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East Meets West in Sweden

Eighty years ago, at the opening of an American Bar Association meeting in Saratoga Springs, New York, the Lord Chief Justice of England, Lord Russell of Killowen, delivered an address on international arbitration.¹

His remarks had particular significance as they were made at a time when war nearly erupted over the Venezuela-Guiana boundary question. Armed conflict was averted by resort to arbitration under a treaty negotiated between Great Britain (acting for its colony British Guiana) and the United States (acting on behalf of Venezuela). Lord Russell in fact was to become a member of the Arbitral Tribunal. Parenthetically, it is ironic and tragic that there exist grave doubts as to the validity of the Award rendered by that Tribunal in 1899, and that the dispute over 50,000 square miles of territory therefore is still unresolved between the United States of Venezuela and the Republic of Guyana.

Lord Russell stated as follows:

It is hardly too much to say that arbitration may fitly be applied in the case of by far the largest number of questions which lead to international differences. Broadly stated, (1) wherever the right in dispute will be determined by the ascertainment of the true facts of the case; (2) where, the facts being ascertained, the right depends on the application of the proper principles of international law to the given facts; and (3) where the dispute is one which may properly be adjusted on a give-and-take principle with due provision for equitable compensation, as in cases of delimitation of territory and the like; in all such cases the matter is one which ought to be arbitrated, and can be satisfactorily dealt with by arbitration.²

At that time, towards the end of the nineteenth century, much discussion was devoted to the establishment of international tribunals. Lord Russell was of the opinion that the resolution of disputes among nations should not be entrusted to a permanent international court but to *ad hoc* arbitral tribunals. He said:

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¹Address by Lord Russell of Killowen, ABA meeting (August 19, 1896), *reprinted in THE TIMES* (London) August 20, 1896, at 5, Col. 1.

²*Id.* at 5, Col. 5.

In the first place the character of the best tribunal must largely depend on the question to be arbitrated. But apart from this I gravely doubt the wisdom of giving that character of permanence to the *personnel* of any such tribunal. The interests involved are commonly so enormous and the forces of national sympathy, pride and prejudice, are so searching, so great, and so subtle, that I doubt whether a tribunal, the membership of which had a character of permanence, even if solely composed of men accustomed to exercise the judicial faculty, would long retain general confidence, and I fear it might gradually assume intolerable pretensions.³

In our time, the disputes which may arise between East and West, and which are justiciable in the sense of not being capable of resolution only by war or diplomacy, are economic and financial ones in which the party on the Eastern side is likely to be a government, or a state organ or state enterprise, and on the Western side, to be a corporation or a group of companies. Projects which have been realized, are in the process of being executed, and are in the planning stage, typically are very large in terms of money and use of manpower. They involve the construction and operation of huge industrial complexes over long periods, involve transfers of technology and skills and require imports of large quantities of materials and sometimes even labor into the recipient country. Financial complexity is often a feature of such transactions because of requirements for extensive credits and repayment in kind, that is, in the form of products of the plant itself or, on a barter basis, of unrelated products, rather than in money.

For many years, it has been recognized on both sides that deals of this kind cannot be made unless the contracts embody a satisfactory mechanism for the resolution of disputes. Existing facilities in the West have not appeared acceptable to the East; nor have Western parties had the necessary confidence in Eastern courts or arbitration institutions. A pattern that seems to have gained widespread acceptance and use in a large number of contracts made over the past decade has been provision for *ad hoc* arbitration in a third country. Sweden has been a favored location in such provisions. And so we find in many important East-West contracts arbitration clauses stating that any disputes which may arise shall be referred to arbitration in Sweden, and that the chairman of the arbitration tribunal shall be designated by the Stockholm Chamber of Commerce, its President, or the Board of its Arbitration Institute.

In line with this practice, on January 12, 1977, there was signed in New York at the offices of the American Arbitration Association (AAA), the so-called United States/USSR Optional Clause Agreement, which constitutes a joint recommendation by the AAA and the USSR Chamber of Commerce and Industry to their respective members to use an optional clause providing for arbitration in Sweden in cooperation with the Stockholm Chamber of Commerce. The United Nations Commission on International Trade Law (UNCITRAL) rules are to apply, and there are detailed

³*Id.* at 5, Col. 6.

rules for the nomination of arbitrators. The structure and mechanical operation of this clause has been analyzed by Mr. Holtzmann. Suffice it for me to say that the Stockholm Chamber of Commerce shall act as appointing authority and appoint the chairman from a panel of arbitrators consisting of six Eastern members, six Western members, and six Swedes. In the circumstances, the Swedes are expected to be favored candidates, and I shall tell you who they are. All of them, by the way, have a full command of English.

The first Swede on the panel is Appeal Court President Sten Rudholm of the Svea Court of Appeal at Stockholm. In Sweden we have six Courts of Appeal (from which appeals lie to the Supreme Court). For historical reasons, the President of the Svea Court of Appeal is considered to be the highest ranking jurist in Sweden. Mr. Rudholm last year was elected to the Chair of the Swedish Academy which traditionally is reserved for a lawyer of great distinction.

Mr. Rudholm has pursued a career as a judge in the Swedish court system and has served as Chancellor of Justice. He is Chairman of the Board of Editors of the Swedish Law Review and Chairman of the Board of the Arbitration Institute of the Stockholm Chamber of Commerce.

The second Swede is Appeal Court Judge Birgitta Blom, a member of President Rudholm's Court. In our country, the judicial career traditionally has been a separate professional career, starting immediately after law school; it is only in recent years that the recruitment of the judiciary has begun to include practicing lawyers. Mrs. Blom, however, has pursued the official career since 1954 in the City Court of Stockholm and the Svea Court of Appeal. She has also worked as an expert for the Swedish Ministry of Justice and was Head of its Division for International Affairs from 1969 to 1976, working in particular on transportation and maritime law. She was Chairman of the Committee of the Whole at the 1976 Diplomatic Conference on Maritime Law in London when a new international convention on shipowners' liability was adopted. Judge Blom was also the Chairman of the Coordination Group of Western countries at UNCITRAL when the UNCITRAL Rules were adopted. She is Vice Chairman of the Board of the Institute of Arbitration of the Stockholm Chamber of Commerce.

The third name on the panel is Judge Nils Mangård, one of the best-known international Swedish arbitrators. He has been a member and chairman of many ICC arbitral tribunals over the years and is now the head of the Swedish Public Consumer Complaints Board and a member of the International Council for Commercial Arbitration (ICCA).

The fourth Swedish member of the panel is Judge Mats Hilding, a Swedish career judge who heads one of the two divisions of the City Court of Stockholm which handles commercial, shipping and insurance disputes. He is one of the most prominent Swedish judges in large civil cases.

Mr. Bengt Westerling, the fifth member of the panel, is a prominent Stockholm lawyer, the senior partner of the Sandström law firm. Mr. Westerling works both as a counsellor and as a trial lawyer in commercial,

financial and corporate matters and is a director of many Swedish corporations, including a number of subsidiaries of American and other multinational companies. He has been active in banking and arbitration matters for many years and he is a Member of the Board of the Arbitration Institute of the Stockholm Chamber of Commerce.

The sixth Swedish name on the panel is my own.

The Stockholm Chamber of Commerce has not yet been called upon to act in any case arising under the United States/Soviet Optional Clause Agreement, nor indeed have any significant number of arbitrations not involving any Swedish party been conducted in Sweden under commercial contracts between East and West. So far, proceedings have taken place in three cases, one between a party in the Federal Republic of Germany and a party in the German Democratic Republic, one between an Italian party and a Soviet party, and one between a French party and a Soviet party. It should be emphasized, however, that on the domestic level, and in transnational matters in which a Swedish party appears, a large number of commercial and similar disputes are referred to arbitration rather than to the courts. This is no reflection on the quality of the courts but is due particularly to a desire to avoid publicity and time-consuming appeals. For our Courts of Appeal try the entire case anew, and while access to the Supreme Court is restricted to cases where it grants leave (principally for the purpose of allowing the creation of precedent), it may retry both factual and legal issues. Hence, a case of any complexity may take five or more years to process through the courts.

East and West have chosen Sweden as a forum not only because Sweden is one of the few developed countries in the world which is nonaligned (this is the cornerstone of Swedish foreign policy), and the word "neutral" may not be adequate to describe it. You find among Swedish lawyers a cool, dispassionate attitude to the resolution of international disputes, and a capacity for efficient administration. It may be an awareness of these qualities that has inspired the confidence of East and West alike in Sweden as a preferred *locale*.

In devising a method for solving potential conflicts in the current international context, East and West have adopted the approach advocated by Lord Russell of arranging for the appointment of *ad hoc* tribunals located in a designated third jurisdiction. However, a new dimension has been added. It has not been deemed enough to select the forum and the nationality of the chairman of arbitral tribunals. In contract practice, it has become the rule to incorporate the entire legal system of the forum.

For some years, Soviet and other Eastern parties insisted on the inclusion of governing law clauses referring to Swedish conflicts of law rules. Swedish counsel, therefore, were required to give opinions on what law would become applicable to the substance of disputes, and this normally would either be the seller's law or the buyer's law or a mixture of both.

Under a clause referring to the Swedish conflicts rules concerning the choice of law with respect to international sales of goods, two immediate difficulties arise. The first is to identify what (if any) elements in the proposed transaction are such that the transaction as a whole, or parts of it, are identifiable as a sale of chattels, as distinct from a contract that does not provide for a sale or a contract that concerns real estate or real estate appurtenances, for the Act only applies to sales of chattels. The second is that the Act does not govern the competence of the parties to contract, the form of the agreement, or the effects of the transaction on third parties; even assuming that some guidance can be obtained from the statute as to the choice of law on these questions indicated by Swedish conflicts rules, the answers are at best insufficient.

Particular difficulties have been encountered in determining under Swedish conflicts law which law should govern licensing and lease agreements and novel forms of contract because there is not enough case law available for guidance.

It has become increasingly common, and by now appears the general practice, to provide that Swedish substantive law shall govern disputes. Contracts containing this provision must be examined closely to ascertain their legal meaning and effect under Swedish law. That task is fraught with difficulties, as even a superficial examination of the problem reveals that all elements of Swedish substantive law simply cannot apply in the different factual and territorial contexts of many contracts for investment projects. It becomes necessary to a considerable extent to refer for guidance on some aspects of these contracts to the law of the place where the project will be constructed.

Reportedly, in a few recent agreements, governing law clauses have been used which, instead of referring to the law of the jurisdictional forum, stipulate that the contracts will be governed by the laws of *both parties*. This is a compromise among businessmen that lacks definable legal meaning and will lead to disputes that are incapable of legal determination. The same can be said about references to "general principles of law" and similar language which sometimes appears.

For the sake of clarity, I must recapitulate the two principal approaches which have been used in Soviet contract forms. The first is an explicit reference to the Swedish conflicts of law rules. As the doctrine of *renvoi* is not accepted in Sweden,⁴ a contract that refers to Swedish conflict of law rules would be treated by a court in the same way as a contract which had no provision at all on the subject. Since the related agreements often are executed in the East, and certainly are largely performed in the buyers' countries and concern plants which will be real property, the net effect of a

⁴See Estate of Erik Kristofferson, Swedish Supreme Court, [1939] *Nytt Juridiskt Arkiv* [N.J.A.] 36.

governing law clause referring to Swedish conflicts of law rules is to provide for the application of the laws of the buyer's country.

If this effect is not desirable, a clear reference should be made to Swedish substantive law. Language so providing may be cast in terms of "Swedish substantive law," "Swedish material law," or simply "Swedish law" (for as I said earlier, the doctrine of *renvoi* does not apply in Sweden). On balance, I would advise using the words "Swedish substantive law." And in the following, I restrict myself to considering a governing law stipulation of this last kind.

I cannot fully review so vast a subject, but will briefly mention a number of specific problems to which, in my practice as a Swedish counsellor on East-West contracts, I have found that a Western negotiator generally must direct his attention. The points are in the realm of general contract law, as typically experienced in long-term plant and hotel construction agreements, sometimes combined with multipartite financing and guaranty agreements.

I. In the arbitration clause itself, no time period for the rendering of an award should be stated, for such a period can be extended only by mutual agreement between the parties. Some Soviet trading organizations have insisted on the inclusion of a time limit so brief that it facilitates obstruction and may render the arbitral remedy illusory. In fact, in several very large contracts between Soviet and Western parties, a three-month period for the rendering of an award is provided. I fear the practical consequences of such clauses if they are ever invoked.

II. Certain limitations are inherent in any Swedish arbitration and governing law provisions. Tort claims by third parties, of course, cannot be covered, and to avoid liability exposure an indemnity clause must be included. Recourse claims based on third-party tort claims require mention if they are to be encompassed by the governing law and arbitration clauses. The definition of real estate and real property appurtenances probably would be deemed to be governed by the law of the *situs* rather than Swedish law, except as relevant solely as between the contracting parties. Thus, any contractual provision derogating from the *in rem* rights system of the *situs* (questions of title, mortgages, liens, etc.) would be unenforceable. And the definition of what rules form part of such real estate law probably also must be derived from the law of the *situs*. Similarly, such matters as limitations on the right of use of property likely will not be resolved with reference to Swedish law. For these reasons, agreements on rights in respect of real estate ought to be drafted so as to include provisions on contractual liability and self-executing set-off and other payment stipulations, coupled with clear risk of loss provisions. Again, restrictions on the competence to conclude contracts, and on arbitrability, may not be resolved with reference to Swedish law.

III. Although I am speaking of substantive law rather than procedural law, there are two cardinal principles of the Swedish law of evidence to which attention must be drawn.

First, "with some exceptions, the concepts of relevance and admissibility are co-extensive."⁵ It is the duty of a court, and of an arbitration tribunal, to establish the correct interpretation of a contract on the basis of the intent of the parties. Any evidence reasonably relevant to this end is admissible. Swedish law provides: "After evaluating everything that has occurred in the proceeding in accordance with the dictates of its conscience, the court shall determine what has been proved in the case."⁶

Therefore, too much reliance should not be placed on entire agreement clauses. On the other hand, there are situation-oriented burden of proof rules of which account should be taken in drafting particular clauses.

Second, Swedish law⁷ prohibits the taking of depositions or production of affidavits made out of court by reason of a pending or contemplated proceeding, unless the court finds admission justified based upon special circumstances. Arbitral tribunals may not apply this rule as strictly as courts, however, and in international proceedings may find special circumstances prevailing more often than they might in a purely domestic context.

IV. Swedish law does not recognize the doctrine of estoppel, even though to some extent the same result may be achieved by the use of such concepts as admission, acquiescence, and passivity.

V. Swedish law severely limits the right of the seller to rely on *force majeure* as an excuse for nonperformance or late delivery. Great care should be exercised in drafting *force majeure* clauses. Since it is generally known that Soviet philosophy does not recognize strikes as events of *force majeure*, the omission of strikes from the *force majeure* clause might be interpreted as a waiver of the right to invoke the clause in exculpation of liability due to a strike. One way of achieving a compromise solution in this respect is to characterize the list of events appearing in the clause as illustrative rather than as exhaustive.

VI. The term "agreed and liquidated damages" should be preferred to "penalties," and it is important to state whether such a remedy is meant to be exclusive or nonexclusive. Indeed, a seller should attempt to include four standard provisions providing for (a) exclusivity of warranties, (b) exclusivity of remedies, (c) exclusion of indirect damages, and (d) termination.

VII. Provisions on transfer of title normally are less important than a clear definition of the point of delivery. If the INCO-Terms are acceptable, they should be expressly embodied in the text or incorporated by reference.

VIII. The distinction between direct and indirect damages is not crystal clear under Swedish law and those concepts, which are often used extensively, should be defined as exhaustively as possible in the contract. As I just said, indirect damages ought to be excluded. Express limitations on

⁵R. GINSBURG & A. BRUZELIUS, CIVIL PROCEDURE IN SWEDEN 281 (1963).

⁶Rattegangsbalken [RB] C. 35, §1 (Swed.).

⁷R.B. C. 35, § 14.

claims for hidden defects also should be provided, for on real estate constructions, there is a potentially dangerous Swedish Supreme Court case.⁸

IX. Under Swedish law, a general contractor is liable, by and large without limitations, for the acts and omissions of his subcontractors; hence, any desirable restrictions on such liability must be explicitly provided.

X. A last point that should be mentioned is that Swedish law on guarantee and indemnity undertakings is complex and has unexpected loopholes. Considerable care should be exercised in drafting related provisions.

The points that I have outlined to you are of course no more than glimpses of problems which have emerged over the years as I have examined the typically obscure and difficult contracts between East and West. More often than not, they are as difficult to interpret as they are arduous to negotiate, starting as they mostly do from a position heavily in favor of the buyer. However, in working with American, English, French, German and Swiss counsel, I have invariably found that the basic principles of contract law, broadly speaking, are the same in Sweden as in those jurisdictions. Moreover, the one thing that is certain is that if the contracts are clear, they will be enforced in accordance with their express stipulations. If they are not clear, a fair and reasonable interpretation will be placed upon them, reached in proceedings in which the tribunal is strictly impartial but receptive to all arguments based on truth and reason.

Mindful of these characteristic features of the Swedish legal and judicial system, I have no doubt that all justiciable modern disputes between East and West, in the words of Lord Russell, "ought to be arbitrated, and can be satisfactorily dealt with by arbitration," and, further, that the Swedish forum and the Swedish substantive law are adequate for the purpose. Whatever the nature of the dispute is, justice will be rendered, reliably and efficiently.

⁸Holming v. Roth, Swedish Supreme Court, [1946] N.J.A. 666.