

Kompetenz-Kompetenz in Swedish Arbitration Law is being recast, how should it be done?

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This article analyses the application in Swedish arbitration law of the doctrine of assertion in connection with jurisdictional decisions by arbitral tribunals and courts in Sweden, considers the doctrine of connection which is applied in parallel with the doctrine of assertion and touches upon the Governmental Inquiry overseeing the Swedish Arbitration Act. In addition, it considers the suggestion to codify the doctrine of assertion in the Arbitration Act, explains why this, in the author's opinion, would not be purposeful and why Sweden ought instead to adopt the principles for making jurisdictional decisions which are contained within the UNCITRAL Rules of Arbitration, the Model Law and the New York Convention.

1 Introduction

In contrast to its Scandinavian neighbours Denmark and Norway, Sweden is not recognized as a Model Law² country. Nevertheless, the main principles underlying the Model Law are also reflected in the Swedish Arbitration Act (the "Arbitration Act") which came into effect in 1999. As a consequence thereof, the doctrine of *Kompetenz-Kompetenz* has been enshrined in the Arbitration Act. Thus, *section 2, first paragraph, first sentence* of the Arbitration Act provides that the arbitrators may rule on their own jurisdiction to decide the dispute. As in other developed arbitration jurisdictions, this means that the arbitral tribunal by operation of law is entrusted with the authority to rule on the existence, validity and scope of the arbitration agreement and thereby to essentially rule on its own jurisdiction to decide the issues in dispute.

The arbitrators' *Kompetenz-Kompetenz* under Swedish law is not limited merely to determining the validity or scope of the arbitration agreement and its application to the instant dispute. The arbitrators also possess authority to recognise or refuse to recognise their jurisdiction on grounds other than those related to the arbitration agree-

¹ This article has been developed from an earlier contribution by the author, see SvJT 2013 s. 730, Påståendedoktrin eller anknytningsdoktrin, efter vilka principer ska en domstol eller skiljenämnd ta ställning till verkan av en skiljeklausul i ljuset av nyare rättspraxis? (Eng: The Doctrine of Assertion or the Doctrine of Connection; How is an Arbitration Tribunal or a Court of Law to Determine Jurisdiction in Light of Recent Case Law?).

² The UNCITRAL Model Law on International Commercial Arbitration (the "Model Law").

ment. For example, the matter in dispute may be non-arbitrable. The arbitrators may, e.g. also consider an objection that a successor to a contract has only assumed certain rights or obligations under the contract without becoming a party to the arbitration agreement. The arbitrators also have authority to decide on the existence of impediments to the arbitration and if the tribunal has been validly constituted and has thereby achieved competence. This latter determination may involve issues such as whether the arbitration has been initiated in the correct manner by a party, whether the arbitrators are qualified and are impartial and independent or if a correct number of arbitrators have been appointed.³

The principle of *Kompetenz-Kompetenz* is intrinsically linked to the principle of *separability*. This latter principle is based on the notion that the arbitration agreement forms a separate contract that is distinct from the main contract. The underlying rationale for this is that since the arbitration agreement contains procedural rules, the agreement is analytically to be distinguished from the main agreement, which basically governs substantive issues. Accordingly, the arbitrators' assessment of their jurisdiction can be based on the assumption that the substantive part of the main agreement is invalid or has ceased to apply between the parties, whilst the arbitration agreement is nevertheless deemed binding. Thus the principle of separability enhances the effectiveness of the doctrine of *Kompetenz-Kompetenz*. Moreover, the principle of separability has been codified in the Arbitration Act as *section 3* provides that an arbitration clause, when included in the main agreement, shall be deemed to constitute a separate agreement.⁴

The two doctrines have been widely recognized as fundamental tenets of international arbitration law due to the advantages conferred thereby. Through the application of the principles, the parties can avoid referring jurisdictional matters to state courts and thus avoid the concomitant costs and delays of court proceedings regarding jurisdictional matters. Moreover, the parties are not provided with the opportunity to obstruct an arbitration simply by challenging the validity of the arbitration agreement and such validity will be decided independently from the validity of the main contract in which the arbitration clause will usually be included. In fact, one has to conclude that international arbitration would not have grown into the preferred dispute resolution mechanism in international commerce and business without the existence of these principles.

Of course, the arbitrators must not determine their own jurisdiction to resolve the dispute irrespective of the claims of the parties.

³ See the judgment from the Supreme Court in NJA 2016 s. 264.

⁴ In addition, according to earlier Swedish case law, the validity of the arbitration agreement has not been considered to be connected to the validity of the main agreement, see NJA 1936 s. 521 and NJA 1976 s. 125.

However, the arbitrators are obliged, by a *sua sponte* examination, to try questions which may result in the invalidity of the arbitral award pursuant to *section 33* of the Arbitration Act, i.e. whether the dispute is arbitrable or whether an arbitral award might violate public policy. This should also apply to flaws as a consequence of which the award cannot be deemed to constitute an award.

2 Court review of arbitral tribunals' jurisdiction

The statutory authority of the arbitrators to determine their own jurisdiction does not however prevent a court from examining the arbitrators' jurisdiction upon request by a party pursuant to the existing Arbitration Act. This follows from the *section 2, first paragraph, second sentence* of the Arbitration Act. Pursuant to this provision, a party has a possibility to turn to a court in order to have the arbitrators' jurisdiction examined both when arbitral proceedings have already commenced and also where no arbitration is pending. The issue referred to the court for determination may be whether a party is bound at all by an arbitration agreement or may relate to the agreement's applicability to a particular dispute or whether an impediment exists to the arbitration. A declaratory judgment by the court that has become final in the matter is binding on the arbitrators and also on a court that is subsequently requested, for instance after the award is contested in a challenge or invalidity proceeding, to consider the jurisdiction of the arbitrators.⁵

If parties in international arbitrations have agreed that the arbitral proceedings shall take place in Sweden, then the Arbitration Act is applicable.⁶ From this it follows, pursuant to the Supreme Court's judgment in NJA 2010 p. 508, that there is a sufficient connection between the dispute and the parties and the Swedish legal system. Swedish courts are thereby competent to rule on, *inter alia*, the arbitrators' jurisdiction in matters where the place of arbitration is Sweden.⁷

As referred to above, in arbitrations in Sweden the parties have a more or less unfettered right to bring a positive or negative declaratory claim before a district court concerning a declaratory judgment regarding the jurisdiction of the arbitrators. In this regard Swedish arbi-

⁵ See the Supreme Court in cases NJA 2010 s. 508 and NJA 2016 s. 264. See also, for instance, the judgment by Svea Court of Appeal dated 5 September 2013 in the case T 10060-10 regarding challenge of an arbitration award. The District Court had determined in a default judgment, which had gained legal force, that the arbitration agreement between the parties did not confer jurisdiction on the arbitral tribunal to settle the dispute. As a result, the Court of Appeal held that the award was not covered by a valid arbitration agreement and set aside the award under *Section 34(1)* of the Arbitration Act.

⁶ *Section 46* of the Arbitration Act.

⁷ The Supreme Court referred to Shaughnessy, *The Right of the Parties to Determine the Place of an International Commercial Arbitration*, *Stockholm International Arbitration Review* 2005:2, p. 264 *et seq.* and Söderlund in the same journal, p. 275 *et seq.* (concerning a court of appeal decision in RH 2005:1 with the opposite outcome).

tration law differs from arbitration laws in a number of countries.⁸ The requirements for a declaratory action regarding the jurisdiction of the arbitrators are those generally applied with respect to a declaratory action in Sweden, and provided for by Chapter 13 Section 2(1) of the Swedish Code of Judicial Procedure.⁹ Consequently, the test applied is whether any uncertainty exists as to the legal relationship in question, and the uncertainty exposes the claimant to a detriment. The provision in section 2(1) is non-mandatory. This postulates a requirement that an action for a declaratory judgment with regard to the circumstances can be deemed to be appropriate for the action to be admissible.¹⁰

In NJA 2010 s. 508, the Supreme Court held that as a rule, uncertainty regarding the legal relationship is demonstrated already by the fact that the parties disagree on the scope of the arbitrators' jurisdiction. If the jurisdiction issue is not resolved before the arbitral proceedings have been concluded and the costs have accumulated, this may prove to be detrimental. Therefore, according to the Supreme Court, it could be argued that an action concerning lack of jurisdiction in a particular dispute under Section 2 of the Arbitration Act is appropriate and admissible if the case cannot be expected to be finally adjudicated at a time which, for instance, will result in significant cost savings in the arbitral proceedings. The Supreme Court concluded on the basis hereof that a party should be entitled to initiate an action under Section 2 of the Arbitration Act concerning the arbitrators' jurisdiction prior to the issuance of an arbitral award, at least in

⁸ Currently, German law only allows declaratory actions with full review of the jurisdiction before the tribunal is constituted. English law allows direct control, but only in two exceptional situations. A party to arbitral proceedings may bring a declaratory action if he/she obtains the consent of the other parties or the arbitrators. Furthermore, a natural or legal person who is alleged to be a party to an arbitral proceeding but is not participating in the proceedings has the right to have certain basic questions in relation to jurisdiction examined by the court (Poudret & Besson, *Comparative Law of International Arbitration*, 2007, p. 411 et seq). The Model Law, however, assumes that direct control is not exercised (Poudret & Besson, *op. cit.* p. 413). Articles 8 and 16 of the Model Law govern the competence of the arbitral tribunal and the salient court to rule on jurisdictional issues. Article 8(1) provides that an arbitration agreement constitutes a bar to judicial proceedings and that the court, on request by a party, shall refer the parties to arbitration. Article 16(1) gives the tribunal the right to rule on its own jurisdiction according to the principle of *Kompetenz-Kompetenz*. If an arbitral tribunal rules as a preliminary issue that it has jurisdiction, any party may, within thirty days after having received notice of the ruling, apply to the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

⁹ The provisions read as follows: "An action for a declaration of whether or not a certain legal relationship exists may be entertained on the merits if an uncertainty exists as to the legal relationship, and the uncertainty exposes the plaintiff to a detriment."

¹⁰ In NJA 2013 s. 209 the Supreme Court explained that this applies regardless of whether the action is for a negative or affirmative declaratory judgment, albeit the test to be applied may have to be made with the application of differing criteria taking into account the kind of action sought.

situations where the award may not reasonably be expected in the near future.

The arbitrators may continue the arbitral proceedings pending the court's decision. The arbitrators are not impeded by a declaratory action to suspend its determination of its jurisdiction, although they are allowed to render such decision if they deem this to be appropriate.¹¹ However, if the arbitrators render a decision that they have jurisdiction then such a decision during the proceedings is not binding upon the arbitrators or the parties. The arbitrators may subsequently change their determination on jurisdiction if new facts come to light and they find it appropriate. Unless the parties have entered into a separate arbitration agreement to refer the issue of jurisdiction to the arbitrators, the arbitrators have no possibility to affirm their jurisdiction through a separate award in accordance with *section 29, first paragraph, first sentence* of the Arbitration Act. This is because only the determination of the substantive matter in dispute or other decision which terminates the proceedings pursuant to the Arbitration Act is recognized as an arbitral award under the Act.

3 Governmental Inquiry overseeing the arbitration act

As referred to initially, the Arbitration Act came into effect in 1999. In 2014 it was deemed appropriate to establish a Governmental Inquiry to oversee the Act and the Inquiry submitted its proposals in 2015 in a Report, SOU 2015:37 (the "Inquiry"). The Inquiry concluded that the general perception was that the Act had, on the whole, been effective. Nonetheless, under the Inquiry's terms of reference it undertook a closer review of certain issues. The Inquiry addressed a number of problems identified by, among others, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) as well as active arbitrators and in the legal literature.

As regards the arbitrators' jurisdiction, the Inquiry considered it to be quite self-evident that a party must have the opportunity to bring a declaratory claim in court with respect to the validity or applicability of an arbitral agreement before arbitral proceedings have been convened.

However, once arbitral proceedings have been commenced, serious concerns could be raised about this possibility. For example, if the district court proceedings are not completed when an award is rendered and subsequently contested there can be dual proceedings ongoing with respect to the same matter. According to the Inquiry, foreign arbitrators and representatives seemed to consider this quite anomalous. In addition, such proceedings tend to be complicated and time-consuming. To remedy these problems in circumstances not involving consumers, the Inquiry proposed to limit the possibility to

¹¹ Section 2(1)(1) provides that the "arbitrators may continue the arbitral proceedings pending the determination of the court".

bring declaratory claims by means of a solution whereby, if the arbitrators have ruled during proceedings that they have jurisdiction to decide the dispute, any party dissatisfied with this ruling may request an examination by a court of appeal, specifically the Svea Court of Appeal in Stockholm. Such a request should, in similarity with the Model Law, be brought within thirty days of receiving notice of the arbitrators' ruling.

The Inquiry noted that according to the existing law, the arbitrators may continue the arbitral proceedings and even render an award pending a decision of the court of appeal. The Inquiry did not propose any changes in this respect. The Inquiry also suggested that the same limitations should apply for the possibility to appeal the decision of the court of appeal to the Supreme Court as apply for applications for setting aside the award.

Not much can be said against aligning Swedish arbitration law in this respect with arbitration law in other developed jurisdictions and with the Model Law. It is expected that these proposals by the Inquiry will eventually lead to corresponding amendments in the Arbitration Act.

As has been stated above, an arbitral tribunal cannot affirm its jurisdiction through a separate affirmative award on jurisdiction that can serve as a basis for a challenge. If, on the other hand, the tribunal finds that it *lacks* jurisdiction over the dispute, the arbitration is to be terminated by the tribunal rendering an arbitral award recording the termination. The Inquiry noted that *section 27* of the Arbitration Act establishes that where the arbitrators terminate the arbitral proceedings without deciding the issues referred to arbitration, such decision shall also take place through an arbitral award. This means that decisions by the tribunal to dismiss or reject a matter are to be designated as awards. The Inquiry noted that the fact that dismissals are to be designated as awards repeatedly causes problems with practical application. According to the Inquiry, Sweden would appear to be the only country in the world that calls a dismissal an award. After careful consideration, the Inquiry decided not to propose any change in this respect. However, the Inquiry observed that according to the legislative history of the current regulations it was intended that if it follows from arbitration rules of procedure or some other agreement that a dismissal is to be designated as a decision then it is possible to do so and the decision is thus to be treated as an award when applying the legislation. The Inquiry found that the system implied thereby should be expressed in the Arbitration Act.

In the event that an award, or a decision as stated above, denying jurisdiction is not assailed then the decision will become final and binding. Decisions whereby the arbitral tribunal finds that it lacks jurisdiction may however be amended by the court of appeal, in whole or in part, upon application of a party pursuant to *section 36* of the

Arbitration Act. This implies that negative jurisdictional findings by the tribunal are subject to appeal. The Inquiry did not propose any changes in this respect. Thus the existing law will continue to govern such actions which must be brought within a period of three months from the date upon which the party received the award or, as the case may be, the decision. The court may thereupon review not only the procedural issue, which has been answered through the decision to dismiss, but also the handling of the issue. Where the arbitrators have declared that they lack jurisdiction due to, for example, the lack of any valid or applicable arbitration agreement, the court's setting aside of the award will amount to a determination with binding effect that an arbitration agreement exists which is valid and applicable to the dispute. The purpose of this regulation in the Arbitration Act is to create a greater degree of assurance that a party will not be deprived of his right to arbitrate by an incorrect decision to terminate the proceedings. It is not altogether clear whether an appeal of any negative findings on jurisdiction were intended under the Model Law. However, there would appear to be cogent arguments that can be advanced in favour of a right to assail negative jurisdictional finding by an arbitral tribunal and such actions are permitted in a number of other non-Model Law jurisdictions such as Switzerland, Belgium, France, England and Wales, the United States and Italy.¹²

The Inquiry did not address the issue of how far the court should go in its examination of the jurisdiction of the arbitrators. Internationally, there is no consensus on whether the court should perform what has been called a *full review*¹³ of the validity and applicability of the arbitration agreement or if the court should limit its examination to a *prima facie review*.¹⁴

¹² Born, *International Commercial Arbitration*, sec. ed. 2014, p. 1101 et seq., Fohlin, *A Case for a Right to Appeal Negative Jurisdictional Findings In International Arbitration Under the Model Law*, *Asian Dispute Review* 2008, p. 113 et seq, and Kröll, *Recourse Against Negative Decisions on Jurisdiction*, *Arbitration International*, Vol. 20 No. 1, 2004, p. 55 et seq.

¹³ Full review has also been called full judicial review in legal literature.

¹⁴ Born, has in an article, 'Irish High Court on Full Versus Prima facie Judicial Consideration of Whether an Arbitration Agreement Exists', *Kluwer Arbitration Blog* from 2010-12-13, summarized the problem as regard to an Irish ruling from 11 November 2010: "If a national court is called upon, in the context of an application to refer parties to arbitration, to determine whether a valid arbitration agreement exists, how probing should the court's examination of the existence or validity of the putative agreement be? Judicial authorities in countries that have adopted the UNCITRAL Model Law on International Commercial Arbitration have split on the question of what standard of judicial review to apply in such cases. Applying Article 8 of the Model Law, some courts have adopted a standard of full judicial review: in deciding whether or not to refer parties to arbitration or to stay national court proceedings, these courts have considered de novo whether or not a valid arbitration agreement exists, rendering a final determination on this issue. In contrast, applying the same provision, other courts have adopted a prima facie review standard; under this standard, a national court only preliminarily determines whether there is a prima facie basis for arbitral jurisdiction and, if so, leaves determination of the jurisdictional issue to the arbitral tribunal, subject to later judicial review of the arbitrators' award and jurisdictional decision." The

Swedish law, in any case after the enactment of the Arbitration Act, appears to presuppose that, in principle, a *full review* is to be conducted by the court upon the determination of the validity of an arbitration agreement. The reason for assuming this is that a final determination on this issue by a court in connection with a declaratory action is binding for arbitrators and courts, e.g. in the event that a party, after a successful declaratory action, initiates arbitration or if the losing party in the arbitration initiates a subsequent challenge or invalidity action with respect to the award.¹⁵

Furthermore, it will have to be assumed that arbitrators, when deciding on their jurisdiction, or the courts, when an arbitration agreement has been invoked as a bar to judicial proceedings, are expected to conduct a similar examination as a court in a declaratory action would undertake. In the preparatory works to the Arbitration Act it was stated that the parties do not usually have any reason to initiate a declaratory action on jurisdiction until after the arbitrators have decided on this issue.¹⁶ Thus, it will have to be surmised that the same examination is to be performed in these instances by the arbitrators as it is difficult to imagine that there could be parallel jurisdiction proceedings with different methods of establishing jurisdiction.

4 The doctrine of assertion

However, pursuant to the case law of the Swedish Supreme court, there are important restrictions to observe when applying the standard of full review. The Supreme Court has in three cases, i.e. NJA 2008 s. 406, NJA 2010 s. 734 and NJA 2012 s. 183 considered what the court refers to as the doctrine of assertion. The doctrine, somewhat simplified, provides that an arbitration agreement applies to a dispute insofar as the claimant asserts that his claim is based on a legal relationship covered by an arbitration agreement. This implies that only the claimant's assertions with regard to the dispute will be taken into account when determining whether a dispute under the arbitration agreement exists (and not the respondent's). Further, if the facts that the claimant bases his claim on is a fact of relevance also with respect to the jurisdiction of the tribunal, such facts are to be accepted by the tribunal without a meritorious review when determining the jurisdictional matter (it may however cause the tribunal to dismiss the claim in connection with the decision on the substantive issue). In an explanatory opinion added to the Supreme Court's decision in NJA 2008 s. 406, the Reporting Justice in the case explained that the doctrine had the benefit of reserving the decision on the substantive matter solely for the tribunal without any court interference.

article was available on 16 August 2016 at <http://kluwarbitrationblog.com/blog/2010/12/13/irish-high-court-on-full-versus-prima-facie-judicial-consideration-of-whether-an-arbitration-agreement-exists/>.

¹⁵ See SOU 1994:81 s. 106 and NJA 2016 s. 264.

¹⁶ See SOU 1994:81 s. 258 and prop. 1998/99:35 s. 214.

The Supreme Court also clarified that under the doctrine a claimant would have to prove that an arbitration agreement was entered into and that the legal relationship in the arbitration agreement that the claimant is referencing exists. In addition, under the doctrine a restrictive interpretation is to be made with respect to what constitutes a “legal relationship”. The doctrine which has been developed in Swedish and international procedural law regarding the court system¹⁷ will be explained in more detail below.

5 The doctrine of connection

However, the *doctrine of assertion* does not reign sovereignly. The Supreme Court has, in three other cases, i.e. NJA 1973 s. 620, NJA 2007 s. 475 and NJA 2008 s. 120, developed what has been referred to as the *doctrine of connection*.¹⁸ This latter principle provides that an arbitration agreement covers a dispute if the dispute is closely *connected* to the main agreement in which the arbitration agreement has been incorporated. This means that an arbitration clause may be applicable to the claimant’s claim despite the fact that the clause has not been considered to cover the legal relationship that the claimant’s claim relates to pursuant to the doctrine of assertions. Thus, it seems that the

¹⁷ See references made in NJA 2008 s. 406 by the reporting clerk in the Supreme Court and the references made in the decision itself to NJA 1955 s. 500, NJA 1982 s. 738 and NJA 2005 s. 586 and NJA 1973 s. 1 and NJA 1984 s. 705 respectively. The case from 2008 involved an arbitration based on statutory law but the Supreme Court explained explicitly that the doctrine of assertion was to be applied in the same manner when an arbitration was based on statutory law as when it was based on an arbitration agreement.

¹⁸ In NJA 2007 s. 475, the Supreme Court held that even if the claimant had alleged that the claim was not based on a lease agreement which included an arbitration agreement but rather a tort claim, the facts invoked were directly related to the lease agreement. Subsequently, in addition to the fact that the claimant’s other grounds were to be adjudicated by arbitrators, the non-contractual ground was also to be considered as within the purview of the arbitration agreement. Similarly, in NJA 2008 s. 120, the claimant, a ferry operator, had pleaded his case without invoking an agreement between him and the respondent, in which an arbitration agreement had been included. The claimant alleged that the respondent’s (a municipal port company) total collection of fees exceeded what the port was entitled to receive pursuant to the cost/price principle in Swedish law. The port company held that certain fees paid by the claimant related to investments in the port in order to stimulate traffic and that this was governed by an investment agreement containing an arbitration clause. The courts of general jurisdiction thus lacked jurisdiction to hear the claimant’s action in the matter to the extent the payments were made under this agreement. The Supreme Court found that the claimant’s request had such strong connection to the agreement that the action in that specific part should be considered as covered by the arbitration agreement. The same principle of connection appears to have been applied by the Supreme Court in NJA 1973 s. 620. The case concerned a request for vacation allowance due to an alleged employment relationship whereas the respondent defended the claim on the basis that the claimant was an independent agent and subsequently invoked the arbitration agreement contained within the agency agreement as a bar to judicial proceedings. The Supreme Court noted that the issue of whether the claimant was entitled to vacation allowance was regarded as so closely connected to the agency agreement that the arbitration clause applied.

Supreme Court Justices are not in total agreement as to how the implications of an arbitration agreement are to be determined.

6 The difficulties created by the parallel doctrines

The inconsistencies of the cases referred to above have caused a significant discussion among practitioners as well as created ambiguity as to how a court of law and a tribunal should proceed when determining the scope of an arbitration agreement.¹⁹ It may be added that the Supreme Court in NJA 2010 s. 734, in which case a prorogation clause in a dispute resolution agreement referred disputes under the contract to a district court designated in the agreement, added by way of an “obiter dictum”, that the fact that there is a connection between a disputed legal relationship and another legal relationship which is covered by an arbitration agreement can only in very rare cases and under very specific circumstances cause the arbitration agreement to be extended to include the disputed relationship. The Supreme Court concluded that such an exceptional case was deemed to have occurred in the Supreme Court case NJA 2007 s. 475 referred to above (it may be added that the panel of five Supreme Court Justices in NJA 2010 s. 734 who substantially narrowed down the scope of the decision in NJA 2007 s. 475 from what can be read from the decision itself, did not include any of the justices from the decision in 2007).

One must assume that the Supreme Court did not consider the legal principles expressed in the findings as being mutually contradictory considering that none of the cases described were determined by the Supreme Court in its entirety (cf. Chapter 3, Section 6 of the Code of Judicial Procedure which provides that if the Supreme Court during its deliberations finds that the prevailing opinion diverges from a legal principle or a construction of law previously adopted by the Supreme Court, it may be directed that the case in its entirety or, if it is feasible, only a certain issue in the case, shall be adjudicated by the Supreme Court in plenary session).

As a consequence of the aforesaid, it must be assumed that the different methods for determining jurisdiction as expressed above can be applied in parallel. The two principles could obviously lead to different results. However, the situations in which one principle should be used instead of the other are far from clear although in the decision from 2010 the Supreme Court clearly indicated that the doctrine of assertion is to be considered as the general rule.²⁰

¹⁹ See, e.g. Heuman, JT 2009–10 s. 335, and JT 2011–12 s. 650 and Lindskog, Skiljeförfarande: en kommentar (Eng: Arbitration. A Commentary), 2012, p. 186 et seq., especially the footnotes 438–441. See also Mohammar & Isaksson, Vänbok till Bertil Södermark (Eng: Commemorative book to Bertil Södermark), 2009, p. 145 et seq., Schöldström, JT 2007–08 s. 467 et seq. and 2008–09 s. 138 et seq. and Forsell & Wallin, JT 2007–08 s. 943. Cf. also Waerme, SvJT 2010 s. 714, Madsen SvJT 2013 s. 730 et seq. and Falkman, SvJT 2016 s. 257.

²⁰ Heuman states in JT 2009–10 s. 335 that the doctrine of assertion and the doctrine of connection focus on two different jurisdictional issues in that the

Moreover, in case NJA 2008 s. 406 where the Supreme Court applied the doctrine of assertion it held that the tribunal's failure to apply the doctrine of assertion constituted per se such a serious procedural error that the award should be set aside solely on this ground. Hence, the Supreme Court did not find it necessary to determine whether the tribunal did in fact have jurisdiction and that its failure to apply the doctrine of assertion had led to an incorrect determination. Nor, it seems, did the Supreme Court determine that the prerequisites for applying the doctrine of connection as developed by the Supreme Court in NJA 1973 s. 620, NJA 2007 s. 475 and NJA 2008 s. 120 were not at hand, rather it stated generally that pursuant to Swedish arbitration law, the arbitrators' jurisdiction was to be determined on the basis of the doctrine of assertion.²¹

On account of the grave consequences of failure to apply the doctrine of assertion when the doctrine is applicable and for many other reasons, it is unsatisfactory that Swedish arbitration law lacks clarity in such an important area as how to determine jurisdiction of arbitrators.

The Inquiry noted that the doctrine of assertion had generated much discussion among legal commentators and that it could not be established whether this doctrine was applied abroad in arbitration proceedings. Despite this, the Inquiry desisted from making any proposals with respect to the doctrine, stating instead that any remaining ambiguities in relation to this issue would have to be resolved by the courts.

7 Codification of the doctrine of assertion

In their consultation responses to the Inquiry's proposed amendments, the International Chamber of Commerce in Sweden and the Swedish Arbitration Association recommended that the doctrine of assertion should be codified in the Arbitration Act as the content of the doctrine of assertion is still unclear and unknown to international

doctrine of assertion is targeted at certain substantive and evidentiary issues, whereas the doctrine of connection is targeted at certain legal issues. In JT 2010–11 s. 650, Heuman develops his theory further and writes that there are reasons to apply the doctrine of assertion in all, or some, cases when facts of double relevance are at hand.

²¹ In fact, the Supreme Court even went a step further, basing the decision on the fact that the tribunal should have accepted the claimant's assertion that he had made an investment within the meaning of the Foreign Investment Law (of the Republic of Kirgizistan). The court did not assess whether the facts invoked by the claimant did in fact qualify him as an "investor" under the statute but concluded that the requirement under the statute was fulfilled by the assertion alone. Likewise, in NJA 2012 s. 183, the Supreme Court based the outcome on the fact that the claimant had contended that his action was founded on the repayment of a loan which had already been granted prior to the entry into of the agreements which included an arbitration clause. Hence, the claim was perceived to constitute a separate legal relationship to the relationship contained in the agreements. This appears to be contrary to Swedish procedural principles as a court is not bound by the legal qualifications made by the parties, but rather only by the facts submitted by them.

arbitration practitioners. However, as the Inquiry did not propose any amendments in this respect, and the question as to how to codify the doctrine of assertion is not an uncomplicated one, it is to be expected that such amendment will not be made to the Arbitration Act at present, and that the present state of uncertainty with respect to how the doctrine of assertion is to be applied and the boundaries between the ambit of the doctrines of assertion and connection will continue to prevail.

Moreover, it seems to me to be questionable to codify the doctrine of assertion due to five reasons which are explained in the following.

8 Why the doctrine of assertion should not be codified

8.1 It would not clarify the contents of the doctrine

As has been referred to above, the Arbitration Committee of the International Chamber of Commerce (ICC Sweden) in its response to the proposals by the Inquiry explained that the Committee shared the observation made by the Swedish Arbitration Association that despite the case law and the analysis thereof by the Inquiry and the discussion in legal commentary, the contents of the doctrine of assertion were still unclear. In the light thereof the Committee advised that the doctrine of assertion be codified through an amendment to the Arbitration Act.

However, it cannot be expected that an inclusion of a provision in the Arbitration Act stating that the doctrine of assertion is to be applied when jurisdictional issues are determined would provide the necessary clarification of the contents of the doctrine itself.

8.2 It is inconsistent with other parts of Swedish arbitration law

To begin with, it may be noted that it is not possible to find support for the doctrine of assertion in the Arbitration Act. *Section 4, first paragraph* indicates that a court may not, against a party's will, rule over a *matter* that has been reserved for an arbitral tribunal to decide. Furthermore, *section 1, first paragraph first sentence* states that *disputes* (my italics), which may be subject to an out of court settlement, may be submitted to arbitration. As regard to future disputes, this applies to *legal relationships* that are specified in the contract.

Generally, the term dispute is used in Swedish arbitration agreements to describe the scope of an arbitration agreement. For example, the SCC model arbitration clause specifies that: “[a]ny dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.”²²

²² In the Swedish version of the rules, only the term “tvist” (Eng: “dispute”) is used. The New York Convention uses the expressions “dispute” and “difference” as synonyms. In NJA 2007 s. 475 the arbitration clause simply stated that *any dispute* was to be settled by arbitration. The Supreme Court found that the clause could be

When it comes to the interpretation of an arbitration clause, standard interpretation principles of civil law are to be applied.²³ Pursuant to Swedish law, this implies that the interpretation of the scope of an arbitration agreement should be based on general rules of contract interpretation in which the written word should be considered fundamental, but also other conditions could affect the interpretation.²⁴ It should be mentioned that the Supreme Court in the case NJA 2007 s. 475 emphasized that the arbitration clause was worded in such a way that all disputes related to the main contract would be settled through arbitration.²⁵ Also the Supreme Court in NJA 2012 s. 183 referred to how the clause was drafted.²⁶

It may therefore be assumed that a court or arbitral tribunal in most cases, pursuant to the Arbitration Act, if standard principles of interpretation are used, was intended to assess whether the parties, by using the word "dispute" in the arbitration clause, may be deemed to have agreed that a particular dispute which has subsequently arisen between the parties shall be covered by the arbitration clause. A "dispute" appears to be constituted not only by the claimant's claim but also by the objections raised against it by the respondent. Thus as a matter of normal language usage, in this context one must also take into account the respondent's objections in order to determine whether the dispute falls within the scope of the arbitration agreement. Consequently, the crucial question is whether a dispute with the present claims and objections can be interpreted as a dispute under such an agreement. Thus, to begin with, the doctrine of assertion as applied by the Supreme Court would appear to be in conflict with how the Arbitration Act is drafted.

8.3 It deviates from generally accepted principles of arbitration law in other jurisdictions

Furthermore, the question is whether the doctrine of assertion, in the sense that only the assertions presented by the claimant are considered upon determination of jurisdiction, has any equivalent in any

read as to imply that all disputes connected to the agreement were to be settled by arbitration and found that the non-contractual claim was also to be arbitrated. In NJA 2012 s. 183 it was stated that *disputes in respect of the agreement or connected thereto* be arbitrated. It is difficult to draw any conclusions as to the scope of the two arbitration clauses on the basis of the wording of the clauses. If anything, one would have thought that the clause in the latter case would be deemed to be more widely drafted as it explicitly stated that disputes connected to the agreement were to be included. However, in the latter case the Supreme Court held that the relevant arbitration clauses (two were involved) did not specify any legal relationship except the agreement regulated by the respective contractual document. Thus, the arbitration clauses would govern only the rights and obligations arising under these agreements.

²³ Lindskog, op. cit., p. 115 et seq.

²⁴ See, e.g. NJA 1995 s. 586.

²⁵ It was previously unclear which impact the form of the agreement had, see, e.g. NJA 1964 s. 2, NJA 1972 s. 458 and Heuman, op. cit. p. 75, footnote 147.

²⁶ See footnote 22 supra.

other prominent arbitration jurisdictions, or whether the doctrine is to be considered as a divergent Swedish regulation. It has to be concluded that it is the predominant picture in international arbitration that customary national rules on contract interpretation should be followed.²⁷ I have not found anything suggesting that the word "dispute" or the equivalent should be construed in any way other than in accordance with a common semantic method of interpretation.²⁸ In a review of court cases concerning the New York Convention Article II (3) relating to an arbitration agreement's effect as bars to judicial proceedings, I have not found any case that provides that only a claimant's assertions should be taken into account upon such determination.²⁹ However, there are a number of court cases that take into consideration the respondent's objections.³⁰ The doctrine of connection as explained above may in this context be said to be in greater harmony with the interpretation of arbitration agreements abroad.

8.4 It is not in conformity with the New York Convention

It may be challenged that the doctrine of assertion, in the sense that only the assertions presented by the claimant are considered upon determination of what constitutes a dispute, can be said to be in conformity with the New York Convention of 1958.

The relevant question here is whether Swedish courts are at liberty to develop the principles on which to decide the applicability or validity of an arbitration agreement. Pursuant to section 48 (1) of the Arbitration Act, the law of the country where the proceedings take place shall govern the arbitration agreement provided that the parties have not agreed upon another law. This means that, in principle, Swedish law will govern the issues discussed here.

²⁷ Cf. Born, *op. cit.*, p. 1321, "It is almost uniformly held or assumed that general applicable rules of contract construction apply to the interpretation of international arbitration agreements".

²⁸ Redfern & Hunter, *Redfern and Hunter on International Arbitration*, Student Version, 2009 (5th ed.), p. 107 assumes that "it is necessary to determine whether a particular claim or a defence has a sufficiently close connection with the contract to be governed by the arbitration agreement". See also Lew, Julian D.M, Mistelis, Loukas A. & Kroll, Stefan, *Comparative International Commercial Arbitration*, Kluwer, 2003, p. 150 et seq., who states that: "Most arbitration agreements are broadly worded. The ICC model clause for example covers 'All disputes arising out of or in connection with the present contract.' It is generally recognised that this wording covers all differences and claims arising from a given contractual relationship and even to non-contractual and tortious claims. In *Kaverit Ltd v Kone Corp* the Alberta Court of Appeal of Canada defined the ambit of such clauses [...] A dispute meets the test set by the submission if either claimant or defendant relies on the existence of a contractual obligation as a necessary element to create the claim, or to defeat it" [*Kaverit Steel and Crane Ltd et al v Kone Corporation et al*, (1994) XIX YBCA 643 (Alberta Court of Appeal, 16 January 1992)].

²⁹ ICCA Yearbook Commercial Arbitration ("ICCA YC") 2003–2012.

³⁰ ICCA YC 2011 US 745 (sub 11-19), 2009 Austria 19 (sub 2–3), Netherlands 33 (sub 15–18), US 662 (sub 20–27), 2008 US 631 (sub 1–2), 2006 US 629 (sub 32–35), 2005 US 505 (sub 9–27) and 2004 US 454 (sub 22–24).

However, that does not imply that Swedish courts may develop legal principles in this area without restrictions. One prominent commentator has stated that “only generally applicable rules of contract law, and not rules which single arbitrations agreement out for special or idiosyncratic burdens, may be invoked to challenge the validity of an international arbitration agreement subject to the Convention. These limits are justified by the Article II’s reference to ordinary and generally accepted principles of contract law (“null and void, inoperative or incapable of being performed”) and by the Convention’s objective of ensuring that Contracting States recognize the validity of international arbitration agreements in accordance with uniform international standards.³¹

In view of the fact that the doctrine of assertion seems to have no equivalence in other jurisdictions and that it may cause a more restrictive application of arbitral clauses, it is questionable if the doctrine complies with the underlying purpose of the Convention.

In addition it is likely that the restrictive application of the notion of legal relationship contravene the Convention. In the case NJA 2007 s. 475, the Supreme Court held that a non-contractual ground invoked by a claimant fell within the ambit of the arbitration agreement. The ruling has been questioned, *inter alia*, on the basis that the Supreme Court did not take into account the requirement set forth in section 1, first paragraph, second sentence of the Arbitration Act, which states that “future disputes” may only be referred to arbitration if the *legal relationship* (my italics) is explicitly mentioned in the arbitration agreement.³² As stated above, the Supreme court in NJA 2010 s. 734 added that the fact that there is a connection between a disputed legal relationship and another legal relationship which is covered

³¹ Born. op. cit., p. 839-840. See also Wolff (ed.), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards-Commentary*, p. 187 and further references in footnote 637.

³² See, e.g. Schöldström in JT 2007–08 s. 467 et seq. and 2008-09, s. 689 et seq. See also Forsell and Wallin in JT 2007–08 s. 943 et seq. Linskog also opines that non-contractual grounds, e.g. caused by an offence, cannot be covered by the arbitration agreement if the offence occurred after the arbitration agreement had been concluded, bearing in mind the fact that such agreements cannot be concluded with regard to a legal relationship that has not yet been established, see Linskog, op. cit., p. 254 et seq. Linskog also claims that NJA 2007 s. 475, as mentioned above, cannot under any circumstances be understood as if one and the same legal consequence may be based on both the main agreement as on a non-contractual rule, a non-contractual claim is always within the scope of an arbitration agreement; that should only be the case in exceptional circumstances and would further require good procedural reasons. Linskog points out that the Supreme Court in NJA 2010 s. 734 has made it clear that this is the case. See also Heuman, *Arbitration Law 1999*, p. 48 et seq. and 92 et seq. Heuman indicates in JT 2011–12 p. 665 that “in case law, courts seem to have overlooked the requirement that arbitration agreements shall regard a specified legal relationship”. Heuman also emphasizes that “the previous case law must be re-evaluated and critically examined” and further refers to that the Supreme Court in NJA 2010 s. 734 held that it is not possible to disregard the legal relationship requirement.

by an arbitration agreement can only cause the arbitration agreement to be extended to include the disputed relationship in very specific cases and under very specific circumstances. In accordance with this view, parties cannot generally agree that a non-contractual ground which has arisen after the formation of an arbitration agreement falls under the arbitration agreement. This is due to the notion that a non-contractual claim would relate to a different legal relationship than the one contained in the arbitration agreement.

This restrictive view of what constitutes a legal relationship and which to a large extent excludes non-contractual disputes seems not to be in conformity with the New York Convention.³³ There is also a limitation on arbitration agreements governing future disputes under the New York Convention and the Model Law. However, both set of rules use the slightly different prerequisite described as “a defined legal relationship, *whether* contractual or not” (my italics) instead of the term “legal relationship” as used within the Arbitration Act.³⁴

It is of interest that the Geneva Protocol on arbitration clauses, introduced in 1923 and the predecessor to the New York Convention provided that arbitration agreements could relate to contracts.³⁵ However, the New York Convention was drafted in such a manner that it was expressly stated that non-contractual disputes could be covered by an arbitration clause, why the term “contract”³⁶ was replaced by the above-mentioned expression.³⁷ The wording of the New York Convention has also been reflected in Article 7(1) of the Model Law. In conjunction with the enactment of this article in the Model Law, it was emphasized that the wording “a defined legal relationship, whether contractual or not” should be given “a wide interpretation so as to cover all non-contractual commercial cases occurring in practice.”³⁸

³³ See SOU 1994:81 s. 256 et seq. and prop. 1998/99:35 s. 212. Lindskog points out that the particular legal relationship requirement was included already in section 1 of the Arbitration Act from 1929 and was then transferred into section 1 of the Arbitration Act 1999 without it being further discussed in the preparatory works (Lindskog, op. cit., p. 247, footnote 144).

³⁴ See Article II (1) of the New York Convention and Article 7 (1) of the Model Law respectively.

³⁵ The Geneva Protocol was behind the Swedish law from 1929 on foreign arbitration agreements and arbitral awards.

³⁶ In the Swedish version, the text reads as follows: “let disputes arisen out of the contract, in whole or in part, be referred to arbitration” (NJA II 1929 s. 72).

³⁷ See van den Berg, Albert Jan (ed.), *The New York Arbitration Convention of 1958: towards a uniform judicial interpretation*, 1981, p. 148. Among other things, van den Berg points out: “The final text has as a main consequence that also actions framed in tort can be submitted to arbitration. This provision supersedes a municipal law which regards arbitration possible only in respect of contractual claims. Of course the claims framed in tort must come within the purview of the arbitration agreement.” Van den Berg also emphasizes on pp. 149–150 that: “The dispute must also ‘arise in respect of’ a defined legal relationship. In other words, the wording of the arbitration agreement must be sufficiently broad to cover the dispute. Whether a dispute falls under the agreement would appear to be essentially a matter of construction.”

³⁸ See UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial arbitration (available at www.uncitral.org, commentary to Article 7

It seems as though there is a broad international consensus that the arbitration agreement may also cover non-contractual claims. This can be inferred from both the international case law as well as national arbitration laws which, in accordance with the Model Law and New York Convention, explicitly state that non-contractual claims are also covered.³⁹

Sweden, by acceding to the New York Convention in 1972, is committed to respecting arbitration agreements also with respect to disputes that are non-contractual (provided that the arbitration agreement otherwise meets the requirements of the Convention).⁴⁰ Although Swedish law generally applies to questions of validity and applicability of arbitration agreements in connection with arbitrations in Sweden, the definition “legal relationship” in the Arbitration Act should generally not limit the arbitration clauses application solely to claims based directly on the main agreement.⁴¹ In fact, the definition “legal relationship” ought to be interpreted in a way that is similar to the expression used in the New York Convention, i.e. a legal relationship that is contractual or non-contractual.⁴² In light of this, a court or arbitral tribunal may find that a dispute in which the claim is based on non-contractual grounds has such a connection to the arbitration agreement that the dispute is deemed to be covered by an arbitration

(1), para. 12, with further references. See also Holtzmann & Neuhaus, *A Guide to UNCITRAL Model Law*, 1989, p. 259 at footnote 2. It states: “The Secretariat gave the following examples: ‘third part interfering with contractual relations, infringement of trade mark or other unfair competition’.” It is further stated that “a number of delegations suggested removing the words ‘defined legal’, but they were retained because they were found in the New York Convention on which Article 7 was consciously based.” A review of court cases in this regard from different jurisdictions can also be found in Poudret & Besson, *op. cit.*, p. 266 et seq.

³⁹ See, e.g. Poudret & Besson, *op. cit.*, pp. 265–268.

⁴⁰ This follows for foreign arbitral agreements to which the New York Convention is applicable.

⁴¹ In connection with the accession of Sweden to the Convention, the provision in the New York Convention has been interpreted so that no contracting state may impose more strict formal requirements than those set out in the Convention. Furthermore, the Supreme Court, in NJA 2003 s. 379 and NJA 2010 s. 219, referred to the underlying purpose of the New York Convention in connection with enforcement of foreign arbitral awards. Regarding the interpretation of an arbitration agreement it may be interesting to mention what is stated in Born, *cit. op. p.* 1318: “The New York Convention acknowledges the necessity of interpreting the scope of arbitration agreements and provides for the non-recognition of awards that exceed the scope of the agreement to arbitrate.” It is further stated that: “The convention does not, however, prescribe any rules governing the interpreting process.” Finally, Born, *op. cit.*, p. 1321 writes that “it is almost uniformly held or assumed that generally applicable rules of contract construction apply to the interpretation of international arbitration agreements” and on p. (p. 1326) “that a valid arbitration clause should generally be interpreted expansively and, in case of doubt, extended to encompass disputed claims.”

⁴² It would be conceivable, at least in theory, that only contractual claims which existed at the time of the establishment of the arbitration agreement were intended, but this seems less likely given the fact that this restriction has not been mentioned in the preparatory works and that no such difference has been recognized in comments thereto. I have not seen it used in any court cases regarding the Model Law or the New York Convention.

clause.⁴³ Thus, the restrictive application of the term “legal relationship” by the Supreme Court appears to have no basis in the New York Convention.⁴⁴

Finally, NJA 2008 s. 406 establishes that if the facts on which the claimant bases its claim include facts which are relevant to both the substantive issue and to the jurisdiction of the tribunal, such facts are to be accepted by the tribunal without a meritorious review when determining the jurisdiction matter. As stated above, the Reporting Justice explained that this had the benefit of reserving the decision on the substantive matter solely for the tribunal without any court interference. Consequently, a court after a challenge to an award will not have the final say with respect to the jurisdiction of the tribunal. Thus, the doctrine of assertion may also result in a tribunal rendering an award after considering the substantive issues in those cases where the tribunal, according to its findings, was not competent to try the case.⁴⁵

However, it seems that a tribunal in an international arbitration regularly performs a full review of its jurisdiction also in cases where the same circumstances are of relevance to both the jurisdictional issue and the substantive issue (double-pertinent facts).⁴⁶ According to

⁴³ As has been noted above, the Convention applies to foreign arbitration agreements. The Supreme Court did not, however, perform any special assessment in NJA 2008 s. 406 although the case concerned foreign parties. Nor have I noticed that the Supreme Court in other decisions has taken particular account of international connections (see, e.g. NJA 2009 s. 128).

⁴⁴ Wolff et al, op. cit., The New York Convention states that the requirement “defined legal relationship” is characterized as autonomous substantive law that is to be interpreted independently from national law regardless of whether the domestic law foresees higher or lower requirements in this regard, p. 111. Moreover, it is emphasised on p. 113: “the defined legal relationship is not limited to a defined contract, it suffices that all disputes between the parties within a given sphere are covered, e.g. all disputes related to a membership in an association, all disputes arising out of the consignment of a certain commodity or all disputes related to joint stock exchange activities.”

⁴⁵ The question may be raised as to whether the doctrine of assertion is in harmony with Article 6(1) of the European Convention on Human Rights – Right to a fair trial. Pursuant to the provision everyone is entitled to a fair and public hearing. A party may waive their right to a court adjudication in favour of arbitration, provided that such waiver is permissible and is established freely and unequivocally (*Suda v. the Czech Republic*, §§ 48 and 49). The Convention is not directly applicable to arbitrations but national courts must comply with the Convention’s fundamental procedural guarantees (see Fouchard, Gaillard, Goldman on International Commercial Arbitration, 1999, p. 118). Article 6 (1) requires the courts to carry out an effective judicial review (*Obermeier v. Austria*, § 70). The principle that a court should exercise full jurisdiction requires it not to abandon any of the elements of its judicial function (*Chevrol v. France*, § 63 (see Guide on Article 6 on the Convention of Human Rights available at http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf, pp. 17,18 and 21). At the very least, it seems to be worth looking more closely at the matter in order to assess whether a party has freely and unequivocally consented to arbitration in the meaning of the Convention by a tribunal or court without reviewing all factual matters pertinent to the waiver.

⁴⁶ See Born I, op. cit., p. 1246 et seq. and with respect to Switzerland and England, Poudret & Besson, , op. cit., p. 419 et seq. See Lindskog, op. cit., in I:0-6.1.2. and particularly in footnote 438. Lindskog, who was the Reporting Justice in NJA 2008 s. 406 and participated in the decisions in NJA 2010 s. 734 and NJA 2012 s. 183 argues against Hobér’s statement in International Arbitration in Sweden,

the UNCITRAL Arbitration Rules and the Model Law (Article 23(3) and 16(3) respectively), the arbitral tribunal may rule on a plea that the arbitral tribunal does not have jurisdiction either as a preliminary question or in an award on the merits.⁴⁷ This approach seems to be in line with the fact that whether an arbitral tribunal has jurisdiction over a dispute is an issue expressly contemplated by Article V(1)(c) the New York Convention. Whether the prerequisites are met is a question to be reviewed by an exequatur court, also in instances where the court may have to review issues of the merits of the award.⁴⁸

8.5 *Disadvantages compared to the doctrine of connection*

In case NJA 2007 s. 475, the Supreme Court considered the fact that the dispute in its entirety could be settled in one forum if the non-contractual ground was embraced by the arbitration agreement. However, it does not seem consistent with Swedish arbitration law, or with the international arbitration law, to refer parties to consensual arbitration for a reason other than that an arbitration agreement exists between the parties. Accordingly, in the absence of any statutory law providing for this in applicable arbitration law, the parties cannot be forced to arbitrate due to reasons relating to achieving an effective dispute resolution.

However, it seems highly unlikely that commercial parties when they enter into an arbitration agreement would prefer some questions

2011, 3.36 with footnote 59 that it is not unusual in international arbitration when doubly relevant facts exist to merge the jurisdictional objections to the merits phase of the arbitration. However, according to Hobér, this does not mean that the arbitrators are prevented from dismissing the case for lack of jurisdiction should they come to this conclusion when trying the facts and the legal arguments. According to Lindskog, this is not in conformity with the doctrine of assertion. According to the doctrine the point of departure is that jurisdiction shall be deemed to exist, which means that the claim shall be dismissed after meritorious review, not without prejudice if the fact or facts of relevance are deemed not proven. This, as a dismissal without prejudice would entail than an action could be instituted in another forum.

⁴⁷ The same applies to the ICC Arbitration Rules, the Secretariat's Guide to ICC Arbitration, 2012, p. 87, 3–264.

⁴⁸ Wolff, *op. cit.*, p. 318 and e.g. the Supreme Court, UK, in *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 UK where it was held by Lord Mance writing for the majority that “the tribunal’s own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority” and that the scheme of the New York Convention “may give limited *prima facie* credit to apparently valid arbitral awards based on apparently valid and applicable arbitration agreements, by throwing on the person resisting enforcement the onus of proving one of the matters set out in Article V(1) and s. 103 [of the Arbitration Act]. But that is as far as it goes. [Claimant] starts with the advantage of service, it does not also start fifteen or thirty love up”. Born, *op. cit.* p. 3477 *et seq.* recognizes that a court will ordinarily consider the existence and validity of an arbitration agreement *de novo* but states that the Supreme Court in the *Dallah* matter *supra* should have shown more deference to the findings of the tribunal.

that are connected to the arbitration agreement to be settled in court and others by arbitration.⁴⁹

In a recently delivered judgment by the Supreme Court in case NJA 2013 s. 477, the Supreme Court held that a bifurcation of a dispute in arbitration and court proceedings would lead to a review of the merits of the dispute in two different proceedings causing complex issues and with *lis pendens* and *res judicata* being further complicated. Moreover, it would, in general, result in the dispute resolution lacking efficiency. Therefore, it is natural that arbitral tribunals and courts, when called upon to interpret arbitration clauses, assume to a considerable extent that it was not the intention of the parties to bifurcate the proceedings to different foras.

An interpretation of an arbitration agreement according to the doctrine of connection instead of the doctrine of assertion would provide a more flexible determination of the jurisdictional matter, which may take into account the parties typical intent of consolidating their disputes in one forum and thereby avoid inefficient dispute resolution by dividing the parties' dispute to be considered in both court and arbitral proceedings. Such a dispute resolution mechanism does not only entail costs and delays but also entail significant risks of conflicting judgments and procedural irregularities associated with complex legal issues as was recognized by the Supreme Court in the above-mentioned case.

As has been referred to above, the contents of the doctrine of assertion has not been sufficiently explained and the consequences of making an error with regard to its application may have dire consequences. In contrast, the doctrine of connection is more in line with how jurisdictional matters are determined abroad and does not entail

⁴⁹ See Born *op. cit.*, p. 1326 *et seq* and decision of the House of Lords, 17 October 2007 [Fiona Trust & Holding & Holding Corporation & Ors 20 v. Yuri Privalov & Ors 17 sub nom Premium Nafta Products Ltd. (20th defendant) & Ors v. Fili Shipping Co. Ltd. (14th claimant) & Ors [2007] UKHL 40]. The House of Lords stated the following: "Ordinary businessmen would be surprised at the nice distinctions drawn in the cases and the time taken up by argument in debating whether a particular case falls within one set of words or another very similar set of words. If businessmen go to the trouble of agreeing that their disputes be heard in the courts of a particular country or by a tribunal of their choice they do not expect (at any rate when they are making the contract in the first place) that time and expense will be taken in lengthy argument about the nature of particular causes of action and whether any particular cause of action comes within the meaning of the particular phrase they have chosen in their arbitration clause. [...]. As it seems to us any jurisdiction or arbitration clause in an international commercial contract should be liberally construed. The words 'arising out of' should cover 'every dispute except a dispute as to whether there was ever a contract at all' [...]. It is not to be expected that any commercial man would knowingly create a system which required that the court should first decide whether the contract should be rectified or avoided or rescinded (as the case might be) and then, if the contract is held to be valid, required the arbitrator to resolve the issues that have arisen. This is indeed a powerful reason for a liberal construction." Furthermore, see SIAR 2007:3 p. 115 *et seq*. There are also numerous cases from various jurisdictions that emphasize the desirability of a conformed dispute resolution.

the same risks of making procedural errors. Hence, an application of the doctrine of connection should also result in a significantly reduced risk of procedural errors.

In view of the considerable disadvantages of applying the doctrine of assertion as set out above, the benefits as described in the case NJA 2008 s. 406 should be described as insignificant.

9 Conclusion

In view of what has been stated above it is my conclusion that amending the Arbitration Act with a provision codifying the doctrine of assertion would not be purposeful. However, the present state of confusion with two diverging doctrines on how to decide jurisdiction is not satisfactory. In this context, maybe it should be considered to align the Arbitration Act with the principles generally applied in international arbitration. This could be achieved by adding a provision to the Arbitration Act with a content that corresponds to what has been prescribed in the UNCITRAL Arbitration Rules and the Model Law that the Arbitral Tribunal may rule on a plea that the arbitral tribunal does not have jurisdiction either as a preliminary question or in an award on the merits. Such amendment could be combined with an amendment to *section 2, first paragraph, second sentence* of the Arbitration Act, bringing the requirement of “legal definition” into compliance with the wording in the New York Convention and the Model Law, i.e. a “legal relationship, whether contractual or not.” As the preparatory works and commentary to the New York Convention and the Model law are voluminous, one would imagine that the amendments to the Arbitration Act suggested herein could be made by simply adopting the locutions used in the New York Convention and the Model law without any additional preparatory or consultative legislative phases being required.