CHAPTER 11

Combating Due Process Paranoia in Swedish Arbitration

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§11.01 INTRODUCTION

Due process paranoia continues to be one of the main issues that users believe is preventing arbitral proceedings from being more efficient.[1] It is defined as the reluctance by tribunals to act decisively in certain situations for fear of the award being challenged because the party did not have the chance to present its case fully. It includes situations where the tribunal admitted new evidence or circumstances late in the arbitration due to perceived concerns that the award would otherwise be vulnerable to challenge.[2]

The wording of sections 23 and 25 of the Swedish Arbitration Act (the 'Act') – the Act's 'Preclusion Rules' – give arbitrators wide discretion in rejecting new circumstances and new evidence (new 'material') submitted late in the proceedings.[3] The relevant parts of the provisions read as follows:

> The claimant may submit new claims, and the respondent his own claims, provided that the claims fall within the scope of the arbitration agreement and, taking into consideration the time at which they are submitted or other

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1. *See 2018 International Arbitration Survey: The Evolution of International Arbitration*, 24, but cf. 27 (2018). ('This year, however, the legitimacy of this "due process paranoia" phenomenon was vigorously contested by a number of counsel and arbitrators.')
2. *See 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, 10 (2015).
3. The Act's Preclusion Rules allow arbitrators the same discretion in precluding new claims. In general, conclusions regarding new circumstances and new evidence will be equally applicable to new claims.

> circumstances, the arbitrators do not consider it inappropriate to adjudicate such claims. Subject to the same conditions, during the proceedings, each party may amend or supplement previously presented claims and may invoke new circumstances in support of his case.
>
> The arbitrators may refuse to admit evidence which is offered where such evidence is manifestly irrelevant to the case or where such refusal is justified having regard to the time at which the evidence is offered.

In line with the international trend, however, arbitrators involved in international commercial arbitration in Sweden 'are generally rather reluctant to reject evidence. The reason is of course that the rejection may be relied on as a ground to challenge the award arguing that the party in question has not been given the opportunity to present its case'.[4]

The *travaux préparatoires* to the Act as well as Swedish legal writings are generally cautious when it comes to preclusion of new material in arbitration. The presumption is that new material should be allowed. Moreover, if the legal force of the award extends to the new material, the arbitrators are said to need *very strong reasons* to reject the material.[5] In addition, it is generally understood that an erroneous decision to reject new material is challengeable as it can violate the parties' right to due process, while an erroneous decision to allow belated material is unchallengeable.[6] Unsurprisingly, the favoured method in dealing with belated material is to allow the material and postpone the final hearing if necessary.

The present chapter challenges the basis for the due process paranoia, arguing that courts should grant significant deference to arbitrators' decisions in matters of preclusion of new material. More importantly however, the chapter also argues that a decision to allow new material is in principle as challengeable as a decision to reject new material.

The chapter will neither address procedural agreements between the parties or institutional rules, nor *what kind of material* the Act's Preclusion Rules can preclude.[7]

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4. Kaj Hobér, *International Commercial Arbitration in Sweden*, 223 (Oxford University Press 2011).
5. Prop. 1998/99:35, 105–109 and 226–227. Practically every author commentating the Act's Preclusion Rules echoes these statements, *see* Fredrik Andersson, *Arbitration in Sweden*, 123 (Jure 2011), Stefan Lindskog, *Skiljeförfarande En kommentar*, 641 (2nd ed., Nordsteds Gula Bibliotekt 2012), Sigvard Jarvin, *The Arbitral Proceedings*, Stockholm Arbitration Report (1999:1), 51, Lars Heuman, *Skiljemannarätt*, 426–427 (Norstedts Juridik 1999), Bengt Lindell, *Alternativ tvistelösning särskilt medling och skiljeförfarande*, 179 (Iustus 2000), Finn Madsen, *Arbitration in Sweden* 258 (4th ed., Jure 2016), Olsson and Kvart, *Lagen om Skiljeförfarande*, 105–106 (3rd ed., Norstedts Juridik 2012).
6. For convenience, the present chapter uses the expressions *challengeable decision* and *unchallengeable decision*, respectively, although it is not the decision itself that is challengeable or unchallengeable. A *challengeable decision* is a decision that, should it be incorrect and influence the outcome of the case, can constitute grounds for setting the award aside. An *unchallengeable decision* is a decision that, even if it is incorrect and influenced the outcome of the case, cannot constitute grounds for setting the award aside.
7. For the latter, compare Lindskog, *Skiljeförfarande*, *supra* n. 5, at 614 (assuming that new legal arguments cannot be precluded with a cut-off) and Geir Woxholth, *Voldgift* (Gyldendal Juridisk, 2013), 621 (asserting that new legal arguments cannot be precluded under the Norwegian Arbitration Act or the Norwegian Code of Judicial Procedure). Compare also Oskar Gentele, *Den mjuka stupstocken i RB*, Juridisk Tidskrift, 299 (2015/16), *Preklusion under huvudförhandling*, Juridisk Tidskrift, 319 (2016/17), *Inställd huvudförhandling – Vad utgör nya viktiga skäl i 43:2 RB?*, Juridisk Tidskrift, 276 (2017/18), *Ostridiga handlingar i civilprocessen*, Juridisk Tidskrift,

§11.02 THE FUNDAMENTAL ROLE OF PRECLUSION RULES IN DUE PROCESS

[A] Introduction

The advantages of preclusion rules are often described in terms of time and cost. Rules prohibiting parties from submitting new material at a late stage of the proceedings reduce the risk of final hearings being cancelled at the last minute. A last minute cancellation would materially delay the resolution of the dispute and waste a large part of the preparation costs, thus adding cost and time. Disadvantages of preclusion rules, on the other hand, are normally described in terms of lack of due process. A Swedish judge has given the following example: If the defendant negligently fails to submit a receipt supporting his claimed payment well before the main hearing, the court may be forced to reject this new evidence and deliver a judgment in favour of the plaintiff, i.e., a factually incorrect judgment.[8] Commentators thus tend to discuss preclusion rules in terms of time and cost versus due process.[9]

It is true that the rejection of belated new material may lead to a factually incorrect award. Properly used, however, preclusion rules are pillar stones of due process, enabling arbitrators to render more factually correct awards; far more than the few factually incorrect awards they might cause.

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582 (2017/18) and *Stridiga handlingar i civilprocessen,* Juridisk Tidskrift, 802 (2017/18). (In summary and simplified, Gentele asserts that the preclusion rules in the Swedish Code of Judicial Procedure ('SCJP Preclusion Rules') – which like the Act's Preclusion Rules can preclude new *circumstances* and new *evidence* – can preclude new *ultimate facts* (Sw. *rättsfakta*) but neither new *evidentiary facts* (Sw. *bevisfakta*) nor new *legal arguments*. Nevertheless, the retraction of an admission of evidentiary facts or legal arguments invoked by the other party can be precluded (which in that case means that the admission will stand). The SCJP Preclusion Rules can preclude not only new means of evidence (Sw. *bevismedel*) but also new evidentiary themes (Sw. *bevistema*). This has limited practical value for written evidence, but means that a court may not accept questions to a witness or indeed include answers from a witness into evidence that are obviously outside the scope of the evidentiary theme(s) invoked for that witness.)

8. Awards and judgments inconsistent with what actually happened are defined here as *factually incorrect* awards or judgments. If the debtor paid the debt but the arbitrators, for whatever reason, find otherwise, the award will be defines as *factually incorrect*. On the other hand, should the arbitrators, for whatever reason, find that the debtor did indeed pay the debt, the award will be defined as *factually correct.* Whether an award is *factually correct* does not say anything about whether it is *correctly decided*. If the debtor fails to provide any evidence of the payment, it would be correct to decide the case upon the finding that no payment was made (even though payment was made). The same would be true if the debtor did provide compelling evidence for the payment, but this evidence was correctly rejected. *Factually incorrect* awards could thus be *correctly decided*. Moreover, it is equally possible for a *factually correct* award to be *incorrectly decided*. For example, if the debtor fails to provide any evidence of the payment but the arbitrators nevertheless decide the case upon the finding (consistent with what actually happened) that payment was made.
9. *See,* e.g., Klaus Peter Berger and J. Ole Jensen, *Due Process Paranoia and the Procedural Judgment Rule: A Safe Harbour for Procedural Management Decisions by International Arbitrators*, 32 Arbitration International, 75, 76 (2017) ('procedural management decisions revolve around two crucial aspects of the arbitral process: the tribunal's quest for streamlined proceedings caused by the users' increasing demand for time – and cost – efficiency on one side; and the arbitrators' role as guardians of due process and guarantors of the legitimacy of arbitration on the other').

[B] Delay as the Only Remedy to Belated Material

Parties have the right to present their respective cases to the extent necessary (section 24 of the Act). This entails a right to sufficient time in order to be able to reply to or rebut new material (that is not rejected) submitted by the other party.

If a party (the 'Submitting Party') submits belated material, the other party (the 'Responding Party') has two main remedies: The Responding Party may request the arbitrators to reject the new material (rejection) or to delay the proceedings (delay).

Rejection constitutes a complete remedy for the Responding Party. The arbitrators will not regard the new material, and the Responding Party is therefore in the same position as it was before the Submitting Party submitted the belated material. Nevertheless, delay comes with a trade-off. On the one hand, the Responding Party is granted additional time in order to be able to reply to or rebut the new material. On the other hand, such additional time comes at the expense of delay.

Delay may both be in and against the interest of a party. A respondent with a weak case may view delay as a welcome respite for payment, giving the respondent financial breathing space. Moreover, sometimes the nature of a claim makes it less valuable over time. The respondent may face a claim under a shareholders' agreement to transfer his shares to the claimant for a specific price. If the respondent can hold on to the shares for some additional time, they might no longer hold a value above the stipulated price (e.g., by being constantly diluted by payments of director's fees to the very same respondent), in effect rendering the claim worthless.

While delay may be welcome to respondents in situations like these, claimants will be inclined to remind the arbitrators of the well-known legal maxim, *justice delayed is justice denied*.[10] Further delay may render the claimant's claim worthless, either because it is no longer possible to effectively enforce an award against the respondent, or because the claim itself has lost its value.[11] There is also the problem with how the owner of a party might view delay. An owner set to sell a company involved in a major dispute may find prospective buyers unwilling to proceed with the acquisition until the dispute is settled. Delay might therefore force the owner to instruct the company to settle the claim on unfavourable terms.

Delay may also deny justice by reducing the evidentiary value of evidence. Let us return to our example above but this time assume that the respondent does not have a receipt of the cash payment (that did in fact happen) but invokes as evidence two witnesses that saw the cash payment. If these witnesses are heard within a reasonable time, they may be able to remember sufficient details to persuade the arbitrators of the

10. Cf. William Penn, *Fruits of Solitude, In Reflections and Maxims Relating to the Conduct of Human Life*, 51 (London, A.W. Bennett, 1863) ('Delays have been more injurious than direct injustice. They too often starve those they dare not deny. The very winner is made a loser, because he pays twice for his own; like those that purchase estates, mortgaged before to the full value. Our law says well, "To delay justice, is injustice". Not to have a right, and not to come at it, differ little. Refusal, or dispatch, is the wisdom of a good officer.' (paragraph numbers omitted; spelling updated)).
11. Naturally, all possibilities in between are also conceivable; delay may render the claimant's claim to a varying degree less valuable or more risky.

cash payment. The arbitrators will then render a factually correct award. With delay, however, the memory of the witnesses might become blurred and their testimony unable to persuade; they might even become unable to testify (e.g., death or severe illness) or unwilling to do so (e.g., for having moved abroad or shifted allegiances). In this case, the arbitrators will render a factually incorrect award.

For the reasons set out above, parties may and often have different views on the desirability of further delay – ranging from equivalent to victory to equivalent to defeat and all in between. If the Submitting Party views delay as undesirable and the Responding Party views delay as desirable, delay might constitute a complete remedy for the Responding Party. Nevertheless, let us consider the more common situation where the Responding Party views delay as undesirable. The Responding Party will then, in choosing whether to request the arbitral tribunal to postpone the final hearing, have to weigh the benefits of being granted additional time against the disadvantages of further delay. At least if assumed rational and self-interested, the Responding Party will only put forward such a request if the expected benefits associated with postponing the final hearing outweigh the expected harm. Every time the Responding Party is objectively entitled to a postponement but unwilling to request it for the reasons set out above, the Responding Party is in effect denied its right to due process.

Unfortunately, a party is often able to identify how the other party views further delay. In a legal system with weak preclusion rules, this may create a fundamental inequality of arms. Assume that both parties recognise that it will be disadvantageous for the claimant but advantageous for the respondent to postpone the final hearing. The claimant will be unable to submit new material late in the proceedings, as the claimant would be susceptible to the risk of the arbitrators postponing the final hearing upon the request of the respondent. The respondent, on the other hand, can ambush the claimant with new material during the final hearing without risk, as he knows the claimant will be unable to request a postponement. The lack of proper preclusion rules may thus create a legal system without equality of arms, in which one of the parties in practice lacks protection against trial-by-ambush.[12]

[C] Preclusion Rules as Pillars of Due Process

If not steered by a tactical agenda, parties tend to submit the most relevant material well in advance of any final hearing, but submit material of lesser relevance as the case proceeds. The influence of new material on the outcome of the case can thus generally be assumed to be weaker the later it is submitted. Paired with the fact that preclusion rules generally only preclude new material submitted at late stages of the proceedings, precluded material can generally be expected to be less likely to influence the outcome of the case.

12. Even though some other remedies might exist – the arbitral tribunal may take the belated submission of the new material into consideration when allocating legal costs between the parties or assessing the value of the evidence – these remedies will only ameliorate but rarely if ever fully compensate for the inequality. *See* Gentele, *Inställd huvudförhandling – Vad utgör nya viktiga skäl i 43:2 RB?*, *supra* n. 7, at 285–292.

Preclusion rules can prevent delay in two ways, directly and indirectly. Direct prevention means that belated material is precluded. Indirect prevention, however, is far more important. Parties adapt to procedural rules out of self-interest. In procedural systems with rigid preclusion rules, parties will submit new material well in advance of the final hearing to avoid the risk of having the new material rejected. The respondent is simply more likely to submit the signed receipt of payment well before the final hearing if a failure to do so will result in rejection. Rigid preclusion rules thus often achieve the goal of preventing unnecessary delay and cost without actually having to preclude any material at all.[13] Consequently, important factors mitigate against the risk of preclusion rules causing factually incorrect awards.

At the same time, rigid preclusion rules may actually help create *more* factually correct awards. As developed above, delay can reduce the evidentiary value of certain evidence, which in turn could cause factually incorrect awards. By minimising delay, preclusion rules minimise the number of factually incorrect awards resulting from such delay. Moreover, preclusion rules offer parties protection against trial-by-ambush tactics other remedies fail to fully address.

In conclusion, rigid preclusion rules may force an arbitral tribunal to render a factually incorrect award *in theory*. Nevertheless, important factors mitigate against that risk materialising in practice. Moreover, rigid preclusion rules play a fundamental part in securing factually correct awards. Well-crafted and well-implemented preclusion rules are therefore pillars of due process.

§11.03 CHALLENGES TO ARBITRATORS' APPLICATION OF THE ACT'S PRECLUSION RULES

[A] Introduction

An award shall be set aside upon motion of a party if, without the fault of the party, an irregularity occurred in the course of the proceedings, which probably influenced the outcome of the case (section 34 of the Act).

Arbitrators can err in applying the Act's Preclusion Rules in two different regards. They can reject new material that should have been allowed or fail to reject new material that should not have been allowed. Both types of errors can influence the outcome of the case. Therefore, I will assess whether each of these two types of errors (failure to allow and failure to reject) are challengeable.

13. Cf. Aleš Galič, *(In)compatibility of Procedural Preclusions with the Goals of Civil Justice: An Ongoing Debate in Slovenia. In: Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems*, 224 (Alan Uzelac, *Ius Gentium: Comparative Perspectives on Law and Justice*, Vol. 34, Springer, Cham (2014)).

[B] Arbitrators Erroneously Reject Material

Swedish legal writings support the position that an incorrect decision to reject new *evidence* is challengeable.[14] Nevertheless and perhaps somewhat surprising, different opinions have been put forward when it comes to erroneous rejection of new *circumstances*.

In the first draft of what was to become the Act, the wording of the relevant provision (section 23 of the Act) was that a party may amend its claim unless it *is considered* inappropriate to adjudicate such claims.[15] That wording was subsequently changed in the parliamentary process. Section 23 of the Act now provides that a party may amend its claim unless *the arbitrators do not consider* it inappropriate to adjudicate such claims.[16] The wording was thus changed from an objective (is considered) to a subjective (the arbitrators consider) discretionary rule.

The report with the first draft of the Act states that the arbitrators have wide discretion in deciding whether to allow new circumstances, but adds that the provision's wording does not exclude the possibility that a misjudgment in applying the Act's Preclusion Rules may be challengeable.[17] That statement in the report is not reproduced in the government bill.[18] All this has led some authors to suggest that not even an obvious erroneous decision to reject new circumstances would be challengeable.[19] Other authors, however, take the opposite view, arguing that an erroneous decision to reject new circumstances is challengeable.[20] In the author's experience, most practitioners would seem to hold the latter view.

The provision in section 23 subsection 2 of the Act is formulated as a classic discretionary rule. If the parties invoke new circumstances after the date set by the arbitrators in accordance with the preceding subsection, then the arbitrators may in their own discretion reject or not reject the new circumstances. A higher court is often hesitant to review a lower court's exercise of its discretion under classic discretionary procedural rules. However, such review does occur from time to time. This implies that not even a classic discretionary rule provides full discretion within the boundaries provided by that rule.[21] Nonetheless, the provision in section 23 subsection 2 explicitly refers to the opinion of the arbitrators. In a discussion of discretionary rules in the Swedish Code of Judicial Procedure (SCJP), it has been suggested that a lower court's exercise of discretion cannot be reviewed by a higher court on appeal where the

14. *See* Lindskog, *Skiljeförfarande*, *supra* n. 5, at 898, Heuman, *Skiljemannarätt*, *supra* n. 5, at 644, Thorsten Cars, *Lagen om skiljeförfarande: En kommentar*, 168–169 (3rd ed., Faktas digitala bibliotek 2005). Olsson and Kvart, *Lagen om skiljeförfarande*, *supra* n. 5, at 111, 147. Hobér, *International Commercial Arbitration in Sweden*, *supra* n. 4, at 6.103. *See also* RH 87:121.
15. SOU 1994:81, 24.
16. Prop. 1998/99:35, 11, 12.
17. SOU 1994:81, 277.
18. Prop. 1998/99:35, 226–227.
19. *See* Cars, *Skiljeförfarande, supra* n. 14, at 116 and Olsson and Kvart, *Lagen om Skiljeförfarande*, *supra* n. 5, at 106, 147. But cf. Cars, *id.*, at 168–169.
20. *See* Lindskog, *Skiljeförfarande*, *supra* n. 5, at 898 and Heuman, *Skiljemannarätt*, *supra* n. 5, at 644.
21. Anna Wallerman, *Om fakultativa regler: en studie av svensk och unionsrättslig reglering av skönsmässigt beslutsfattande i processrättsliga frågor*, 215–224 (Iustus 2015).

discretionary rule explicitly refers to the opinion of the court.[22] If this were true for decisions by arbitrators under the provision in section 23 subsection 2, then not even an obviously erroneous decision to reject new circumstances would be challengeable.

Whether and to what degree a rule confers discretion cannot be considered a matter of mere lexical interpretation, however. The wording of section 23 subsection 2 of the Act does indeed imply wide discretion. Nevertheless, the government bill states that its version of that provision *in principle* is consistent with the first draft's version, and that the difference would lie *merely in technicalities of legal drafting* (Sw. *en något annorlunda lagteknisk lösning*).[23] It thus appears highly unlikely, especially taken together with the otherwise cautious approach to the preclusion of new circumstances advocated in the *travaux préparatoires*, that the lawmaker intended to give arbitrators unlimited discretionary power to reject or to allow new circumstances. The more so since such power may come into conflict with the explicit duty to handle the dispute in an impartial and speedy manner (section 21 of the Act) or to allow the parties to present their respective cases to the extent necessary (section 24 of the Act).

One should also bear in mind that the government bill did not suggest any change in section 25 subsection 2 of the Act (which allows preclusion of late evidence).[24] This section is worded objectively, allowing the arbitrators to reject new evidence *where such refusal is justified*. Consequently, at least an incorrect decision to reject *evidence* is challengeable.[25] If the lawmaker did want to vest the arbitrators with an unlimited discretionary power to reject or allow new circumstances, not vesting the arbitrators with the same discretionary power when it comes to evidence makes little sense. After all, there is little point in being able to challenge a decision to reject one's evidence if one cannot challenge the decision to reject the circumstances one would like to support with that evidence.

In conclusion, an incorrect decision to reject new material can constitute grounds to set aside the award, regardless of whether this new material consists of new circumstances or new evidence.

[C] Arbitrators Erroneously Allow Material

A failure of arbitrators to reject late material may influence the outcome of a case in several ways. Let us yet again return to the example of the payment and assume that the respondent submits the receipt as new evidence during the final hearing. We assume the arbitrators erroneously fail to reject this new evidence. We also assume the respondent would have been unable to prove payment if the receipt was rejected. As it is now erroneously allowed into evidence, however, the arbitral tribunal finds in

22. Wallerman, *Om fakultativa regler*, *supra* n. 21, at 216, 217. In my opinion, even the most discretionary worded rule must have its limits. Assume we have a procedural rule allowing the court to reject evidence *when the court deems fit*. It is unthinkable that the court would be allowed to use this power to reject a witness *because the witness is a woman*. Cf. Lindskog, *Skiljeförfarande*, *supra* n. 5, at 891, footnote 148.
23. Prop. 1998/99:35, 105.
24. Prop. 1998/99:35, 12, SOU 1994:81, 29.
25. *See supra* n. 14.

favour of the respondent. It is clear that the failure to reject the new evidence has influenced the outcome of the case.

Many observers might consider the arbitrators' error in allowing the new evidence as acceptable, even preferable, assuming that justice was done in the end, as the procedural error allowed the tribunal to render a factually correct award. Nevertheless, the presentation of a receipt does not necessarily mean that payment was made. The receipt could be a forgery and the respondent would be able to prove as much if given the time necessary to do so. For any of the reasons given above, however, the respondent may be unable to request a postponement and rebut the new evidence. The failure to reject the new evidence will then have caused a factually incorrect award.

Moreover, a failure to reject new evidence can be the cause of a factually incorrect award even when the final hearing is postponed. Assume that the claimant and respondent did meet in order for the respondent to pay his debt to the claimant – and that a witness was present. Before the respondent paid, however, the respondent swiped the receipt and ran away. The respondent submits the receipt and the claimant invokes the said witness as rebuttal. The respondent then submits new material on an unrelated matter (just before the final hearing) which the arbitrators erroneously allow postponing the final hearing. Moreover, before the new date of the final hearing, the witness becomes unable to testify. If the claimant is then unable to persuade the tribunal that no payment was made and the tribunal renders a factually incorrect award, a different result may have materialised if the witness had been allowed to present his testimony at the first (scheduled) final hearing.

In summary, a failure to reject new material may influence the outcome of the case in at least three different ways: (1) By failing to reject new material that will influence the outcome of the case regardless of how the Responding Party responds. (2) By failing to reject new material that will influence the outcome of the case only because the Responding Party is in effect unable to request the final hearing to be postponed and therefore unable to rebut the new material effectively. (3) By failing to reject new material that necessitates the postponement of the final hearing, which in turn makes certain evidence unavailable (or less convincing).

An arbitral tribunal's failure to reject new material is normally unchallengeable, according to the Svea Court of Appeal in *InterBAU v. PJSC MMC Norilsk Nickel*.[26] The Court noted that the claimant, in its action to set the award aside, alleged that the counterparty had submitted new material after the time limits decided by the tribunal, but that the claimant did not even argue that it was not given sufficient time to rebut or comment on this new material. In view of the foregoing, the Court found it obvious that the circumstances submitted in support of the set-aside action did not constitute such an irregularity in the course of the proceedings that could warrant the award to be set aside. Considering the action to be manifestly lacking any foundation in law, the action was dismissed on the merits.

26. Decision on 30 August 2016 in Case No. T 797-16.

The Court did not elaborate on why an arbitral tribunal's failure to reject new material normally is unchallengeable. However, the Court did refer to opinions expressed in the literature by Heuman and Lindskog. It may therefore be assumed that the Court adopted their reasoning.

Heuman asserts that, as a rule, an award cannot be set aside merely because the proceedings have been delayed. Nevertheless, he does not explicitly assert that an arbitral tribunal's failure to reject new material is unchallengeable.[27]

Lindskog asserts that an arbitral tribunal's failure to reject new material is unchallengeable. Lindskog notes that different procedural rules may have different purposes. Somewhat simplified, he asserts that an error in applying a procedural rule can only be challengeable if the purpose of that procedural rule is to secure a factually correct award.[28] As the purpose of rules allowing the tribunal to reject new material is not to secure a factually correct award, but merely to secure that the dispute is handled in a speedy manner, Lindskog argues, an erroneous decision allowing new material is unchallengeable.[29] In essence, Lindskog's position that a failure to reject new material is unchallengeable relies on two assumptions, both of which must hold true: (1) An error in applying a procedural rule is unchallengeable if the purpose of the rule is not to secure a factually correct award ('Lindskog's exemption'). (2) The Act's Preclusion Rules do not have the purpose of securing factually correct awards.

The provision's wording does not support Lindskog's position, which is something Lindskog himself acknowledges.[30] Moreover, neither the *travaux préparatoires* to the old Arbitration Act of 1929, nor the *travaux préparatoires* to the Act (the current Arbitration Act) mention Lindskog's exemption. The *travaux préparatoires* to the old Arbitration Act of 1929 concluded that while it was impossible to list exhaustively all irregularities in the course of the proceedings that could constitute grounds for setting the award aside, one could use the provisions regarding the proceedings as guidance in this regard.[31] According to the *travaux préparatoires* of the Act (the current Arbitration Act), a guiding principle in drafting the Act has been that the Act shall not contain any regulations that can be set aside without a sanction.[32] Moreover, according to the same *travaux préparatoires*, one can hardly take the position that a procedural error that has influenced the outcome of the case should be unchallengeable; all procedural errors should thus in principle be challengeable according to the *travaux préparatoires*.[33]

27. *See* Heuman, *Skiljemannarätt*, *supra* n. 5, at 643 and Lars Heuman, *Arbitration Law of Sweden: Practice and Procedure,* 632 (Juris Publishing 2003).
28. Lindskog does not write about rules that try to secure awards that are *factually correct* but rules that try to secure 'an in a legal sense lawful award' (Sw. *en i rättslig mening rättsenlig skiljedom*) (Lindskog, *Skiljeförfarande*, *supra* n. 5, at 892). An 'in a legal sense lawful award' may or may not be something different to a *factually correct award*. Nevertheless, if so, such difference is not likely material to the arguments put forward in this chapter. The author has therefore taken the liberty to simplify Lindskog's position somewhat.
29. Lindskog, *Skiljeförfarande*, *supra* n. 5, at 892–893, 899.
30. Lindskog, *Skiljeförfarande*, *supra* n. 5, at 892.
31. Prop. 1929:226, 60.
32. SOU 1994:81, 75, Prop. 1998/99:34, 44.
33. SOU 1994:81, 179. This statement is reproduced with a slightly different wording in the government bill. Instead of 'It can hardly be argued that an error that has influenced the outcome of the case should be unchallengeable. *All* procedural errors that have influenced the outcome

Consequently, neither the statute nor the *travaux préparatoires* support Lindskog's exemption. To the contrary, the *travaux préparatoires* would seem to assume that in principle, all procedural errors that influence the outcome of the case and in particular those procedural errors arising from a failure to apply the provisions regarding the proceedings, should constitute grounds for setting the award aside. The Act's Preclusion Rules form part of the provisions regarding the proceedings. The *travaux préparatoires* consequently support the position that all procedural errors in applying the Act's Preclusion Rules should be challengeable.

A further problem with Lindskog's position is that it requires the categorisation of procedural rules into those that do or do not aim to secure factually correct awards. Lindskog does not explain how this categorisation should be done, but asserts that section 23 paragraph 2 of the Act (one of the Act's Preclusion Rules) does not have as its purpose to secure a factually correct award (but merely to secure speedy proceedings).

The *travaux préparatoires* do not assign the Act's Preclusion Rules a specific purpose.[34] Let us nevertheless assume that the lawmaker thought of the Act's Preclusion Rules foremost as ensuring speedy proceedings. This does not change the fact, as developed in §11.02, that preclusion rules do indeed play a fundamental part in securing factually correct awards.

If Lindskog's exemption is accepted, it appears arbitrary and artificial to categorise procedural rules solely based on *an assumption* of what the lawmaker had in mind when drafting the rules. A categorisation based on each procedural rule's *actual* role in the proceedings appears more relevant. And would one categorise the Act's Preclusion Rules based on their *actual* role in the proceedings, the Act's Preclusion Rules would be among the rules that, if applied incorrectly, could constitute grounds for setting the award aside.

As alluded to in the introduction, however, the biggest problem with Lindskog's position is the overall effect it has on arbitral proceedings, making arbitration under the Act slower, costlier and less capable of rendering factually correct awards.

Let us use the numbers 1–30 to illustrate how strong the reasons are for rejecting or allowing new material, as shown in the figure below. We denote the number 1 the situation where there is nothing that would warrant rejection and the number 30 the situation where there is nothing that would warrant allowance. The number 15 means there is slightly less speaking in favour of rejection than against rejection and the number 16 means there is slightly more speaking in favour of rejection than against rejection.

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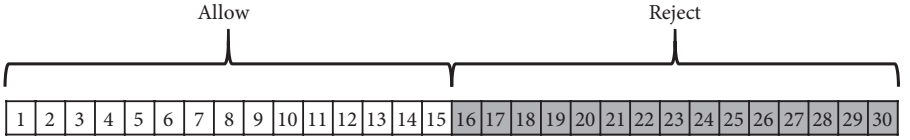
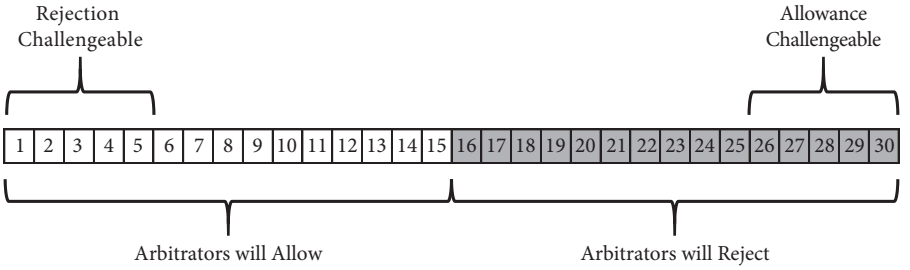
of the case should in principle be challengeable', the government bill (Prop. 1998/99:35, 148) states 'It can hardly be argued that an error that has influenced the outcome of the case should be unchallengeable. *The* procedural errors that have influenced the outcome of the case should in principle be challengeable.' (The author's translations.)

34. SOU 1994:81, 138–141, 145–150 and 276–280. Prop. 1998/99:34, 105–109, 114–120 and 226–229.



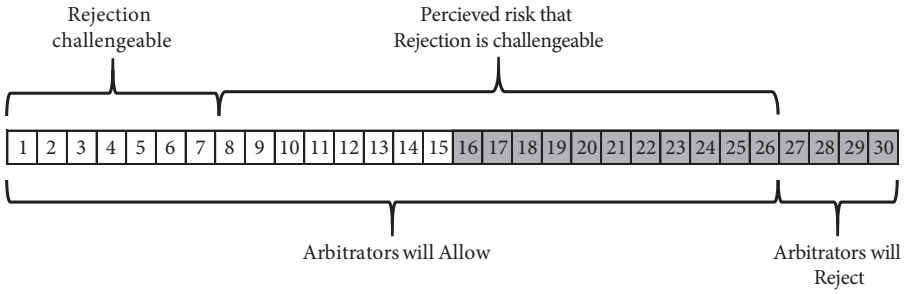
Arbitrators have been recommended '*to avoid conducting the disputes in a way which involves a substantial risk of vacating the award*'.[35] Arbitrators with *due process paranoia* go further however, and will try to avoid decisions that involve *any* risk of vacating the award.

Assume we have a system where both the failure to allow and the failure to reject would be challengeable, as shown in the below figure. The arbitrators would then have an incentive to assess carefully each situation, reject new material only when they believe more speaks in favour of rejection, and allow only when they believe more speaks in favour of allowing the new material. Such a system will constantly yield the best decisions arbitrators are capable to reach.



Let us instead stipulate that we have the system commonly assumed by practitioners, where only the erroneous rejection of new material (but not the failure to reject) is challengeable, as shown in the below figure. Such a system will not yield the best decisions the arbitrators are capable to reach. As long as the arbitrators believe there is a *risk* that a court would not find rejection warranted, they would abstain from rejecting the new material even though they themselves believe that rejection is warranted. This behaviour will be reinforced if there is a perceived uncertainty as to arbitrators' discretion.

35. Lars Heuman, *Current Issues in Swedish Arbitration*, 175 (Juristförlaget 1990).



A system sanctioning only one of the two opposite errors can thus increase the likelihood of the error not sanctioned being committed (potentially creating more errors in total than a system with no sanctions). Since there is a widespread reluctance to reject new material, parties adopt their expectations accordingly and assume that belated material will not be rejected. Therefore, parties submit new material later than would otherwise be the case, which in turn leads to final hearings being postponed unnecessarily or Responding Parties (unable or unwilling to request the cancellation of the final hearing) unable to present their case to the extent necessary. This, in turn, makes arbitration slower, costlier and less capable of rendering factually correct awards.[36]

In summary, neither the statute nor the *travaux préparatoires* support the position that a failure to reject is unchallengeable. That position relies on an arbitrary and artificial categorisation of the Act's Preclusion Rules inconsistent with their actual role in the proceedings. The view also results in arbitration becoming slower, costlier and less capable of rendering factually correct awards while providing limited if any gain. In light of the above, I respectfully submit that an erroneous decision to allow new material is challengeable.[37] This view finds support both in statute and the *travaux préparatoires*. It is also consistent with arbitrators' duty to handle the dispute in a practical and speedy manner while helping to secure the parties' right to due process.

§11.04 ARBITRATORS' DISCRETION

If both the erroneous rejection and the erroneous failure to reject new material are challengeable, arbitrators might find themselves in a difficult situation when faced with the submission of belated material. If they reject the material but the court finds

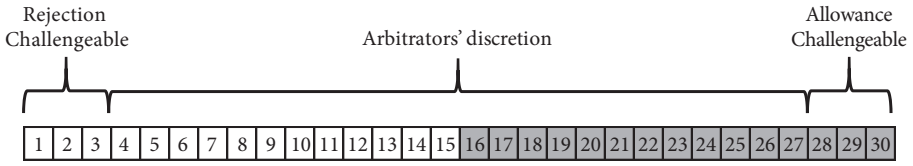
36. Which is against the key purposes of the Act, *see* Prop. 1998/99:35, 151.
37. Cf. Supreme Court Decision on 20 March 2019 in Case No. T 5437-17 (Belgor), para. 40 (where the Supreme Court, considering a motion to set an award aside due to, *inter alia*, an alleged erroneous rejection of a request for postponement, did not make any distinction between an indefensible decision to grant and an indefensible decision to reject a request for postponement), but cf. *id.*, para. 41 (where the Supreme Court went on to discuss only the situation where a request for postponement was rejected).

that they should have allowed it, the award may be set aside; however, the same is true if they allow the material but the court finds that they should have rejected it.

While the *travaux préparatoires* take a cautious stance against preclusion, they also stress that arbitrators should enjoy wide discretion in deciding whether new material should be accepted.[38] This in line with international practice, where 'national court decisions uniformly grant arbitrators similarly broad discretion to permit, or deny, amendments, based on an assessment of the fairness and efficiencies of each course of action'.[39]

The arbitrators are in the best position to assess whether new material should be accepted or rejected, taking into account the reasons given by the parties.[40] Consequently, if a decision to reject or allow new material is to be reviewed due to a motion to set an award aside, the court could not perform a de novo review of the decision, acting as if it were considering the question of preclusion for the first time. Instead, the court must grant significant deference to the arbitrators' decision and review whether the arbitrators' decision was *unjustifiable*.[41] An award must thus as a starting point be affirmed unless the court finds that the decision to allow or reject new material was unjustifiable.

38. SOU 1994:81, 141. Prop. 1998/99:35, 108, 109.
39. Gary B. Born, *International Commercial Arbitration* 2260 (2nd ed., Kluwer Law International 2014). Compare Born, *id*., at 3 238–3 242.
40. Cf. Belgor, *supra* n. 37, at para. 40.
41. Cf. Belgor, *supra* n. 37, at paras 40 and 47, Heuman, *Arbitration Law of Sweden: Practice and Procedure*, *supra* n. 27, at 417 ('If a party wishes to challenge an arbitration award on the ground that a claim amendment has not been granted, the award can only be set aside in the event of gross misjudgement, i.e., where the court finds that the application for the amendment was presented in good time before the final hearing and that for this and other reasons the tribunal's discretionary assessment was unacceptable.'), Andersson, *Arbitration in Sweden*, *supra* n. 5, at 123 ('the decision to dismiss a request for amendment must be grossly erroneous, in order to set aside an award'), Patricia Shaughnessy, *The Swedish Approach Towards Arbitration*, 314 (Lars Heuman, Sigvard Jarvin, *Swedish Arbitration Act of 1999, Five Years on: A Critical Review of Strengths and Weaknesses* (JurisNet, LCC 2006)) ('Ultimately, it is up to the arbitrators to exercise their discretion unless parties have agreed otherwise. This discretion should be guided by the essential procedural principles earlier mentioned, namely ensuring equal treatment of the parties and affording them to be heard in a fair, speedy and practical proceeding. The decision of the arbitrators should not be subject to challenge unless they have seriously violated one of these principles and the violation has probably affected the outcome of the proceedings.'). But cf. Lindskog, *Skiljeförfarande*, *supra* n. 5, at 889, 890. Compare Berger and Jensen, *Due Process Paranoia and the Procedural Judgment Rule: A Safe Harbour for Procedural Management Decisions by International Arbitrators*, *supra* n. 9, at 87 ('While under the Procedural Judgment Rule it is first and foremost for the arbitrators to determine what is "reasonable", in reviewing this decision the courts adopt their own reasonableness test. The relevant circumstance they consider in this test is whether in light of the arbitrators' prerogative to conduct the proceedings there was a serious violation of a party's right resulting in a blatant case of refusal of due process by the tribunal, which amounts to a clear misuse of its procedural discretion.').



In combining a wide discretion with a review that prohibits the unjustifiable use of this discretion regardless in which way the discretion is used unjustifiably,[42] as shown in the figure above, arbitrators are incentivised to use the full potential of the Act's Preclusion Rules in the best interest of the parties. At the same time, they do not run the risk of vacating the award as long as they do not fail considerably in exercising the very same sound judgment that got them appointed in the first place.

§11.05 CONCLUDING REMARKS

Due process paranoia may or may not be a widespread epidemic. But if it is, there is a simple two-step remedy:

(1) Allow arbitrators a wide discretion in deciding whether to reject new material.
(2) Prohibit the unjustifiable use of this discretion regardless in which way the discretion is used unjustifiably.

I respectfully submit that the Act already allow for both these steps. And given the wide discretion advocated above, I am confident that arbitrators using the very same sound judgement that got them appointed in the first place will not produce challengeable awards due to their decisions to reject or allow new material.

42. The Supreme Court did not explain in Belgor (*supra* n. 37) when a procedural ruling is unjustifiable. Some US courts have applied an *abuse of discretion* standard to arbitrators' procedural rulings in annulment actions (*see* Born, *supra* n. 39, at 3 229 and n. 407). This standard would involve reviewing whether the decision-maker has made a *clear error of judgment*, or has applied an *incorrect legal standard* (*see*, e.g., *Alexander v. Fulton County*, 207 F.3d 1303, 1326 (11th Cir. 2000)). Arguably, if the arbitrators abused their discretion when reaching a decision, that decision is unjustifiable. It is possible that a decision to allow or reject new material should be considered to be unjustifiable under Swedish law if the arbitrators in allowing or rejecting the new material have made a clear error of judgment, or have applied an incorrect legal standard.