SWEDEN: Avoiding Service Nightmares

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James Hope and Olga Zelepukina of Vinge in Stockholm report on a low-value case that turned into a nightmare owing to a problem with service

A recently decided Swedish Supreme Court case, *OAO Lenmorniiproekt v Arne Larsson & Partner Leasing AB* (case number Ö 13-09) provides some salutary lessons on what can go wrong when serving a request for arbitration.

The Russian claimant commenced arbitration at the International Commercial Arbitration Court at the Russian Chamber of Commerce (ICAC) back in September 2003, and service of the request for arbitration was carried out in accordance with the ICAC's rules. Although the Swedish respondent played no part in the arbitration, the arbitral tribunal found that service had been duly effected. It eventually rendered an award in the claimant's favour. However, on enforcement of the award in Sweden, both the Svea Court of Appeal in Stockholm and, more recently, the Swedish Supreme Court declared the award to be unenforceable on the basis that the respondent was not given proper notice of the arbitration proceedings.

In short, the claimant pursued the case for six-and-a-half years and got nowhere.

How can this happen? The answer is: all too easily. It can sometimes be very difficult to ensure that service has been effected correctly. Even if you think you have done everything in accordance with the applicable arbitration rules, the manner of service may come back to haunt you many years later on enforcement.

Facts

Under a contract, the Russian claimant – referred to as Lenmornii – had agreed to carry out certain works to assist the construction of an oil terminal in the Primorsk region of Russia. The Swedish respondent, Arne Larsson & Partner Leasing AB – or ALPL – had undertaken to pay for such works. In 2003 the parties fell out and Lenmornii commenced arbitration against ALPL, alleging that the Swedish company had failed to meet its payment obligations.

The ICAC served the request for arbitration in accordance with its rules, by sending it to ALPL's address in central Stockholm as set out in the contract. The ICAC even received notification of delivery from the courier company, which showed that the request for arbitration had been signed for by someone called "Lavaica".

The ICAC subsequently sent a subpoena to the same address calling ALPL to a hearing; however, this was returned with a note that the intended recipient could not be found at that address.

The tribunal determined the question of service in accordance with the ICAC rules, finding that ALPL had been informed of the request, that it had failed to notify the tribunal of a change of address (as was required under the rules) and that, in the circumstances, service should be deemed to have been effected at ALPL's last known address as permitted in article 12(5) of the ICAC rules. The tribunal rendered an ex parte award in favour of Lenmornii on 27 April 2004, awarding compensation of nearly US$164,000 plus costs.

Lenmornii applied some years later to the Svea Court of Appeal in Stockholm to enforce the award in Sweden. It was then that ALPL took an active part in the proceedings for the first time. ALPL told the Svea Court that it had not known anything about the arbitration until it received a request for enforcement of the award.

In fact, it turned out that ALPL had moved its registered address at the end of 2002, from the centre of Stockholm to the suburb Lidingö.

ALPL had failed to notify Lenmornii of its change of address. However, after hearing representatives of ALPL give evidence under oath that they had been unaware of the arbitration and had lacked any access to the company's former office from late 2002, the Svea Court found that this was not decisive. ALPL had not been properly notified, it found.

The court was given no information about who "Lavaica" was.

The Svea Court refused to enforce the award because of lack of proper notice. Lenmornii appealed to the Swedish Supreme Court, but the Supreme Court upheld the Svea Court's decision. The Supreme Court pointed out that, while foreign arbitral awards should be enforced in Sweden, this rule does not apply if the respondent is able to prove that it did not receive proper notice of the arbitration (see Section 54(2) of the Swedish Arbitration Act and Article V(1)(b) of the New York Convention).

In accordance with the Swedish legislature's intention when the New York Convention was incorporated into Swedish law, the respondent party has the burden of proof in this situation. Although there is a general requirement under Swedish law and the New York Convention to promote the enforcement of foreign arbitral awards, the phrase "proper notice" is not defined. The Supreme Court held that it was a fundamental requirement that the respondent should have received the request for arbitration – rejecting Lenmornii's argument that the respondent should have provided notification of its change of address.

Accordingly, the Supreme Court held that a foreign arbitral award should not be enforced if the respondent is able to raise reasonable doubt over its receipt of the request for arbitration. The situation would be different, though, if it were clear that the respondent had nevertheless been informed about the arbitration and was able to present its case, the court said.

Comment

Every litigator knows that service of process needs to be carried out correctly. The rules in litigation are often technical and complex, and should be followed strictly.

For an example of the problems that can occur in litigation, see the English case of *Cherney v Deripaska* [2007] EWHC 965 (Comm), concerning an attempt to effect personal service upon Russian businessman Oleg Deripaska by leaving a claim form with the "butler" at his London residence in Belgrave Square. The court found that this was not personal service on the respondent himself.

It is sometimes assumed that the rules of service are simpler in international arbitration than in litigation. However, the basic principle remains important – the need for "proper notice" is set out in Article V(1)(b) of the New York Convention.

But what is proper notice? The Convention does not define the term, and in the end it is for the enforcing court to decide. The best advice to a claimant embarking on proceedings is to make strenuous efforts to ensure that the respondent does in fact receive the request for arbitration.

In some countries this ought to be straightforward. For example, in Sweden it is easy to find the address of a publicly registered company. Thus, in this case, the claimant could have found out the correct address of ALPL by a simple internet search at the Swedish Companies Registration Office. Even a Google search would have thrown up the information.

The process of service is far more difficult in some other countries – notably tax havens where public records are hard to obtain – but a claimant hoping for an enforceable award still needs to do all in its power to ensure that proper notice is given. The use of private investigators, local lawyers, process servers or a combination of all three ought to be standard practice for claimant counsel if there is a risk that service will not be effective.

Relying on formalistic rules, as Lenmornii seems to have done in this case, is dangerous. Although the arbitral tribunal was content to rubber-stamp the claimant's actions without hearing from the respondent, there was of course no guarantee that the enforcing court would come to the same conclusion – or that the respondent would always be silent!

A German court took a similar approach to the Swedish courts in a case decided in 2000 (Bay ObLG, 4Z Sch 50/99, 16 March 2000; XXVII Y.B. Com. Arb. 448-50). In that case a Russian seller sought enforcement of an ICAC award in Germany under the 1958 German-Russian Treaty on General Issues of Trade and Maritime Shipping. Applying both the treaty and the New York Convention, the Court of Appeal of Bavaria denied enforcement of the ICAC award, holding that the German respondent had not been informed of the arbitral proceedings. Although Russian arbitration law provides that a communication to the respondent's last known address suffices as service if no other address can be found following a reasonable inquiry, the court found that in that case, there was no evidence of any attempt to find the correct address. The respondent's address had not in fact changed since the conclusion of the contract.

The message is simple. Claimants need to ensure that proper notice has been given, and that any doubts are resolved at the start of the case. A sleepless night or two at the start of the arbitration is better than a nightmare at the end.