CHAPTER 14

Preserving Evidence in Arbitration Proceedings: From a Swedish and Norwegian Perspective

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§14.01 INTRODUCTION

The outcome of the majority of commercial disputes depends on the evidence presented during the proceedings. Consequently, access to evidence is a crucial aspect of almost every dispute. This includes preserving evidence which may be at risk of deteriorating or being lost. This chapter discusses the possibility of requesting court assistance to secure evidence prior to the commencement of arbitration proceedings – an opportunity that may have been overlooked in the past.

Requesting assistance from courts to preserve evidence prior to filing suit is regulated in many jurisdictions and is fairly uncontroversial with respect to court litigation. However, the matter is not clearly regulated with regard to arbitration proceedings. This has caused uncertainty as to whether it is possible for parties to request such assistance from the courts.

The purpose of this chapter is to examine whether parties who are bound by an arbitration agreement may request assistance from the general courts to secure evidence prior to the initiation of the arbitration. The chapter examines the issue under both Swedish and Norwegian law. The reason for the comparative perspective is that the relevant legislation is very similar in Sweden and Norway. However, legal scholars have approached the issue differently in the two countries, and this provides for an interesting comparison. The comparative aspect is also compelling because the issue has been a subject of dispute in some fairly recent lower court decisions in Norway. In Sweden, on the other hand, the relevant court decisions are from the Supreme Court, but the rulings are quite old.

Both Norwegian and Swedish law allow parties to secure evidence prior to the initiation of a legal action before the regular civil courts. This is regulated in Chapter 28 of the Norwegian Dispute Act (NDA) and Chapter 41 of the Swedish Code of Judicial Procedure (SCJP).

However, neither the Norwegian Arbitration Act (NAA) nor the Swedish Arbitration Act (SAA) contain any express rules on preserving evidence and do not refer to the rules in the NDA Chapter 28 or the SCJP Chapter 41, respectively. The UNCITRAL Model Law on International Commercial Arbitration (the 'Model Law'), by which both arbitration acts are influenced, also lacks rules on the securing of evidence.[1]

Accordingly, the question is whether the rules on securing evidence in the NDA and SCJP may be applied to disputes that are to be settled by arbitration.[2]

The fundamental background for the question is that the considerations which justify the provisions in Chapter 28 of the NDA and Chapter 41 of the SCJP are equally relevant in arbitration. This includes the primary purpose of the rules which is to promote substantively correct decisions by ensuring that the facts of the case are as clear and well-established as possible. The alternative to securing evidence would be that the case is decided without the specific evidence being presented to the tribunal or the quality of the evidence being significantly reduced. It could also be argued that the need to be able to secure evidence is even more important in arbitration since it in practice is a one-instance dispute resolution procedure.[3] In addition, a large share of arbitration cases are decided on the facts.[4]

Another key purpose of the provisions is to provide a party with the opportunity to evaluate the strength of its case before any proceedings are initiated.[5] This consideration also applies when the parties have agreed to have their disputes settled through arbitration.

Section §14.02 provides a general overview of the provisions concerning the preservation of evidence under the NDA and the SCJP. Section §14.03 is the core part of the chapter, where we analyze the legal authorities in Norway and Sweden. In §14.04, we summarize our conclusions and provide some final comments.

1. That fact that the NAA is based on the Model Law is evident from NOU 2001:33 pp. 49-50 and Ot. prp. no. 27 p. 25. In Sweden the legislator used the Model Law as a road map when drafting the SAA and noted that having a similar design as the Model Law was of substantive value in itself, government bill. 1998/99:35 pp. 43-46.
2. There are additional legal issues that must be considered if the seat of arbitration is outside Norway or Sweden respectively. These issues are not examined further in this chapter.
3. Neither of the NAA nor the SAA allow for arbitral awards to be appealed to the courts or be set aside due to an incorrect assessment of the merits, *see* the SAA section 34 and the NAA section 43.
4. Per M. Ristvedt og Sven Eriksrud, 'Bevistilgang i voldgift', *Tidsskrift for forretningsjus* 2015, pp. 275-330 (Ristvedt and Eriksrud), and Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (6th ed.) point 6.75 og 6.76 (Blackaby).
5. NOU 2001:32 pp. 987-988, Ot. prp. no. 51 (2004-2005) p. 470, and NJA II 1943 p. 515.

§14.02 OVERVIEW OF THE LEGAL PROVISIONS

The following section provides a brief overview of the Norwegian and Swedish rules on the securing of evidence as a foundation for the analysis of the question of application of the rules in arbitration.

The main provisions of the NDA have the following wording:[6]

> Section 28-1. Securing evidence
>
> Evidence may be secured outside of legal proceedings by judicial examination of parties and witnesses and by providing access to and inspecting real evidence.
>
> Section 28-2. Conditions for securing evidence
>
> Evidence may be secured if it can be of significance in a dispute to which the applicant may become a party or intervener, and there is either a clear risk that the evidence will be lost or considerably weakened, or there are other reasons why it is particularly important to obtain access to the evidence before legal proceedings are instigated.[7]

The corresponding provisions in the SCJP read as follows:

> Section 41-1. Preservation of evidence for the future
>
> If there is a risk that evidence concerning a circumstance of importance to a person's legal rights may be lost or difficult to obtain and no trial concerning the rights is pending, a district court may take and preserve for the future evidence in the form of witness examination, expert opinion, view, or written evidence. However, evidence may not be taken pursuant to this chapter for the purpose of investigating an offence.

The provisions are most commonly invoked to enable the examination of witnesses or to obtain access to physical evidence, such as relevant documents which are in the possession of the opposing party. It should be noted that the NDA allows for parties to be examined, while this is not allowed under the SCJP.

A prerequisite for a petition to be granted is that there is a risk that the evidence will be lost, considerably weakened or difficult to obtain. The SCJP does not allow for the securing of evidence for other reasons. The NDA, on the other hand, also encompasses other reasons of particular importance.

Under the NDA, the petition to preserve evidence shall as a main rule be filed at the court where the case could have been brought, *see* section 28-3(1). The SCJP allows the applicant to choose which district court it wishes to submit its petition. However, witnesses and experts are only required to appear before the district court where they reside, *see* sections 41-2 and 41-3.[8]

6. The wording referred to in this chapter is based on the official translations of the acts that are available. The NDA refers to the 'securing' of evidence, while the SCJP uses the term to 'preserve' evidence. These terms are used as synonyms throughout the chapter.
7. The full text of the NDA is accessible in Norwegian and English at www.lovdata.no.
8. Fitger, *Rättegångsbalken* (JUNO 21 March 2023), commentary to section 41-2.

Under the NDA, the person to whom the petition is directly addressed and the person towards whom any ensuing action is likely to be directed shall be identified as opposing parties, *see* section 28-3(2). If possible, the opposing party shall be notified before the securing of evidence is initiated, but the securing of evidence may be carried out immediately without notification if prompt action is necessary, *see* section 28-3(3).

Under the SCJP, the general rule is that the person against whom proceedings may be instigated is only to be summoned to a hearing if there are specific reasons for this, *see* section 41-3.

The provisions concerning the taking of evidence outside of a main hearing apply *mutatis mutandis* under both acts; *see* the NDA section 28-4 and the SCJP section 41-3.

§14.03 SECURING OF EVIDENCE BEFORE ARBITRATION PROCEEDINGS ARE INITIATED

[A] Starting Point

As indicated in the introduction, the main question is whether the rules on securing of evidence in the NDA and SCJP can be applied to disputes that are to be settled by arbitration, or if the fact that the parties have agreed to arbitration also means that they have agreed to waive the possibility of invoking the rules on preserving evidence outside court proceedings. This question will be examined first from a Norwegian perspective and then from a Swedish perspective.

[B] The Norwegian Perspective

[1] Section 28-2 of the NDA

The natural starting point is the wording of Chapter 28 of the NDA. According to section 28-2, evidence may be secured 'if it can be of significance in a dispute'. The use of the general term 'dispute' strongly suggests that the rules are not only limited to disputes before the courts but also may apply to disputes that are to be resolved by arbitration. In other words, a natural interpretation of the wording of the NDA is that the rules on securing of evidence can be invoked by parties in advance of arbitration proceedings.[9]

The fact that the provisions concerning the securing of evidence are found in the NDA, which applies to cases before the courts and which generally does not apply to arbitration, may, give reason to question the application of the rules in cases where the parties have agreed to arbitration. However, such an interpretation would entail a restrictive understanding of the wording of section 28-2 by introducing an additional

9. Schei et al. *Tvisteloven, kommentarutgave,* comments to section 28-1 point 1.3, write that the wording of section 28-1 strongly suggests that it will be possible to secure evidence under Chapter 28 before arbitration proceedings are commenced.

requirement that the evidence specifically can be of significance in a court case rather than in a dispute in general.

The next question is whether or not the provisions in the NAA limit the parties' rights to invoke the rules on preserving evidence in the NDA.

[2] Section 6 and Section 8 of the NAA

As a clear general rule, an agreement to arbitrate implies that the parties waive the right to have disputes heard by the ordinary courts. Accordingly, the NAA section 6 (1) provides that the courts have jurisdiction to hear or decide disputes that are subject to arbitration only where the law so provides:

> The courts have jurisdiction over the deliberation and resolution of disputes subject to arbitration only to the extent provided by this Act.

According to the wording, the provision requires a legal basis in the NAA for the ordinary courts to render decisions in disputes where the parties have agreed to arbitrate.[10] In international jurisprudence, it is held that the wording of the corresponding provision in the Model Law Article 5 entails that the courts' involvement is limited 'strictly to such matters as are specifically provided in the Law'. However, it is presumed that the Model Law Article 5 does not completely rule out that the courts may have jurisdiction in arbitration cases with regard to issues that are not expressly regulated in the Model Law. As a result, it is not entirely clear how strictly the requirement for a legal basis is to be interpreted.[11]

As mentioned above, the NAA does not contain any explicit provisions allowing the courts to render decisions on the securing of evidence. By comparison, section 8 states that the courts may make an order for provisional security even if a dispute is subject to arbitration:

> The courts may make an order for provisional security pursuant to chapters 32 to 34 of the Act relating to the resolution of disputes even if a dispute is subject to arbitration.

The fact that the NAA contains an express provision on the authority of the courts to order provisional security (interim measures) but no corresponding provision on the securing of evidence suggests that securing of evidence is not available in arbitration proceedings. It could be argued that the NAA would contain provisions concerning the preserving of evidence outside court proceedings if the legislator intended this form of action to be available in disputes where arbitration has been agreed.

However, there is no basis for drawing firm conclusions on this point. The question is not mentioned in the preparatory works. Furthermore, the reason that the NAA section 8 expressly regulates provisional security is that the Model Law has a

10. The provision corresponds to the Model Law Art. 5.
11. Bantekas et al., *UNCITRAL Model Law on International* Commercial *Arbitration – A Commentary* (2020), p. 84 (Bantekas).

corresponding provision on this in Article 9.[12] In connection with the work on the NAA, it was established that it should correspond as closely as possible to the content and system of the Model Law, and the preparatory works underline that section 8 is based on the parallel provision in the Model Law.[13]

Further to this, it should be considered that the Model Law Article 9 does not clearly indicate which interim measures the courts can grant. However, it has been held that the courts can grant the same interim measures as an arbitral tribunal can decide under the Model Law Article 17.[14] Pursuant to Article 17 (2)(d), an arbitral tribunal can order a party to 'preserve evidence that may be relevant and material to the resolution of the dispute'. This indicates quite clearly that the courts can decide to preserve evidence under the Model Law, and that the NAA should be interpreted accordingly.

It may also be questioned whether the wording of section 6 (1) of the NAA – 'disputes subject to arbitration' – must be interpreted as referring to the substantive issues and not procedural issues such as the securing of evidence. The connection with section 7 (1) supports such an interpretation. According to the latter provision, the courts shall dismiss 'a lawsuit that is the subject of arbitration' if a party so requests no later than in his first submission on the 'substance of the dispute'. This can be understood to mean that the court's obligation to dismiss relates to actions concerning the merits of a case; *see* further in §14.03[B][4] below.

[3] Section 6 (2) and (3) of the NAA

Section 6 (2) of the NAA regulates which court is competent when the courts have jurisdiction under the act. The last sentence of the provision appears to presume that the courts may make decisions to secure evidence even if a dispute is subject to arbitration:

> Securing of evidence may also take place before a different court.

The preparatory works do not contain any further discussion of the provision but mention as an example that evidence may be secured at the court where the witness who is to give evidence lives.[15]

The wording of section 6 (2) does not expressly refer to Chapter 28 of the NDA, but it is natural to interpret the word 'securing of evidence' as a reference to these rules. Section 6(3) stipulates that the rules in the NDA apply to the court's involvement in the case unless otherwise stated in the NAA. Furthermore, only Chapter 28 uses the term securing of evidence.

12. The provision reads as follows: 'It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.'
13. NOU 2001:33 pp. 49-50 and 92, and Ot. prp. no. 27 (2003-2004) pp. 25 and 90.
14. Bantekas p. 160.
15. NOU 2001:33 p. 85 and Ot. prp. no. 27 (2003-2004) p. 89.

[4] Section 7 of the NAA

Section 7 (1) of the NAA provides that the courts shall dismiss a legal action that is subject to arbitration if a party so requests no later than in his first submission on the merits of the dispute.

The court's duty to dismiss refers to 'a lawsuit that is the subject of arbitration'. The text does not specify what is meant by 'a lawsuit', and this is not commented on in the preparatory works. However, it is natural to understand the term to mean a case before the courts concerning a legal claim; *see* the NDA section 1-3 (1).

Further, a lawsuit is normally understood as a claim for a judicial determination with regard to the substance of a matter but may also concern procedural claims, such as an action to set aside an arbitral award as invalid under Chapter 9 of the NAA.[16]

The term lawsuit is thus not entirely unambiguous, but as used in section 7 of the NAA, it must be understood to refer to the merits of the case, *see* section 7(1), which provides that a party must request dismissal 'no later than in his first submission on the merits of the dispute'. This is in accordance with section 8 of the Model Law, which stipulates that the courts shall dismiss the case if a party so requests 'not later than when submitting his first statement of the substance of the dispute'.[17] In international jurisprudence concerning the Model Law, it is held that Article 8 does not apply to petitions to preserve evidence.[18]

Furthermore, it is linguistically not natural to characterize a petition to preserve evidence outside court proceedings as a lawsuit and a request to secure evidence will not relate to the merits of the case.[19] Consequently, the provision in section 7 does not seem to imply an obligation for the courts to dismiss applications to secure evidence.

This conclusion must have a bearing on the interpretation of the provision in section 6 (1) concerning the court's jurisdiction. There appears to be a clear connection between sections 6 and 7 whereby the courts according to section 7 shall dismiss cases which they do not have jurisdiction to hear pursuant to section 6 (if a party so requests no later than in his first submission on the merits of the dispute).

When section 7 is also read in conjunction with section 6(2), which seems to presume that the courts may hear requests for the securing of evidence, this further supports the view that a party may request evidence to be secured under Chapter 28 of the NDA, even if the parties have agreed that disputes are to be resolved by arbitration.

16. Schei et al., commentary on section 1-3 of the NDA, point 1.2.
17. The Model Law Article 8 and its preparatory works are discussed in more detail by Borgar Høgetveit Berg, 'Voldgiftslova § 7. Særlig om fristen for å krevje søksmål för domstolane avvist på grund av voldgift', in Borgar Høgetveit Berg and Ola Ø. Nisja (ed.), *Avtalt prosess*, Universitetsforlaget 2015, pp. 29-31.
18. Bantekas pp. 141: 'Pre-actions, such as those that seek to obtain documentary evidence, are generally viewed as not falling within the scope of article 8 […].'
19. Woxholth, p. 160, writes that section 7 cannot be used as a barrier to the securing of evidence, and that it is not linguistically natural to refer to a request for the securing of evidence as a 'lawsuit' within the meaning of the provision.

[5] The Arbitration Agreement

Both sections 6 and 7 of the NAA refer to disputes and actions that are 'subject to arbitration'. The question is whether the specific arbitration agreement may have an impact on the right to request the securing of evidence and whether the parties' agreement may constitute a waiver of the possibility to preserve evidence through the courts.

It is common for arbitration clauses to state that all disputes between the parties relating to the agreement in question are to be settled by arbitration. Furthermore, there may be a dispute between the parties not only concerning the substance of the case, but also about access to evidence, such as relevant documents. In other words, the question is whether an arbitration agreement must be interpreted to entail that not only the merits of the case, but also all procedural issues, must be settled by arbitration.

Section 2 of the NAA establishes that the provisions of the act may be derogated from by agreement to the extent provided for in the individual section. Thus, if the parties wish to deviate from the act by agreement, this must have statutory authority in the individual provision of the act. No such statutory authority appears in sections 6, 7 or 8, which regulate the relationship with the ordinary courts. Consequently, these provisions cannot be derogated from the parties' arbitration agreement.[20]

The limitations on the right to derogate from the rules of the NAA also apply when the parties agree that the dispute shall be resolved according to the rules of an arbitration institute. The main arbitration institute in Norway is the Oslo Chamber of Commerce Institute for Arbitration and Alternative Dispute Resolution (OCC).[21] The rules for arbitration institutions in Norway must stay within the framework of the NAA and can thus only deviate from the declaratory rules of the act. Accordingly, the OCC rules Article 2 states that the rules are supplemented by the provisions of the NAA.[22]

The fact that the parties cannot deviate from sections 6, 7 and 8 in the arbitration agreement must imply that disputes on procedural issues relating to the jurisdiction of the courts must be determined by an interpretation of the provisions of the NAA, regardless of the parties' agreement or the rules of the OCC. Accordingly, the individual arbitration agreement cannot expand nor restrict any right to secure evidence under the NAA. Thus, when sections 6 and 7 refer to disputes or actions 'subject to arbitration', this must as a starting point clearly refer to the substantive issues, not procedural matters such as the issue of securing of evidence.

20. *See* Høgetveit Berg et al., *Voldgiftsloven, kommentarutgave*, p. 101, which points out that since section 6 is mandatory, the parties cannot in principle assign more tasks to the court than what is stipulated in the Act.
21. The Nordic Offshore & Maritime Arbitration Association (NOMA) should also be mentioned, though it is not a traditional arbitration institution.
22. Rules of The Arbitration and Dispute Resolution Institute of the Oslo Chamber of Commerce.

[6] The Preparatory Works

The question of whether evidence may be preserved outside of legal proceedings when the parties have agreed to arbitration is not directly addressed in the preparatory works of the NAA or the NDA.

However, in the preparatory works to the NDA, it is emphasized that the rules on the taking of evidence in court proceedings in Chapter 27 of the NDA are also applicable to arbitration.[23] This will be the case where the arbitral tribunal requests assistance from the courts pursuant to section 30 of the NAA, which provides that 'the arbitral tribunal or a party with the consent of the arbitral tribunal may ask the court to take testimony from parties and witnesses and take other evidence'. The preparatory works do not provide a similar clarification with regard to the application of Chapter 28 of the NDA to arbitration.

[7] Case Law

There are no Supreme Court decisions concerning the securing of evidence in connection with arbitration. However, there are some lower court decisions which may have argumentative value and which illustrate the questions of interpretation raised by the NAA.[24]

The question of securing of evidence when the parties have agreed to arbitration first came up in a case before the Bergen District Court (TBERG-2011-13681). The case involved a party's request for documents from a limited liability company in connection with a dispute concerning additional remuneration under a share purchase agreement. The reason for the request was that the party needed the documentation in order to determine whether she was entitled to additional remuneration.

The court based its decision on sections 6 and 7 of the NAA, and the determining factor was whether the request for the securing of evidence was 'a lawsuit that is the subject of arbitration'. The court found that it was not natural to consider the request for the securing of evidence as a 'lawsuit'. On this basis, the District Court concluded that the petition to preserve evidence fell outside the scope of section 7 of the NAA.

The District Court further held that the fact that section 8 of the NAA contains a separate provision giving the court jurisdiction to order interim measures and that there is no express provision concerning the securing of evidence was not sufficient to substantiate that the District Court could not order evidence to be preserved.

In addition, the District Court stressed that compelling substantive considerations supported the court's finding.

The decision by the Bergen District Court was appealed to the Gulating Court of Appeals (LG-2011-92858), which found that the arbitration agreement implied that evidence could not be secured pursuant to Chapter 28 of the NDA.

23. NOU 2001: 32 pp. 983 and 987.
24. The significance of lower court practice as a source of law is discussed by, among others, Jens Edvin A. Skoghøy, *Rett og rettsanvendelse*, Universitetsforlaget, 2018 p. 215.

The Court of Appeals based its decision on section 7 of the NAA and held that the question was whether the request for production of the documents was a dispute that was 'subject to arbitration'.

The Court of Appeals found that there undoubtedly was a dispute between the parties as to which documents the company was obligated to produce. The court interpreted the arbitration clause in the share purchase agreement to also cover disputes concerning the production of documents and that it was not decisive that the dispute involved a procedural issue.

Furthermore, the Court of Appeals emphasized that section 6 of the NAA states that the courts may only decide disputes which are subject to arbitration where there is a statutory basis in the NAA. In that respect, the court pointed out that section 8 of the NAA only applies to provisional security, such as arrest and interim measures and does not include the securing of evidence under Chapter 28.

Both lower-court decisions contain flaws in their argument. The ruling from Bergen District Court did not discuss the wording of section 6 (1) and whether the court's ability to order the securing of evidence requires statutory authority in the NAA. Furthermore, it is a weak point in the reasoning of the Court of Appeals that it did not address section 6 (2) which presumes that the courts may hear cases concerning the securing of evidence. In addition, it is a flaw in the court's reasoning that when interpreting the arbitration clause, it did not discuss the fact that sections 6 and 7 cannot be derogated from by agreement between the parties, *see* §14.03[B][5] above. The court should also have discussed whether the petition to secure evidence constituted a lawsuit that the court had jurisdiction to dismiss under section 7.

In conclusion, little emphasis can be placed on the decisions from the lower courts when determining how to interpret the provisions of the NAA.

[8] Jurisprudence

In jurisprudence, there appears to be – with one exception – consensus that a party can request the securing of evidence when the dispute is subject to arbitration.[25] For instance, Woxholth provides the following opinion:

> A petition for securing of evidence prior to a possible dispute must be considered to fall outside the scope of the NAA section 7. This provision cannot be used to prevent the securing of evidence. Linguistically it is not natural to describe a petition for securing of evidence as a 'lawsuit' in the context of the provision, and good, substantive reasons […] support the view that securing of evidence can be carried out in these cases.

25. *See* Woxholth, *Voldgift*, p. 160, Ristvedt and Eriksrud point 5, Schei et al., *Tvisteloven, kommentarutgave,* comment to section 28-1 item 1.3, and Amund Bjøranger Tørum, '"Best practice" i norsk og nordisk voldgift og NOMAs Guidelines', *Tidsskrift for forretningsjus*, 2018 (Tørum 2) p. 122, footnote 47.

Only Hjort takes the view that it is not possible to secure evidence outside court proceedings when arbitration has been agreed.[26] In her opinion, it is difficult to arrive at a different conclusion than the one reached by the Gulating Court of Appeals in LG-2011-92858. We do not agree with this. As pointed out, there are multiple weak points in the court's reasoning and several clear indications in the NAA that securing of evidence outside court proceedings may be requested even when the parties have agreed to arbitration.

Hjort does, however, state that she finds it puzzling that the act allows the courts to order interim measures pursuant to section 8 of the NAA but does not provide a similar statutory basis for the securing of evidence. In Hjort's opinion, there is reason to question whether this is a well-considered distinction.

The fact that a majority of legal scholars believe that the NAA must be interpreted to allow the securing of evidence is significant but is clearly not a decisive argument.

[9] Considerations Based on the Objects and Interests of the Legislation

It is equally important in arbitration proceedings as in cases before the ordinary courts to give the parties the opportunity to secure evidence that may be lost or substantially impaired, or to allow a party to have access to evidence in order to assess its legal position before initiating proceedings.

As indicated in the introduction, it could also be argued that it is even more important that a party can obtain access to evidence when disputes are subject to arbitration. This reason is that arbitral awards are final, even though it in theory is possible for the parties to agree that an arbitral award may be appealed to another arbitral tribunal.[27] Further, it is not possible to re-open arbitration proceedings, for instance, due to new information or factual errors in the decision; *see* by comparison the NDA section 31-4(a). In addition, an arbitral award cannot be declared invalid due to errors in the court's assessment of evidence, *see* the NAA section 43. It is, therefore, particularly important to ensure that the facts in arbitration proceedings are as accurate and complete as possible.

In accordance with this, the legal scholars who have examined the issue all agree that there *should be* a right to secure evidence under Chapter 28 of the NDA, even if the parties have agreed to arbitration. A right to secure evidence is also well in line with the arbitral tribunal's and the parties' right to request the courts to record evidence or to order the production of evidence pursuant to the NAA section 30.[28]

Tørum points out that if the conditions in section 28-2 are not interpreted strictly, this could open up a form of discovery, which is time-consuming and costly and not in

26. Maria Astrup Hjort, *Tilgang til bevis i sivile saker: Særlig om digitale bevis*, Universitetsforlaget 2016, p. 247.
27. Woxholth, p. 50 and Høgetveit Berget al. p. 315 and section 464 (2) of the former Civil Procedure Act. An arbitral award cannot be appealed to the ordinary courts for a substantive review, but can only be set aside as invalid, *see* section 42 of the NAA.
28. *See also* Schei et al., commentary on section 28-1, point 1.3.

accordance with the Nordic tradition in arbitration cases.[29] We agree that this may be a counterargument, but as the conditions are worded and interpreted, there is, in our view, little risk that the possibility of securing evidence will allow for a form of discovery. The requirement for securing of evidence pursuant to section 28-2 is that it is 'particularly important' to gain access to the evidence before proceedings are instigated. Furthermore, it is specified in the preparatory works that this indicates a strict standard.[30]

[10] Conclusion

As apparent from the discussion above, the wording of the NAA is not entirely clear. There is no decisive case law and little guidance in the preparatory works.

With such a lack of clarity in authoritative legal sources, decisive weight should in our opinion be given to the substantive considerations that undeniably support the view that it should be possible to secure evidence under Chapter 28 of the NDA also when the parties have agreed to arbitration.

[C] The Swedish Perspective

[1] Chapter 41 of the SCJP

Similar to the discussion above regarding Norwegian law, the natural starting point for the analysis under Swedish law is Chapter 41 in the SCJP.

As mentioned, section 41-1 provides that a person may apply to have evidence preserved by a court if there is a risk that the evidence may be lost or difficult to obtain and the evidence concerns a circumstance of importance to a person's legal rights. The provision requires that the dispute is not already subject to a trial. An arbitration is in this regard considered equivalent to trial, i.e., a court shall reject a party's application if the issue is subject to an initiated arbitration.[31]

The wording of the provision does not stipulate any requirement that the evidence is to be used in future court proceedings. The preparatory works state that Chapter 41 primarily relates to evidence that may be submitted to litigation before general courts; however, this distinction is not made in relation to arbitration but to proceedings before administrative courts.[32]

From a systematic perspective, one may question if the fact that the provisions of Chapter 41 are found in the SCJP instead of the SAA means that the provisions do not

29. Tørum 2018, p. 122, footnote 47.
30. NOU 2001:32 p. 988 and Ot. prp. no. 51 (2004-2005) p. 470.
31. The alternative would allow a party of an arbitration to circumvent the requirement that parties must otherwise obtain the consent of the arbitral tribunal in order for evidence to be examined in court, *see* Justitieombudsmannens Ämbetsberättelse 1953, pp. 61-62.
32. NJA II 1943 p. 516. In the motives, the legislator indicated that the provisions of Chapter 41 may be applied in cases where special provisions of administrative law permit preservation of evidence.

cover disputes which are to be decided through arbitration. The preparatory works do not indicate that the legislator made any association between Chapter 41 and arbitration. This could imply that granting the preservation of evidence would be in conflict with the legislator's intention. However, in light of the fact that the statutory text does not require the relevant right to be tried in general court, the argument is rather weak and should in our opinion not be decisive. Such an interpretation would in fact suggest that an additional requirement is read into section 41-1, namely that the evidence must be used before a general court.

Consequently, it is reasonable to conclude that section 41-1 of the SCJP does not constitute any obstacle to securing evidence for a possible arbitration procedure. In the following, we will discuss whether other provisions or considerations may entail a different conclusion.

[2] Chapter 10, Section 17a of the SCJP and Section 4 of the SAA

Chapter 10, section 17a of the SCJP, regulating the jurisdiction of the courts, states that the SAA contains special provisions on barring proceedings in courts. According to section 4 of the SAA, a court may not, against a party's objection, try an issue which is to be examined by arbitrators. The provision contains an exemption for interim measures, which may be decided by the courts without prejudice to the arbitration agreement. This applies irrespective of whether the arbitration is ongoing or has not yet been instigated:

> A court may not, over an objection of a party, rule on an issue which, pursuant to an arbitration agreement, shall be decided by arbitrators.
>
> […] During the pendency of a dispute before arbitrators or prior thereto, a court may, irrespective of the arbitration agreement, issue such decisions in respect of interim measures as the court has jurisdiction to issue.[33]

Thus, section 10-17a of the SCJP and section 4 of the SAA prevents a court from examining issues which are to be examined by an arbitral tribunal.

As will be discussed in §14.03[C][3] below, an arbitral tribunal has exclusive jurisdiction to decide whether evidence should be examined before a court when an arbitration has been initiated. There is no provision in the SAA that allows a tribunal to decide on the preservation of evidence prior to a dispute. This follows from the fact that the tribunal does not exist until the arbitration has been initiated. Consequently, the wording of section 4 of the SAA and section 10-17a of the SCJP does not prevent courts from preserving evidence.

It should be noted that the courts' jurisdiction to decide on interim measures, before and during the arbitration, is expressed in section 4 of the SAA. This could support the argument that there is no legal basis for deciding on preserving of evidence prior to arbitration, as there is no similar exemption. However, there is no clear support in the preparatory works that this was a deliberate position of the legislator. Another

33. Section 4 of the SAA.

interpretation is that the regulation of interim measures is an issue that is often raised in proceedings. It was therefore warranted for the legislator to include an explicit regulation of the issue. As stated in §14.03[B][2] above regarding the NAA, the existence of the stipulation in the Model Law is presumably one of the reasons for including such a provision in the SAA. The Swedish preparatory works refer in particular to the existence of a similar provision in the Model Law. Accordingly, the argument that the omission of provisions concerning the preserving of evidence was a deliberate position from the legislator is weak.[34]

[3] Sections 25 and 26 of the SAA

According to section 25 of the SAA, it is the arbitral tribunal that decides whether to admit or dismiss evidence:

> The parties shall supply the evidence. However, the arbitrators may appoint experts, unless both parties are opposed thereto.
>
> The arbitrators may refuse to admit evidence presented if it is manifestly irrelevant to the dispute or if such refusal is justified having regard to the time at which the evidence is invoked.
>
> [...]

Section 26 of the SAA states that evidence may be admitted before a court provided that the arbitral tribunal has given its permission:

> If a party wishes a witness or an expert to testify under oath, or a party to be examined under truth affirmation, the party may, after obtaining the consent of the arbitrators, submit an application to such effect to the District Court. The aforementioned shall apply if a party wishes that a party or other person be ordered to produce as evidence a document or an object. If the arbitrators consider that the measure is justified having regard to the evidence in the case, they shall approve the request. If the measure may lawfully be taken, the District Court shall grant the application.

As indicated in the wording, the court shall reject the request if a party to an arbitration files a request for the taking of evidence without the permission of the tribunal. The court shall not make any assessment of its own of the admissibility of the evidence.[35]

Consequently, the provisions give arbitral tribunals exclusive authority to decide on evidence, including the taking of evidence in court, at least during the arbitration proceedings. The provisions do not make any references to the preservation of evidence under Chapter 41 of the SCJP. However, allowing the preservation of evidence with the assistance of a court would constitute a deviation from the principle that a tribunal has exclusive authority to decide on evidence. Legal scholars have

34. Government bill 1998/99:35 pp. 71 ff.
35. Government bill 1998/99:35, p. 226 f.

therefore argued that the provisions prevent the preservation of evidence as it could constitute a circumvention of the arbitral tribunal's exclusive jurisdiction.[36]

However, it should be noted that section 25 of the SAA provides that it is the parties who are responsible for the evidence and that the arbitral tribunal's ability to dismiss evidence is limited to situations where the evidence is clearly irrelevant or where it is justified from a time perspective. This is further emphasized in the preparatory works:

> According to the committee, the parties' right to control the evidence should not extend so far that the arbitrators are forced to take up evidence that is irrelevant to the dispute. The committee further states that there also must exist a restriction against a party – perhaps for the purpose of procrastination – invoking new evidence at a late stage of the proceedings. The Government shares the Committee's assessment and proposes that a provision with this effect is included in the Act.[37]

The exclusive jurisdiction of the arbitral tribunal to decide on evidence in arbitration is thus only warranted for the purpose of ensuring that the arbitration proceeds efficiently and expeditiously. The implication of this is discussed in §14.03[C][7] below.

[4] Preparatory Works

The preparatory works of the SCJP and the SAA do not address the issue of securing evidence for future arbitration proceedings. There is no indication that the legislator has considered the issue. This calls for some caution when it comes to drawing far-reaching conclusions from the exact wording of the statutory text. For example, it may be questionable to interpret sections 4, 25 and 26 of the SAA *e contrario* to exclude the preservation of evidence for a future arbitration.

[5] Case Law

The question of whether it is possible to secure evidence prior to an arbitration has not been settled in Swedish case law. However, there are two judgments from the Swedish Supreme Court concerning the Former Swedish Arbitration Act (FSAA) which contain relevant statements.[38]

In the Swedish Supreme Court case no. NJA 1971 p. 521, a constructor and an association had agreed to build a terraced house for a buyer. Under the agreement, certain costs for the house were to correspond to the association's own cost price. The obligations of the association were later transferred to a housing association. The

36. *See* section §14.03[C][6] below.
37. Government bill 1998/99:35, p. 114.
38. The FSAA also required the approval of the arbitral tribunal in order for evidence to be admitted in court, *see* section 15 of the FSAA. The provision required that the examination of evidence was necessary. An arbitration agreement also barred court proceedings under the previous act, *see* Hassler, *Skiljeförfarande,* p. 20 f, and Lindskog, *Skiljeförfarande,* 3rd ed., p. 333.

agreement contained an arbitration clause. After some time, the buyer questioned whether the costs corresponded to the association's cost price and therefore applied to the district court to order the housing association to present certain documentation. The housing association contested the application, partly on the grounds that there was no danger of the documentation being destroyed. The district court granted the buyer's request, an assessment which the court of appeal upheld after the housing association had appealed the decision.

Supreme Court reversed the lower courts' decisions and rejected the application as it found that the buyer had not substantiated any risk concerning the destruction or deterioration of the documents.

What is interesting in this decision is that none of the three courts expressed any hesitation as to whether the arbitration clause could affect the right to preserve evidence. The Supreme Court's reasoning also shows that the court took note of the existence of the arbitration agreement:

> Nor has any particular circumstance been presented of such a nature which entail the existence of a risk that the documents in question will be destroyed or lost; or that [the Buyer's] ability to produce them as evidence in court proceedings or arbitration will otherwise be denied or impaired.[39]

In light of the fact that the Supreme Court rejected the request, it is unclear if the Supreme Court's decision includes a position on whether the arbitration clause could have constituted an obstacle to the preservation of evidence. The Supreme Court's reference to a possible future court proceeding, despite the existence of the arbitration clause, may be interpreted to mean that the court chose not to assess whether the arbitration clause constituted an obstacle per se. However, the Supreme Court's statement is a stronger argument in support of permitting the preservation of evidence with regards to a future arbitration, rather than the opposite, as the court referred to it as a possible and perhaps relevant proceeding in the future.

In the Supreme Court case no. NJA 1994 p. 683, a company requested the district court to allow the examination of two of its employees. The company had received indications that it would be evaluated for a tax surcharge. The employees were to be questioned about their contacts with the tax authorities to preserve their statements for future administrative proceedings. Thus, the case did not concern a future arbitration but the question of whether Chapter 41 of the SCJP could be applied for future administrative proceedings. The Supreme Court concluded that this was not possible, but it granted the application as the company had amended its request before the Supreme Court by including that the company was also considering a civil action for damages due to the issue. The Supreme Court stated that:

> It is true that the wording of chapter 41, section 1 of the [SCJP] cannot be regarded as precluding the preservation of evidence in order to safeguard the individual's rights in a context other than a trial before a general court. However, as previously indicated, such a broad application of the law is not consistent with the structure of [SCJP] and the general formulation of the rules of evidence in the [SCJP]. In

39. NJA 1971 p. 521.

> view of the fact that the administrative courts are to be regarded as equal to the general courts, the outset should also be that the provisions regulating the administrative courts are exhaustive within their field and are not supplemented by the provisions of the [SCJP] [...], unless otherwise stated.[40]

The reasoning of the Supreme Court corresponds to the considerations presented above in §14.03[C][1], i.e., that a systematic approach may perhaps prevent the application of Chapter 41 with regard to arbitration. It should, however, be noted that there is reason to distinguish arbitration proceedings from administrative proceedings, as arbitration is a substitute for litigation in general court.[41] Accordingly, the Supreme Court's decision does not address the relevant question for the article as it targets administrative proceedings instead of civil proceedings. One of the justices, who disagreed with the reasoning of the judgment, commented on the issue of securing evidence prior to arbitration.

> The prerequisite stated in chapter 41, section 1 of [SCJP] for the taking of evidence for future security that the evidence must relate to a circumstance that is of significance to someone's right does not include any requirement that the legal claim must necessarily be relevant in a future trial before a general court. It is also clear from the preparatory works to the provisions of the chapter that these are indeed primarily aimed at evidence that may be invoked in such a trial, but that they are also intended to be mainly applicable when the taking of evidence is required, for example, for an administrative procedure (NJA II 1943, p. 516). According to the generally accepted opinion, the taking of evidence for future security is also considered to be possible in general civil court with regard to circumstances covered by an arbitration agreement, provided that arbitration proceedings have not been initiated (*see, inter alia*, Lars Heuman in Juridisk Tidskrift 1989/90, p. 234).[42]

As evident from the quote, the dissenting judge expressed a positive view on the issue that there is an accepted opinion that evidence may be secured prior to an arbitration. His position is not contradicted by the majority's argumentation but is based, among other things, on statements from Professor Heuman. Heuman's statements are further discussed in the section below.

Consequently, there are no direct statements from case law that close the door to allowing the securing of evidence prior to arbitration. On the contrary, it is more logical to interpret the judgments as the door has been left open, even if the statements have been made *obiter dictum* and in a dissenting opinion. That being said, the reasoning of the majority in NJA 1994 p. 683 could be invoked as a reason why the systematic of the SCJP speaks against such an application. However, arbitration proceedings and civil cases in general courts generally have greater similarities with each other compared to administrative proceedings, especially when it comes to evidence. This speaks in

40. NJA 1994 p. 683.
41. It may be noted that the legislator expressed an ambition that the SAA should be independent of the rules of the SCJP, *see* government bill 1998/99:35, p. 46. However, this has not prevented the Supreme Court from often being inspired by the provisions of the SCJP if the SAA has not provided an answer to a question.
42. Justice Munck's dissenting opinion in the Swedish Supreme Court Case No. NJA 1994 p. 683.

favour of applying Chapter 41 prior to an arbitration, even if it is not permissible with regard to administrative proceedings.

[6] Jurisprudence

The topic of this article has not received much attention in Swedish jurisprudence. However, there are mainly three publications that deal with the issue.

In the article referred to by the dissenting justice in NJA 1994 p. 683, Heuman stated that a party may request the preservation of evidence before the court, provided that the arbitration has not yet been initiated. If the proceedings have commenced, the court shall reject the request. Heuman refers partly to the fact that an ongoing arbitration proceeding prevents the taking of evidence under section 41-1 of the SCJP and partly to the fact that the taking of evidence during the arbitration circumvents the FSAA requirement for the arbitral tribunal's permission to examine the evidence before the court.[43]

Later, Heuman appears to have changed his position. In a subsequent publication, written after the entry into force of the SAA, Heuman states that the provisions on the preservation of evidence are not applicable prior to arbitration proceedings because a party would then be able to circumvent the requirement of the arbitrators' permission for the taking of evidence in court.[44] Heuman does not elaborate on his apparent change of position. Even if the statement itself is clear, the lack of reasoning raises the question of whether Heuman actually meant to refer to the situation where a party attempts to conduct an evidentiary hearing pursuant to Chapter 41 SCJP during the course of an arbitration. Indeed, Heuman refers to a legal source which refers exactly to that situation. This would then be in line with his position in the previous publication.[45]

Lindskog questions Heuman's position that the arbitration agreement would prevent the securing of evidence:

> It has been argued that an arbitration agreement is an obstacle for preservation of evidence. However, it is doubtful whether this is the case.
>
> The fact that a district court should not approve an application for securing of evidence when an arbitration proceeding is in progress follows from the fact that it would constitute a circumvention of the provisions on the taking of evidence before a court set out in section 25. However, this argument has less bearing in the case of the taking of evidence for preservation in accordance with the provisions of chapter 41 of the [SCJP]. It is doubtful whether the mere interest in taking evidence is sufficient to allow a party the right to initiate arbitration proceedings. The requirement of the arbitral tribunal's authorisation in section 25 can hardly justifiably be invoked as a reason against a party's right to apply directly to a court;

43. Heuman, *Editionsföreläggande i civilprocesser och arbetstvister Del II,* Juridisk Tidskrift 1989/90, p. 233. In the article Heuman refers to section 15 of the FSAA, corresponding to section 26 of the SAA.
44. Heuman, *Skiljemannarätt,* p. 349.
45. Heuman only reference is to Justitieombudsmannens Ämbetsberättelse 1953, p. 61, which concern the situation where an arbitration is already initiated.

> the purpose of this requirement should be limited to enabling an ongoing proceeding to be enforced efficiently and with legal certainty. The conclusion therefore seems to be that the arbitration agreement does not constitute an obstacle for taking of evidence by way of preservation.[46]

[7] Considerations Based on the Objects and Interests of the Legislation

As stated in the introduction and in the discussion of §14.03[B][8] above on Norwegian law, there are significant interests that support the conclusion to allow parties to secure evidence prior to arbitration.

Arguably, the procedure in arbitration calls for a greater interest in collecting evidence prior to the initiation of proceedings compared to court cases, as arbitration proceedings are characterized by the parties agreeing on a timetable early on in the proceedings and the fact that the procedure is often more front-loaded than in court cases.

Even though the SCJP requires that there is a risk that the evidence will be destroyed or impaired, the preparatory works state that the securing of evidence may help a party determine its evidentiary position before any legal steps are taken. Thereby, a party may avoid proceedings where the evidence to support its claim is insufficient.[47]

Given that there is no clear answer in the wording of the law, the preparatory works, or case law and that the legal scholars have not managed to close the door on the securing of evidence prior to arbitration, the assessment must be determined by balancing of purposes of the alternatives.

The main reason for not allowing the securing of evidence is that the arbitral tribunal shall have exclusive jurisdiction to rule on the admissibility of evidence. This jurisdiction is based on the tribunal's interest in conducting the arbitration in an expeditious and practical manner.[48] These interests are in fact not affected by allowing the preservation of evidence prior to the commencement of arbitration proceedings. As the arbitration has not been initiated, the taking of evidence cannot affect the conduct of the arbitration. Should the evidence turn out to be irrelevant once the arbitration has commenced, the arbitral tribunal may still reject it pursuant to section 25 of the SAA. Arguably, securing evidence prior to the arbitration could mean that the arbitration proceeds more efficiently as some evidence is already secured prior to the proceedings.

It could be argued that the commencement of an evidentiary hearing may disturb the opposing party by requiring the opposing party to present evidence and shift focus from preparing the arbitration. This is, however, a consideration of lesser concern as it is still required that the applicant must demonstrate an actual risk of destruction or

46. Lindskog, *Skiljeförfarande*, 3rd ed., p. 352.
47. NJA II 1943 p. 515. It may be noted that the rule should not be applied to enable searching for evidence. The main purpose of the rule is to allow a party to protect evidence that the party knows exists.
48. *See* §14.03[C][2]-§14.03[C][3].

deterioration of the evidence.[49] The fact that the applicant must also reimburse the opposing party for its costs pursuant to Chapter 41-4 of the SCJP may also act as a deterrent against petitions which lack sufficient merit. Lastly, it is not possible to hold examinations of the counterparty to the arbitration, which is justified precisely to avoid abuse.[50]

In our opinion, on the whole, the balance of purposes in allowing the preservation of evidence in arbitration outweighs the negative aspects.

[D] Conclusion

Similar to the situation under the Norwegian law, the legal authorities fail to provide an unambiguous answer to the question raised in this chapter. However, none of the legal sources appear to prohibit the securing of evidence prior to an arbitration. If anything, we would argue that the legal sources lean towards allowing it. We would also contend that this is further supported by the fact that the considerations which form the basis of the provision in SCJP section 41-1 strongly support this conclusion.

§14.04 SUMMARY AND CONCLUSION

The provisions in the respective acts in Sweden and Norway are very similar, not least the arbitration acts, which are both inspired by the Model Law. However, even though the legislation is comparable, the approach to the issue concerning the securing of evidence is quite dissimilar, and emphasis is placed on different arguments.

For instance, in Sweden, the strongest argument against allowing the securing of evidence prior to an arbitration case being commenced is, at least in jurisprudence, the arbitral tribunal's exclusive authority to decide on the evidence pursuant to the SAA sections 25 and 26. The NAA contains corresponding provisions, but these have not been accentuated by any courts or legal scholars when examining the issue of preserving evidence.

In our view, the different approach taken in each country demonstrates the value of a comparative analysis. It displays that the quality of the assessment of a legal issue can be improved by examining how the question has been analyzed in another country with comparable rules.

The conclusion with regard to the issue of securing of evidence is the same both in Norway and Sweden. Despite some uncertainty in the wording in each country's legislation, the acts in both countries should be interpreted to allow for evidence to be secured prior to the commencement of arbitration proceedings.

The lack of clarity is in our view unnecessary. There appears to be a broad consensus that an opportunity to secure evidence is just as important in arbitration proceedings as in cases before the ordinary courts. This is strongly supported by

49. In addition to the wording of the legal provisions, this was emphasised by the Supreme Court in NJA 1971 p. 521.
50. *See* Fitger et al., *Rättegångsbalken* (12 December 2022, JUNO), commentary to Chapter 41 §1.

substantive considerations and, in Sweden, also by the statements from the Supreme Court. In our opinion, both the SAA and NAA could benefit from being amended by including a provision expressly stating that the courts have the power to secure evidence prior to the commencement of arbitration proceedings in the same manner as section 8 of the NAA and section 4 of the SAA states that the courts may order interim measures.[51]

Such clarification may help to ensure that evidence is preserved where this is essential. From a broader perspective, this may contribute to the facts in arbitration cases being clearer, thereby ensuring more materially correct arbitral awards.

51. Legislation could also solve practical issues regarding preserving of evidence. For example, in Sweden an examination of a witness is generally recorded by video. Preferably, the recording could be used as evidence before the tribunal. However, the general rule is that a video recording may not be handed out by the court without the witness consent (43-4 of the Swedish Public Access to Information and Secrecy Act). A party has an unconditional right to see the recording, for example at the court, but not an unconditional right to receive a copy of the recoding (Swedish Supreme Court case No. NJA 2008 p. 883), and a party may always receive copy of a sound recording. It is probable that a party may receive a video recording by referring to overriding provisions in the Information and Secrecy Act, such as section 10-2, but it would be favourable if the right was clearly acknowledged by the legislator.