The Swedish example does not necessarily apply to Finland in order for Finland to become an attractive place for international arbitration; economic importance of a future services sector

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One may wonder why we are all here today. If one is to believe the yearly reports published in GAR, “Finland’s progressive and pro-arbitration legislative framework contributes towards making Finland an attractive and arbitration-friendly seat. Both domestic and international arbitration proceedings in Finland are governed by the 1992 Arbitration Act” … which “largely mirrors the provisions of the UNCITRAL Model Law.”

The article does not explain in what areas the Finnish Act mirrors the Model Law. You may object that most of these country reports should not be taken too seriously, they are self-serving.

Sweden is part of a group of small European countries whose laws favour international arbitration, like Austria, Belgium, Denmark, the Netherlands and Switzerland. Stockholm is an established arbitration place although, in terms of global practice, not a major seat like Hong Kong, London, Paris and Singapore.

Owing to a long established practice in Sweden of resolving business disputes through arbitration rather than in courts, in both domestic and international cases, arbitration is an accepted way of settling disputes. Sweden does not have the specialized commercial courts found in much of Europe after the French Revolution.

1 Jussi Lehtinen’s and Heidi Yildiz’ report on Finland in The European Arbitration Review 2018, GAR, Law Business Research Ltd, page 50. The same statement was made in the 2017 review at page 54.

2 To my knowledge, no statistics exist regarding the overall number of arbitration cases - institutional and ad hoc – in various seats. Arbitration institutions publish statistics of the number of cases submitted to them but the number of ad hoc cases taking place in a particular city remains unknown. A look at recent statistics reveals that the ICC received 966 new cases in 2016 and that the seats are spread to 106 cities. SIAC had an active caseload of 650 cases and Singapore, i.e. the city, hosted mostly SIAC and ICC cases and many more ad hoc and UNCITRAL-governed ones. Hong Kong received 460 new cases in 2016, with all (but one) seated in Hong Kong. Stockholm hosted 153 cases under the SCC Rules in 2016, approximately 100 of them were domestic Swedish cases, which means that some 50 were international. I found no statistics regarding Helsinki-based seats on the FAI website. Switzerland has, based on my personal experience, a high number of international ad hoc cases, probably much larger than the roughly 100 institutional cases published on the SCAI website.
Sweden is not a UNCITRAL Model Law country, although one can learn from the GAR country reports mentioned above, that the Swedish Arbitration Act “generally follows the UNCITRAL Model Law”, but here again, no comparison with the Model Law is offered. Sweden acceded early to the New York Convention and Swedish courts are used to handling arbitration-related issues, such as challenge of arbitrators and requests to set aside arbitral awards. Most such cases are referred to the Svea Court of Appeal in Stockholm where two of the court’s chambers specialise in arbitration matters.

Although regarded as a civil law jurisdiction, Sweden does not have a civil law system in the European continental sense, like France or Germany. Sweden does not have a code of obligations like France with its Napoleonic Code civil or Germany’s Bürgerliches Gesetzbuch.

The Swedish court procedure is a mixture of civil and common law, with orality and concentration being its main features. The procedure is not inquisitorial, the judge does not lead the questioning of party representatives and witnesses, another marked difference with traditional civil law jurisdictions. Parties, witnesses and experts are heard by the parties’ lawyers in direct and cross-examination; however written witness statements, as we know them from international arbitration, are not allowed in Swedish courts.

Swedish legislation in the field of arbitration

Arbitration legislation goes far back in history. There are statutory provisions in one of the provincial codes (landskapslagar) compiled in the middle of the 14th century. The first arbitration act appeared in 1887, it was succeeded by the 1929 Act. When Sweden acceded the New York Convention amendments were made in the 1929 Act; an act which was in force for 70 years. In 1999, the present Arbitration Act was adopted.

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3 Sverker Bonde’s report on Sweden in The European Arbitration Review 2018, GAR, Law Business Research Ltd, page 115. The same statement was made in the 2017 review at page 120.


5 A comparison between the Swedish Arbitration Act and the UNCITRAL Model Law was discussed at a seminar in 2004 and can be studied in the book “The Swedish Arbitration Act of 1999, Five Years On: A Critical Review of Strengths and Weaknesses”, with contributions by Jernej Sekolec (Secretary UNCITRAL), Nils Eliasson (Mannheimer Swartling), Jianlin Zhu (Deputy secretary general CIETAC), Jeffrey M. Hertzfeld (Salans Paris), Ulf Franke (Secretary...
Sweden’s attitude to international arbitration; how things began to change in the 1970s

In the late 1970s, international commercial arbitration began to expand globally. The Soviet Union and the United States were looking for a better way for settling disputes between Soviet foreign trade organizations and US private business; the Americans did not want to settle disputes with the Soviet Foreign Trade Arbitration Commission and the Soviets did not accept ICC-arbitration, considered too close to capitalistic values.

This was the time when, as some observers noted, “Stockholm was looked to by those at the forefront of the expanding arbitration business”. Sweden was politically neutral and not too closely identified with any particular block of nations. Political neutrality goes well with commercial dispute resolution. Sweden is a small country, like Switzerland, and thus available as a neutral forum. In the 1970s, during the Vietnam war, under the leadership of prime minister Olof Palme (who was murdered in Stockholm in the 1980s), Sweden temporarily broke off diplomatic relations with the US, invited North-Vietnamese leaders to Stockholm and accepted US soldiers who deserted from the Vietnam war, which made Sweden an interesting – and acceptable - country for the Soviet Union.

At the time, Stockholm had no major institutional presence in international commercial arbitration. Thanks to the interest of the American and Soviet governments, a joint venture was created with the aim to find a new structure for the arbitration of contract disputes between American corporations and Soviet foreign trade organisations. The key feature was a model arbitration clause which corporations in the US and Soviet foreign trade organisations could include in their contracts, known as the “Optional Clause for Use in Contracts in USA-USSR Trade 1977”. It specified that arbitration would take place in Sweden under the UNCITRAL Arbitration Rules, which rules had been created shortly before. The SCC was to appoint the chair from a panel jointly established by the USSR Chamber and

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the AAA. The SCC agreed to furnish secretariat services and physical facilities on demand.

The joint studies and discussions by the three organisations (AAA, SCC, the USSR Chamber of Commerce and Industry) took several years. As part of the effort, the three organisations jointly conducted a comprehensive analysis of Swedish arbitration law, leading to changes in the law, and the publication of a book published by the Stockholm Chamber of Commerce: “Arbitration in Sweden”.

Thanks to the Optional Clause, Stockholm was put on the international business arbitration map with a specific, high-profile East-West niche. The initiative was not Swedish, Sweden did not go after a market. Unlike London, Stockholm did not have the ambition to export arbitration services to the rest of the world. This has, as we know, completely changed since. Today, Sweden like many other countries, not only England, has discovered that international arbitration brings in money to the state as a services sector.

As pointed out by Christopher Seppälä: “Ironically, the growth of Stockholm as a popular place for resolving disputes involving Russian and Chinese parties appears to have resulted from an event not in Sweden but in Finland, namely the Helsinki Final Act of 1 August, 1975, which was adopted by, among others, the U.S.S.R., the United States and numerous other Western countries including Finland. The participating states to the Helsinki Final Act expressly acknowledged that arbitration was an appropriate mean of settling commercial disputes” and that provisions should be made to permit arbitration in a third country.

UNCITRAL’s role and importance

Mr Coulson, then president of the AAA and one of the negotiators of the Optional Clause, stated that:

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9 Yves Dezalay & Bryant G. Garth : Dealing in virtue, The University of Chicago Press, 1996 p 188
10 Christopher R. Seppälä: Why Finland should adopt the UNCITRAL Model Law on international commercial arbitration, article published in 3 2016 Liikejuridiikka, editor Kauppakamari, note 20
“UNCITRAL Arbitration Rules and accompanying administrative guidelines have been a useful effort by the United Nations to achieve coherence”.11

I think it is fair to guess that without the existence of the UNCITRAL Arbitration Rules, the elaboration of the Optional Clause would have been an even longer exercise. Sweden’s arbitration law was not well known and had to be jointly studied by the USSR and the US. Howard Holtzmann, another of the American negotiators told me that the AAA took a calculated risk when agreeing on Stockholm – the capital of a socialist country. Thanks to the existence of the United Nations’ fresh product, the UNCITRAL arbitration rules, the parties were confident that future disputes would be decided with the application of fair rules, elaborated by arbitration specialists, endorsed by the United Nations and thus backed by states – and not business stakeholders.

Finland’s situation is different compared to Sweden’s.

It seems to me that there are both similarities and differences between the choice of Sweden in the 70s and Finland’s choice today. I presume that Finland actively wishes to make in-roads to international commercial arbitration.

First the similarities. Sweden’s arbitration legislation was not well known outside Sweden in the 70s, just as Finland’s arbitration act is not well known outside Finland today; I would go farther and say it is hardly known at all. During my 35 years in international commercial arbitration I have met two (2) people who knew the basics of the Finnish Arbitration Act. That already is a very good reason for adopting the UNCITRAL Model Law.

Now the differences. Sweden made a place for itself in the international arbitration arena without adopting the 1985 Model Law, based on the notoriety that Sweden had gained through high profile cases submitted to Stockholm arbitration since 1977 thanks to the Optional Clause. Finland has a tougher situation to deal with; competition among countries that wish to attract arbitrations to its territory is fierce today. Finland’s arbitration practice is widely unknown. So is knowledge outside Finland about whether Finnish courts are “arbitration friendly” or not. However, nothing is impossible, other cities and countries have developed from little-known to world-wide known places of arbitration, e.g. Singapore, largely owing to reforms

and publicity combined with a long-term commitment to establish themselves. Cairo and Kuala Lumpur may be on their way. If Finland adopts the Model Law foreign parties would at least, and immediately, know what the arbitration procedure looks like and thus have more confidence in the system.

It is interesting, and encouraging, to note that the leaders of Finland’s arbitration community now feel a need to change. Is it because a new generation, more professional and technical, has taken over in Finland, like in well-known arbitration places (Geneva, London, Paris etc.)? In the old days, the arbitrator was a white male who had risen to the top of his legal profession but was not specializing in the field of arbitration; their aura made them credible arbitrators, they were the ‘Grand Old Men’. The second generation of arbitrators had a career entirely dedicated to arbitration; this was the generation of the ‘Technocrats’. Two commentators propose that we now live with the third generation of arbitrators: the ‘Managers’. With the increasing pressure from users that international arbitration be cost-effective comes the need to have arbitrators, especially presiding arbitrators, who not only have experience in the law and practice of arbitration, like the Technocrats, but who can manage an arbitration so that it results in an award within the time set.

An effective arbitration regime in Finland

I maintain the view that an effective arbitration regime must be predictable. The powers of the arbitrators must be clearly defined, arbitrators must be able to issue sanctions against violations of the arbitral process. Foreign parties must be able to bring their own lawyers to the hearing; it should not be necessary to hire local counsel in order to figure out what the Arbitration Act at the place of arbitration means. Such factors speak in favour of adopting the Model Law; counsel and parties coming to arbitrate in Finland should be safe from procedural surprises.

At the Stockholm seminar in 2004, Mr Sekolec (the UNCITRAL Secretary) compared the Swedish Arbitration Act with the Volvo sports car that the Saint used in a

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12 The typical arbitrator was “male, pale and stale” as one (female) in-house counsel has put it.
television series. The car was well designed but somewhat idiosyncratic: one had the feeling that you had first to read the manual before you could use it. In this globalised world, arbitration practitioners know how to use the UNCITRAL Model Law without reading the manual.

Any successful arbitration seat must curtail against the development of a culture in which whom you know is more important than what you know. Foreign arbitrators and counsel must not feel at a disadvantage in a community where local arbitrators and local counsel all know each other; a typical risk in any small and homogenous community where informal contacts are common.

I think Finland would gain a lot, and not lose much, if it adopted the Model Law, an arbitral system that is internationally known.