A Comparative Study of Injunctive Relief and Specific Performance in the Arbitral Forum

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Abstract

This thesis concerns the issue of injunctive relief and specific performance in arbitration. The availability of such relief varies significantly between different jurisdictions and the issue is further complicated when parties opt out of litigation in favor of arbitration, not the least in terms of enforcement. In light of this, the thesis aims to determine the consequences for parties opting for arbitration instead of litigation with regard to the availability and enforceability of specific performance and injunctive relief. This overall research question has been answered under the laws of Sweden and the United States of America.

First, this thesis has concluded that there are considerable differences between the jurisdictions in the availability of specific performance and injunctive relief in litigation. In Sweden, remedies are issues of substantive law and for many kinds of contracts, the primary remedy for breach. Consequently, courts do not differentiate claims for specific performance or injunctive relief, and routinely grant such claims in no different way than granting monetary relief. Conversely, in the United States, remedies are viewed as procedural issues, not substantive. There, specific performance and injunctive relief are discretionary matters of equity and not rights at law. Hence, the availability of specific performance and injunctive relief is limited as compared to damages. Further, this thesis has concluded that the categorization of reliefs and remedies as substantive and procedural, respectively, is mirrored also in arbitration. While in Sweden, the choice of arbitration as proper contract forum does not affect the availability of the reliefs now in question, it does so in the United States. There, courts have held that the division of remedies into legal and equitable is not applicable in arbitration. Thus, parties have the freedom to by contract control which reliefs an arbitrator may grant. In absence of such agreements, courts have presumed arbitrators to have been given a broad grant of authority, allowing otherwise unavailable reliefs.

Third, this thesis has concluded that, inter alia, because of the inherent contempt powers of courts in the United States, the means of enforcing arbitral awards providing specific performance and injunctive relief are more extensive in the United States than in Sweden, where comparable powers do not exist. Further, parties may by means of contract, grant arbitrators the authority to supervise such reliefs and enforce previously granted specific performance and injunctions by contractual fines and sanctions. Again, in absence of explicit contract language such authority is presumed in the United States, but not in Sweden. Overall, the choice of arbitration has consequences in both jurisdictions.
In the United States, mostly for the availability of the reliefs in question and in Sweden, mostly for the enforcement.
Abbreviations

AAA  American Arbitration Association
AAA Rules  AAA Commercial Arbitration Rules and Mediation Procedures (as effective per September 1, 2022)
Am. J. Comp. L.  American Journal of Comparative Law
ECJ  Court of Justice of the European Union
Cir.  Circuit
FAA  Federal Arbitration Act (9 U.S.C. § 1 et seq.)
FINRA  Financial Industry Regulatory Authority
F.  Federal Reporter
F.2d  Federal Reporter, Second Series
F.3d  Federal Reporter, Third Series
F. App'x  Federal Appendix
F. Supp.  Federal Supplement
F. Supp. 2d  Federal Supplement, Second Series
F. Supp. 3d  Federal Supplement, Third Series
ICDR  International Centre for Dispute Resolution
JT  Juridisk tidskrift vid Stockholms universitet
NJA  Swedish Supreme Court Reports (Sw. Nytt juridiskt arkiv)
SAA  Swedish Arbitration Act (Sw. lag [1999:116] om skiljeförfarande)
SCC  SCC Arbitration Institute (f.k.a. the Arbitraiton Institute of the Stockholm Chamber of Commerce)
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<tr>
<td>SCC Rules</td>
<td>SCC Arbitration Rules 2023</td>
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<td>SEA</td>
<td>Swedish Enforcement Agency (Sw. Kronofogdemyndigheten)</td>
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<td>SEC</td>
<td>Swedish Code on Execution (Sw. utsökningsbalk)</td>
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<td>SPC</td>
<td>Swedish Code on Judicial Procedure (Sw. rättegångsbalk)</td>
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<td>UCC</td>
<td>Uniform Contract Code</td>
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<td>ULIS</td>
<td>Uniform Law on the Formation of Contracts for the International Sale of Goods</td>
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<td>U.S.</td>
<td>United States (of America) or U.S. Reports (depending on context)</td>
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<tr>
<td>U.S. Sup. Ct. R.</td>
<td>Rules of the Supreme Court of the United States</td>
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<td>WL</td>
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1 Introduction

1.1 Background and Topic

Most disputes concern the obligation to pay money. Whether as damages or as performance, whether contractual or tortious, the payment of money is oftentimes the center of many disputes. Of course, there are also non-monetary disputes. Non-monetary disputes can be of all sorts and kinds. Examples include, *inter alia*, title (whether *in rem* or against the defendant) and declarations (such an agreement being declared null and void). This thesis however does not concern the aforementioned kinds of disputes. Instead, the subject of this thesis is specific performance and injunctive relief, *i.e.*, where the relief sought is for the respondent or defendant to either make an act or an omission. Examples of such disputes are, *inter alia*, a party to a construction contract wishing for the contractor to perform the construction work under the parties’ contract or a party to a contract with a non-compete clause seeking to enjoin its counterparty from breaching it. The availability of reliefs and remedies for such parties typically vary depending not only on the jurisdiction where the dispute is tried but also the law applicable to the legal relation of the parties. Different jurisdictions have different legal traditions that can either facilitate or hinder the possibility for courts to grant various reliefs. Some jurisdictions split remedies up into remedies in law and remedies in equity while other ones do not. Certain jurisdictions view reliefs as procedural issues (the common law view), while some view them as substantive issues (the civil law view).

The issue becomes even more complicated when the dispute is not litigated before a judge but rather arbitrated before an arbitral tribunal or a sole arbitrator. One such complication is the issue of the authority of the tribunal to order various reliefs. Is such authority founded in the substantive law governing the dispute or is it a matter of procedural law? Depending on which, does the standard for granting injunctive relief or specific performance vary in arbitration as compared to litigation? If so, what factors influence the applicable standard? Another issue is the question of what body oversees upholding such orders. Would a party seeking to uphold such an order have to commence a new proceeding and what is the competent body to plead before?

The topic concerns practically important and academically interesting questions. It entails an analysis of arbitration law but also that of procedural law and of substantive private law. The mix of these areas of law and the balancing of their various principles entails methodological challenges, as does the international character of the topic. Further, while the topic is discussed in commentary, it is often dealt with quite briefly, often simply observing the
difference between common and civil law jurisdictions and/or noting that there may be enforcement issues.\textsuperscript{1} Even when discussed more elaborately, the discussion often concern a broader perspective and usually not focused on specific jurisdictions.\textsuperscript{2} This thesis, as further defined below, adopts a more narrow approach which is focused on a specific comparative analysis. The choice of this topic is therefore justified.

It should already here be noted that the topic of this thesis concerns only specific performance and injunctive relief as final remedies, not as provisional ones. In other words, the focus is on arbitrations, as compared to litigations, where such relief is the aim itself, and not a temporary tool to maintain status quo.

1.2 Aim and Research Queries

The aim of this thesis is to establish what consequences the choice of arbitration, as opposed to court litigation, as forum has regarding the availability and enforceability of injunctive relief and specific performance, under the laws of Sweden and the United States. This aim constitutes the overall research question to be answered in this thesis.

To achieve the aim, \textit{i.e.}, to answer to overall research question, the following queries will be examined and answered:

\textbf{i.} Under what circumstances is injunctive relief and specific performance granted and how is it enforced, in litigation? This query includes questions relating to basis of the authority of courts to grant such relief, the applicable body of law deciding the prerequisites for doing so and the means of enforcement that are available to enforce such judgments.

\textbf{ii.} Under what circumstances is injunctive relief and specific performance granted in arbitration? This query includes questions relating to basis of the authority of tribunals to grant such relief and the applicable body of law deciding the prerequisites for doing so.

\textbf{iii.} What is the role of courts and arbitral tribunals, respectively, in supervising and enforcing arbitral awards providing injunctive relief or specific performance? This query includes questions relating to the application of the \textit{functus officio} doctrine, confirmation, recognition and enforcement of domestic and foreign awards by courts, and sanctions available for use by courts and arbitral tribunals respectively.

\begin{footnotesize}
\textsuperscript{1} See \textit{e.g.}, Lew, J., et al, Comparative International Arbitration (24-72), 2003.
\textsuperscript{2} See \textit{e.g.}, Schneider, M. & Knoll, J. (eds.), Performance as a Remedy: Non-Monetary Relief in International Arbitration: ASA Special Series No. 30, 2011, where case statistics etc. are presented from a variety of institutions.
\end{footnotesize}
1.3 Scope and Demarcations

1.3.1 Scope
As indicated above, the issues examined in this thesis will be examined under the laws of Sweden and the United States. This is done not solely to ascertain de lege lata in the two jurisdictions respectively, but also to determine the differences and similarities therein between. The choice of jurisdictions is justified for many reasons. First, arbitration law itself is an inherently international field of law, which oftentimes not only allows for but rather requires a multi-jurisdictional approach. Second, the jurisdictions chosen have developed bodies of law on arbitration and civil procedure. Further, there is an interesting contrast between the countries, with one of them being a common-law country and one being civil law.³ This entails interesting discussions on the boundaries between substantive and procedural law, an issue at the very heart of the topic and research questions of the thesis.

As concerns query (ii), in addition to examining the lex arbitri of Sweden and the United States, other relevant legal sources will be examined as well. Given, that arbitrators are granted their jurisdiction in arbitration agreements, such agreements will be examined. However, an examination of individually drafted arbitration agreements would be of little use. Instead, institutional rules (which by reference in arbitration clauses constitute arbitration agreements) will be examined. The rules examined will be those of the SCC and the AAA, as those are the ones most closely related to the legal traditions of each jurisdiction respectively. Further, the CISG will be examined. As many international arbitrations are substantively governed by the Convention, it is justified to examine its provisions on specific performance as well as the application of those provisions in arbitration as opposed to in litigation.

Finally, in addition to answering the overall research question (by answering the individual research queries), a de lege feranda discussion on the availability and enforceability of injunctive relief and specific performance in arbitration is also included in the scope of this thesis.

1.3.2 Demarcations
Already by means of the defined aim and scope above, many otherwise topic relevant issues are precluded. However, in order to perform a more streamlined and focused inquiry, further demarcations are warranted.

First, this thesis will solely concern injunctive relief and specific performance in contractual disputes. Hence, actions for injunctions to stop intellectual property infringements are for example excluded. There are several reasons for this. Taking the same example with intellectual property infringements, there are

³ Albeit perhaps not the most typical civil law country as concerns Sweden.
many differences as concerns the substantive law governing intellectual property. Moreover, many extracontractual causes of action that may give parties right to injunctions (such as intellectual property law, real estate law, marketing law etc.) oftentimes contain public law elements and issues under such areas of law may sometimes not be objectively arbitrable. Further, contractual obligations are better suited for comparison between different jurisdictions.

Second, specific performance, for the purposes of this thesis, concerns only such performance that cannot as such be enforced or executed. Consequently, obligations such as delivering a specific object (e.g., a specific painting which is already painted and exists and is in physical form) are not included in the definition, as such obligations can be enforced as such in many jurisdictions (it is possible for enforcement officers to take physical possession of the object from the obligor and deliver it to the obligee). An example of an obligation that qualifies as specific performance under the definition of this thesis is the obligation of a software developer to, under a contract with its customer, grant it access to a software by providing a specific software key (without which it is technically not possible to access the software). The reason for this division and demarcation is that this thesis focuses largely on the availability of coercive measures to incentivize an obligor to do something than cannot be done without the participation of the obligor.

Third, this thesis will solely concern commercial arbitration. In excluding such arbitrations, issues relating to sovereignty and similar issues need not be examined. Fourth, as concerns the United States, the law on arbitration examined is federal law, hence primarily the FAA. The substantive contract law examined is however primarily state law, albeit uniformly adopted by all states (see further in section 2.3.2 below).

Finally, it should be noted that demarcations provided herein only constitute limits on the object of the analysis. Consequently, authority relating to issues that fall under the demarcations provided here may still be examined, provided of course that the authority is still relevant for the aim and research queries. For example, case law pertaining to the enforcement of an injunction granted under intellectual property law may still be relevant for procedural issues, such as e.g., the persons bound by the injunction, the coercive measures that may be used to enforce the injunction etc.

1.4 Methodology and Research Material

1.4.1 Introduction

In section 1.2 above, the aim of this thesis has been established. Therein, an overall research question has been presented, further divided in to three research queries, each of which constitute a part of reaching the aim. In section 1.3, the

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4 Federal Arbitration Act, 9 U.S.C. 1 et seq.
scope applicable to the aim presented in the previous section, 1.2, is provided. Further, the scope is demarked and limited. Hence, thus far this chapter has i) provided the object of this thesis and ii) provided the outer limits of that object. This section seeks to set out not what is covered and what is not (such as done in (i) and (ii)), but rather how the issues covered will be examined. The aforementioned “how” is constituted of the legal methods used in this thesis and described in this chapter.

These methods, and their application in this thesis, are described in subsections 1.4.2 and 1.4.6 below. Therein, the specific risks and challenges associated with the use of each method for the purposes of this thesis, will be discussed. In sections 1.4.3-1.4.5 the sources used in this thesis are discussed, along with the challenges associated with each.

1.4.2 Two Separate De Lege Lata Inquiries – Legal Dogmatics

The aim of this thesis is to answer the overall research question, which is a question relating to the proper content of the law. In other words, the overall research question is asked de lege lata, i.e., “what applies?”. The principal tool available to scholars and lawyers in so doing is the legal dogmatic method. This, in turn, entails the question: What is legal dogmatics?

In short, legal dogmatics is the method used by jurists to determine de lege lata. A (very) condensed description of the method is provided by Hjertstedt, describing it as a method “(1) seeking to analyze [de lege lata] by in a specific regard by (2) interpreting sources of law that carry authority.”

Insofar as said definition is concerned, almost any legal product is legal dogmatic in nature. While perhaps not untrue, as Hejrtstedt continues, there is generally more to legal dogmatics than the two steps just mentioned. As is noted by Sandgren, scholars cannot seem to agree on what it is that is characteristic for the legal dogmatic method. Possible characteristics include, inter alia, the application of legal sources in a hierarchical order, its purpose to determine de lege lata, and the operation conducted in applying the method (i.e., the act of interpreting and systematizing).

Nonetheless, this thesis categorizes as legal dogmatic in nature.

As concerns the difference between the application between the legal dogmatic method applied in an academic setting as compared to a practical one, some might argue that there is none. While, the question arguably has no right or wrong answer, the better view is the opposite. A practitioner who analyzes legal sources does so in hopes of being able to conclude an issue of practical law (such as to adjudicate a dispute or give a legal opinion to a client). The practitioner does not choose the research question to be examined, instead the

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research question is controlled by the situation at hand. Moreover, it is the goal of the practitioner to solve the specific situation in question. Conversely, a scholar (or a master’s candidate) chooses the research question himself. Further, the goal is not to prevail in a specific dispute, but rather to provide a generally applicable answer to the question, in abstracto. These distinctions are important to make note of. While the purpose of this thesis is to answer the overall research question (and the individual research queries) in abstracto, some of the sources herein used aim not to provide general answers but to resolve a specific dispute.

Finally, one of the main risks associated with legal dogmatics must be addressed. While all legal research seeks to examine all relevant source material, such an ambition is seldom possible. The vast amount of material combined with differences in availability constitutes an ever-present risk in legal research. This risk, while unavoidable in nature, is mitigated by conducting one’s research in a generally cautious manner. Further, in having formulated a narrow scope with clear demarcations, a thorough analysis of the relevant material is facilitated.

Now that a general description of the legal dogmatic method has been provided, its application on the jurisdictions and the areas of law of interest to this thesis will be discussed.

1.4.3 National Sources of Law in Sweden

As indicated above, the main feature of legal dogmatics is the interpretation of legal sources. Therefore, the standing of these sources must be examined. As this thesis not only involves one but two jurisdictions, the difference between them must be noted and respected. As concerns Swedish law, it is generally accepted that legal sources are hierarchy sorted. The main and principal source of law is statutory text. Statutes are in turn divided into different hierarchical categories (the constitution, acts of parliament, regulations of the government [i.e., the cabinet] and regulations of municipalities and administrative agencies). These are not only of different hierarchical order, but also of different functions. The main kind of statute of relevance to this thesis is acts of parliament. In addition to being hierarchically superior to all statutes but the constitution, such statutes are also the only ones allowed to provide rules of private law. As arbitration law is private law, government regulations therefore need not be examined. However, the enforcement of titles of execution (such as arbitral awards, further described in 4.2.1 below) is a matter of public law. Therefore, government regulations will have to be considered in that regard. The statutes

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9 The Swedish constitution consists of four fundamental acts, but are herein jointly referred to as the constitution.
10 Chapter 8 Sections 2 and 3 of the Instrument of Government (Sw. regeringsformen).
that are of most relevance for this thesis are the SAA\textsuperscript{11}, the SPC\textsuperscript{12} and the SEC\textsuperscript{13}. Further, other statutes indicating what applies, as a matter of substantive law, in regard to specific performance, are of relevance, \textit{e.g.}, the Sales of Goods Act\textsuperscript{14}.

In interpreting statutes, the preparatory works of the statutes are of importance. In the Swedish legal system, preparatory works are considered more important than in other legal systems.\textsuperscript{15} There are two principal ways in which preparatory works can be used. First, when the preparatory works explicitly deal with an issue of contention, the statements made therein may be used in applying the subjective principle of statutory interpretation (\textit{i.e.}, interpreting the statute as intended by the legislator).\textsuperscript{16} Second, when the preparatory works indicate the \textit{ratio} of the statute, the preparatory works can be used in applying the subjective teleological principle of statutory interpretation (\textit{i.e.}, using the interpretation that best fits the \textit{ratio} of the statutes).\textsuperscript{17} However, there are limits to the usefulness of preparatory works. As the statutes, and preparatory works, become older, their relevance may decrease.\textsuperscript{18} Moreover, when an issue is not governed in statutory law at all, there are no preparatory works to examine. For this thesis, the preparatory works of the SAA are the most relevant ones.

Further, case law is also an important source of law. In addition to playing an important role in deciding how to interpret statutory text, the Supreme Court\textsuperscript{19} play an important role in the creating of law by precedents.\textsuperscript{20} There are several ways in which court case law come into play. In regard to the part of the thesis focusing on the availability and enforceability of injunctive relief and specific performance in courts, their precedents will of course be of great value. As concerns the availability of the same in the arbitral forum, case law from courts will be interesting to review when concerning set-aside and enforcement proceedings. However, it should be noted that since the review conducted by courts in such proceedings is limited to the grounds for set-aside and refusal of enforcement, respectively, the value of such precedents is limited to determining whether the awarding of specific performance or injunctive relief violates any of the grounds for set-aside or refusal of enforcement. Consequently, reviewing court case law does not answer the question whether the awarding, or not awarding, of such relief was proper or not, as the function of courts in such proceedings is not to be an appellate forum. Finally, in regard to court case law, it should be noted that the SAA (Section 43) provides that the courts of appeal usually be the final instance trying set-aside and enforcement actions (and

\textsuperscript{11} Swedish Arbitration Act (Sw. lag [1999:116] om skiljeförfarande).
\textsuperscript{12} Swedish Code on Judicial Procedure (Sw. rättegångsbalk).
\textsuperscript{13} Swedish Code on Execution (Sw. utökningsbalk).
\textsuperscript{14} Sw. köplag (1990:931).
\textsuperscript{17} Id.
\textsuperscript{18} Bernitz et al., p. 31.
\textsuperscript{19} And other final instances (such as the Supreme Administrative Court).
\textsuperscript{20} Bernitz et al, p. 31 \textit{et seq.}
consequently not the Supreme Court). Hence, the authoritative value of appellate level precedents in such cases may be higher than normal.

1.4.4 National Sources of Law in the United States

As concerns the United States, there are both differences and similarities compared to Sweden. For the avoidance of repetition, the focus will be on indicating the differences with the Swedish sources. The United States is a common law jurisdiction. As much of the body of law relevant for this thesis is embodied in case law, precedents will have a bigger role in this thesis in determining de lege lata in the United States, than in Sweden. As concerns federal law, which in theory is the same wherever in the United States one might be, consideration must be shown when an issue has not been settled by the Supreme Court. As the Supreme Court is the only court that can issue opinions binding all courts, it holds a higher status. Conversely, case law from the circuit courts of appeals only binds the districts which are included in the circuit in question. In conducting research on case law, it is therefore important to make note of the risk of circuit splits (i.e., when case law differs between different circuits). The reliance on precedent is further strengthened by the fact that in the U.S. the federal statute governing arbitration proceedings is much less detailed. It can also be noted that, unlike in Sweden, preparatory works have only very limited value, if any.

As concerns contract law, as indicated in 1.3 above, the demarcation to federal law does not apply, as contract law is not governed federally. Therefore, it must be recognized that the subject of examination, in that regard, technically is not one jurisdiction (the United States) but rather fifty (the individual states of the United States). However, by means of great legislative efforts in the previous century, all fifty states have adopted the UCC. Hence, while the application of the UCC might differ, the general principles of relevance are uniformly adopted.

1.4.5 Other Sources of Law

Any lawyer or scholar in the field of arbitration is well aware of the unique considerations that have too given when dealing with arbitration law. Arbitration, as a method of resolving disputes, is intended to be independent from the judicial formalities of national courts and to be well suited for international contexts. Further, given the limited review that may be exercised by courts, it is hard to find any binding precedent on issues that do not constitute grounds for set-aside or refusal of enforcement.

Here, it can initially be noted that the CISG, which examined in 3.4, is a non-national source of law. The special considerations in interpreting it will however be provided in the same section as it is discussed, rather than here.

21 When such circuit splits exist, they constitute (persuasive but not decisive) reasons for the Supreme Court to grant certiorari. See U.S. Sup. Ct. R. 10(a).
22 Not counting the District of Columbia and U.S. territories.
Moving on to non-national arbitration-specific sources, it can first be noted that institutional rules are of much importance. However, just as arbitration acts, rules also need to be interpreted. Here, two sources are of significance, both for interpreting institutional rules but also for arbitration law in general. These are arbitral awards and legal commentary.

In deciding on how to rule, arbitrators often turn to other arbitral awards for guidance. While of course not binding (unless concerning the same parties), arbitral awards do indeed carry some value as sources of law. This legal source is however not without its flaws. First, each arbitral tribunal rendering awards is commissioned by the parties in that specific arbitration. As a result, there is no hierarchical order between different awards and tribunals. Therefore, when contradicting each other, there is no simple way of weighing their importance against each other. Second, arbitral awards, unlike court judgments, are not automatically available to the public. While some do get published, for various reasons, there are no guarantees that the published ones accurately reflect how a specific issue is dealt with by most tribunals. Third, the value of arbitral awards as sources of law lays within their status as persuasive, rather than authoritative, and therefore one might argue that they carry the same weight as commentary.

With regard to commentary, there are also considerations to be made. First, it should be noted that commentary (in the sense of all sorts of scholarly works) is not only important as a source of arbitration law, but rather as a source of law in general. Usually, two functions of commentary are emphasized; the systematizing function, and the persuasive function. In systematizing and summarizing a large number of legal sources, commentary may merely restate what is already provided in the sources systematized. Such restatements may serve well as aids in determining legal issues in this thesis, regardless of it being the question of reliefs granted by courts or arbitrators. Sources of that kind are especially useful in determining U.S. law, as it is case law based and thus large in quantity (as opposed to shorter statutory provisions). Further, commentary can have a persuasive function insofar as arguments for a specific order being the proper one (including policy arguments, arguments relating to uniformity with other rules of law etc.) may persuade adjudicators, and is therefore also relevant to examine in this thesis. Some authors argue that the persuasive value of commentary depends on the reputation of the author and the reputation of the publisher. While undeniably true in practice, such a contention can hardly be afforded to be given any regard in an academic endeavor such as this. Further, it can here be added that in engaging in these types of scholarly works, it may sometimes be hard to distinguish the authors’ *de legel lata*

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24 Madsen, p. 56.
25 Cf., Strong, p. 143.
26 See e.g., Bernitz et al. p. 187 et seq.
27 Id.
28 Strong, p. 152.
argumentation from their *de lege feranda* argumentation. Sometimes, the two are mixed.\(^{29}\)

1.4.6 The Differences Between the Jurisdictions – Comparative Method

Above, the legal dogmatic method and its application to the two legal systems of Sweden and the United States has been discussed. However, this thesis does not solely purport to ascertain *de lege lata* in the two jurisdictions respectively. Rather, it also seeks to determine the similarities and differences between the two legal systems. For this reason, and for the other reasons provided below, the comparative method will also be used in this thesis.

Here, comparative law and (or) comparative method must first be defined. Bogdan suggests a three-tiered definition under which the researcher compares legal systems by establishing similarities and differences, discusses the differences in one or more contexts and also discusses the methodological application of the comparative method itself.\(^{30}\) Jensen seem to hold a similar view, also emphasizing determining similarities and differences: “The core of comparative knowledge consists in a structured description of a set of similarities and differences of the objects compared.”\(^{31}\) A somewhat more straightforward description is offered in Black’s Law Dictionary: “The scholarly study of the similarities and differences between the legal systems of different jurisdictions, such as between civil-law and common-law countries.”\(^{32}\) Regardless of which definition used, the method used in this thesis qualifies as “comparative”. For the purpose of this thesis, the term “comparative method” rather than “comparative law” will be used. However, the thesis seeks not to engage in the potential definitory differences between the two.

Having defined the comparative method, the rest of this subsection sets out the features of the method (and their application to reach the aim of the thesis) and the therewith associated methodological risks. First, the *tertium comparationis*, must be defined. The *tertium comparationis* is the object of comparison between the two jurisdictions chosen. In defining it, care must be taken so as to define it as a function of law instead of a specific legal rule to be compared.\(^{33}\) A function of law, in this context, refers to the real-life use or application of the rule, not necessarily its systematic or theoretical place in the legal system(s). In this thesis, the issue at hand is the availability and enforcement of injunctive relief and

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\(^{29}\) For an example of relevance to this topic where the argumentation is, seemingly, mainly *de lege feranda*, see Elder, T., “The Case Against Arbitral Awards of Specific Performance in Transnational Commercial Disputes’ in Arbitration International, Volume 13, Issue 1 (1997) p. 1 *et seq*. The article is further discussed in the *de lege feranda* subsection of this thesis, 5.4, below.


\(^{32}\) COMPARATIVE LAW, Black’s Law Dictionary (11th ed. 2019).

specific performance in the arbitral forum, as opposed to in courts. Here, an example of the difference of their functional and theoretical contexts is suitable. As is elaborated in chapter 2, the place of reliefs in the present legal systems varies greatly. However, for the purposes of the tertium comparationis of this thesis, any provisions of law (“law” in its broadest terms [including equity]), or any practice of law, in which a right is conferred by an adjudicator at the request of a party and at the expense of an another, is considered a relief. This is a description of the function of reliefs. Their legal role in each system respectively, is a completely different matter. Put short, and simplified, in Sweden reliefs are granted by courts as a continuation of the substantive law (in the present thesis, contract law). In the United States on the other hand, reliefs are the procedural tools available (sometimes mandatorily, sometimes discretionarily) to adjudicators to offer parties when a wrong has been established. Should “reliefs”, for the purposes of the tertium comparationis be confined to any of the latter two definitions, the comparison would be flawed as a consequence.

The importance of defining the tertium comparationis in a functional manner is further evident from the importance of examining the legal system in its entirety, which in using the comparative method, and when engaging with any legal system, is vital. Using this specific method is sometimes called the descriptive comparative method.34 Failure to do so may cause the results to be flawed.35 Again, this is a result of different legal systems categorizing different legal rules and principles as different areas of law or performed by different societal functions.36 An example of importance for this thesis is the issue of enforcement and execution. In Sweden, the public authority in charge of enforcing the decisions of courts are not the courts themselves, but rather the SEA,37 which categorizes as an administrative agency. Hence, a lawyer not familiar with the Swedish legal system may disregard Swedish administrative law in analyzing the functions of the SEA and consequently not getting the full picture. As is the case with most methodological risks, the best mitigator of the risk is caution and awareness of it.

Finally, some elaborations on the use of this method in relation to the aim and scope of the thesis is warranted. First, the use of the comparative method makes the de lege lata inquires more robust. It is well established that the comparative method can be used in gaining a better understanding of one’s own legal system.38 In comparing the laws if Sweden and the United States, and in emphasizing their differences and similarities, new perspectives are added that otherwise may have gone lost by only studying one of the legal system’s answers to the overall research question. It ought to be axiomatic that one cannot know what one does not know. By relying on the views of multiple legal systems, perspectives provided in one legal system may be used to view the same issue in the other, and in doing so minimizing the risks of such “blind spots” one otherwise cannot

35 Bogdan, p. 46 et seq.
36 Id., p. 47.
37 Swedish Enforcement Agency.
38 Bogdan., p. 27.
know that one has. Second, the comparative method allows for a broader *de lege feranda* discussion. While a *de lege feranda* discussion is free from the requirements on sources and authorities that exists in *de lege lata* analyses, a multitude of legal systems and viewpoints undeniably enhance the depth of the discussion.

1.5 Disposition

This thesis is divided into five chapters. Save for this first chapter, all chapters include an introductionary section where the content of the chapter and relevance thereof is explained. Here, the overall disposition of the thesis is discussed. The first chapter, the present one, introduces the topic, presents the aim, the scope and the demarcations and finally explains what methods and materials that are used, what they entail and how they are used. The following three chapters each examine one research query. At the end of each of those chapters, a conclusion is provided which answers the research query examined in that chapter. There, the differences and similarities between the two jurisdictions examined are also discussed. Further, where needed, partial summaries and conclusions of subsections of chapters are provided.

In chapter 2, the first research query is examined. There, the availability and enforceability of specific performance and injunctive relief in court litigation is examined. Hence, chapter 2 will serve as a point of comparison and departure for the chapters following it. It may also be noted, that unlike chapters 3 and 4, the subheadings of chapter 2 are not symmetrical between the two jurisdictions compared. This is a result of the two legal systems in question having fundamentally different approaches to the issues of reliefs, remedies and enforcement. Hence, the disposition of chapter 2, in itself, reflects the division that exists between the two legal systems.

In chapter 3, the availability of specific performance and injunctive relief in arbitration is examined. There, the focus is on ascertaining the potential differences between the availability of the present reliefs between arbitration and litigation in the two jurisdictions. That is done by comparing the sources of the authority of arbitrators to grant reliefs and examine how that authority is used in practice. Further, arbitrations under the CISG are discussed specifically as the remedial provisions of the CISG goes to the heart of the issue examined in chapter 3. Part from the conclusions and the section dealing with the CISG, the subheadings of chapter 3 are symmetrical between the two jurisdictions (and arbitral institutions) examined.

In chapter 4, the issue at hand is enforcing specific performance and injunctive relief awarded in arbitration. Again, the objective is a comparison with what applies for court judgments. There, both the issue of enforcing specific performance and injunctive relief in courts as well as instead continuing arbitration on the issue are examined. As with chapter 3, the subheadings of the chapter are symmetrical between the two jurisdictions. Finally, in chapter 5, the thesis is concluded. There, the previous conclusions and answers to the research queries are summarized and an answer to the overall research question is
presented. Moreover, the overall conclusion is discussed also from other perspectives. To conclude the chapter, and the thesis, a *de lege feranda* discussion is lastly provided in chapter 5.
2 Availability and Enforceability of Injunctive Relief and Specific Performance in Courts

2.1 Chapter Introduction

In order to properly discuss the reliefs available in the arbitral forum, and to compare them with the reliefs available in courts, an understanding of both reliefs and remedies as such, and their general availability in courts is necessary. Therefore, this chapter discusses the concepts of reliefs and remedies and their general availability in courts.

As discussed in more detail below, different legal systems have different views on what constitutes substantive law and procedural law respectively. Moreover, the view on the role of courts in their administering of justice also differ. These differences of course impact all aspects of the law, not the least the issue of reliefs and remedies. Hence, an understanding of both the substantive law of contracts in terms of remedies and of the procedural law in terms of reliefs is paramount. Having a good understanding of both, i.e., substantive and procedural, is also important since the lines between substantive and procedural are not always clear and also differ between the jurisdictions.

The issue is below examined per jurisdiction. First, reliefs and remedies, their place in the substantive part of Swedish law and how they are upheld in Swedish courts, are examined (2.2). Second, the role of reliefs and remedies in the procedural parts of U.S. law, the historic background thereto, and the relevant portions of contract law are examined (2.3). Finally, in 2.4, conclusions will be drawn based on the findings in 2.2 and 2.3.

2.2 Sweden - Reliefs and Remedies as Substantive Law

2.2.1 Contract Law Background

As mentioned above, in 1.1, jurisdictions where the legal system is civil law, tend to historically have viewed the right to demand performance of the contract as the premiere remedy in contract law. Sweden is no exception. Initially, it should be noted that Sweden, unlike many other civil law jurisdictions does not have a codified law of obligations. While some types of contracts are governed by statutory law, such as, inter alia, the sale of goods, many types of contracts are not
governed in statutory law. The law of such contracts, including the issue of what remedies that are available in case of breach, is developed through the case law of the Swedish Supreme Court oftentimes by applying the statutory provisions of law governing other types of contracts *ex analogia*.

It is a generally recognized principle of Swedish contract law that the first and primary remedy in cases of contractual breach is demanding performance, at least for many types of contracts (*pacta sunt servanda*). This viewpoint is not novel. Section 21 of the Swedish 1905 Sales of Goods Act provided that “When the goods are not timely delivered, and neither by fault of the buyer or by accident, he may decide whether he wishes to demand delivery of the goods or terminate the purchase”. Present-day legislation also provides for contractual performance as a remedy. For example, Section 23 of the Sale of Goods Act (suitably placed under the heading “Performance”) provides that in cases where the seller does not deliver the goods (the breach), the buyer may “stand by the purchase and demand performance” (the remedy). The Section further provides that the seller does not have to perform under the contract when doing so is not possible or when doing so would entail unreasonable sacrifices for the same. The same principle is applicable when the seller delivers faulty goods (Section 34 of the Act). Similar provisions are found in Chapter 3 Section 4 and Chapter 5 Section 4 of the Consumer Sales Act and Sections 20 and 28 of the Consumer Services Act.

While Swedish law does have strong tendencies toward favoring performance as a remedy for contractual breach, said tendency is not absolute. Under Section 32 of the Commissions Agency Act, a Commission Agreement ceases to exist when the principal recalls the assignment or when the agent renounces it, regardless of whether the recalling or renouncing was legal or not. The provision implies *e contrario*, that demanding contractual performance is not an available remedy for this type of contract. The preparatory works of the Act confirm that this is the case. Instead, parties will have to make do with damages under Section 43 of the Act. It is unclear whether it is possible to view the right to demand performance as a general principle of Swedish law. While there is some support in commentary for such an assertion, there is also opposition. For the purposes of this thesis however, it may be concluded that under Swedish law there is a substantive right to performance for many kinds of contracts.

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39 Govt. bill. 2008/09:88 p. 145: ”The Section expresses the general principle of [Swedish] law that in cases of agency, parties cannot be forced to non-monetary performance.”

2.2.2  Reliefs Available in Courts

Swedish procedural law allows for two types of actions: actions for performance and declaratory actions.\textsuperscript{41}

Performance is the most common of the two. This type of action includes requests for monetary relief, but also specific performance and injunctive relief (as discussed further below). Under Chapter 13 Section 1 of the SPC plaintiffs have a right to have their performance claims heard by courts, provided the performance is due (mature). The aforementioned section also extends the courts’ obligation to hear performance claims to certain cases when the obligations are not yet due (such as, \textit{inter alia}, cases of repeating obligations, where one or more are due). Conversely, courts are not obliged to try declaratory actions. Rather, Chapter 13 Section 2 of the SPC provides that a declaratory action may be tried if it relates to a legal relationship between two or more parties, the unclarity of which causes prejudice to the plaintiff. Thus, in cases where those requirements are met, the court \textbf{may} try the case. As set out by the Supreme Court in numerous cases, a declaratory action must also be “suitable” to be tried.\textsuperscript{42}

As set out above, performance claims include both monetary performance and specific performance.\textsuperscript{43} Although not entirely uncontroversial, claims for injunctive relief are also considered performance claims.\textsuperscript{44}

With regard to the procedural requirements for the court to entertain (and to grant) claims for specific performance or injunctive relief, there are none but those mentioned above regarding the obligation being due. This is a consequence of the Swedish law stance that the power of courts to grant relief is a direct consequence of the underlying substantive law.\textsuperscript{45} This viewpoint is paramount to axiomatic; Chapter 13 Section 1 of the SPC speaks not of “payment” but of “performance”. One exception to this principle is deciding the maturity of negative obligations. As the one requirement for performance claims, maturity of the obligation to be performed, claims for injunctive relief (\textit{e.g.}, enjoining a party from breaching a non-compete clause of an agreement) give rise to special considerations. The issue has been a topic of discussion in commentary. The prevailing view is that an action for injunctive relief may be commenced when the defendant has violated its negative obligation at least once, \textit{if} not earlier.\textsuperscript{46}

\textsuperscript{41} It should be added that there is a third type of relief a court may grant: the ordering of a legal status, an example of this being divorce. Such relief is not further discussed as it falls outside the scope of this thesis.


\textsuperscript{43} Ekelöf, P. et al., Rättegång II p. 120 \textit{et seq.}, 9th online ed., 2015 (available at \texttt{juno.nj.se}).


\textsuperscript{45} Rätt och dom p. 169, \textit{gf.}, p. 130; Domen i tvistemål p. 33. Other civil law jurisdictions seem to have a similar approach, see Schlosser, P., ‘Right and Remedy in Common Law Arbitration and in German Arbitration Law’ in Journal of International Arbitration 4 (1987) passim.

\textsuperscript{46} See \textit{e.g.}, Larsson, L. ‘Fullgörelsetalan’ p. 467 in Hessler, H. (Ed.) \textit{Festskrift till Per-Olof Ekelöf}, 1972 and Rättegång II, p. 123 \textit{et seq.} with therein made references. Some argue that it ought to be enough that the defendant has threatened to break its obligation but not yet done so (\textit{id.}).
2.2.3 Enforcement of Judgments Granting Injunctive Relief or Ordering Specific Performance

In requesting injunctive relief or specific performance, the plaintiff may ask the court to combine its judgment with administrative fines (Sw. offentligrättsliga viten). If granted, the dispositive part of the judgment will then contain both the decree as such (e.g., to provide software to the plaintiff) and the threat that fines may be imposed for non-compliance. The court is not bound by the requested size of the fine, in fact the court may order the relief under penalty of fine even without a request for the fine to constitute part of the judgment.\(^\text{47}\) In such case the defendant does not comply with what has been ordered in the judgment, the plaintiff may commence a new action against the defendant for the actual ordering of the fine.\(^\text{48}\) Under Section 8 of the Act on Administrative Fines\(^\text{49}\) the procedural law applicable to such actions is the rules in the SPC on the trial in criminal cases where the maximum penalty is fines, where applicable. Consequently, the party allegedly in violation of the judgment or order must be proven “guilty” beyond reasonable doubt. Moreover, there are further consequences of the applicability of the criminal procedural rules, such as, \textit{inter alia}, protection from the obligation to provide documentary evidence,\(^\text{50}\) more limited availability of \textit{ex parte} judgments in cases of non-appearances,\(^\text{51}\) the inclusion of lay judges in the district court,\(^\text{52}\) and the that the action should be denied in case of a tie of votes between the judges.\(^\text{53}\)

In addition to the power of the courts to combine the dispositive part of their judgments with the threat of administrative fine, such fines can also be ordered by the SEA. Chapter 16 Section 12 Paragraph 1 of the SEC provide that the SEA, when enforcing an enforcement title (such as a judgment), may order the defendant to perform what it has been ordered to perform or to respect what it has been enjoined from doing. The fact that a court has provided how a judgment should be enforced (such as by imposing administrative fines) does not hinder the SEA to enforce the judgment elsehow under Paragraph 3 of the


\(^{\text{48}}\) Lavin, R., Viteslagstiftningen – En kommentar, Section 8, 3rd online ed., 2022.

\(^{\text{49}}\) Sw. lagen (1985:206) om viten.

\(^{\text{50}}\) Chapter 38 Section 2 of the SPC.

\(^{\text{51}}\) Under Chapter 44 Sections 2 and 4 of the SPC a plaintiff in a civil case may move for a default judgment against a non-appearing defendant, provided the defendant has been summoned to appear under penalty of default judgment. If plaintiff so does, the court is under the same provisions obliged to render such default judgment as requested. Conversely, in criminal cases, default judgments may not be rendered. However, trial may continue \textit{in absentia}, as per Chapter 47 Section 24 and Chapter 46 Section 15a of the SPC.

\(^{\text{52}}\) Chapter 1 Section 3b Paragraph 1 provides that district courts in criminal cases are quorate with one legally trained judge and three lay judges. It should however be noted that under Paragraph 2 of the aforementioned provision, a single legally judge may decide the present types of cases without lay judges, provided the legally trained judge is not a clerk (see Section 18 of the Ordinance Containing Terms of Reference for the District Courts [Sw. förordningen [1996:381 med tingsrättsinstruktion]]).

\(^{\text{53}}\) Chapter 29 Section 3 of the SPC.
aforementioned Section. The SEA may issue such orders under penalty of administrative fine, as provided in Chapter 2 Section 15 Paragraph 1 of the SEC. Should the order of the SEA be ignored, it may commence an action before the competent court to order the defendant to pay the fine for having violated the SEA order. Again, in trying such actions, courts are to comply with the criminal procedure provisions of the SPC.

2.3 United States - Reliefs and Remedies as Procedural Law

2.3.1 Background

2.3.1.1 Law and Equity

The legal system of the United States originates from that of England. As such, a (very) brief overview of English law, the difference between law and equity, and certain other features of the legal system(s) in question, is warranted.

In the early stages of the English legal system, only courts of law existed. The courts of law, as the name implies, applied the law common to all Englishmen, i.e., common law. Common law developed slowly. It did contain substantive rights, however it only allowed monetary remedies (remedies in law). Thus, a landowner could seek a judgment granting him damages from a trespasser. Should the judgment debtor choose not to pay, his property could be attached. The landowner stood however without any remedy to prevent the trespassing to occur again. The imperfectness of the reliefs granted by the courts of law, caused the public to turn to the chancellor of the realm, asking him to by means of his political powers order just relief. Pleads for the chancellor to grant relief were thus not legal or judicial in nature, they were pleas to the supreme administrative officer of the Kingdom. Thus, in the early days, the people of England pleaded the chancellor to grant relief where the law did not, i.e., equitable relief. Eventually, the pleas to the chancellor were directed to a new court of chancery, a court of equity rather than a court of law.

Initially, the pleas in equity were isolated to cases were the plaintiff held a right under substantive common law, for which the law did not provide a suitable remedy. Thus, the plaintiff would make a plead for a relief that was just and fair (equitable), such as enjoining the defendant from entering the land of the

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54 There are many peculiarities to discuss in comparing law and equity. For the purposes of this thesis, generally, only the difference in reliefs and remedies between the two is of interest.
56 The chief political and administrative officer of the sovereign, best compared to a modern-day prime minister.
plaintiff. The reliefs granted were generally coercive in nature. To uphold its orders, the chancellor, and later the courts of equity, used contempt powers. If a defendant chose not to comply with the order of the chancellor court, he would be fined or jailed until he changed his mind. Thus, it was said that the courts of law acted against property, while courts of equity acted against people.\textsuperscript{58}

2.3.1.2 Courts of combined jurisdiction in the United States and modern-day equity

Although the division of courts of law and equity survived the migration to the United States, the division has now largely been forgotten. On the federal level, there is no longer any division, and the district courts may hear pleas for both legal and equitable relief (as may the circuit courts and the Supreme Court of the United States).\textsuperscript{59} The same is largely true on the state level. Currently only a few states have separated courts of law and equity.\textsuperscript{60} As a result of this, the question of the what the importance of the division of reliefs as legal and equitable, both in general and in connection with the topic of this thesis, arise. This is explained below.

Although (mainly) exercised by the same courts, legal and equitable reliefs are still treated differently, both in substance and procedure. First and foremost, equitable relief is, at least in principle, not seen as a right of the plaintiff but rather a discretionary matter for the court to entertain. Thus, a court may exercise its best judgment to decide if an injunction, for example, really is equitable in the specific scenario. Conversely, a plaintiff requesting legal relief may not be denied on discretionary grounds. The discretionary nature of equitable relief has historically been one of its key features. However, as the body of equity related case law has grown, the discretionary powers of courts have been subjected to limitations under which they must be exercised.\textsuperscript{61} The chief source of guidance remains the availability, and adequacy, of damages as the remedy for breach of contract. Before granting equitable relief, courts must generally find remedies at law – damages, that is – incomplete and inadequate.\textsuperscript{62} Courts have held that parties may not contractually, by in their agreement stating that money damages are inadequate, agree on equitable relief since the discretion of courts to grant equitable relief is just so; discretionary.\textsuperscript{63} In balancing their choice of relief, courts should consider which option better serves the ends of justice.\textsuperscript{64} The availability and adequacy of damages is however not the only factor in deciding whether to grant equitable relief. These factors are numerous, but one of special interest is

\textsuperscript{58} Dobbs, § 2.2.
\textsuperscript{59} Fed. R. Civ. P. 2.
\textsuperscript{60} An example of a state that still upholds the division is Delaware, which is home to the Delaware Court of Chancery.
\textsuperscript{61} Dobbs, § 2.4(7); Restatement (Second) of Contracts § 357 et seq (1985).
\textsuperscript{62} Leasco Corp. v. Taussig, 473 F.2d 777, 786 (2d Cir. 1972).
\textsuperscript{63} See e.g., Baker’s Aid, a Div. of M. Raney Co. v. Hussmann Fodservice Co., 830 F.2d 13, 16 (2d Cir. 1987), denying a motion for preliminary injunction on appeal holding that the parties having contractually stated that money damages for either parties’ breach is inadequate does not control the question of whether the court should find such relief appropriate.
\textsuperscript{64} Id.; Restatement (Second) of Contracts § 359.
that in exercising its discretionary powers, courts may balance the interest of the public (even when the public is not a party).65

Another important difference between legal and equitable actions is the presence or absence of a jury trial. In the beginning of its history, as stated in 2.3.1.1 above, the trying of equitable claims by the chancellor was not considered to be an operation of judicial nature. Thus, no jury trials were held. Instead, the chancellor acted both as the fact finder and as the applier of law and facts.66

This tradition was continued in the United States. The seventh amendment to its constitution provides (emphasis added):

“In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.”67

However, the Supreme Court has held that whenever a suit asserts both legal and equitable claims, the right to a jury trial may not be denied.68

Finally, the issue of the subject of injunctions must be addressed. When courts order injunctions, the injunctions are of course directed toward the defendant in question. However, the defendant is not the only one bound by the injunctions. Rather, an injunction binds, in addition to the parties, their officers, agents, servants, employees, and attorneys, and also other persons “in active concert or participation” with a party.69

2.3.2 Uniform Commercial Code

While long only found in case law, there have been considerable efforts made to codify and unify the contract laws of the fifty states, the District of Columbia, and the territories. While some efforts had been made in the early twentieth century to unify some law governing certain commercial transactions, such as the sale of goods, no uniform act existed for commercial transactions in general. The Uniform Commercial Code (UCC) is a comprehensive commercial code governing, inter alia, contracts. It was first adopted by the state of Pennsylvania in 1953 and has since been adopted by all fifty states. As discussed below, the UCC has, potentially, changed the legal position of parties seeking injunctive relief and specific performance in the United States.

Initially, it can be noted that the UCC, on a general level, provides for remedies to be administered “liberally”. Indeed, its § 1-305(a) provide:

66 Blackstone, at 48.
67 It should however be noted that some state constitutions preserve the right to a jury trial also in equitable cases. Further, jury trials are sometimes a right in certain cases concerning equitable actions, when provided by statutory law.
“The remedies provided by [the Uniform Commercial Code] must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special damages nor penal damages may be had except as specifically provided in [the Uniform Commercial Code] or by other rule of law.”

The regime under the UCC, although similar to what applied pre-UCC, is not entirely the same. UCC, § 2-716, the provision governing specific performance under sales of goods contracts, provides that courts may grant specific performance when the goods in question is “unique” or “in other circumstances”. The ratio of the provision was to broaden availability of specific performance. Hence, the requirement was stated as the goods having to be “unique” rather than having to be specific. The relevant factor to try is the “commercial feasibility of replacement”, making specific performance a possibility also in cases when replacement is possible but not commercially feasible. The test must be applied considering all circumstances related to the contract. Specific performance should be refused when damages or other remedies at law are “as certain, prompt, complete, and efficient to attain the ends of justice as a decree of specific performance”. Examples in case law include, inter alia, an action by a buyer for specific performance under a contract for the sale of a limited edition (but not one of a kind) car which could – maybe – only be replaced after “considerable expense, trouble or loss” (internal quotations omitted) and a buyer of hog casings which could purchase replacements but not of sufficient quality.

Finally, in addition to broadening the interpretation of uniqueness, UCC, § 2-716 provides an addition ground to grant specific performance; when there are “proper circumstances”. Here, it should be added that the wording of §2-716(a) must not be construed as unique goods and proper circumstances are meant to be cumulative prerequisites.

2.3.3 Enforcement of Judgments Granting Injunctive Relief or Ordering Specific Performance

As has been established above, courts in the United States may grant equitable relief, which inter alia, may consist of ordering specific performance or to issue an injunction. This section deals with the enforcement of such orders.

70 Official Comment 1 to UCC § 2-716.
71 Official Comment 2 to UCC § 2-716.
75 Official Comment 2 to UCC § 2-716; 522 F.2d 33, 40; “specific performance may be ordered even though personalty is involved in the 'proper circumstances.'”; § 1-305:2 Liberal administration of remedies, 1 Hawkland UCC Series § 1-305:2.
The way in which courts in the U.S. ensure compliance with their orders and judgments is by use of their contempt powers. The power of courts to punish or compel parties and others in contempt their orders, be it by jail or fines, is considered an inherent power of the courts. Generally, the sanctions used to exercise the contempt powers of the courts have two different functions: coercive and determinate. The former is considered civil (regardless of it being the question of imprisonment), while the latter is considered criminal. The division between the two can best be described as follows.

Coercive sanctions have as their objective to compel the subject of the sanction to comply with the order of the court. This could, for example, be the case when a court orders a party to provide some sort of specific performance (such as provide software under an agreement), but the party refuses. The court may in such cases indeterminately imprison the party (or its officers) until it (or they) agree(s) to comply. Another option is to order fines to be paid for each day the order is not complied with. These sanctions have as their objective to compel compliance. The person against whom the sanctions are directed may at any time decide to comply, thereby terminating the continuation of the sanctions. Conversely, criminal contempt concerns cases when the order of a court has been violated by an action already committed, forcing the court to vindicate its authority by punishing the violator.

As concerns injunctions enjoining parties from taking certain actions (i.e., negative injunctions), their status is somewhat ambivalent. An order not to do something (that one is currently not doing, but considering) is per definition complied with from outset – until it is not (e.g., confidentially obligations are naturally complied with – without the obligor having to do anything – until suddenly the obligor changes its mind). Therefore, some states view any coercive sanction to enjoin a party from doing something, that is later imposed, is at the time of the latter, punitive in nature and thus a matter of criminal contempt. Federal courts do not seem to agree.

Common for both civil and criminal contempt is that the trying of the contempt itself requires a hearing of its own. This applies for all cases of contempt not concerning acts committed (or omitted) directly before a judge. Thus, the judge both makes the order, and supervises it.

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76 While parts of what is stated in this section is also applicable to equitable money judgments, such issues are outside the scope of the thesis and are not the subject of discussion here.
77 *Ex Parte Robinson*, 86 U.S. 505 (1873): “The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice”. See also Fed. R. Civ. P. 70(e) and 71, and 18 U.S.C. § 401(3).
78 The same may also be achieved by imposing jail while putting the defendant on probation from the imprisonment for as long as the defendant stays compliant, see Dobbs, § 2.8(3).
81 See, e.g., *New York State National Organization for Women v. Terry*, 886 F.2d 1339, 1351 (2d Cir. 1989), emphasizing that the fine in question was prospectively fixed: “The prospectively fixed penalties were plainly intended to coerce compliance with the court's order and to preserve the parties' then-existing legal rights.”
82 Dobbs, § 2.8(1).
2.4 Chapter Conclusions

This chapter has explored availability and enforceability of specific performance and injunctive relief in courts. As one may expect, the differences between the two jurisdictions are several.

In Sweden, as in many civil law countries, the availability of specific performance and injunctive relief is mainly an issue of substantive law. The legal culture has among its main pillars the principle of *pacta sunt servanda*. When a party commits to perform, it does not simply incur a strictly fiscal liability on itself. Instead, the party incurs on itself, also, a liability *in natura*. The obligation to perform *in natura* varies from contract to contract depending on the nature of the contract. However, when an obligation to perform *in natura* has been shown to exist, the aggrieved party usually has a right under law for courts to recognize and uphold said right. In fact, the SPC, in its provision governing when performance claims are mature to be brought before courts, speaks not of debts that are due, but instead of performances that are due. As concerns injunctive relief, in principle, the same applies. The fact that a party, instead of having committed to perform, has committed not to perform does not change that it may be obliged to act (omit) thereafter *in natura*. While not clear when such obligations that entail a party not to act fall due – and thereby capable of being brought before courts – commentary is in agreement that it ought to be sufficient that the obliged party has breached its duty at least once. Hence, the basis of the authority of courts to grant specific performance and injunctive relief is the same basis as grants the authority to adjudicate disputes; to secure the legal rights of parties.\(^83\)

Unlike in many other countries, Swedish courts do not enforce their own judgments.\(^84\) Instead, enforcement is handled by the SEA. However, as an alternative to directing parties to the SEA, courts may issue their judgments under penalty of administrative fines. When having done so, the party owed the specific performance or for the benefit of which the injunctive relief was granted, may commence new action before courts to have the fines imposed if the other party is in breach. If the judgment is not issued under penalty of administrative fines, the prevailing party is forced to seek the assistance of SEA, which may issue orders of its own, directing the breaching party to comply with the judgment under penalty of administrative fines.

In the United States, the general rule is that parties are not obliged to perform *in natura*, even when having made contractual promises to do so. It is said that

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\(^83\) Ekelöf, P. et al., Rättegång I p. 26 *et seq.*, 9th online ed., 2016 (available at juno.nj.se).

\(^84\) While “many” of course is a subjective standard, it ought not be controversial to assert that the Swedish solution with the SEA as separate authority from the courts is not that common. *Cf.*, Article 3 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which mentions the SEA explicitly (albeit in the context of summary orders).
under common law, there is no right to performance. While true, parties still have other avenues to explore to secure specific performance or injunctive relief.

When common law was first formed, Englishmen were forced to settle with legal remedies, *i.e.*, damages. Eventually, citizens started pleading to the chancellor, to as a matter of equity use his political powers to offer relief from wrongs suffered to them by others, for example to order them to stop trespassing under penalty of imprisonment for having violated the chancellor’s authority. In time, the court of chancery was born. Armed with coercive powers, the court decided claims without juries and granted reliefs based on principles of equity. While different at first, today all federal courts (and most state courts) in the United States have combined jurisdiction over both legal and equitable cases. Although federal courts have jurisdiction over equity cases, the source of their authority to grant equitable reliefs vary greatly from their authority to grant legal reliefs. The same applies for the applicable procedure; it varies greatly in comparison.

When trying claims where the relief requested is legal, parties have the right to a jury trial under the Seventh Amendment. As it is a matter of rights, the plaintiff is entitled to the relief requested if it can show that its rights have been violated. In other words, the court cannot refuse the relief on a discretionary basis. For equitable claims, the opposite applies. There is no constitutional right to a jury trial for parties, and moreover the relief sought by the plaintiff is discretionary for the court to grant. However, the discretionary power of courts may not be abused, something aided by the standards for granting equitable relief which has been set out by means of precedents over time. Factors reviewed by courts in deciding whether to grant equitable reliefs include adequacy of legal remedies (damages) and prejudice suffered to the parties. By the adoption of the UCC by all states, courts in the United States have taken a more liberal stance toward granting specific performance.

Like in most countries, and unlike in Sweden, courts in the United States are responsible for enforcing their own orders and judgments. When the relief granted in a judgment concerns specific performance or injunctive relief, the principal tool available to courts is the use of their inherent contempt powers, *i.e.*, imposing jail time or fines. Those subject to the contempt powers of courts are not only simply the parties before it, but also their agents, officers, employees and other persons in active consort with them. The contempt powers of courts are divided into two functions: coercive and determinate. When contempt punishments are used to coerce compliance, it is considered civil contempt (regardless of the punishment imposed). Conversely, when contempt powers are used to vindicate the court’s authority for a violation that has already occurred, it is considered criminal contempt, resulting in the applicability of certain minimum due process rules for criminal cases.

In comparison, the two legal systems differ in all aspects reviewed. The core of the differences lay in the fundamental elements and historical backgrounds of the two systems respectively. These differences have led to completely distinct developments of each system’s judiciary in this regard. Whereas in Sweden, the issue has almost been viewed as a non-issue, the opposite has been the case in
the United States. There, an intricate web of exceptions, tests and standards has been developed by courts in order to determine when specific performance and injunctive relief are appropriate and should be granted on basis of equity. Finally, while Swedish courts do not have any procedural restrictions on granting specific performance or injunctive relief, they do not have as elaborate and “powerful” coercive measures to enforce such relief, as compared to courts in the United States.
3 Availability of Injunctive Relief and Specific Performance in Arbitration

3.1 Introduction

As set out above, the issue of reliefs available for plaintiff parties in litigation is not a simple one. Analyzing the issue in international arbitration requires a rigid structuring of the analysis. This section seeks to outline the structure of the analysis to follow. It should at this stage be noted that the issue discussed in this chapter solely is what authority arbitrators have to render awards granting injunctive relief and specific performance. Thus, issues relating to how such awards are enforced and supervised are not discussed here. Instead, such issues are discussed in chapter 4. The subject of this chapter is linked to research inquiry (ii), the basis of arbitrators’ authority to grant injunctive relief and the applicable body of law deciding the prerequisites for doing so.

This chapter analyses the present issue from three different perspectives. First, in 3.2, the issue is examined as a matter of national law. Here, the authority of arbitrators under law to render awards granting injunctive relief and specific performance is addressed. Further, the section examines if and to what extent courts and statutory law hold arbitrators to the same standards as courts for granting the present kinds of reliefs. Second, in 3.3, the issue is discussed from the perspective of the arbitration agreement. This is achieved through an analysis of institutional arbitration rules, which of course are considered part of the arbitration agreement when incorporated by reference. Third, in 3.4, the issue is discussed in the specific context of the CISG. The reasons behind singling out the CISG especially have been briefly explained in 1.3 above and are further explained below. Finally, in 3.5, conclusions are drawn based on the findings of this chapter.

3.2 Authority under law

3.2.1 Sweden

As set out above, substantive Swedish law generally provides contracting parties with performance as the main remedy for breach (2.2.1). The power of courts to grant injunctive relief is a result of the substantive law governing the dispute, and is consequently not a procedural issue (2.2.2). To enforce their orders, Swedish
courts may render judgments granting injunctive relief under penalty of administrative fine, which can be imposed by the same court upon request of the non-breaching party (2.2.3). The now relevant question is what applies in the arbitral forum?

While containing a few provisions on the formal requirements of arbitral awards, the SAA provides no guidance concerning the permissibility of injunctive relief or specific performance being awarded. The Act does however contain some guidance that may be of relevance to the present inquiry. Under Section 1 (3rd sentence) of the SAA, parties may submit to arbitration disputes concerning the presence of a circumstance, i.e., *inter alia*, obtain a declaration as to factual issues. The rule constitutes a deviation from what is the case in litigation. As set out above (2.2.2), under the SPC, actions may be brought for declaratory relief only when the i) declaration sought concerns a *legal relation* between the parties, ii) the *legal relation* is uncertain, iii) the uncertainty causes prejudice to the plaintiff and iv) the action is deemed overall appropriate. Consequently, parties may not ask courts to decide matters of fact that they find relevant. The broader possibilities to bring disputes under the review of arbitrators than courts were deliberate difference contemplated by the Swedish legislator. In the preparatory works of the Act, it was stated that even before the implementation of the Act, declaratory actions for matters of fact could be brought before arbitrators, but only when the fact in question was or could be relevant for the future assessment of a legal issue between the parties. Such a requirement, that the claimant should be obliged to show the future legal relevance of the factual issue for which the declaratory relief was sought, was considered when drafting the Act, but was later dropped. The takeaway of this, for the purpose of this thesis, is that there is a difference between the competence of courts and arbitral tribunals to grant some reliefs, with the competence of arbitral tribunals being wider.

As just set out, the Act does not contain any provisions governing injunctive relief, or any kind of performance relief at all for that matter. The Acts preparatory works on the other hand do, however briefly, touch upon the subject. It is there stated that the issue of arbitral tribunal’s powers to grant injunctions *under the penalty of administrative fines* has been discussed and discarded in literature and that a continued negative treatment of the idea is advisable. The issue discussed is not the granting of the injunction itself, but rather if the arbitral tribunal can in its award grant the relief by issuing the dispositive part under

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87 Id., p. 61 et seq.
88 Govt. bill 1998/99:35 p. 59: “It is a general conception that the powers of arbitrator to try various issues of civil nature spans wider than the powers of courts”.
89 As defined in 2.2.2 above.
penalty of administrative fines. That the injunction itself can be granted, seems to be considered something apparent.

Similarly, the issue has not directly been discussed in case law, but rather taken for granted. In one case, a company commenced an arbitration in Norway against a personal business owner, requesting the tribunal to, *inter alia*, render an award enjoining the respondent from breaching a non-compete covenant in the parties’ agreement. Upon the tribunal rendering such award, the claimant brought enforcement proceedings before the Svea Court of Appeal, the judgment of which was appealed to the Supreme Court. The case mainly concerned issues of mandatory competition law and whether the injunction by virtue of non-compliance with competition law violated public policy. In a more recent decision by the Svea Court of Appeal, the issue at hand was the set-aside of an award that, *inter alia*, in its dispositive part directed specific performance. Again, the specific performance itself was not the issue of controversy. Here, one may already conclude that specific performance and injunctive relief are allowed in arbitration in no less extent than in litigation. However, further support for this contention can be found.

Commentary, when dealing with the issue, seems unified in that arbitrators have the same competence to entertain claims for specific performance and injunctive relief as courts do, at least. Lindskog argues that the general limitations on court actions set out in Chapter 13 of the SPC also apply in arbitration (presumably with the exception of the additional competence granted to arbitrators in Section 1 of the SAA). As concerns performance *in natura* specifically, he contends that the limitations applicable to courts also apply in this regard. Heuman goes further than Lindskog. He also argues that specific performance is allowed. However, he further argues that arbitral tribunals may entertain performance claims (which include both monetary and non-monetary obligations, see 2.2.2 above) even when the obligation to perform is not yet due, at least in cases where the obligor in beforehand has stated that it does not intend to perform. Moreover, as indicated when discussing the preparatory works above, there are further scholarly discussions on the topic of arbitrators’ authority to render awards for specific performance and injunctive relief under penalty of fines, which of course presupposes a competence to grant such relief in the first place. These are further discussed in section 4.4.2 below.

To conclude, all authority examined either expressly or implicitly indicate that there are no hinders for arbitrators to grant specific performance or injunctive relief. The lack of a broader discussion on the topic ought to be explained by the
fact that the issue is not considered procedural in Sweden, why the choice of forum should lack relevance for the availability of the reliefs in question.

3.2.2 United States

As was the case in 3.2.1 above, a (very) short summary of the findings regarding the issue of injunctive relief and specific performance in litigation and in general provided in section 2.3, is warranted. Unlike what is the case in Sweden, parties to federal cases in the United States do not have the right of performance as a remedy for breach. Performance can however be granted as an equitable relief by courts (2.3.1.2). The adoption by all states of the UCC has however led to a, albeit small one, shift of the law. Now, the granting of specific performance is a bit more generous, with the practical standards for granting it being continuously provided in case law (2.3.2). Once granted, the judgment or order containing the relief will be supervised by the court that issued it. The main tool of the courts to secure compliance is the use of their contempt powers (2.3.3).

Now to the issue of relevance here, the relief available for parties before arbitral tribunals rather than courts. Here, it can initially be noted that the FAA, much like the SAA, lacks provisions on the reliefs available in arbitration. The courts have however discussed the issue, and some clarity exists.

Generally, courts in the United States have had a liberal approach to confirming awards granting a wide array of reliefs. An important starting point to consider in the analysis is that the body of case law available seem to unequivocally support the notion that there is a difference in the reliefs available in arbitration as compared to litigation. This difference is that arbitral tribunals have greater freedom in deciding appropriate remedies and granting reliefs. In United Steelworkers of Am. v. Enter. Wheel & Car Corp the Supreme Court held that “[w]hen an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies.” Further, there is ample precedent at the appellate level. Circuit courts in many circuits have applied, albeit not explicitly, the findings of the United Steelworkers Court, to arbitrations and arbitral awards in general, both those governed under the NYC and those not. Examples include, inter alia, ReliaStar Life Ins. Co. of N.Y. v. EMC Nat. Life Co, ReliaStar Life Ins. Co. of N.Y. v. EMC Nat. Life Co, Banco de Seguros del Estado v. Mut. Marine Off., Inc. Almost without exception, the courts cite the arbitration

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99 It should be noted that this case concerned arbitration under a collective bargaining agreement, which might have impact on the general applicability of the findings of the Court.
100 ReliaStar Life Ins. Co. of N.Y. v. EMC Nat. Life Co., 564 F.3d 81, 86 (2d Cir. 2009), the court held that it was within the tribunal's authority to sanction a party for bad faith conduct by imposing in its award an obligation to pay attorney's fees, as “arbitrators have the discretion to order such remedies as they deem appropriate”.
101 Banco de Seguros del Estado v. Mut. Marine Off., Inc., 344 F.3d 255, 262 (2d Cir. 2003), the court held that “[w]here an arbitration clause is broad, as here, arbitrators have the discretion to order remedies they determine appropriate, so long as they do not exceed the power granted to them by the contract itself.”
agreement as such in concluding that the remedial discretion (or freedom, rather) of arbitral tribunals is greater than that of courts. So did, *inter alia*, the Court in *United Steelworkers* (“when an arbitrator is *commissioned*”, emphasis added) and the court in *Banco de Seguros del Estado* (“where an *arbitration agreement* is broad”, emphasis added). There is however some ambiguity on the issue. In some cases, such as the aforementioned, the courts have held that the arbitrators’ remedial authority stem from the *arbitration agreement*. Conversely, in other cases the courts, at least seem to, have found the arbitrators’ power to grant non-monetary relief in the underlying contract itself.

In the specific terms of specific performance (pun intended) and injunctions, courts have not treated such relief differently than other reliefs. Rather, the same rationale is applied; the appropriate relief is for the arbitral tribunal to decide. In *Stone v. Theatrical Inv. Corp.*, the court held that “[i]t is well established that, for example, arbitrators may award injunctive relief.”

### 3.2.3 Conclusions

The level of certainty of the current legal order varies between the two jurisdictions. In both jurisdictions, it is undisputed that arbitral tribunals *may* grant injunctive relief and specific performance.

In Sweden, the applicable standard for arbitral tribunals to apply in deciding whether such relief should be granted is not the object of any lengthy discussion in literature, case law or preparatory works. Albeit not certain, the most probable conclusion must be that the reason the issue is not discussed at any length in the context of arbitration is that it is the result of the issue of reliefs and remedies being a matter of substantive law in Sweden. Thus, at least in principle, it should be indifferent whether arbitration or litigation is the proper venue, provided there exists a substantive right of performance under the substantive law governing the parties’ legal relation. The issue of what applies in such case a dispute is governed by the law of a jurisdiction not viewing reliefs and remedies as substantive issues is discussed in section 3.5 below.

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102 See also, *inter alia*, *Island Creek Coal Sales Co. v. City of Gainesville, Fla.*, 729 F.2d 1046, 1049 (6th Cir. 1984), abrogated in here irrelevant parts by *Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.*, 529 U.S. 193 (2000), “The authority for equitable relief arises from Rule 43 of the AAA Commercial Arbitration Rules which the Agreement incorporates by reference. Rule 43 provides that ‘[t]he arbitrator may grant any remedy or relief which the arbitrator deems just and equitable and within the scope of the agreement of the parties, including but not limited to, specific performance of a contract.’” (emphasis added).

103 See, *inter alia*, *McDonnell Douglas Fin. Corp. v. Pennsylvania Power & Light Co.*, 858 F.2d 825 (2d Cir. 1988), where the court held that arbitrators, provided they have jurisdiction under an arbitration agreement that does not specifically preclude certain reliefs, then the “construction of the contract and of the parties’ rights and obligations under it are within the jurisdiction of the arbitrator.” While, similar to the reasoning by the court in *Banco de Seguros del Estado*, the emphasis in this case is also put on the parties’ rights and obligations (under the main contract, presumably) as such. Hence, the reasoning of the court in this case is based on the presence of a substantive right of, for example, specific performance under the contract in the first place, rather than viewing the available reliefs as an entirely procedural issue.

The current status *de lege lata* in the United States is more certain. It has been established on numerous occasions that the fundamental difference in the source of powers between courts and arbitrators entails a difference in their powers to grant reliefs. The judicial precedent developed in regard to the equitable powers of courts (as partially codified in the UCC) therefore only binds courts. Arbitral tribunals on the other hand have a larger freedom to grant such relief that in courts are considered equitable. Most precedent suggest that the powers of arbitrators to grant reliefs of various nature stems from the arbitration agreement. Some precedent on the other hand suggest that the powers in questions stem from the substantive rights and obligations under the main agreement, in combination with the submittal to arbitration in the arbitration agreement.

3.3 Institutional Rules and Arbitral Practice

3.3.1 Introduction

As set out above, the arbitration agreement plays in many cases a vital role in deciding what reliefs that are available for claimant parties. With most arbitration clauses providing for arbitration under the rules of an arbitration institute rather than *ad hoc* proceedings, the rules of arbitration institutes come in to play in analyzing the issue of available reliefs. Further, as the ones who apply these rules, at least in the first place, are arbitral tribunals, arbitral case law is also of importance. This section 3.3 discusses these topics.

First, it should be recognized that there are many arbitral institutions and even more arbitral awards to analyze. The purpose of this thesis is not to analyze them all, nor is it the purpose of this section. Instead, the reason for the following analysis is to ascertain whether or not there are any notable differences between the rules, if there are any discernible trends in arbitral practice and whether arbitral tribunals agree or disagree with courts in regard to their remedial freedom (their freedom to formulate reliefs in their own awards). While the rules applicable to an arbitration, and the arbitral institution administering the rules, do not necessarily entail a specific city or country being the seat of arbitrations under said rules, some generalizations can be made. For example, in 2022, 81 per cent of SCC administered cases had their seat in Sweden, while none had their seat in the United States.105 While not indicated in the official statistics, it ought not be controversial to state that many AAA arbitrations are U.S.-seated. Therefore, this section will focus on AAA and SCC arbitral awards, and any differences therebetween.

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3.3.2 AAA

The AAA Rules, used primarily for domestic U.S. arbitrations, and thus presumably drafted with the general principles U.S. law in mind, provide in Rule R-49(a)\textsuperscript{106} the following.

“The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.”

Here, there are a couple of observations to be made. First, and perhaps most importantly, the arbitrator is given authority to grant any relief the arbitrator deems just and equitable. By including the word any, it ought to be clear that there are no restrictions as the type or sort of remedy that can be granted. Further, the arbitrator must deem the remedy just and equitable. The broad terminology of the provision puts much discretion at the hands of the arbitrator. The requirement for the arbitrator to consider the relief “just and equitable”, at least suggests that a party may be denied a relief, specific performance for example, even when successfully making its case, based on such relief being unequitable. In other words, judging from the wording at least, “just and equitable” constitutes the applicable standard under AAA arbitrations. Given what was set out above (3.2.2), that the judicial standards for granting reliefs at law and equity do not apply in arbitration, it would be reasonable to assume that the “just and equitable” standard applies in lieu of the judicial standards discussed in 2.3.1.2 and 2.3.2 above. Arbitral case law confirms this stance.

In 	extit{Telecom Business Solution},\textsuperscript{107} investors had acquired a minority position in a holding company owning a telecommunications company. The majority, held by the previous sole principal owner, concluded a shareholder’s agreement with the minority, \textit{inter alia}, providing for a so called “drag-along” clause forcing both parties to sell their shares upon request of either one under certain circumstances. The agreement further contained a remedies clause providing the right to specific performance in case of a breaching party’s non-performance. Following disagreements between the owners, the minority claimant commenced an action before an AAA tribunal requesting, \textit{inter alia}, that the arbitral tribunal order the majority respondent to partake in the selling of the whole company. Respondent objected to the sought relief on many grounds, among them that the standard for granting specific performance under the applicable (New York) law had not been met, regardless of whether those standards were considered substantive or procedural. The tribunal rendered an award granting claimant’s requests, with relatively great reasoning on the specific performance issue. Here, two aspects of the reasoning will be commented. First, the tribunal held that unlike courts, the

\textsuperscript{106} This Rule is the one referred to in note 102 above.
\textsuperscript{107} 	extit{Telecom Business Solution, LLC and LATAM Towers, LLC v. Terra Towers Corp., TBS Management, S.A., DT Holdings Inc., Jorge Hernandez, Alberto Arzú and Continental Towers Latam Holdings, Ltd., ICDR Case No. 01-21-0000-4309, Partial Final Award Concerning Sale of the Company, 24 February 2022.}
tribunal’s powers to grant requests for relief derives from the contract: “This Tribunal’s remedial powers are derived from the Parties’ contract. That means our power to grant specific performance is controlled by [contract provision on specific performance mentioned above] and AAA Commercial Rule R-47(a), both adopted by the Parties in the [contract].”\(^{108}\) The tribunal continued, “as an arbitral tribunal we do not exercise ‘the equitable power of the court’ but (as just observed) the powers conferred on us by the Parties in the Agreement.”\(^{109}\)

Second, while the tribunal found itself not to be bound by the rules (and case law) governing the use of courts’ equitable powers in New York, it did make use of New York case law to inform it on the application of the “just and equitable” standard under the AAA Rules: “This cited law concerning the judicial equitable power is a discretionary factor informing our determination of whether specific performance would be ‘just and equitable.’”\(^{110}\) Consequently, while not bound by court precedent, tribunals may look at what courts find equitable to be better informed on their own assessments of claims being just and equitable or not. In doing so, this tribunal analyzed many of the same factors as courts do, \textit{inter alia}, the (in)adequacy of remedies at law (monetary damages) and whether the specific performance resulted in any undue hardship for the respondent, while still using a more liberal approach to granting specific performance. This case, while of course not authoritative for the law in general, is a good example of the differences between the equity powers of courts (see 2.3.1.2 and 2.3.2 above) and the remedial freedom of arbitrators (3.2.2) in the United States.\(^{111}\)

The \textit{Telecom Business Solution} case is far from the only case where U.S. arbitrators in their awards have taken an explicit stance that their powers to grant specific performance and injunctive relief is more far-reaching than that of courts (but it might be one of the more reasoned ones).\(^{112}\) Further, there are more examples of

\(^{108}\) Id. ¶ 20.

\(^{109}\) Id., ¶ 70.

\(^{110}\) Id., ¶ 57.

\(^{111}\) Claimant petitioned the district court to confirm the award, respondent cross-petitioned for vacatur of the award. The district court confirmed the award, denying respondent’s cross-petition to vacate it (\textit{Telecom Bus. Sol., LLC v. Terra Towers Corp.}, No. 22-CV-1761 (LAK), 2023 WL 257915 [S.D.N.Y. Jan. 18, 2023]) and the case is now pending before the Second Circuit Court of Appeals.

\(^{112}\) See \textit{e.g.}, \textit{Northstar Mechanical Inc. v. J.C.H. Delta Contracting Inc.}, AAA Case No. 13-110-Y-00749-05, Disposition of Application for Modification of Award, 14 January 2009: “Moreover, the AAA Rules, Rule 44 [present Rule R-49], Scope of Award,’ provide a liberal, and broad grant of Arbitrator authority for fashioning the terms of the Final Award.”; \textit{Three Brothers Trading LLC v. Generex Biotechnology Corp}, ICDR Case No. 01-17-0007-1894, Amended Award of Arbitrator, 29 January 2021, ¶ 15: “Nor should New York law control as to what may be an appropriate remedy. The Parties agreed to arbitrate under the Commercial Rules of the American Arbitration Association, and it is those Rules that control here as to remedy. Rule 47(a) provides that I may provide for a remedy that is just and equitable and within the scope of the agreement.”; \textit{Interbill, Inc. v. Atlantic-Pacific Processing Systems, LLC}, AAA Case No. 01-20-0015-5612, Interim Award, 4 April 2022, ¶ 24: “The decree of specific performance and award of damages set forth herein are just and equitable. See [predecessor of AAA Rule R-49(a)].” \textit{Cf.}, \textit{Signature Pharmaceuticals, LLC v. Ranbaxy Pharmaceuticals, Inc.}, AAA Case No. 01 16 0004 6534, Partial Final Award, 19 December 2016, where the tribunal held that it was not bound by the statute of limitations (which in the U.S., much like reliefs are considered procedural and unlike Sweden where the issues of statutes of limitations and
tribunals granting such relief without any reasoning on the applicable standards for doing so, thereby perhaps suggesting that they are exercising their right to determine what is just and equitable rather than meeting the standards set by courts. However, arbitral precedent does not unanimously support the notion of arbitrators having, and exercising, a broader authority to order specific performance and grant injunctive relief.

In summary, some arbitrators, empowered by the clear precedent of courts holding that arbitrators have broader possibilities to grant equitable relief and by AAA Rule R-49(a), make explicit use of their broader authority to grant such relief. Other arbitrators seem to do so, but implicitly, while there also are arbitrators that adopt the judicial standards of granting equitable relief as is.

3.3.3 SCC

Unlike the AAA Rules, the SCC Rules contain no provision on reliefs or remedies. The only guidance provided is contained in Article 27(1) stating that:

“The Arbitral Tribunal shall decide the merits of the dispute on the basis of the law(s) or rules of law agreed upon by the parties. In the absence of such agreement, the Arbitral Tribunal shall apply the law or rules of law that it considers most appropriate.”

Fortunately, there is some arbitral precedent to review, albeit limited in quantity. The general trend seems to be that arbitral tribunals apply the substantive standards provided in the law applicable to the merits of the arbitration. In JSC Techsnabexport a Russian supplier of uranium came into dispute with its U.S. buyer when the parties disagreed on whether a revision of the purchase price of the uranium concluded by the parties in an addendum to their agreement, constituted a final or tentative fixing of the price. The supplier commenced an

available reliefs is substantive) but rather by the AAA Rules which apply in lieu of the statute of limitations (see ¶¶ 15-18).

113 See e.g., Equifax Information Services LLC as successor in interest to Equifax Information Services Inc. v. Zoot Enterprises Inc., Award of Arbitration Panel, 24 June 2003, ¶ 4(i), where the tribunal held that the alleged breach had been proven by the claimant and that “[t]herefore, [claimant] is entitled to and is hereby granted specific performance” (emphasis added), thus not factoring in any judicial standards in granting specific performance; Northwest CBD Solutions, LLC v. CBD Brand Partners, LLC and Health Plus Oregon, LLC, AAA Case No. 01-21-0000-4178, Interim Award, 27 May 2022, where the tribunal simply held “[s]pecific performance is available under New York law” (emphasis added).

114 See e.g., Liberty Theatres LLC v. The Stomp Company Limited Partnership, AAA Case No. 01-15-0003-3728, Partial Final Award of Arbitrator, 18 December 2015, where the arbitrator notes the authority granted in Rule R-49(a) but goes on to try the claim for specific performance under New York law “Specific performance is available under New York law where […]” (emphasis added).

115 And the various predecessors of the rule.

arbitration seeking declaratory relief for its position whereas the buyer sought an order of specific performance in such way that the supplier be ordered to make deliveries of certain amounts of uranium to the price the buyer contended had been agreed by the parties. Since the parties’ agreement was Swedish law governed, the CISG applied.\(^{117}\) In its award, the tribunal simply held, after having sided with the respondent that claimant had breached its obligations, that Article 46(1) of the CISG provides as a remedy for the seller’s breach that the buyer may require performance.\(^{118}\) Therefore, the arbitral tribunal continued, the buyer was entitled to specific performance which the tribunal granted.\(^{119}\)

In *Gazprom v. Lithuania*\(^{120}\) gas company Gazprom had entered a Swedish law governed shareholders agreement containing an SCC arbitration clause with the Republic of Lithuania and another company regarding their ownership of a Lithuanian gas company. Under their agreement, the parties appointed a number of board members each. Following a board resolution of the jointly owned company’s board to renew and amend an existing agreement with Gazprom, the Lithuanian government commenced an action before the Lithuanian courts against the company and its board members – but not Gazprom – in which the government requested an expert to be appointed to investigate whether the company’s best interests had been considered, and if not that the court administer sanctions. Gazprom commenced arbitration against the republic claiming it to be in breach of the arbitration agreement by commencing the action before the Lithuanian courts and requesting the arbitral tribunal to render an award enjoining the government from making certain requests to the court and ordering it to amend and withdraw certain other requests. The arbitral tribunal, after having concluded that the Lithuanian action was covered by the arbitration agreement, stated “The Tribunal also finds that it has the powers to limit the Ministry’s [Lithuanian government] requests (suggested remedies) under items 1.1, 1.3, 1.4 and 1.6 of its Revised Claim filed before the Lithuanian Court, in order to prevent the Ministry from breaching the arbitration clause provided in the SHA.”\(^{121}\)

Again, the relief granted by the arbitral tribunal was not an issue of controversy, at least not in the sense the remedial issue was discussed in the AAA arbitrations in subsection 3.3.2. These cases are not isolated. Rather, SCC tribunals seem to apply to the provision of the substantive law governing the dispute in the same manner as done by courts in Sweden.\(^{122}\) It should however be noted that the reasoning of the arbitral tribunal in some cases does not allow

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117 See further on the CISG in 3.4. Regarding the applicability of CISG as Swedish law, see Section 1 of the Act (1987:822) on International Purchases.

118 JSC Techsnabexport, ¶ 186.

119 Id., ¶ 187.


121 Id., ¶ 266.

122 See e.g., Italia Ukraina Gas S.P.A v. National Joint-Stock Company “Naftogaz of Ukraine”, SCC Case No. V007/2008, Separate Award, 19 October 2010, ¶¶ 236 et seq., where the arbitral tribunal applies the CISG to the issue of specific performance and not considering the wording of the arbitration clause or the SCC Rules.
for a conclusion on which standard, test or law the tribunal have applied to the issue of which reliefs to grant.\textsuperscript{123}

3.3.4 Conclusions

It should perhaps not come as a great surprise that there are differences in both the content and the application of the two rules compared.

As set out in 3.2.2, arbitrators in the United States have greater freedom than courts in granting reliefs that in courts are considered equitable.\textsuperscript{124} This chapter shows that said freedom is exercised by both arbitral institutions in drafting their rules and by arbitral tribunals in granting reliefs their awards (and presumably by parties requesting such relief, although no inquiry of party submissions have been made within the framework of this thesis). The cases analyzed show that many tribunals recognize the remedial freedom of arbitrators. However, it is not uncommon for arbitrators to be informed on standards of justness and equity by reviewing court precedent. Still, some arbitrators seem to apply judicial standards “as is”, without further explanation.

With regard to Sweden, as have been set out above, neither arbitration nor civil procedure sets any standards for granting specific performance or injunctive relief. The same applies for the SCC Rules, which are silent on the issue of reliefs. The awards reviewed indicate that arbitrators adjudicating disputes under those rules often either apply the substantive law governing the dispute or simply presume the presence of a right of performance.

The difference between SCC and AAA arbitrations ought to be indicative of the differences between Sweden and the United States indicated in 3.2.3 above. The difference in legal cultures is hence not only reflected in “public” sources of law but also in institutional rules and the practice of arbitrators. As set out in 1.4.5 above, arbitral awards, while indicative of trends in arbitration, are always associated with the risk that there is a difference in trends between published and unpublished awards, which may distort the findings. Nonetheless, and especially given that these results are consistent with the findings after an examination of “public” sources of law, these conclusions ought to be reasonably certain.

3.4 The CISG

The lines between legal and equitable, substantive, and procedural, and judicial and arbitral, are not always clear, as shown above. When a legal relation in dispute is governed by the CISG, these lines may become even more blurred. This

\textsuperscript{123} See e.g., \textit{MultiQ Products AB v. DigiPoS Store Solutions Inc.}, SCC Case No. V 145/2008, Final Award, 28 September 2009, ¶¶ 256 \textit{et seq}. , where the arbitrator clearly applies a standard (whether or not the goods can be replaced elsewhere) but omits where the standard is found or why the standard is applicable.

\textsuperscript{124} Given the legal and historical background of equity as a “non-legal” standard in courts, it is arguable whether one can divide reliefs into legal and equitable in the arbitral forum, hence the wording “reliefs that in courts are considered equitable”.

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section 3.4 seeks to analyze the remedial provisions of the CISG and to ascertain their importance for the issue of what reliefs arbitral tribunals in CISG governed disputes may grant.

First, an introduction to the relevant provisions of the CISG now in question is warranted. As a convention governing the international sale of goods, the CISG contains several provisions on the rights and obligations of both buyer and seller parties. Article 46(a) of the Convention provides as a remedy of the buyer the right to require the seller’s performance provided the buyer has not exercised any other remedies that are inconsistent with requiring the performance of the seller. Similarly, Article 62 provide that the seller may as a remedy require the buyer to perform its obligations, such as e.g., taking delivery of the goods. Hence, the CISG, at least in principle and as a matter of substantive law, provides specific performance as a remedy. However, the availability of specific performance is also governed by Article 28, which provides:

“If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.”

In short, the provision provides a procedural exception for the substantive rights of specific performance contained within the CISG. The somewhat odd rule provided in Article 28 stems from a compromised middle ground agreed to when drafting the Convention. As set out in chapter 2 above, civil law countries usually have a tradition of favoring specific performance as the premiere remedy for breach as it is seen as an inherent right of the obligor while common law countries in cases of breach only recognize damages as a right (remedy at law) and conversely view specific performance as a discretionary matter of the court to award on an equitable basis and thus not a right of the obligor. This of course was the subject of some debate in drafting the Convention as well as its predecessor, the ULIS annexed to the 1964 Hague Convention. Article VII(1) of the the 1964 Convention contained language similar to that of the present Article 28 of the CISG. In drafting the CISG, the current Article 28, inspired by Article VII(1) of the 1964 Convention, was proposed by the United Kingdom and the United States.

In applying Article 28 it must first be established whether the aggrieved party has any rights of performance under the CISG. If not, Article 28 is not applicable. If so, the Article provides that a court is not bound to grant specific performance in such case it would not have done so in a comparable dispute under the substantive law lex fori. Hence, while both courts in the United States and Sweden

127 While not a party to the CISG, the United Kingdom did partake in its drafting.
apply the CISG as is, they will look at their own domestic laws to try whether the specific relief can be granted. In Sweden, that means the Sales of Goods Act, thus allowing the courts to grant specific performance. In the United States, the test would instead usually be made under the UCC.

Of interest in the context of this thesis is the wording used to identify the adjudicator. The provision clearly states that “[…]a court is not bound[…]”. Does this wording entail an exclusion of arbitral tribunals from its scope or is it simply a matter of sloppy use of language? Commentary strongly speaks toward the provision being applicable also to arbitral tribunals. Their contentions are not convincing. None of the present commentaries (see note 132) provide any authority for their stance, save for other commentary. Moreover, and perhaps more importantly, none of them provide any rationale for their taken stance but rather state that arbitral tribunals are to be included in an assertive manner. One exception is Schwenzer & Schlechtriem, where the reason for including arbitral tribunals is that “there is no apparent reason to deny a promisor sued before an arbitral tribunal the privilege granted by Article 28”. As explained below, this argument lacks merit.

To construe the meaning of Article 28 of the CISG, the proper methods of interpretation must first be ascertained. These methods are laid out in the 1969 Vienna Convention. Under its Article 31.1, treaties must be construed “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Recourse may be taken to the preparatory works of the convention, only when an application of the rules on interpretation provided in Article 31 leads to a result that is either ambiguous or obscure or leads to a manifestly absurd or unreasonable result.

As concerns the requirement to interpret in good faith it is hard to see that any one of the two now relevant options (to include or to exclude arbitral tribunals from the scope of Article 28 of CISG) entails good or bad faith. As concerns the ordinary meaning of “courts”, it ought to be clear that arbitral tribunals are not included. On the other hand, in some contexts, the natural

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129 By having been incorporated as (federal, in the case of the United States) law.
130 See above, 2.2.1 and Ramberg, J. & Herre, J., Internationella köplagen (CISG) - En kommentar § 5.5.3, online ed. 4b (available at juno.nj.se).
132 See, e.g., Schwenzer, I. & Schlechtriem, P., Commentary on the UN Convention on the International Sale of Goods (CISG) (Article 28 ¶ 8), 4th ed. (2016): “it is undisputed that the provision is to be applied analogously to arbitral tribunals”; Ramberg/Herre, § 5.5.6: “Article 28 is of course also applicable also when the dispute is tried by arbitrators rather than ordinary courts” (quote translated); Lookofsky, J., Understanding the CISG p. 112, 3rd ed (2008); Brunner, C. & Gottlieb, B., Commentary on the UN Sales Law (CISG) (Article 28/p. 185), (2019); Faust, F., ‘Specific performance’ in Schwenzer, I. et al (eds), Current Issues in CISG and Arbitration, 2014.
133 See e.g., Lookofsky p. 112 n. 32 citing Schwenzer & Schlechtriem and Schwenzer & Schlechtriem, Article 28, n. 35 citing Lookofsky.
135 Of course, as always, there are no absolutes, as even seemingly clear distinctions can be confused. See e.g., NJA 2017 p. 198 where a party applied for recognition and enforcement of an award rendered by the “Arbitration Court of the St Petersburg and Leningrad Region” (quote translated). After having held that courts may review issue of whether the decision brought before
meaning of “court” could also simply be a reference to the adjudicator. Consequently, the ordinary meaning of the term is not decisive either. Now, to the context of the word. In the context of the CISG as a whole, there is interpretation data suggesting that arbitral tribunals are not covered by Article 28. The CISG makes three references to the (hypothetical) adjudicator trying claims brought under contracts governed by the Convention. The first, Article 28, only mentions courts. The other two however, also mention arbitral tribunals. Articles 45(3) and 61(3) provide that “[n]o period of grace may be granted to the [buyer/seller] by a court or arbitral tribunal when[…]” (emphasis added). Finally, the provision must be construed in the light of its object and purpose. As explained above, the provision is the predecessor of Article VII(1) of the 1964 Hague Convention. The reason for introducing the provision was to bridge the gap between common and civil law traditions. An earlier draft of the CISG used the words “the court could do so”, rather than “would do so”. This prompted the United States and United Kingdom to propose the current version, arguing:

“Under [the earlier draft of the current Article 28 of the CISG], if a national court had jurisdiction to grant specific performance—in other words, if it "could" do so it would be obliged to [award specific performance]. Courts in England in fact had jurisdiction entitling them to order specific performance, but it was very rarely exercised. [...] However, because the courts had jurisdiction to grant it, they no longer enjoyed the protection extended by article VII of the Hague Convention.”

It is important to note to whom the protection applies; the courts. The object and purpose of Article 28 is thus to grant courts a way out of being forced to grant specific performance, in violation of their judicial culture. Hence, the rationale provided by Schwenzer & Schlechtriem, that there is no reason to deny a promisor sued before arbitrators the same privilege as one sued before a court, is not convincing, as the purpose of the provision is to provide privilege to courts and not to parties. Instead, the question of whether Article 28 of the CISG applies to arbitral tribunals must be answered in accordance with what applies in general concerning the difference between reliefs granted by courts and relief granted by tribunals, as provided in lex arbitri.

For example, the (federal) lex arbitri for U.S. seated arbitrations provides that arbitrators need not comply with the equitable case law of courts in deciding whether to grant injunctions or specific performance (see 3.2.2 above). Hence, an arbitrator in the United States, being free from the judicial constraints on entertaining requests for specific performance, ought not be able to invoke Article 28 of the CISG to avoid granting a request for specific performance.

them in an application for recognition and enforcement under the NYC really is an arbitral award sua sponte, the Supreme Court found that the adjudicator in question was a commercial state court and not an arbitral tribunal.

136 In this context, the preparatory works are studied to ascertain the purpose and object of the CISG so as to make possible an interpretation under Article 31 of the 1969 Vienna Convention, instead of being granted any stand-alone importance (cf. Article 32 of the 1969 Vienna Convention).

137 Official Records, 13th meeting (19 March 1980), ¶¶ 43, 44. The proposal was adopted (id., ¶ 52).
Conversely, there are other jurisdictions that provide that arbitral tribunals should apply the same rules for granting reliefs as courts, at least save for an arbitration agreement providing an express or implied exception. In such jurisdictions, England\(^{138}\) for example, Article 28 of the CISG ought also to be applicable to arbitral tribunals (had United Kingdom ratified the CISG).\(^{139}\)

The contention that the applicability of Article 28 of the CISG to arbitral tribunals should be decided on a jurisdiction-per-jurisdiction basis (based on what national law provides in regard to the relation between judicial rules on relief and powers of arbitrators) further finds some support in the preparatory works of the Convention. When the amendment proposed by the United Kingdom and the United States (see above) was discussed, the issue of the applicability of it to arbitral tribunals was briefly discussed. The only answer to the issue provided in the Official Records is that it was pointed out that: “[..] in many States the relevant legislation also related to arbitration proceedings. That should be taken into account in deciding whether [the present Article 28] could or should apply to arbitral tribunals as well.”\(^{140}\) The present statement should however only be viewed as a supplemental argument for the conclusion in question, as the main argument is the one provided above regarding the purpose and object of the provision.\(^{141}\) Further, there is also some support for the conclusion herein provided in commentary, again only providing supplemental support to the analysis as is.\(^{142}\)

3.5 Chapter Conclusions

Many findings have been made in this section 3. Here, the findings will be summarized and the conclusions will be set out.

First, the authority of arbitrators to grant various reliefs has been examined. In Sweden, the legal authority to resolve disputes by granting reliefs is, in some specific cases, broader than the authority granted to courts and judges. Concerning injunctive relief and specific performance however, no difference in authority between courts and arbitral tribunals have been ascertained. The probable-most reason for this is that reliefs are not seen as substantive issues under Swedish law. Therefore, the issue of what authority arbitrators are

\(^{138}\) Section 48(5) of the English Arbitration Act (1996) provide that arbitral tribunals have the same powers as courts to \emph{inter alia} grant injunctions and order specific performance.

\(^{139}\) Examples of other jurisdictions where the \emph{lex arbitri} provide that arbitral tribunals are to use the same rules as courts in deciding what reliefs to grant include \emph{inter alia}, Singapore (see Singapore International Arbitration Act of 1994 [as amended], Article 12(5)(a)).

\(^{140}\) Official Records, 13\(^{th}\) meeting (19 March 1980), ¶ 48.

\(^{141}\) 1969 Vienna Convention, Article 32.

endowed with, has not been an issue of controversy or debate. In the United States however, the opposite applies. As the issue of reliefs, in the United States, is seen as procedural, the choice of arbitration as the forum has effect on the issue. When ordering specific performance or granting injunctive relief, courts make use of their equitable powers. The nature of those powers is judicial in nature and parties cannot contractually bind themselves or the court to make use of the court’s equitable powers in such a manner so as to grant the specific performance or injunctive relief in question. Conversely, the power of arbitral tribunals to grant such relief is not based on judicial principles of equity. Rather it is the agreement of the parties that is controlling of the issue. While not entirely clear, most authority speaks toward the arbitration agreement being deciding in which reliefs that are available, as opposed to the underlying substantive contract of the parties.

Second, the application of arbitration agreements in the form of institutional rules has been examined. The AAA Rules, contain a rule explicitly granting arbitrators the authority to award such relief they see just and equitable. The rule in question is cited in many arbitral awards where, in this context, it is often used to justify the awarding of specific performance or injunctive relief. However, the application of the rule is not uniform, and some arbitrators and arbitral tribunals instead seem to apply the standards set out in equity related case law even if not bound by it. The SCC Rules do not provide any explicit rule concerning reliefs of any sorts. The SCC awards analyzed show that specific performance and injunctive relief under Swedish law is not dealt with any differently by arbitral tribunals as compared to courts.

Third, the issue of specific performance under the CISG has been examined. Although the Convention does contain numerous provisions providing for the right to specific performance, all these provisions are subject to Article 28 of the Convention. The Article provides that courts need not enter specific performance into judgment in such case they would usually not have done so under lex fori. Even though the Article only mentions courts, as opposed to other articles that references courts and tribunals, the prevailing view in commentary is that the rule also applies to arbitral tribunals. The analysis provided in this thesis however indicates the opposite. Instead of directly applying Article 28 to arbitral tribunals, one must first establish what the lex arbitri in question provides on the relation between the remedial powers of courts as compared to arbitrators.

The findings of this section 3 clearly emphasize the inherent difference in the legal cultures of Sweden and the United States. In Sweden, the availability of specific performance and injunctive does not change between courts and arbitrators. The basis of arbitrator’s authority to grant such relief is thus the underlying contract and the substantive law governing it. In the United States on the other hand, as issues of reliefs are considered procedural, the basis of arbitrator’s authority to award the present kinds of relief is found in the arbitration agreement. The institutional rules examined, the AAA Rules, do give a broad grant of authority. However, even without such specific language, courts have upheld specific performance and injunctive relief awarded by arbitrators.
Whilst the two systems function separately, situations when they mix may become complicated, with one such instance being the matter of the CISG. One might pose the question of what it is that applies when the combination of forum and governing substantive law either clashes or leaves an issue undealt with. For example, if parties to a New York law governed contract choose either arbitration or litigation in Stockholm, what would apply in terms of specific performance? Under the laws of New York, no right, at law, to specific performance exists. In practice however, courts routinely grant such relief when deemed appropriate, as an equitable relief. Conversely, neither courts nor arbitral tribunals in Sweden have any procedural authority to order specific performance. Instead, their authority to order parties to act in a certain manner or to enjoin them from acting in another manner stems from the substantive law governing the contract, which in this example is New York law (which, again, does not grant any such rights at law). These sorts of hybrids that may appear in multi-jurisdictional arbitration as well as litigation are perhaps inevitable. When they do appear, and if contentious, arbitrators must take great care in deciding on which requested reliefs to grant, or else risking having decided the dispute under a different law than the one they have been tasked with.
4 Enforcement of Injunctive Relief and Specific Performance Awarded in Arbitration

4.1 Introduction

Having inquired the issue of the granting of requests for injunctions or specific performance in the arbitral forum, the now remaining issue is the supervision and enforcement of awards granting such relief. This issue spans across questions of jurisdiction, objective arbitrability, res judicata and more. The disposition of this chapter is therefore explained here. However, before further elaborating on the disposition of this chapter, some definitory explanations are warranted.

In this chapter, and in the rest of this thesis, the adjudicator “supervising” the award means the adjudicator that either on motion or sua sponte decides whether the award has been complied with. For example, when an award contains a permanent injunction ordering the respondent to refrain from engaging in certain activities so as to comply with a non-compete undertaking, the adjudicator supervising the award is the one deciding whether or not the respondent has indeed ceased (or never started) with the competing activities or whether the respondent is still performing the activities in violation of the award. As the issue of whether the award has been (or currently is) being complied with can be contentious, the choice of adjudicator to supervise the award is not without significance. The adjudicator “enforcing” the award on the other hand, again for the purposes of this chapter and thesis, is the adjudicator that – when breach or non-compliance has been established – can compel compliance or else how secure the materialization of the award, e.g., by sanctioning a non-compliant party. Using the same example, the injunction enjoining the respondent from engaging in competing activities, the adjudicator enforcing the award is the one that – when a violation of the non-compete has been established – may impose penalties such as fines or fees or that may order jail or imprisonment for contempt of court or other similar sanctions. Now, back to the disposition of this chapter.

First, in section 4.2, the issue of having arbitral awards containing specific performance or injunctive relief being supervised and enforced by courts\(^{143}\) will be examined. Here, the focus will be on the differences in enforcing awards

\(^{143}\) Or semi-judicial governmental authorities (e.g., the SEA).
providing injunctive relief and specific performance from judgments and court orders containing the same. Second, in section 4.3, the object of analysis will be the possibilities to task the arbitral tribunal that rendered the award with supervision of the specific performance or injunctive relief provided therein. In this section, issues relating to the *functus officio* doctrine will mainly be discussed. Third, in section 4.4, the authority of arbitrators to award sanctions for non-compliance with awards providing specific performance or injunctive relief is discussed. Finally, in section 4.5, the findings of this chapter will be summarized and conclusions will be made.

### 4.2 Supervision and Enforcement in Courts

#### 4.2.1 Sweden

The enforcement of arbitral awards in Sweden in general is a relatively straightforward process. Here it should be noted that there is a difference in enforcing domestic and foreign arbitral awards. Under Chapter 3 Section 1 of the SEC domestic arbitral awards (*i.e.*, such awards rendered by Swedish seated tribunals) constitute titles of executions in and by themselves. Hence, there is no need to have a domestic award confirmed or recognized by a court. Foreign arbitral awards on the other hand need to be brought before the Svea Court of Appeal before the (usually) prevailing party receives an exequatur.

When having obtained an award granting specific performance or injunctive relief, the prevailing party may not, as with court judgments, commence action before the courts to have administrative fines issued to its opposing party in cases of breach. This is because arbitrators cannot, unlike judges do in court judgments in these cases, issue their awards under penalty of administrative fines. Instead, if the arbitral award is not complied with, the aggrieved party is directed to commence action before the SEA. As set out in section 2.2.3 above, the SEA, when enforcing a title of execution either enjoining the defendant from committing actions or orders the defendant to take certain actions, is to order the defendant to comply with the title of execution in question, as per Chapter 16 Section 12 Paragraph 1 of the SEC. In ordering the defendant to comply, the SEA may under Chapter 2 Section 15 Paragraph 1 make its order under penalty of administrative fines. If the SEA order is not complied with, it is the SEA that under Chapter 2 Section 15 may commence action before the competent court to have the fines issued. Hence, the aggrieved party does not have the right to commence action itself. In court, the party allegedly being in breach of the order is entitled to all the protections that are applicable in criminal cases (see 2.2.3 above).

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144 Chapter 3 Section 2 of the SEC.
As described above, the aggrieved party has quite limited opportunities to influence the process of the enforcement. Instead, the party must rely on the decisions of the SEA. However, the decisions of the SEA are subject to appeal. If, for example, the SEA would decide not to issue its order under penalty of fines or not to commence action for the fines to be issued in case of a violation of the order, the decision of the SEA could be appealed by the applicant. Appeals are made to whichever district court is of competence, according to Chapter 18 Section 1 Paragraph 1 of the SEC. While the Court Matters Act (Sv. lagen [1996:242] om domstolsärenden) is applicable to the proceedings, the SEA does not appear as a party in the court proceedings, as provided in Chapter 18 Section 1 Paragraph 3 of the SEC. Instead, the parties to such court proceedings will be the appellant (applicant) and the respondent.

4.2.2 United States

First, it should be noted, as is the case with Sweden, that there are differences in the United States in enforcing domestic awards as compared to awards under the NYC.\(^{146}\) These differences will be noted when relevant.

Unlike in Sweden, arbitral awards in the United States do not themselves constitute any writs or titles of execution or anything similar. Instead, parties, when having agreed to do so, may make motion courts to confirm their awards.\(^{147}\) When an award is made under the NYC, the same applies, save for more generous limitations rules, narrower grounds for vacatur and no need for an agreement providing that the award may be confirmed.\(^{148}\) The court is obliged to confirm the award, absent the presence of any grounds to vacate, modify or correct it,\(^{149}\) or in the case of awards made under the NYC, absent any grounds for refusal of enforcement provided in Article V of the Convention.\(^{150}\) Awards are confirmed in summary proceedings.\(^{151}\) When an arbitral award is confirmed, it has the same legal status as a judgment of the confirming court.\(^{152}\) Hence, upon having confirmed an award, the court has at its disposal the same powers as it would have to enforce its own judgments and orders. Here, a recap of the findings of section 2.3.3 above is warranted.

\(^{146}\) For the purposes of the laws of the United States, foreign awards are not merely such awards that are rendered outside the United States, but also \textit{inter alia} awards involving non-U.S. persons or entities or involving property located abroad or performance abroad, even when rendered by a U.S. seated arbitral tribunal (see 9 U.S.C. § 202). \textit{Cf.} Article I(1) (second sentence) of the NYC.

\(^{147}\) See 9 U.S.C. § 9 (parties may make applications to courts to confirm awards) and 9 U.S.C. § 6 (applications under the FAA are to be heard as motions).


\(^{150}\) 9 U.S.C. § 207.

\(^{151}\) Florasynth, Inc. v. Pickholz, 750 F.2d 171, 176 (2d Cir. 1984).

\(^{152}\) Id.; Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc., 126 F.3d 15 (2d Cir. 1997); Trans Chem. Ltd. v. China Nat. Mach. Imp. & Exp. Corp., 161 F.3d 314 (5th Cir. 1998): “The district court’s judgment confirming an arbitral award is to have the same effect, in every respect, as in any other judgment entered by the court […].”
Under Fed. R. Civ. P. R 65(2)(d), all injunctions issued by federal courts bind, in addition to the parties of the proceedings, also their “officers, agents, servants, employees, and attorneys” and other persons in active consort with the aforementioned. Herein lies an important consequence of confirming arbitral awards containing injunctive relief; that it not only enjoins the (arbitration respondent) party but also its officers, agents employees etc. Thus, the prevailing party, by seeking confirmation of the award, may de facto expand the subjective scope of the award.

When having rendered a judgment confirming the award, the responsibility to supervise and enforce the judgment lands on the court issuing the judgment. In doing so, what has been set out in 2.3.3 above also applies here. As therein provided, the procedure to “enforce” is mainly the inherent contempt powers of the courts. Hence, one must first distinguish between the criminal and civil contempt powers of courts. Arbitral awards contained in judgments confirming or recognizing them ordering specific performance ought mostly to be of such kind that civil contempt is the appropriate remedy. This is because a decree of specific performance obliges the respondent to act, thus making it possible for coerce compliance by imposing sanctions. For example, a party obliged to provide its opposing party access to certain data may be imprisoned by a court until such time the party agrees to grant the access (e.g., by providing a passcode unlocking the data). Similarly, a contractor ordered to finish the construction of a project may be fined by a court on a weekly basis until having completed the project (or started to, at least). Sometimes however, the way an arbitral tribunal drafts the dispositive part of its award may make any subsequent contempt sanctions imposed by the court confirming the award punitive, and thus criminal, in nature. An example of this could be that an award orders something to be performed no later than a certain date. After the expiry of that date, any sanctions for contempt imposed by a court would ipso facto be considered criminal contempt. This because the performance can no longer be coerced as it is no longer possible to perform. As for prohibitory injunctions, the line between civil and criminal, coercive and determinate that is, becomes more blurred. As discussed before, an injunction enjoining the defendant from acting in a certain manner in the future is complied with until the act is committed. Before the act is committed, the party cannot be held in contempt. After having committed the act in question, only measures to prevent future violations can be considered civil.

When the party subject to the specific performance or the injunction is in breach (or non-compliance), the aggrieved party generally may commence civil contempt proceedings itself. While the Federal Rules on Civil Procedure contain no rules governing civil contempt procedures, such rules are routinely provided

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154 See note 77 above.
155 See 2.3.3 above.
157 886 F.2d 1339, 1351 (see note 81 above).
in local court rules.\textsuperscript{158} The local rules of the United States District Courts for the Southern and Eastern Districts of New York, for example, provide that such proceedings shall be commenced by service to the alleged contemnor, or its counsel if it has appeared the present action, and that the alleged contemnor has the right to a hearing if it contests the alleged conduct.\textsuperscript{159} In cases of criminal contempt on the other hand, the contempt is a criminal charge\textsuperscript{160}, which must be prosecuted by prosecutors and not by the judge trying the case.\textsuperscript{161} The court may direct private attorneys to act as private prosecutors, rather than depending on government prosecutors. Counsel for the aggrieved party is however not eligible to be appointed, because of its bias.\textsuperscript{162}

4.2.3 Conclusions

In both jurisdictions, there are procedures for courts to enforce arbitral awards with their dispositive parts including injunctive relief or specific performance. There are however significant differences between the two jurisdictions.

In Sweden, domestic awards carry the same legal effect as court judgments and thereby constitute titles of execution. Foreign awards may be granted the same status by the Svea Court of Appeal, save for the presence of such grounds specified in Article V of the NYC. The actual enforcement and execution of the award (both foreign and domestic ones) is performed by the SEA, which may order a party ordered to perform to do so, under the penalty of administrative fines. If its order is not complied with, the SEA, but not the aggrieved party, may request a court of competence to impose the fines. The decisions of SEA (such as \textit{inter alia} a decision on not issuing an order under penalty of administrative fines or not to pursue the imposing of the fines) is subject to appeal by the aggrieved party.

In the United States, domestic awards do not carry the same legal effects as court judgments. Parties may however move to confirm awards, whereby the courts enter awards into judgment. Such judgments are no different than other judgments of the confirming court. When such judgments are not complied with, the aggrieved party may request the court to coerce compliance by means of its

\textsuperscript{158} For an overview of the relevant rules, see Carback, J. (2023) "Contempt Power and the United States Courts," Mitchell Hamline Law Journal of Public Policy and Practice: Vol. 44: Iss. 1, Article 6.
\textsuperscript{159} Local Rules of the United States District Courts for the Southern and Eastern Districts of New York, Local Civil Rule 86(a)-(b).
\textsuperscript{160} Contempt of court is criminalized as a federal crime under 18 U.S.C. § 401 \textit{et seq}.
\textsuperscript{161} See e.g., \textit{Bloom v. State of Ill}, 391 U.S. 194, 204 (1968), (out of court contempt requires “more normal adversary procedures”); \textit{In re Murchison}, 349 U.S. 133, 135 (1955): “trial before the judge who was at the same time the complainant, indicter and prosecutor, constituted a denial of the fair and impartial trial required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States” (under the then present circumstances); \textit{Am. Airlines, Inc. v. Allied Pilots Ass’n}, 968 F.2d 523 (5th Cir. 1992): “The conviction must be reversed however for another procedural defect. Judge McBryde \textit{sua sponte} initiated the contempt proceeding, questioned the witnesses and otherwise acted as prosecutor, and then decided all factual and legal issues.”
inherent contempt powers, *inter alia* including imposing fines or imprisonment. The aggrieved party may not however act as a prosecutor in bringing charges for criminal contempt.

In short, the issue of enforcing awards granting injunctive relief and specific performance, as with other reliefs, is an inherently judicial issue, involving many public law aspects. This is evident in both jurisdictions examined. One example is the power and influence of the aggrieved party in Swedish enforcement proceedings, or lack thereof. Hence, even though it is the matter of enforcing an arbitration award, it is in the end controlled by not only courts by also administrative judicial agencies. While the aggrieved party has more influence in U.S. civil contempt proceedings, as compared to their Swedish equivalent, the proceedings are still very much judicial (as opposed to arbitral) in nature, and heavily dependent on public law sanctions. As concerns criminal contempt for violation of a confirmed arbitral award, it is doubtful that, for the purposes of what is examined in this thesis, such proceedings even constitute means of enforcement, as their object is not to secure compliance (other than by deference, perhaps) but rather to vindicate the authority of the court.

Parties that have opted for arbitration rather than litigation may have been seeking to avoid just such public and judicial procedures and inconveniences. One could certainly, without risk of overstatement, say that the procedures described above are anything but what arbitration is often described as; without formalities, private and quick. Moreover, these procedures include quite extensive review of substantive matters that judges and judicial officers have to examine: Is the performance directed clear enough? Has the party ceased with “any and all competitive activities”? Which are “the reasonable efforts” the award dictates the party to undertake? The findings of this section 4.2 therefore raise another question: How long can parties stay in their chosen arbitral forum before being forced to drag the matter to court? This is examined in sections 4.3 and 4.4 below.

4.3 Supervision by the Arbitral Tribunal That Rendered the Award

4.3.1 Introduction

Unlike what is true for courts and judges, the jurisdiction and authority of arbitral tribunals is not granted in statutes and constitutions. Instead, their authority is granted in the arbitration agreement. But, most times, parties do not conclude arbitration agreements submitting to the jurisdiction of a specific arbitral tribunal, but rather to arbitration as such. Until a dispute arises, no tribunal exists. The same is typically true when an award have been rendered; no tribunal (longer) exists. This is a result of the *functus officio* doctrine. The doctrine, Latin for “having
performed his or her duties”, describes a body or official losing its authority by having fulfilled what it was tasked to do.\textsuperscript{163}

When parties’ request injunctions or specific performance, they may, in cases of non-compliance by the other party, wish to return to the arbitral tribunal that first granted the relief, now to ask for further relief to secure the other party’s compliance with the original award. For such parties, proper knowledge of the \textit{functus officio} doctrine is of utmost importance. Should the arbitral tribunal be \textit{functus}, it may effectively bar the aggrieved party from returning to it asking for further relief.

### 4.3.2 Sweden

First, it may be noted that Swedish law\textsuperscript{164} provides statutory provisions to both the doctrine itself, as well as the exceptions to it. Under Section 27 of the SAA, the arbitral tribunal has fulfilled its duty upon having rendered its final award, save for what is provided in Sections 32 and 35. According to Section 32, arbitral tribunals may, \textit{sua sponte}, correct any clerical errors contained in the award, as well as supplement the award if the tribunal mistakenly have forgotten to try an issue that should have been tried, within 30 days from the rendering of the award. Further, under the same provision, parties may ask for corrections, supplementations or interpretations of the award, within 30 days of its rendering. Under Section 35, a court in a set-aside proceeding may under certain circumstances, instead of vacating the award, remand it to the arbitral tribunal. These instruments, while not of direct interest for a party wishing to enforce specific performance or injunctive relief previously awarded, constitute persuasive authority for the \textit{functus officio} doctrine not being absolute.\textsuperscript{165} The question that must now be anwered is whether the exceptions provided in the SAA are exhaustive, or whether there are any exceptions that are not provided in the SAA which may allow parties to return to the tribunals that first granted them specific performance or injunctive relief and ask for further relief.

When the text of a statute sets out a rule along with its exceptions one might assume that the exceptions provided therein are exhaustive, unless otherwise indicated. While such a rule of thumb may serve well as a presumption, the presumption cannot be relied on in a proper examination of \textit{de lege lata}. A good starting point is a review of the preparatory works. Unlike the Act, its preparatory works do explicitly (or as close to explicit as can be) indicate that the statutory

\textsuperscript{163} FUNCTUS OFFICIO, Black's Law Dictionary (11th ed. 2019).

\textsuperscript{164} In addition to “domestic” Swedish law, the doctrine has been acknowledged (or at least mentioned) at the EU law level, see footnote 26 in the opinion of the Advocate General Wathelet in \textit{Gazprom}, case no. C-536/13 (ECJ).

\textsuperscript{165} The predecessor of the SAA contained no provisions on when the arbitral tribunal was rendered \textit{functus}. It was generally considered that the tribunal became \textit{functus} upon rendering its final award. Further, the possibility to correct awards was not provided in the previous act but was recognized nonetheless. The rationale behind introducing the provision on the arbitral tribunal being \textit{functus} upon having rendered its award in Section 27 of the SAA was to at the same time provide the exceptions to the \textit{functus officio} doctrine in the act as well. See govt. bill. 1998/99:35 p. 99 \textit{et seq}. and govt. report 1994:81 p. 131 \textit{et seq}. and 167.
exceptions to the *functus officio* doctrine are exhaustive, except for any differing party agreement. In the government report containing the first draft of the act, it was stated that “[t]he starting point must be that the assignment [of arbitrators] is considered finished when a final award has been rendered. […] This entails that the arbitrators, save for when they have special [Sw. särskilt] support in statute or the agreement of the parties, may not engage themselves in the dispute.” The bill that contained the act provided a corresponding statement. Hence, it seems as if the preparatory works give one more exception to the doctrine than provided in the SAA; when the parties have agreed upon a deviation.

As clear as the aforementioned statements may be, they are not recognized (and consequently neither supported nor disputed) in most commentary. On the other hand, commentary does provide one more piece of this complicated puzzle. In commenting and describing Section 27, most authors contend that an arbitral tribunal engaging with an arbitration after having rendered a final award risk exceeding its *jurisdiction*. That assertion plays well with what is provided in the preparatory works regarding the permissibility to contracting around the *functus officio* doctrine. If the consequence of being *functus* is considered a jurisdictional issue (as opposed to e.g. an issue of objective arbitrability or the capacity of arbitrators), the issue is ultimately decided by the parties.

Finally, some comments on the difference between final and partial awards are warranted. Under Section 27, the tribunal is only considered to having completed its duty when it has rendered its final award. Consequently, if specific performance or injunctive relief is awarded in a partial award, the tribunal does not become *functus* and is therefore available for parties to return to (until a final award is rendered). However, the practical use of this route ought to be quite limited. A partial award is under Section 29 of the SAA defined as an award that decides “a part of the dispute” or “an issue of importance for the assessment of the dispute”. Hence, when the object of a dispute is the specific performance or injunctive relief itself, there are no further parts of the dispute to decide on, and the award is therefore final and not partial. Another hinder in this context, which may make arbitrators disinclined to oblige requests to grant their reliefs in partial awards, is that arbitral tribunals are under Section 37 of the SAA only

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168 Semantically, as opposed to viewing it as an exception to the doctrine, one could instead argue that party agreements deviating from Section 27 entail that the commission of the arbitrators does not end, and that the tribunal never becomes *functus* in the first place. This difference is not of relevance in this thesis.
170 Potential subsequent claims for non-compliance with the award (e.g., of the sorts further discussed in 4.4.2 below) are not issues left for the tribunal to decide at the time the “first” award is rendered. This is because any obligations resulting from a breaching party’s non-compliance with an award can only arise after the award has been rendered. While, as set out in 3.2.1 above (cf. 2.2.2), it is unclear whether it is possible to bring claims before arbitrators even before they fall due, it ought not be possible to bring a “claim” that does not even exist in the first place.
authorized to order (in the enforceable sense) parties to pay their fees in a final award and not a partial one.\textsuperscript{171}

4.3.3 United States

With regard to the United States, the FAA also contain provisions on modifications and corrections of awards.\textsuperscript{172} Consequently, the \textit{functus officio} doctrine has statutory exceptions in the United States.

The question now is whether there are any exceptions to the \textit{functus officio} doctrine that may allow arbitrators to supervise their awards granting injunctive relief and specific performance? One case of significance is \textit{Cuna Mutual}\textsuperscript{173}. In short, a labor union commenced arbitration under a collective bargaining agreement against an employer seeking to resolve a grievance arising out of a layoff of several employees in favor of outsourcing their work. The arbitrator, having found that the lay-offs were unjustified, rendered an award ordering that the work be restored. Further, he directed the parties to attempt to resolve issues of back pay and lost benefits among themselves. However, the arbitrator also retained jurisdiction to “resolve any controversy” on the implementation of the award. After the employer sought to vacate the award in federal court, the union motioned the court to impose sanctions under Fed. R. Civ P. 11 to award reimbursement for attorney’s fees, contending that the action to vacate the award was frivolous. The district court denied the vacatur action and granted the Rule 11 motion, wherefore the employer appealed. In trying the appeal, the Seventh Circuit Court of Appeals, \textit{inter alia}, examined whether the contention that arbitrators may \textit{not} retain jurisdiction in such manner as had been done in the present case, constituted a violation of the employer’s\textsuperscript{174} duty to only make contentions in court that are "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law".\textsuperscript{175} In this context, the court found that “there is an abundance of case law in both this circuit and other circuits that recognizes the propriety of an arbitrator retaining jurisdiction over the remedy portion of an award”.\textsuperscript{176} Given this, the court found that the employer, for questioning this, had violated Rule 11.

While an “abundance” is arguably subject to interpretation and subjective considerations, it can hardly be disputed that this exception to the \textit{functus officio} doctrine finds support in case law both inside and outside the Seventh Circuit. In \textit{Dries \& Krump}, the court, in trying the application of the statute of limitations on vacatur actions when an arbitrator had retained jurisdiction after rendering

\textsuperscript{171} See also Lindskog, 37-6.1.1. It should however be noted that this is usually not an issue in institutional arbitration as institutional rules often provide that the advance on costs posted by the parties may be used also before a final award is rendered. See e.g., Article 51(7) of the SCC Rules.

\textsuperscript{172} 9 U.S.C. § 11.


\textsuperscript{174} Or rather, its attorney’s duty, Fed. R. Civ. P. 11(b).

\textsuperscript{175} \textit{Id.} 11(b)(2).

\textsuperscript{176} 443 F.3d 556, 565.
the award, held that retaining jurisdiction is “implicit in any order that grants equitable relief”. In *SBC Advanced Solutions*, the court found that “arbitrators frequently retain limited jurisdiction to resolve issues related to the implementation of a remedy ordered by the arbitrator” and that the practice was not in violation of law. The *ratio* behind allowing arbitrators to retain jurisdiction seem to be that in ordering injunctive relief or specific performance, or any other relief that may require further revisions or supervision, the award of the arbitrators is not final insofar as it does not deal with all outstanding issues (with the outstanding issue being the potential revisions or potential supervision measures that may be required). What is indicated in the award as well as the intention of the arbitrator for the award to be final or not are factors for courts to consider in determining the finality of an award. Hence, in the United States, whenever a party wishes to have the opportunity to return to the arbitrator to request further relief from its opponent in case of non-compliance, the party should request the arbitrator to grant the original relief in a non-final award and that the arbitrator retains its jurisdiction over the matter.

4.3.4 Conclusions

This subsection has explored the role of arbitral tribunals in supervising awards providing specific performance and injunctive relief. Again, the differences between the jurisdictions examined have been numerous.

In Sweden, the *fuctus officio* doctrine is codified, along with its exceptions. With one exception, this thesis has found the statutory exceptions to be exhaustive. The only further exception, which finds support in the preparatory works of the SAA, is when the arbitration agreement provides that the tribunal may continue to exercise after having rendered its final award. Barring such agreement, the *fuctus officio* doctrine prevents parties entitled to injunctive relief or specific performance under arbitral awards from returning to the same tribunal that rendered the award to have it enforced.

In the United States, it is common for arbitrators to retain jurisdiction over an arbitration in order to facilitate any the resolving of any post-award disputes. Such retaining of jurisdictions is sometimes even considered implied when the relief granted in award is “equitable”. Courts have even held that arbitrators retaining jurisdiction is so widely accepted that commencing vacatur actions on

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177 Dreis & Krump Mfg. Co. v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 8, 802 F.2d 247, 250 (7th Cir. 1986).

178 *SBC Advanced Sols., Inc. v. Comm'nrs Workers of Am.*, Dist. 6, 44 F. Supp. 3d 914, 925 (E.D. Mo. 2014), aff'd, 794 F.3d 1020 (8th Cir. 2015).

179 *SBC Advanced Sols., Inc. v. Comm'nrs Workers of Am.*, Dist. 6, 794 F.3d 1020, 1031 (8th Cir. 2015).

180 *Loc. 36, Sheet Metal Workers Int'l Ass'n, AFL-CIO v. Pevely Sheet Metal Co.*, 951 F.2d 947 (8th Cir. 1992).

181 For a practical example of such an award, see *ThyssenKrupp Materials, LLC v. Triumph Group, Inc. and Triumph Aero-structures, LLC*, AAA Case No. 01-20-0007-3633, Interim Award of Arbitrator, 16 April 2021, ¶ 7.

182 On the choice of “equitable” in describing the reliefs in question, see note 124 above.
that basis are without legal basis to such extent that they entail sanctions for counsel.

The difference between the jurisdictions is perhaps explained by the fundamental differences in legal and procedural cultures in litigation. While post-judgment litigation (not counting appellate proceedings) is not that uncommon in the United States, it is not at all occurring in Sweden (with limited exceptions), because of the differences in the role of courts in enforcing court judgments.

### 4.4 Enforcement by Arbitral Tribunals and Sanctions Available

#### 4.4.1 Introduction

In the previous section, 4.3, the subject of examination was whether arbitral tribunals may engage in post-award arbitration to resolve disputes arising under their awards, such as supervising injunctions and specific performance. What is discussed here is similar yet different. Here, the question is what sanctions an arbitral tribunal may use to coerce a non-complying party to comply with a previous award. For the purposes of this section, it is not necessarily relevant whether it is the same tribunal as rendered the original award that is sanctioning the non-compliance within the framework of the same arbitration, or if it is a subsequently constituted arbitral tribunal under the same arbitration agreement.

Before examining if and how arbitrators may sanction parties, the term “sanction” must be defined (for the purposes of this section). In this section, the term “sanction” covers any sanction or measure that can be ordered or imposed by an arbitral tribunal which coerces a party to comply with a previously rendered award (regardless of which tribunal rendered it) or that compensates the aggrieved party for the other party’s non-compliance with the previously rendered award (and not for the underlying contract breach itself).

#### 4.4.2 Sweden

While not governed in the SAA, the issue of administrative fines in arbitration has been treated in a quite unique way in the preparatory works of the Act. The government report does mention the issue of whether arbitrators should be able to issue their awards under penalty of administrative fines (which would be a necessary step to later enforce the fine in arbitration), but it does not discuss the matter. Instead, it notes that the issue has been discussed in literature, then most recently by Welamson, and that the report adopted the views of Welamson. Consequently, Welamson’s view carry importance that is superior to other

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183 Welamsson, L., ’Vite i samband med skiljetvister’ in Agell, A. et al., Festskrift till Bertil Bengtsson, p. 477 et seq.
literature on this issue. A closer review of his views and arguments are therefore necessary. Welamson initially notes that while the Administrative Fines Act requires authorities to have statutory support in ordering administrative fines, courts are nonetheless authorized to order such fines (see 2.2.3 above). Consequently, Welamson argues that the lack of statutory support does not necessarily have to entail that arbitrators cannot issue awards under penalty of fines. Further, he argues that in such case arbitrators would be allowed to issue awards under penalty of fines, the rules governing administrative fines would not be applicable, and thus causing uncertainty as to many practical issues concerning the fines. Moreover, Welamson questions whether the issue of administrative fines does qualify as disputes capable of settlement, as that is and was the main requirement for a dispute being objectively arbitrable. He found the law not to be clear to as to whether a dispute loses is status as being amenable to settlement, when the substantive issue in and by itself is capable of being settled by agreement but when the requested sanction is not. In any case, he concluded, it ought to be clear that parties cannot agree in advance that a party breaching their agreement must pay public fines. For these reasons, at least put together, Welamson found that fines could not be issued in arbitration.\textsuperscript{185} As explained above, these statements ought to be considered of greater authoritative value than other commentary.

Further support in the conclusion that arbitrators may not order such fines is found in the statements of the Supreme Court in NJA 2000 p. 435 I and II. The cases, with principally identical circumstances, originated out of lawsuits filed by a broadcaster, TV3. TV3 commenced two actions against two of its competitors, requesting the district court to enjoin the defendants from broadcasting a TV show TV3 asserted rights to. The requests were made under certain provisions of the Copyright Act\textsuperscript{186} and the previous Trade Secret Act\textsuperscript{187} respectively, which allowed right holders to commence actions to enjoin adverse parties from breaching their rights, under penalty of administrative fines. After the defendants entered their pleadings into record, objecting to TV3’s requests, TV3 recalled its actions. Both defendants used the right granted to defendants in civil actions under Chapter 13 Section 5 of the SPC where the dispute is amenable to settlement, to request the court to decide the case on the merits in spite of TV3’s recall of its complaints. When the cases were before the Supreme Court, the question at hand was whether an action in which a plaintiff requests a judgment that is sanctioned by fines in case of non-compliance, can be considered amenable to settlement, and thus within the scope of Chapter 13 Section 5 of the SPC. The Court held, given the public law nature of the fines requested and the responsibility of the trying court to make sure that the order is clear enough to be followed when sanctioned by fines as well as the fact that the court is the one that decides on the size of the fines, that the actions were not such actions amenable to settlement.

\textsuperscript{185} Welamsson p. 479 set seq.
\textsuperscript{186} Swedish Copyright Act (lagen [1960:279] om upphovsrätt till litterära och konstnärliga verk).
\textsuperscript{187} (The previous) Swedish Trade Secret Act (lagen [1990:409] om skydd för företags hemligheter)
The findings of the Court are important to the issue of whether arbitral tribunals may issue their awards under penalty of administrative fines. As only issues that are amenable to settlement are considered arbitrable under Swedish law, the conclusion must be that no such possibilities exist, given that requests for administrative fines makes actions incapable of settlement. Consequently it is not possible for arbitral tribunals to impose such fines either. Hence, if parties wish to have arbitral awards awarding injunctive relief or specific performance to be imposed to their opponents under the penalty of administrative fines, they must await the award and then request the SEA to issue an order to the opposing party to comply with the award and request the SEA to seek the imposing of the fines by a competent court if need be.

That the arbitral cannot order its awards under penalties of administrative fines does not necessarily mean that it lacks access to coercive measures completely. While public sanctions, such as administrative fines, are not arbitrable, there is nothing preventing parties from authorizing arbitrators to award contractual fines (i.e., liquidated damages) to non-complying parties, in other words agreed upon procedural fines paid to the aggrieved party rather than to the government. As it is a matter of contract, the possibilities to draft agreements allowing such sanctions are endless. Some important factors must however be mentioned specifically.

First, it is important to note that that for the present type of procedural penalties to be available, the parties cannot rely on provisions of the contract on liquidated damages in general. Instead, the agreement must be clear in providing liquidated damages as a remedy for non-compliance with a potential future award (instead of non-compliance with the contract as such). Further, it is advisable to specify the amount of the “penalties” (e.g., SEK X per violation or per week of non-compliance), or to grant the arbitral tribunal with the power to set the amount of the “penalties”. Finally, the parties should consider whether to they want this arrangement to constitute part of their arbitration agreement or if they want it to constitute part of their underlying contract. Should it constitute part of the underlying contract, an award ordering “penalties” for violation of previous award may not be challenged on the ground of the arbitral tribunal lacking the authority to impose the penalty, as it is a substantive issue under the parties’ agreement. Conversely, if part of the arbitration agreement, challenges may be brought on the same factual basis, but now qualified as an issue of jurisdiction or excess of mandate.

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188 Section 1 of the SAA.
190 It can be noted that this procedure, seen from a functional perspective (see 1.4.6 above), bears some resemblance to the practice of confirming arbitral awards in the United States.
192 An explicit grant of authority to the arbitrators ought not be necessary if the parties have authorized the tribunal to adjudicate the dispute ex aequo et bono.
4.4.3 United States

Although lacking the inherent contempt powers of courts (it ought to be very strange if arbitrators could impose jail time for contempt), U.S. arbitral tribunals may impose such monetary sanctions for non-compliance as they are authorized to do under the arbitration agreement. In this context, a specific difference between the legal cultures of Sweden and the United States must first be addressed. In Swedish litigation, the main rule is that the prevailing party is entitled to recover its legal fees from the losing party. In arbitration, Section 42 of the SAA provides that an arbitral tribunal is presumed – absent a differing arbitration agreement – to have the authority to upon request from a party divide the costs of the arbitration between the parties. Article 49(6) of the SCC Rules provides a similar rule, providing that the arbitral tribunal is to give regard to *inter alia* the outcome of the case. Conversely, in the United States, the main rule is that parties bear their own costs in both litigation and arbitration, except when otherwise provided by law or contract. In such cases where the main rule of bearing one’s own costs is applicable, courts may still award reimbursement of one party’s attorney’s fees, but then as a sanction against another party. Consequently, for the purposes of this section, such kind of forced reimbursements of another party’s costs in arbitration is considered a sanction, the threat of which may restrain parties from being non-compliant with awards.

In this context, the arbitration code of FINRA is of special interest. Under its Rule 13212, an explicit grant of authority is given to arbitrators to sanction parties “for failure to comply with any provision in the Code, or any order of the panel or single arbitrator authorized to act on behalf of the panel”. Further, the Rule provides a non-exhaustive list of available sanctions, which include monetary penalties payable to parties, awarding attorney’s fees and expenses and even, in more serious cases, the dismissal with prejudice of a claim or defense brought in the arbitration. The enumeration of sanctions is preceded by the oftentimes used boilerplate, “unless prohibited by applicable law”. Hence, we look to the law. In *Torres* a FINRA arbitration had been commenced against financial advisor Morgan Stanley by its former clients. In the arbitration, the tribunal ordered discovery, which was not complied with by Morgan Stanley. As a consequence, the tribunal, in its award, ordered Morgan Stanley to pay USD 3 million for its violation of the discovery orders, and in doing so causing “extreme prejudice” to the clients. Morgan Stanley then brought a vacatur action, *inter alia* claiming that the sanctions constituted excess of mandate by the arbitrators under the FAA (9 U.S.C. § 10(a)(4)). The district court denied vacating and instead confirmed the award, the Eleventh Circuit Court of Appeals affirmed. The argument provided by Morgan Stanley was that the sanctions were prohibited by

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193 Chapter 18 Section 1 of the SPC.
194 See e.g. Fed. R. Civ. P. 11(c)(4).
195 Financial Industry Regulatory Authority.
and thus not backed by the rules (that only authorized sanctions when not prohibited by applicable law). Interestingly, the court held that whether or not the sanctions were permissible by law, and hence not in violation of the boilerplate language in the FINRA Code, was a legal question that was not subject to review in vacatur actions. Similar findings have been made by the Tenth Circuit Court of Appeals in trying an appeal in a vacatur action against sanctions imposed by arbitrators in form of dismissal of claims with prejudice.

However, courts have not only upheld arbitrator’s sanctions when they find explicit support in the parties’ agreement. In ReliaStar, the Second Circuit Court of Appeals seemingly formulated a presumption for arbitrators’ authority to sanction parties, at least when the arbitration agreement is “broad”. The arbitration agreement in question provided for ad hoc arbitration and was broadly formulated in terms of the legal relation specified therein. What is of special interest in this context is that the agreement explicitly provided that each party should bear its own costs. Nonetheless, the court held that “a broad arbitration clause, such as the one in this case, [...] confers inherent authority on arbitrators to sanction a party that participates in the arbitration in bad faith and that such a sanction may include an award of attorney's or arbitrator's fees.” The holdings of the court find support both inside and outside the Second Circuit.

4.4.4 Conclusions

On the issue of sanctions available to arbitrators, the differences between Sweden and the United States are lesser, at least compared to other comparisons made in this thesis. In both jurisdictions arbitrators cannot render their awards under penalty of public sanctions, such as imprisonment or fines payable to the government, nor can they impose such sanctions themselves.

While not having the full force of governmental sanctions at their hands, arbitrators can still coerce compliance with arbitral awards, both those rendered

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198 Morgan Stanley contended that the sanctions were in violation of Goodyear Tire & Rubber Co. v. Haeger, 581 U.S. 101 (2017), which sets certain boundaries on in what ways federal courts may grant reimbursement of attorney’s fees as sanctions.
199 839 F. App’x 328, 334.
200 In Piston v. Transamerica Cap., Inc., 823 F. App’x 553 (10th Cir. 2020), arbitrators’ dismissal of claimant’s claims with prejudice, as a sanction for claimant’s non-compliance with procedural timetables, was challenged as being in excess of mandate under the FAA, as claimant, according to himself, had not received prior warnings or sanctions. The court held that the issue ultimately was a question of interpretation of the FINRA Code, and that even if the tribunal had erred in interpreting the rule in question, the issue was beyond the court’s scope of review under the FAA. The court therefore affirmed the district court’s decision to deny the motion to vacate the award.
201 564 F.3d 81, the case was also briefly discussed in section 3.2.2 above.
202 Id., 86.
by themselves as well as those rendered by other arbitrators. The legal basis of such sanctions is the arbitration agreement. Here, the differences begin.

In Sweden, the idea of contractual procedural fines has been proposed in commentary. While the courts have not engaged in the matter, there is no legal authority indicating that such contractual creations are unenforceable. In the United States however, arbitral institutions have adopted explicit rules authorizing sanctions against non-compliant parties. Such rules have been tried by federal appellate courts on numerous occasions, whereby the courts have held that the properness of the sanctions is outside the courts’ scope of review. Courts have even held that such authority is granted to arbitrators, implicitly, when an agreement to arbitrate is formulated broadly. That is far from the more conceptual ideas discussed in Swedish literature of the possibilities of contractual procedural fines.

As concerns the kinds of sanctions available, many tribunals – and courts – in the United States award attorney’s costs as sanctions. While available also to Swedish tribunals (both under the SAA and most institutional rules that are applied in Swedish-seated arbitrations), the awarding of costs is routinely made in favor of the prevailing party. Therefore, such measures can hardly be viewed to function as sanctions in Sweden.

4.5 Chapter Conclusions

The issues discussed in this chapter have varied in nature and conclusions. Here, the conclusion to the chapter is presented. The conclusion herein presented is the answer to research query no. iii.

In short, the role of courts and arbitral tribunals in supervising and enforcing arbitral awards depends on two factors: i) the arbitration agreement and ii) the preferences of the prevailing party. Further, the importance of these factors, as well as the mean in which enforcement is performed, depends on the jurisdiction.

In both jurisdictions, parties may seek to have arbitral awards providing for specific performance or injunctive relief enforced. The issue of enforcement of course lays in the hand of the prevailing party. Here, the party obliged to act has no influence. If the prevailing party seeks to enforce the award, the procedure is similar to that of enforcing judgments. In the United States, as awards are first confirmed as judgments of the confirming court whereby they have the same legal effects as other judgments of that court, the role of courts is exactly the same as when they enforce their judgments. The same applies for the procedure, it stays the same. In specific terms, the principal tool used by courts to enforce injunctive relief and specific performance is the use of their contempt powers. Here, the aggrieved party may file a motion for civil contempt itself, and act as a “civil prosecutor” in providing evidence of a breach and arguing for penalties to

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204 A difference between the jurisdictions in this regard is that domestic U.S. awards have to be confirmed before being enforced, whereas Swedish domestic awards are seen as having the same legal effects as court judgments and hence constitute titles of execution in and by themselves.
be imposed. Should the issue at hand be not to coerce the obliged party to comply, but rather punishing it for already having violated the judgment of the court, it is instead considered criminal contempt. In such cases, the aggrieved party merely becomes a spectator as the court seeks to vindicate its authority by using punitive measures.

In Sweden on the other hand, there are some differences in enforcing awards granting specific performance and injunctive relief as compared to court judgments providing the same relief. For a court to impose fines on party for non-compliance, the party must have been directed to fulfill its obligation under penalty of fines. Unless the obligation has been directed under penalty of fines, no fines can be imposed. When courts issue judgments containing specific performance or injunctive relief, they routinely issue them under penalty of fines (which courts are allowed to do sua sponte). Arbitrators on the other hand, lack the authority to render awards under such penalties. Consequently, the party prevailing in the arbitration cannot commence a court action to have fines imposed in cases of breach. Instead, parties must go through the SEA. In enforcing titles of execution (including arbitral awards) that contain injunctive relief or specific performance, the SEA may order the party to do so under penalty of fines. Thereby, the obligation is ordered under penalty of fines. However, parties choosing the route through the SEA must relinquish the wheel to the hands of the SEA. When an SEA order that has been issued under penalty of fines is violated, it is the SEA – and not the party for the benefit of which the order was made – that is authorized to commence court action to have the fines imposed.

Hence, in both jurisdictions, the enforcement of arbitral awards for injunctive relief and specific performance before national courts involve engaging in questions of public law and further entails allowing public authorities adjudicating more or less substantive issues of the dispute. Parties may therefore wish to remain in the arbitral forum also in the post-award stage of their dispute. While possible in both jurisdictions, the options available to parties to do so differ.

First, for parties wishing to return to the same arbitral tribunal that rendered the award that is not being complied with, the *functus officio* doctrine may cause parties some headache. In the United States, it is common for arbitrators to retain jurisdiction when rendering their awards, so as to later being able to resolve any post-award disputes. This practice is recognized and upheld by the courts, that sometimes even consider such procedure to be given when the relief awarded is of such nature that it would be considered equitable if requested from a court. In Sweden on the other hand, the doctrine is provided in statutory law, along with its exceptions, which are listed in an almost exhaustive manner. In addition to the exceptions listed in the SAA, none of which are applicable to the present issue, there is also significant authority indicating that parties may agree on not applying or modifying the *functus officio* doctrine. Hence, in Sweden this issue should be contemplated already at the contract drafting stage.

Second, regardless of whether a party seeks to enforce specific performance or injunctive relief before the tribunal that granted it or before a new tribunal,
the party needs to consider the sanctions available for the arbitrators to coerce the compliance of the breaching party. Neither jurisdiction allows arbitrators to make use of public law sanctions, such as fines or jail. However, none of the jurisdictions hinder parties from granting arbitrators with the power to sanction them on a contractual basis. Some arbitral institutions in the United States have adopted explicit, and quite elaborate, rules to this aim. In trying vacatur actions, courts have held that the application of institutional rules on sanctioning parties concerns legal issues beyond the limited scope of review courts are granted by the FAA. Even absent such agreements (the previously mentioned rules constitute part of the arbitration agreement by reference) arbitrators have been found to have the authority to sanction non-compliant parties, when the arbitration agreement is broad. In Sweden, on the other hand, there is no authority supporting the contention that arbitrators should be presumed to have being granted the authority to sanction parties, merely by the conclusion of “broad” arbitration agreement. Hence, again, in Sweden, parties anticipating this issue should consider it already at the contracting stage.

As set out in the beginning of this section, the role of courts and arbitral tribunals in supervising and enforcing arbitral awards depends on two factors: i) the arbitration agreement and ii) the preferences of the prevailing party. The preference of the prevailing party is of relevance insofar as it is the one deciding when and where to commence action. The arbitration agreement is of relevance insofar as it controls what possibility the prevailing party has both in being able to return to the award rendering tribunal and to have an arbitral tribunal sanction the breaching party for its non-compliance. The preferences of the prevailing party and the arbitration agreement must however be viewed in the light of which one of the two jurisdictions that is of relevance. While most options are open to parties in both jurisdictions, at least in terms of supervision and enforcement in the arbitral forum, the rules and presumptions governing what applies in the absence of an explicit provision in the arbitration agreement may have a decisive role.
5 Thesis Conclusion and Final Remarks

5.1 Introduction

This final chapter of the thesis has two functions. First, this chapter provides the answer to the overall research question presented in 1.2 above. The previous chapters, no. 2 through 4, have examined one research query each. At the end of each of those chapters, a conclusion has been provided. Those conclusions have answered the research queries examined in each of the chapters respectively. In this chapter, the conclusions made in the previous chapters will be used and analyzed in answering the overall research question of the thesis. This is all provided in 5.2 below. Further, in section 5.3 the overall conclusion presented in section 5.2 will be discussed in a wider academic and societal context. Second, in 5.4 this chapter endeavors to discuss the issue at hand in this thesis from a de lege ferenda perspective. In so doing, the findings of sections 5.2 and 5.3 will be discussed in light of the goals of efficiency and party autonomy in arbitration, in regard to the two jurisdictions examined. Finally, it should be noted that no final section on the conclusions of this chapter will be provided, as this chapter is itself devoted to concluding the thesis.

5.2 Conclusion to the Overall Research Question

5.2.1 Summary of Conclusions Thus Far

To answer the overall research question provided in 1.2 above, three research queries were posted, and answered. In short, this thesis has thus far concluded the following.

I

The first research query was regarding the circumstances for granting and enforcing specific performance and injunctive relief in courts. The issue was examined and the query answered in chapter 2. There, it was concluded that specific performance and injunctive relief was available in both legal systems, but fundamentally different conditions. In Sweden, as in most civil law jurisdictions, the right of performance (including omissions), whether by payment or in natura, is considered a substantive right under contract law. Courts, in trying claims for specific performance or injunctive relief, merely effectuate the substantive law governing the obligations of the parties. Hence, courts may not deny such claims on discretionary grounds. Conversely, in the United States,
as in other common law systems, the division of law and equity is present. As a result, contracting parties have no legal rights of performance. Courts may however, grant performance on basis of equity. While a discretionary matter for the court, certain principles are guiding in using said discretion. Those include, *inter alia*, the adequacy of legal remedies (damages) and the uniqueness of the performance.

In both jurisdictions there are sanctions available against parties that are non-compliant with judgments of courts when they grant injunctions or specific performance. Further, both jurisdictions allow parties to pursue the imposing of such sanctions.

II

The second research query was regarding the circumstances for granting specific performance and injunctive relief in arbitration. The issue was examined and answered in chapter 3. Here, the focus was to ascertain whether the availability of such reliefs differs compared to what applies in litigation. In short, the answer was “it depends”. A review of precedent in vacatur actions reveled differences between Sweden and the United States. In Sweden, the irrelevance of procedural law to the issue of reliefs is apparent also in arbitration law. Courts seem to expect nothing else than the tribunals applying the substantive law also as concerns reliefs. In the United States on the other hand, there are substantial differences between the authority of arbitrators to grant reliefs as compared to courts. While courts are bound by the division of law and equity, deriving their authority to grant reliefs from law and judicial standards, the same does not apply for arbitrators. Instead, arbitrators find their authority in the arbitration agreement, wherefore it is the arbitration agreement that is controlling also for the issue of reliefs. Courts have held that even when the arbitration agreement is silent on the issue, a broad grant of authority in granting reliefs is presumed when the arbitration agreement itself is broadly formulated.

An analysis of the SCC Rules and the AAA Rules and awards made thereunder further show the difference between the two jurisdictions. AAA arbitrators and tribunals often exercise their remedial freedom as recognized by courts, mostly in an explicit manner. SCC tribunals on the other hand often provide only limited reasoning on the issue of reliefs.

Another aspect highlighting the difference between courts and arbitrators in granting reliefs is the CISG. The Convention contains a substantive right to performance while at the same providing a procedural exception for courts that would not have done so under their own laws. While the answer is uncertain, this thesis contends that the procedural exception mainly applies to courts and is not automatically appliable to arbitral tribunals. This strengthens the view of arbitration as independent of litigation in terms of reliefs.

III

The third research query concerned the roles of courts and arbitral tribunals in supervising and enforcing arbitral awards granting specific performance or injunctive relief. The issue was examined and answered in chapter 4. First, the issue of court enforcement of arbitral awards providing injunctive relief or specific performance was examined. In this regard, it was first concluded that the
court enforcement of arbitral awards providing specific performance or granting injunctive relief in large is similar to enforcing court judgments providing the same. In the United States, the procedure, after an award has been confirmed, is not only similar but identical to what applies in enforcing equitable court judgments. In other words, the premiere tool available is the contempt powers of the courts. When party is non-compliant, the aggrieved party has standing to request the court to hold the non-compliant party in contempt and impose upon it – or its agents, employees and officers – fines or jail time, so as to coerce compliance. In Sweden, in order for parties to seek the imposing of fines upon their adversaries for not complying with their obligations, the decree (usually judgment) providing the obligation must be ordered under penalty of fines. Arbitrators lack the authority to render their awards under penalty of (public) fines wherefore parties cannot seek to impose any such fines in courts. Instead, parties in Sweden are left with seeking enforcement before the SEA, whereby the SEA may, under penalty of fines, order a non-compliant party to perform its obligations as provided in the arbitral award. In such case a party breaches an SEA order, it is the SEA – and not the aggrieved party – that is authorized to seek imposing of fines.

Instead of going to court, parties may instead choose to remain in the arbitral forum also for the supervision and enforcement part of the proceedings. In this regard, the first thing to be considered is the *functus officio* doctrine which may hinder the arbitral tribunal that rendered the award from further engaging with the matter. Here, a retention of jurisdiction by arbitrators is nothing unusual in the United States, and is routinely upheld by courts, while the same ought to require explicit support in the arbitration agreement if done in Sweden.

As concerns the sanctions available to tribunals – whether the same that rendered the award to be enforced or a subsequent one – both jurisdictions allow contractually crafted fines to be imposed by arbitrators. In the United States, this practice is more common, and some institutions even have explicit rules on sanctions. Even without such explicit rules, courts have upheld awards ordering sanctions. In Sweden however, there is no authority supporting the contention that arbitrators are to be presumed to have such authority even without explicit support in the agreement.

### 5.2.2 The Conclusion

As set out in 1.2 above, the above research queries and the answers to them, are of relevance in answering the overall research question:

What consequences does the choice of arbitration, as opposed to litigation, as forum have regarding the availability and enforceability of injunctive relief and specific performance, under the laws of Sweden and the United States?

The answer to the question, the conclusion, is firstly that there are consequences. Concerning the question of availability, in the United States, the choice of arbitration as a forum is controlling for the issue of reliefs. For parties, the
consequence is that the availability of specific performance and injunctive relief generally is greater when they choose arbitration rather than U.S. litigation as the method for dispute resolution. In choosing arbitration parties may control what reliefs that are to be available in case of a dispute. Conversely, in U.S. litigation, parties cannot control the equity powers of courts by contract. Hence, the consequence of choosing arbitration has two consequences in this regard: that the issue of which reliefs to be available becomes subject to contract and that barring concrete contract language indicating the opposite, the availability of specific performance and injunctive relief is greater. In Sweden however, the choice of arbitration as a forum instead of Swedish courts, should have no consequence for the availability of specific performance and injunctive relief.

With regard to the consequences of arbitration as compared to litigation for the enforcement of specific performance or injunctive relief, there are consequences in both jurisdictions. Concerning the “usual” method of enforcement – through courts and judicial agencies – parties in Sweden may not seek the imposing of fines from courts to coerce their opponents but must instead rely on the SEA and both to order the opposing party’s compliance under penalty of fines and to seek the imposing of those fines. When parties have chosen to litigate in Sweden instead, the prevailing party may, in addition to going to the SEA, rather commence court action itself to have the fines imposed. Accordingly, the consequence of choosing arbitration rather than litigation in Sweden is that the outcome of the proceeding (an arbitral award) is harder to enforce than the outcome of a court proceeding (a court judgment), in terms of specific performance and injunctive relief. In the United States however, an arbitral award, when confirmed, has the same effect as a judgment of the confirming court, thus allowing the aggrieved party to request the court to use its contempt powers. Correspondingly, in the United States, there are no consequences in terms of enforceability between arbitral awards and court judgments that provide for specific performance or injunctive relief. The consequences for parties in the United States do not consist of lessened availability of court enforcement, but rather increased enforcement opportunities in the arbitral forum. In both Sweden and the United States, it is possible for parties to return to the arbitral tribunal to ask for further relief in enforcing an award providing specific performance or injunctive relief, when that tribunal has retained its jurisdiction. In Sweden, such retention of jurisdiction requires direct support in the arbitration agreement of the parties, while it does not in the United States. Nonetheless, the consequence for parties in both countries is that they have an extra forum for further proceedings, and thus in that regard broader possibilities to bring enforcement proceedings. When again before arbitrators – either the same ones or new ones – parties in both jurisdictions may request arbitrators to “sanction” the breaching party on a contractual basis for having violated the award. In the United States, some institutional rules grant arbitrators with an explicit authority to award such sanctions. Further, even without explicit rules, such authority is presumed when an arbitration agreement is broad. In Sweden the opposite ought to apply, as no such presumptions can be found in legal authority. So, while the consequence for parties in both jurisdictions is that
yet another mean of enforcing specific performance and injunctive relief awarded in arbitration is available – wherefore the possibilities are broader compared to litigation –, the biggest practical impact is in the United States, where the possibility does not have to be expressly agreed upon.

To summarize, the choice of arbitration rather than litigation does have consequence. Which these consequences are depends on the jurisdiction. In Sweden, the consequences are quite limited and appear in in supervising and enforcing the award containing specific performance or injunctive relief. These are that parties cannot seek to have fines imposed by courts but must leave it to the SEA to take such action, but also that they have the theoretical possibility to seek to “enforce” the award before arbitrators. Whether parties in Sweden may seek to have any contractual sanctions imposed on their opponents and whether they may seek them from the same tribunal that rendered the original award depends on the arbitration agreement. Given that parties must agree upon it in beforehand, and that such language is not reflected in the (in Sweden) commonly used SCC Rules, this is usually not an option for parties in Sweden, which then are only left with the SEA. In the United States, the consequences are more substantial. A largely contributing factor is the fact that the availability of injunctive relief and specific performance in courts is limited. That fact, in addition to the remedial freedom arbitrators have under U.S. law, makes for a more substantial change for parties in the United States opting for arbitration over litigation, at least compared to parties in Sweden. The difference is more substantial for parties in the United States also in the enforcement stage, as exceptions to the functus officio doctrine as well as authority to sanction parties is often presumed and need not always be explicitly granted. In short, while the choice of arbitration has consequences for the present issue in both jurisdictions, the consequences are more substantial in the United States than in Sweden.

5.3 What Does the Conclusion Entail?

In 5.2 above, the answers to the research queries have been summarized and a conclusion to the overall research question has been presented. Here, these findings are discussed from a broader academic and societal perspective.

Initially, one should acknowledge that while arbitration is supposed to be an international method of resolving disputes, national laws will always have the final say, at least in the enforcement stage. When national laws have the final say, so does national legal and societal cultures, at least indirectly. The jurisdictions chosen each have very distinct – and different. – legal cultures. Many of the differences in these cultures have been reflected in this thesis. One example is the role of courts in each system. In the United States, courts have a more highlighted constitutional role. Great advancements have been made in fields of individual rights and due process, not by legislation but by precedent. Further, individual rights are upheld almost solely through adjudicative processes, rather than administrative. In exercising the constitutional powers of courts over all cases in law and equity (U.S. Const. art. 3 § 2), the Supreme Court has held that
the courts contempt powers are inherent and that their "existence is essential to
the preservation of order in judicial proceedings and to the enforcement of the
judgments, orders, and writs of the courts, and consequently to the due
administration of justice". Few roles are more authoritative than that a judge
in the United States, dressed in a robe entering a court room as all present rise
before them. In Sweden, the role of courts has historically not been as large and
as emphasized. Instead, courts are often viewed simply as government
authorities, the sole difference of which from the administrative authorities has
been their resolving controversies in individual cases (Sw. rättsskipning). No
courts have "inherent powers". Instead, their powers are generally derived from
statutory law, and sometimes analogies thereof, and in comparison to those of
courts in the United States, are quite modest.

Given this, it is perhaps naive not to expect that these differences may also be
reflected arbitration. In other words, the case may perhaps be such that the
natural expectation that parties have of how an adjudicative processes functions,
which is influenced by the legal culture of the two jurisdictions, indirectly
influence how the proceedings are routinely done and how precedent develop in
each jurisdiction. Hence, one could argue that Swedish parties (and their lawyers)
do not expect to return to the tribunal after the award has been rendered, because
they would not have expected to do so if they had litigated before a judge instead.
Conversely, U.S. parties and their lawyers would not be surprised by a summons
to appear for a judge even after the judgment has been rendered, as post-
judgment litigation is not uncommon in the United States, wherefore the idea of
an arbitrator retaining jurisdiction to address any post-award issues is not very
controversial, and perhaps presumed. In short, most arbitrators, counsel and
judges do not practice law in a vacuum. Instead, they are influenced by the legal
tradition to which they are accustom. As set out above, arbitration is an
international field of law, but its boundaries are ultimately set by national
practitioners.

With all this being said, or written rather, it should be noted that the practical
effect of the topic of this thesis – specific performance and injunctive relief in
arbitration – is limited to the needs (or whishes) of parties to secure such relief.
Many parties may ultimately choose to go for the undoubtedly simpler option of
money damages. As the choice of the relief pursued is ultimately governed by
commercial considerations, some remarks are warranted. Here, it can be noted
that there are countless different kinds of disputes and that there is no "one size
fits all" solution to them. Instead, parties and counsel must undertake a careful
analysis of the aim of each dispute pursued, especially on the claimant side.
Oftentimes, money damages can be sufficient, at least when the damage can be
calculated and proven. With a concrete amount in mind, it is also oftentimes
easier to determine whether the claim is worth pursuing or not. However,
sometimes money damages are simply not enough. Especially when public
perception and goodwill are on the line, and when the performance promised

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205 See note 77 above.
206 Cf. Chapter 1 Section 8 of the Instrument of Government.
cannot be replaced, performance *in natura* ought to be high on the wish list. In such cases, the last thing a client wants to hear by its lawyer is that such relief has been made impossible by having opted for arbitration.\(^\text{207}\) Instead, a good lawyer will turn to the *lex arbitri*, the arbitration agreement (or the rules referenced therein), and to the *lex fori* of the place of enforcement and ask not “Is such relief possible?” but instead “How and when is such relief requested, granted and enforced?”. This thesis has answered the latter question.

### 5.4 Final Remarks – *De Lege Feranda*

Above, this thesis has provided questions, answered those questions and reasoned as to the importance of those answers in a broader context. In this final section of the thesis, the focus will shift somewhat. Instead of discussing what applies, why it applies and what that entails, this subsection is devoted to the question what should apply. Here, policy arguments will be discussed against the findings of this thesis.

There are many arguments both in support and in opposition of specific performance and injunctive relief in arbitration, as with most things. An exhaustive list of pros and cons is neither possible nor intended to present here. A good starting point of this discussion is to leave some remarks on a scholarly work on the present topic, which has taken a different route than this thesis. In his article,\(^\text{208}\) *The Case Against Arbitral Awards of Specific Performance in Transnational Commercial Disputes*, Elder has, as the name of the article suggests, made a, seemingly *de lege ferenda*, case against such relief in international arbitration, and in doing so covered many of the commonly used arguments. This thesis contends otherwise.

Elder argues, *inter alia*, that, as a general rule, parties should not be able to agree upon arbitrators having the powers to grant specific performance.\(^\text{209}\) The main argument provided is the difficulties for courts in enforcing awards providing such relief. In essence, the arguments presented are that the New York Convention was drafted with the money awards in mind and that courts in enforcing awards for specific performance have to get substantively involved in the dispute.\(^\text{210}\) None of these arguments are convincing. Instead, they merely limit party autonomy.

First, Elder shows no authority in claiming that “[t]hose who elaborated the text of the principal treaty that describes the international arbitral system, the New York Convention, constructed a mechanism that presupposes a common law conception of damages as the usual means of relief”. To clarify, the proposition is not disputed by this thesis, nor is it adopted. For the sake of

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\(^{207}\) In commentary, contentions have been made disapproving of the idea of specific performance in arbitration.  
\(^{208}\) See note 29.  
\(^{209}\) Elder, p. 22.  
\(^{210}\) *Id.* p. 22 *et seq.*
argument, the proposition can be considered correct. Even then, the argument of the contracting states getting more than they bargained for is not convincing. Most national procedural law, whether viewing performance *in natura* as an ordinary or extraordinary relief, have some sort of enforcement systems in place. A good example is the United States where the enforcement methods for such are more elaborate than those in Sweden, in spite of Swedish law often viewing specific performance as the primary remedy and U.S. law doing the opposite. In other words, there is a difference between what a court usually would do and what it can do. 211 The argument may admittedly be stronger in in respect to jurisdictions where courts lack the means to even try to enforce specific performance and injunctive relief. However, in legal systems where there are no legal methods of coercion that are available to enforce court judgments, at all, the idea of enforcing specific performance may very well be in violation of that jurisdiction’s public policy, thereby freeing that jurisdiction from its obligation to enforce the award in the first place. Therefore, there is no reason to bar the enforcement of such awards also in all other jurisdictions, and in doing so taking the matter out of the hand of the parties.

Second, while it is true that the enforcing court may have to get somewhat substantively involved in a dispute, 212 it is here necessary to take a step back and ask oneself why that is a problem. Parties conclude arbitration agreements for a multitude of reasons, breaking free of burdensome litigation being one of them. When an obligee-claimant commences arbitration against a non-compliant obligor to secure specific performance, it does (or rather should do) so fully aware of the risk of prolonged litigation if the obligor does not comply with the future award. In doing so, one may argue that the obligee foregoes its right to keep the matter of out court, or at least accepts the risk of court involvement. Viewing the issue from the other side, an obligor being ordered to perform in an award has in a legally binding manner been ordered to do so. Should the obligor, in spite of this, elect not to comply, it can similarly be argued that the obligor foregoes its right to stay out of court. Hence, the fact that the enforcing court (or judicial agency) might have to get involved does not constitute a convincing policy argument against specific performance or injunctive relief being awarded in arbitration.

In addition to the arguments provided above, it may be noted that the risk of complications in the enforcement stage also is present when enforcing awards for money damages. Issues like what may be attached (and what is exempt from being attached), what belongs to the debtor (and what instead belongs to third parties but is held by the debtor), and whether or not the debtor already has paid under the award (either directly or having gotten assets attached abroad) are all controlled under national law and may all be contentious and thus in the hand of national courts (or judicial agencies). Thus, awards for money damages are not immune from enforcement complications.

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211 A point made by the representatives of the United States and United Kingdom in drafting the CISG. See note 137 above.

212 Cf. 4.2.3 above.
As have been set out above, the complications that may be involved in enforcing awards for injunctive relief or specific performance do not pose convincing arguments for disallowing arbitrators in international disputes from granting such reliefs in the first place. Any legislative or judicial step in such a direction would therefore not only disrupt and diminish the rights and obligations of parties in international contracts and deprive them of the possibility to receive promises that can be truly relied on, but would also be unwarranted.

However, as has been explained in this thesis, there are not only judicial ways of enforcement of awards for specific performance or providing injunctive relief. In this context, a heavy burden rests on the shoulders of arbitral institutions. Some arbitral institutions have already taken steps to minimize the need for extensive post-award litigation, such as FINRA. Especially in Sweden, where the presumptions for arbitrators being allowed to retain jurisdiction and being allowed to sanction parties do not apply, there may be a need for arbitral institutions to consider amending their rules so as to include such provisions. It could be argued that doing so would promote efficiency and lessen the need for courts to get involved. On the other hand, as discussed in 5.3, the needs or wishes of parties in practice to seek specific performance and injunctive relief may not be that great, why an amendment of institutional rules perhaps would not be justified. Also, just as court enforcement proceedings, elaborate arbitral rules on retaining jurisdiction and authority to issue sanctions can also be exploited and misused by parties, which certainly is not efficient. In the end, it is the users of arbitration that ultimately decides what should apply in the future, either by drafting arbitration agreements of their own or by expressing interest in having institutional rules amended. To conclude this de lege feranda discussion, and with it, this thesis: time will tell.
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