arbitration in Switzerland, a Swiss court must merely decide *prima facie* on the validity of the arbitration agreement to decline jurisdiction.[27] On the other hand, where an arbitration is conducted abroad, it will apply the New York Convention.[28]

Switzerland's grant of greater power to an arbitral tribunal to decide its jurisdiction needs to be considered together with Article 186(3) of the PILA providing as follows:

> "The arbitral tribunal shall, in general, decide on its jurisdiction by a preliminary decision." [29]

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[21] For a summary of the Swiss position, *see* Professor François Perret, *Parallel Actions Pending Before an Arbitral Tribunal and a State Court: the Solution under Swiss Law* in ASA Swiss Arbitration Association, Special Series No. 15 ("Arbitral Tribunal or State Courts – Who Must Defer to Whom?"), January 2001, 65-66.

[22] Section 1032(2) of the German Code of Civil Procedure.

[23] Sections 32 and 72 of the English Act.

[24] Poudret and Besson, 437.

[25] As treaties are self-executing in Switzerland, the New York Convention applies directly in Switzerland.

[26] Article 7.b of the PILA.

[27] Perret, 65, 66, citing to a Swiss Federal Court decision (ATF 122 III 139 & foll.) to this effect.

[28] *See* commentary on Article 7 of the PILA contained in a booklet entitled "*The New Swiss Law on International Arbitration*", Swiss Arbitration Association, 1990.

[29] While referring to the possibility of a ruling on jurisdiction as a preliminary question, Article 16(3) of the Model Law neither favors nor disfavors such a ruling on a jurisdictional issue.

The requirement that an arbitral tribunal should generally decide on its jurisdiction by a preliminary decision should limit the risk that an arbitral tribunal would override a valid jurisdictional objection and proceed to a full consideration of the merits with all the costs and time that this would entail.

Another special feature of Swiss law is its espousal of the doctrine of *lis (alibi) pendens* with regard to the relationship between a court and an arbitral tribunal, which to some extent limits the power of arbitrators to decide their jurisdiction, at least compared to French law (as discussed below).[30] This doctrine has been interpreted by a Swiss Federal Court decision of 2001[31] to require an arbitral tribunal in Switzerland to give due consideration to litigation initiated abroad, prior to arbitration, about the same subject matter. A condition to the application of this doctrine is that the foreign litigation would result in a decision which would be enforceable in Switzerland. This is an exception to the otherwise autonomous decision-making power of an arbitral tribunal regarding its own jurisdiction.

In other words, if a state court in a foreign country were seized of the matter first (including, specifically, the issue of whether arbitrators would have jurisdiction) then, under this doctrine, an arbitral tribunal sitting in Switzerland would have to stay its proceedings until there were a binding decision of the foreign state court, if and to the extent such decision would be enforceable in Switzerland, the justification for the doctrine of *lis pendens* being to avoid the risk of contradictory decisions.[32]

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[30] This is provided for in Article 9 of the PILA and also in Article 100 of the French New Code of Civil Procedure ("NCCP") but Article 100 of the NCCP excludes application of this theory to arbitration as it requires both tribunals to be competent for the theory to apply, which is not possible where there is an arbitration agreement. The doctrine would also be excluded by Article 1458 of the NCCP (quoted below in the main text). The doctrine does not appear to exist in common law systems. Instead, there the judge may have discretion to stay proceedings in view of proceedings pending elsewhere.

[31] Fomento de Construcciones y Contratas S.A. vs. Colón Container Terminal S.A., Rev. arb. 2001, 835, and Poudret's note. A translation of this case into English is to be found in (2001) ASA Bulletin 555.

[32] If the parties were bound by a valid arbitration agreement, which the foreign court failed in its decision to recognize, then the foreign decision would not be enforceable in Switzerland, Poudret and Besson, pp. 469-70. Professor Poudret, the well known Swiss arbitration authority, would apply the *lis pendens* doctrine – giving priority to whichever action begins first – if both the court action and the arbitration were taking place in Switzerland but would give priority to an arbitral tribunal if the court action were taking place in a foreign country and not in the same country (*i.e.* Switzerland) as the arbitration and either there appeared *prima*

E. French Position

The French position[33] is even more favorable to arbitration than that of Germany or Switzerland or the Model Law. Article 1458 of the French New Code of Civil Procedure ("NCCP"), which has been held to apply directly to international arbitration,[34] provides that (translation):

> "When a dispute of which an arbitral tribunal is seized by virtue of an arbitration agreement is brought before a state court, the state court must declare itself incompetent.
>
> If the arbitral tribunal is not yet seized of the dispute, the state court must also declare itself incompetent unless the arbitration agreement is manifestly null and void."

Thus, French law draws a distinction between whether or not an arbitral tribunal has already been seized of the dispute. Before it has been seized, a state court must declare itself incompetent unless it finds the arbitration agreement manifestly void. After an arbitral tribunal has been seized of the dispute, a party can no longer refer the matter to a court. Thus, it cannot, as in Sweden, seek from a court a declaration of whether or not the alleged arbitration agreement is valid or not.[35] A party's sole remedy would be to apply to have the award set aside at the enforcement stage. At that stage, the award may be challenged under Article 1502(1) or (3) of the French NCCP, at which point in time both the facts and law would be subject to a full review. The rationale for this distinction is that where a dispute has not yet been referred to

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facie to be a valid arbitration agreement or the defendant seized an arbitral tribunal of the dispute within a limited time frame. *See* Poudret, *Litispendance entre l'Arbitre et le Juge: Quelle Priorité?*, Mélanges Jean-Pierre Sortais, Bruylant 2002, 495, 512, and especially, Poudret and Besson, 481, for this conclusion.

[33] The French position appears to be derived, in part, from the 1961 European Convention on International Commercial Arbitration. Article VI(3) of that Convention prohibited the courts, where arbitration proceedings had been begun, from resolving the question of the existence or validity of an arbitration agreement unless they had "good and substantial reasons to the contrary". This language was intended to signal that only a *prima facie* review of the validity or the existence of an arbitration agreement was to be performed at this stage (as distinct from a full review in the context of an enforcement or setting aside action after an award had been rendered).

[34] Cass. 1e civ., Eurodif v. Republique Islamique d'Iran, 28 June 1989, Rev. arb. 1989.653, and P. Fouchard's note.

[35] Cass. 1e civ., Zanzi v. J de Coninck et autres, 5 January 1999, Rev. arb. 1999.260, and P. Fouchard's note.

an arbitral tribunal, a party's action in bringing the matter before a state court is less likely to be in bad faith than where an arbitration has already been begun.[36]

The French position is claimed by its proponents to have two advantages:[37]

(1) completely prohibiting recourse to state courts after an arbitral tribunal is seized of a dispute may be the most effective procedure for combating dilatory tactics, avoiding the costs of two parallel proceedings and the risk of contradictory decisions,[38] and

(2) by preventing state courts from fully considering the issue of arbitrators' jurisdiction until the enforcement stage, all issues relating to arbitrators' jurisdiction can be centralized in the same court or courts, that is, the courts assigned to deal with challenges to awards.[39] This permits these issues to be addressed by courts that are experienced in arbitration and, thereby, limits the risk of inconsistent or anomalous decisions.[40]

Where courts have the power in parallel with an arbitral tribunal to decide the arbitral tribunal's jurisdiction, this centralization exercise would not be possible. Any competent first instance court (a district court in Sweden if the arbitration proceedings are conducted in Sweden), would have jurisdiction to decide the validity and scope of an arbitration agreement.

In conclusion, the French position may be justified if one considers that the danger of dilatory tactics is greater than the danger that the arbitrators will make a self-interested and/or erroneous decision regarding their jurisdiction and oblige a party to defend itself

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[36] *Fouchard, Gaillard & Goldman on International Commercial Arbitration* (edited by Emmanuel Gaillard and John Savage), Kluwer Law, The Hague, 1999 (hereinafter cited as "**Fouchard, Gaillard & Goldman**"), 411.

[37] Fouchard, Gaillard & Goldman, 411-12.

[38] For example, *see* the SMG Swedish case referred in note 6 above.

[39] For example, in France, all such actions are centralized in the Courts of Appeal (in international arbitration, as a practical matter, the Paris Court of Appeal, *see* Article 1505 of the NCCP).

[40] Similarly, Swiss law gives exclusive jurisdiction to the Federal Supreme Court to hear actions to set aside awards made in Switzerland unless the parties provide otherwise (Article 191 of the PILA) and the Model law attempts to centralize actions to set aside awards before specified courts in each country adopting it (Articles 6 and 34(2)).

unnecessarily before an arbitral tribunal as well as, possibly, in a proceeding to enforce any award against it.[41]

VI. CONCLUSION AND PROPOSALS

Any decision on what is the best approach requires one to balance:

(1) the reasonable expectations of a claimant to an efficient arbitral process insulated, so far as possible, from the risk of undue delay and of having needlessly to resort to local state courts, and
(2) the reasonable expectations of a defendant not to have to defend, any more than is necessary, against an arbitration proceeding which has been wrongly brought against him.

Sweden and, in a more limited way, Germany and England, provide that a defendant should be entitled, without having to participate in the arbitration, to obtain a declaration on this subject immediately from a local state court. But some respected Continental European arbitration experts say such "direct control" of arbitration by a state court is disappearing in other countries[42] and should be abolished.[43]

In France and Switzerland, as I have said, there appears to be no direct control by the courts of the validity of arbitral proceedings. The issue of whether the arbitrators have jurisdiction will only arise before a state court where a party begins an action on the merits before such a court in respect of a matter alleged to be covered by an arbitration agreement.

According to French legal doctrine, to ensure that arbitrators have the full power to decide on their own jurisdiction, it is necessary not merely to exclude direct control but also to give arbitrators the power to decide on their own jurisdiction before a state court can make this

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[41] Interestingly, pursuant to Section 18 of the Act, as in France and Switzerland (*see* Poudret and Besson, 362), where a party has requested a court to appoint an arbitrator, the court may refuse to do so only where it is manifest that the arbitration is not legally permissible. Accordingly, Section 18 (like Article 1458 of the NCCP) provides only for a *prima facie* control of the arbitration agreement. One might ask why have a different degree of control of the validity of the arbitration agreement in Sweden when appointing an arbitrator as compared to when the court is referring a party to arbitration.

[42] Poudret and Besson, 432. According to Professor Poudret and Mr. Besson, such action is not admissible or no longer admissible in Belgium and The Netherlands, Poudret and Besson, 437.

[43] Poudret and Besson, 438.

decision.[44] In France, before the arbitrators are seized of the case, a party will only be allowed to proceed with a state court action on the merits where manifestly he is not bound by an arbitration agreement. After the arbitrators are seized of the case, a party will not be allowed to proceed before a state court until after an award (whether partial or final) is rendered, when he may apply to have it set aside because the arbitrators lacked jurisdiction.

Which solution is best? It is difficult to say. I am aware of no statistics or other empirical data which can demonstrate convincingly that the solution in one country is necessarily better than in another. Among other things, much may depend on the speed and efficiency of the relevant state courts, which will naturally vary from country to country, and the availability, or not, of appeals from state court decisions.

However, as an important center for international arbitration, Sweden may wish to consider making its law more favorable to arbitration in this respect. If so, Sweden may want to consider the following modifications to Section 2 of the Act in the case of an international arbitration:

(1) Like France and Switzerland, which are also important centers for international arbitration, Sweden may want to abolish the procedure entitling a party to seek a declaration from a state court, at any time, about whether the arbitrators have jurisdiction.

As discussed earlier, such an action may discourage the arbitrators and the parties from proceeding with the arbitration. Furthermore, as the court decision may be subject to review both by a court of appeal and, subsequently, the supreme court, these court proceedings may continue for several years.

(2) Like Germany and Switzerland, Sweden may want to encourage an arbitral tribunal to decide the issue of its jurisdiction by a preliminary ruling that is subject to prompt review by a court whose decision (at least under the Model Law and in Switzerland) is not subject to appeal.

(3) Sweden may want to abandon the requirement that, when arbitrators decide they have jurisdiction, they make that ruling by a decision that is "not binding". If the arbitrators

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[44] This is referred to by French authors as the "negative effect" of the "competence-competence" rule, that is, the rule according to which arbitrators have the power to decide on their own jurisdiction.

do not have the information to make a "binding" decision, then I suggest that they should not make one at all. On the other hand, if they have the information, they should make a final and binding decision by an interim or partial award that is subject to prompt review by a court (as stated in (2) above).

(4) Sweden may want in its Act to provide guidance to parties as to how Swedish courts will act not merely in the case of arbitrations taking place in Sweden, as foreseen in Article 46 of the Act, but also in the case of arbitrations taking place abroad or where the place of arbitration has not been determined. The German Code of Civil Procedure contains such provisions.[45] This will make the Act more "user friendly" and will be welcomed by practitioners whether in Sweden or abroad.

In the international arbitration field, at least, I think the risk of the use of a declaratory action, provided for by Section 2 of the Act, for dilatory purposes is considerable. If, as a lawyer, one were defending a party which wished to delay and disrupt an arbitration (as can quite often happen), why would one not commence such an action? Apart from the expense of such an action, what has a defendant to lose? In short, I believe that this risk is greater than the risk that arbitrators will assume jurisdiction in cases where they were not entitled to do so, coupled with the negative consequences for a defendant which this may have.

The quality of international arbitrators is constantly improving. They may be at least as able to decide jurisdictional issues correctly - and disinterestedly - as state court judges. If this is correct, why deny the arbitrators priority in deciding them? Swedish, as well as German and English law may still reflect the traditional view that the justice afforded by state courts is somehow superior and more disinterested (as well as being, admittedly, more definitive) than that afforded by an arbitral tribunal. But that is not necessarily the case in international arbitration today.

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[45] *See* German Code of Civil Procedure, Section 1025(2) and (3).

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LARS HEUMAN

SIGVARD JARVIN

EDITORS

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