

## **Damage Estimation Rule Applies to Arbitration**

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[Background](#)

[Arbitration](#)

[Court Decision](#)

[Comment](#)

In a case regarding the challenge of an arbitral award, a procedural rule on evidence in the Swedish Code of Judicial Procedure was held to be part of general law. It was ruled that the arbitrators were at liberty to apply the rule in arbitral proceedings notwithstanding the parties' arguments before the arbitrators.

### **Background**

Arbitration in Sweden is flexible. Under the Swedish Arbitration Act, the parties are largely free to agree on the procedure applied. The Swedish Code of Judicial Procedure is not directly applicable to arbitral proceedings.

Arbitration awards in Sweden may not be appealed on the merits. In general, an award is final and enforceable. However, awards can be set aside for a limited number of reasons, such as where the arbitrators have exceeded their mandate or where procedural irregularities have influenced the outcome.

Under the Code of Judicial Procedure, a court may estimate the extent of any damage where evidence cannot be presented, or can be presented only with difficulty. Estimation may also be performed where the production of evidence would entail costs or inconvenience that are not proportionate to the damage, the damages claimed constituting the smaller amount.

### **Arbitration**

During 1997 and 1998 IT companies Innitek and Venantius entered into a series of agreements for the provision of network services on a consultancy basis. At the end of 1998, the relationship became strained. Venantius revoked the Innitek agreements shortly before 1999.

Both parties initiated arbitral proceedings, claiming damages on numerous grounds. The

arbitrators dismissed Venantius's claims, but Innitek was awarded substantial damages. In deciding the amount of damages to be awarded, the arbitrators applied the damage estimation rule.

### **Court Decision**

Venantius lodged a claim in the Stockholm District Court to set aside the arbitral award. Its suit was based primarily on the premise that the arbitrators, by their application of the damage estimation rule, had exceeded their mandate or performed a procedural irregularity. Venantius submitted that the arbitrators had applied the damage estimation rule by analogy, despite Innitek not asking the tribunal to do so and Venantius opposing its application.

Innitek submitted that the issue of application of the damage estimation rule had been at least discussed during a preliminary hearing before the arbitrators. Innitek took the stance that the arbitrators did not need the actual express consent of the parties to apply the rule, or at the very least that the parties had tacitly accepted such an application.

The court ruled that the arbitrators were at liberty to apply the damage estimation rule by analogy notwithstanding the stance of the parties. The court argued that the rule in the Code of Judicial Procedure is an expression of a more general rule in Swedish law providing for a certain relief from the burden of proof. The court held that arbitrators are free to apply the general rule even without making reference to the Code of Judicial Procedure. The award was upheld. The Svea Court of Appeal summarily denied Venantius's appeal and affirmed the district court ruling in its decision of April 21 2004.

### **Comment**


The ruling of the appellate court indicates that arbitrators are free to apply general rules of law to a matter at hand despite the procedural nature of such rules. The ruling further indicates that the arbitrators' exercise of reasonable discretion when deciding a case is not a reason for having the award set aside. The appellate court now is the court of first instance in challenge proceedings under the new Swedish Arbitration Act.

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