Mediation in Sweden
March 2011

Introduction

Mediation is not frequently used in Sweden. In 2004-2005 only 157 cases in the district courts were referred to a special mediator. This constitutes less than 0, 01 per cent of all cases amenable to out-of-court settlement. In 2010 the Mediation Institute of the Swedish Chamber of Commerce received just one request for mediation. Nevertheless mediation of some sort is in fact an integral part of a Swedish judge's role as he is obligated to lead the parties in a conciliatory path, in the majority of cases resulting in a settlement. Mediation, in broad terms, therefore exists in actions amenable to out-of-court settlements in the district courts in three different ways: mandatory as a part of the judge's obligation to investigate the case during the preparation phase, presumed as a conciliatory settlement and optional as an order of special mediation.

Sweden has a long tradition of institutionalised dispute resolution. Paired with a generous insurance coverage for the parties' legal costs, it has made little to enthuse parties to choose the alternative path to settlement through mediation.

However, there are some steps made towards establishing a solid infrastructure for mediation due to developments within the EU. Some pilot projects administered by the district courts show promising statistics from court-annexed mediation where an entire 74 per cent[1] of the cases are settled.

Why this low interest in mediation?

1. There is no widespread use of mediation clauses in commercial contracts.

2. The judge's role as a mediator in Sweden is more predominant than in common law countries.
The Swedish civil law system puts the focus on the judge as it is he who defines the disputed issue, in contrast to the more adversarial role in a common law context. Conciliatory activities are currently undertaken primarily by the judge administrating the case according to the Code of Judicial Procedure ("CJP"). A Swedish judge must attempt to settle disputes between the parties and must clarify the parties' positions and what they want to achieve.

3. Conflict resolution in Sweden is to a high degree institutionalised.
A characteristic of the public sector in Sweden, as for all of the Nordic countries, is the large number of boards of different sorts; for example, the Traffic Injury Board, the Insurance Board and the Consumer Complaint Board. In addition there are the Ombudsmen. The oldest to date is the Justitieombudsmannen, who supervises the authorities, including the courts, to ensure the rule of law and access to justice. Other ombudsmen are the Discrimination Ombudsman, the Child Ombudsman, the Press Ombudsman, and the Consumer Ombudsman. The boards and ombudsmen cannot make binding decisions or awards but many disputes are resolved in these avenues.

[1] Statistics from a survey 2004-2005 of the Swedish District Courts, SOU 2007:26, Alternative dispute resolution, p. 95.

Moreover, non-government organisations (NGOs) have significant importance in Sweden. There are the labour organisations such as LO (for blue collar workers) and TCO, SACO (with a predominately base of white collar workers). There is also the National Tenancy Organisation. These NGOs provide free legal services to their members.

4. There is no established infrastructure to appoint mediators
There is a lack of infrastructure as regards to the appointment of skilled and interested mediators. Currently, there are no fixed lists or pools of registered mediators from which the court can appoint a mediator within the framework of court-annexed mediation.

There are two official training programs for mediators in Sweden. One is given by the Mediation Institute of the SCC and the other is administered through the Chamber of Commerce of Western Sweden. However, these programs only have a few years of existence, why an impact is yet to be seen.

5. The legal aid system is not set up in a manner that promotes mediation to commonplace judicial review.
A generous legal aid system was introduced back in 1972. It made it possible for any private individual to litigate without normally having to pay more than a contributory sum of their legal costs. In the aftermath of the economic downturn of the 1980s the legal aid act of 1996 was passed which shifted responsibility for legal costs from the public to insurers; a move made possible by the fact that approximately 98 per cent of the Swedish population have legal insurance incorporated into their home insurance.

Settlement in court

Mediation, in broad terms, exists in actions amenable to out-of-court settlements in the district courts in three different ways: mandatory as a part of the judge's obligation to investigate the case during the preparation phase, presumed as a conciliatory settlement and optional as an order of special mediation.

This only applies to the lower courts. The courts of appeal and the Supreme Court are exempted from pursuing the role of mediating a settlement.

Around 60 per cent of all cases are settled during the preparation of the case in the district courts. 37 per cent[2] are settled during the proceedings, without any assistance of the court, and 74 per cent of the cases that have had a special mediator appointed within the frame of court-annexed mediation[3].

Court-annexed mediation
According to the CJP a case is referred to mediation after an action has been instituted and normally after the first preparatory conference has been held. A case can not be referred to mediation if one party opposes it. If and when the parties have agreed to mediation and decided upon a mediator, there is a stay in the proceedings while the mediator entertains the case.

[2] Statistics from a survey of 1st of February to the 31st of March 2006, SOU 2007:26, Alternative dispute resolution, p. 339.
[3] Statistics from a survey 2004-2005 of the Swedish District Courts, SOU 2007:26, Alternative dispute resolution, p. 95.

The CJP is silent with respect to the court-referred mediation process. It is up to the parties to decide with the mediator how to structure the procedure. There is thus no confidentiality provision with respect to a mediator in the CJP or in any other act. However, the prevailing opinion is that the mediator and the parties are under a duty of confidentiality. If the parties enter into a confidentiality agreement the court should respect it but the CJP does not exempt the mediator from the duty to be heard as a witness in a subsequent court case.

If mediation is successful, the agreement between the parties can on request be confirmed as a court judgement. It will then have the capability to be enforced and have res judicata effect.

Mediation is still a very unusual feature in court proceedings. In 2004-2005 only 157 cases or less than 0, 01 per cent of the actions amenable to out of court settlement were referred to a special mediator.

Of these cases 74 per cent were settled, quite an impressionable figure.

Extra-judicial mediation

The SCC Mediation Institute was established in 1999. According to the SCC rules mediation is normally run by a sole mediator. The mediator(s) may be appointed by the parties or by the Institute. The time limit for the procedure is two months, unless otherwise agreed. Unless the parties have decided otherwise, the Institute shall decide the fee for the mediator(s) in accordance to a table.

If the parties do agree, the settlement cannot be confirmed by a court since no formal legal action has been instituted. In order to make it enforceable the parties have to agree to appoint an arbitrator to confirm the settlement agreement as an arbitral award.

Looking at the most recent number from the Mediation Institute at the Stockholm Chamber of Commerce ("SCC") it is obvious that there is a meagre interest, if any at all, of mediation in commercial disputes. In 2009 the Mediation Institute at the SCC received three requests for mediation, in 2010 one request and by March this year (2011) the institute had received yet one more request. To put this into perspective, in the year 2009 there were 4 900 new commercial disputes in the Stockholm District Court and 215 new requests for commercial arbitration in the SCC.

Leading the way with legislation

In April 2007 the Parliament was introduced with an inquiry regarding alternative dispute resolution in the district courts (SOU 2007:26). The inquiry is in line with the European directive that aims to promote mediation as a conciliatory solution. Court-annexed mediation has been introduced by legislation in the rest of the Nordic countries. The inquiry's task was to study how the use of mediation could increase in actions amenable to out of court settlement. It shall also be possible to offer mediation to the parties in the Court of Appeal. The inquiry is currently resting.

Last autumn the Judicial Department issued a memorandum (Ds. 2010:39) regarding Mediation in certain private law issues. The memorandum would implement the

European parliament and the European Counsel's directive 2008/52/EC of 21May 2008. The proposals include private mediation as well as court-annexed mediation. To encourage parties to use the mediation process it is suggested that deadlines and limitation will not end during present mediation. To ensure the confidential character of the mediation process it is further suggested that the mediator has to observe professional secrecy and is exempted from the obligation to testify concerning matters entrusted to, or found out by, them in their professional capacity.

A settlement that has been reached through mediation either in court or as part of arbitration can be established through a judgement or an award and thereby become enforceable. Thus, there will no longer be any requirement of "double exequatur" by appointing an arbitrator. The memorandum is currently under investigation and there is no information to as when the proposals may enter into force.