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EVIDENCE IN THE ARBITRATION PROCESS. STUDYING THE EXPERIENCE OF SWEDEN AND THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE

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Abstract:

This article provides the deep analysis on theoretical and legal aspect of evidences in international investment arbitration process. The main focus of this paper is to examine the burden of proof, the process of submission of evidences in investment arbitration process and study the experience of that process in Sweden and the Arbitration Institute of the Stockholm Chamber of Commerce.

Keywords: Investment, Arbitration, Evidence, Alternative Dispute Resolution, International Private Law, Stockholm Chamber of Commerce, Sweden, Burden of Proof, Disclosure, Arbitrators.

INTRODUCTION. *What is the Evidence in Arbitration Process?*

Evidence is the cornerstone of any adversarial process in which the outcome of a dispute is entirely dependent on a party's ability to convince a judge or arbitrator of the correctness of its claims. The role of evidence is especially great in international arbitration, where arbitrators traditionally take a passive, neutral position, giving the parties complete freedom of action in the means and methods of proof. Evidence means information about the circumstances referred to by the parties to the dispute and which are important for resolving the dispute[1]. Such circumstances, depending on the applicable procedural rules, can be confirmed by a variety of means, including paper and electronic documents, material evidence, audio and video recordings, testimony of witnesses and experts, site inspection, examination of evidence at their location, as well as by other available means[2]. In this sense, Swedish Arbitration Act has no exception and proceeds from the generally accepted principle: «*The parties are obliged to present evidence*»[3]. In other words, the party is obliged by its active actions, without indicating to the arbitrators, to provide the latter with sufficient evidence in support of the stated claims or to exercise its defense. It is considered that active actions of the arbitrator to request evidence in order to establish the truth violate the principles of the adversarial process and equality of the parties and may serve as a basis for annulment of the arbitral award[4].

Part 1*. Form of Evidence in Arbitration Process in Sweden*

Evidence in the arbitration process is divided into two types, written and oral. Written evidence includes circumstances related to a dispute, recorded in the form of records, graphics, diagrams, drawings on physical or electronic media. Written evidence includes contracts, certificates, all kinds of correspondence, plans, schedules, texts, decisions of arbitration tribunals and courts, other court orders, minutes and other documents. The parties independently determine the range of written evidence to be disclosed in arbitration in support of their stated position. Written evidence is perhaps the most common type of evidence and the most important in terms of evidentiary weight and significance, since it is the written form that allows with a sufficient degree of reliability to confirm or refute the correctness of the circumstances referred to by the parties to the dispute. Oral evidence includes explanations of the parties, third parties and the testimony of witnesses. The testimony of a witness is one of the means of evidence in the arbitration process. A witness (testis) is a person who is aware of any relevant circumstances. Testimony of witnesses is information provided by persons who may be aware of the circumstances that are important for the consideration and resolution of the case.

[1] A. Magnusson, J. Ragnwaldth and M. Wallin, *International Arbitration in Sweden. A Practitioner's Guide* (2021), p. 269

[2] F. Andersson, T. Isaksson, M. Hojansson and O. Nilsson, *Arbitration in Sweden* (2011)

[3] Swedish Arbitration Act 2019, Article 25 (1)

[4] *Systembolaget AB v Vin & Sprit AB.* (2009) Svea Court of Appeal, No T 4548-08

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The process of presenting evidence in arbitration and its form in Sweden is mainly governed by the Swedish Arbitration Act. As noted earlier, the above-stated Act, as a rule, does not restrict the parties in the presentation and in the form of evidence. That is, based on this, and also based on the fact that the above-mentioned Act does not have a clear wording regarding the form of evidence, it can be concluded that the Swedish arbitration institutions also do not exclude the possibility that the parties to the arbitration may submit evidence to the arbitral tribunal that were obtained by illegal means (for example, hacking e-mail and / or any other method of illegally obtaining information and documents)[5]. This fact demonstrates the striking difference between the Swedish arbitration process and the arbitration institutions under civil law jurisdiction. For example, according to the Arbitration Procedural Code of the Russian Federation «the use of evidence obtained in violation of federal law is not allowed»[6].

However, despite the above-stated information, the Arbitration Tribunal of the Swedish Arbitration Institutions has a certain legal mechanism and can exclude from the proceedings of the arbitration hearing evidence that was obtained illegally. Such a decision is based on the Rules of the International Bar Association (hereinafter - IBA Rules) on the Taking of Evidence in International Arbitration, which states that the Arbitral Tribunal, at the request of a party, or on the basis of its decision, may refuse to accept evidence that was obtained by illegal methods[7].

Part 2. ***Disclosure of Documents by Parties***

The concept of «discovery»[8] is known to Swedish courts and arbitrators, although it is applied in a much more truncated form than in common law courts. The Swedish Judicial Code, for example, stipulates that a party to a dispute or any third party in possession of a document relevant to the resolution of a dispute is obliged to provide it at the request of a court[9]. The disclosing party is given the opportunity to present its arguments against such disclosure to the court, for example, when the documents are confidential and protected by law from disclosure.

A similar mechanism is contained in Article 31 (3) of the SCC Rules, which, however, does not restrict the parties from agreeing to conduct a full discovery procedure without any exceptions or restrictions. If a party has reason to believe that the other party has specific documents relevant to the resolution of the dispute, then, at its request, the arbitral tribunal may order the other party to produce such documents. For this purpose, the arbitration issues a procedural order, which sets out the list of documents to be disclosed.

It is noteworthy that the Swedish court also has the right to oblige third parties who are not a party to the arbitration to provide evidence relevant to the resolution of a dispute between the other parties. The conditions for the issuance of a court order are: a) the opinion of the arbitration tribunal on the significance of such documents for the resolution of the dispute; b) permission of the arbitration to go to court; c) non-disclosure of the information received by the arbitration tribunal to third parties. This is the ruling made by the Swedish Supreme Court in the dispute between *Euroflon Tekniska Produkter AB v Flexiboys i Motala AB*[10]. Regarding the retrieval of documents from a third party, the court took into account the close relationship between Anderssen (third party in this case) and Flexiboys i Motala AB and granted Euroflon's request for disclosure.

Part 3. ***The Role of Arbitrators***

As a rule, Swedish arbitrators largely abstain from questions during hearings (opening and closing remarks of the parties, questioning of witnesses and experts of the parties, etc.). Most often, the arbitrator addresses questions to one or another party only to clarify details from the testimony or written evidence already presented. Thus, the arbitrators completely refrain from any semblance of «judicial investigation» aimed at identifying or examining evidence not declared by the parties. A similar position is taken by retired Swedish state judges, who are increasingly seen as chairmen of arbitral tribunals under the SCC Rules, especially in significant cases

[5] F. Andersson, T. Isaksson, M. Hojansson and O. Nilsson, *Arbitration in Sweden* (2011), p. 124

[6] Arbitration Procedural Code of Russian Federation 2002, Article 64 (3)

[7] IBA Rules on the Taking of Evidence in International Arbitration, Article 9 (3)

[8] The concept of "discovery" comes from countries of the common law system and boils down to the fact that one party can apply to the arbitral tribunal to oblige the other party to provide (disclose) documents that may affect the outcome of the dispute

[9] The Swedish Code of Judicial Procedure, chapter 38, section 2

[10] *Euroflon Tekniska Produkter AB v Flexiboys i Motala AB.* (2012) Swedish Supreme Court, No Ö 1590-11

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- they refrain from active actions to establish the truth[11]. This is due to the Swedish legal tradition, which, after the adoption of the Judicial Code in 1948, incorporated the most progressive elements of the systems of common and continental law. This tradition has influenced the arbitration process (including in international cases), in which Swedish lawyers act as arbitrators. In contrast to this approach, arbitrators from countries of the continental system of law, especially retired judges, are more likely to actively participate in the search for the truth, or, in other words, to the "inquisitorial" approach.

Due to the lack of legislative regulation, the question of the role of the arbitrator in establishing the truth was investigated in detail by the Court of Appeal of the Svea District (Stockholm)[12]. In this case, the Court of Appeal issued a judgment in which it was noted that the arbitrator must remain neutral and refrain from any action that could be regarded as a violation of the principle of equality of arms. The described decision of the Court of Appeal in general characterizes the generally accepted international and Swedish practice of non-interference of the arbitrator in the process of evidencing. At the same time, this decision cannot avoid criticism[13], if only because the arbitrator has a more general duty to explain to the parties the need to prove all the circumstances to which they refer. The arbitrator is obliged to explain to the parties their right to present written evidence, call and interrogate witnesses and experts, as well as use other available evidence.

The question of the reliability of oral testimony is solved in a similar way. According to Swedish law, arbitrators cannot swear in witnesses and can rely solely on their good faith: «*The arbitrators cannot swear in or interrogate a party under the condition of telling the truth*»[14]. This is due to the fact that: a) arbitration is a private-law dispute resolution mechanism, devoid of the function of coercion; b) the witness is not bound by obligations under the arbitration agreement and has the right to refuse to testify in one form or another.

Thus, the Law does not endow the arbitrators with any functions of coercion in relation to the parties to present evidence, therefore, the arbitrators have no right on their own initiative to demand from the party to provide any evidence, respectively, they are not entitled to «*impose penalties or use other compulsory measures to obtain evidence*»[15]. The arbitrators may have the right to require a party to a dispute to provide some evidence only if it is permissible under the applicable arbitration rules or applicable rules for obtaining evidence and only if the other party so requests. That is, according to SCC Arbitration Rules, it is admitted that «*at the request of a party, the arbitral tribunal may order the other party to produce any documents or other evidence that may affect the outcome of the case*»[16]. In other words, the parties to the dispute are given the broadest autonomy in determining the issues of procedure, including in the submission and recourse of evidence. This opens up the opportunity for the parties to the arbitration process to formulate the procedure for providing and demanding evidence on their own or to do it using any existing rules

CONCLUSION

Summarizing the above-mentioned, it should be noted that evidence is one of the key part of the arbitration process, not only in Sweden, but throughout the world. As noted earlier, Swedish arbitration institutions take into account evidence that is directly related to the arbitration process between the parties to the dispute, and also accept almost any form of evidence due to the fact that the law and regulations do not define the exact forms of evidence. However, despite the gaps in legislation, arbitrators have the right to be guided by the IBA Rules on the Taking of Evidence in International Arbitration, which in some sense restrict the parties from filing and presenting some evidences. Also, the role of arbitrators in the process of accepting evidence was previously discussed, where it was noted that arbitrators in Swedish arbitration institutions do not have broad powers in the process of accepting evidence. Moreover, arbitrators must comply with the principle of neutrality and have no right to request evidence that was not presented by the parties, but which may significantly affect the further decision of the arbitration.

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