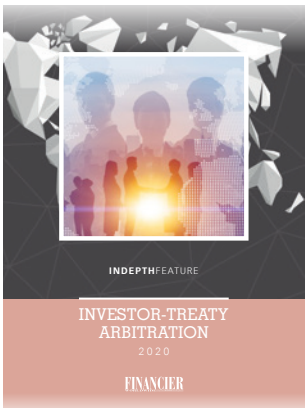




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# INVESTOR-TREATY ARBITRATION

Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in investor-treaty arbitration.

SWEDEN

# Hannes Snellman

## *Respondents*


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Pontus Ewerlöf specialises in arbitration and civil litigation and is head of Hannes Snellman's dispute resolution team in Stockholm. He has substantial experience in international and domestic arbitration, as well as court proceedings in Sweden. His experience as counsel encompasses a wide range of areas, such as supply, share and asset purchases, construction and real estate, finance, energy, investor-state disputes, agency and distribution, professional and product liability, regulatory issues and insurance. He is also appointed as an arbitrator on a regular basis.


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Martin Rifall is a partner in the dispute resolution team in Stockholm. He has extensive experience in court proceedings as well as domestic and international arbitration proceedings. He has acted as counsel for Swedish and foreign companies in SCC, ICC and ad hoc arbitrations. His practice has a particular focus on construction disputes, acting as counsel for employers and contractors in large national and international construction projects. He is also involved in investor-state disputes. Mr Rifall regularly advises clients in disputes relating to natural resources, such as valuable metals and minerals, natural gas & oil.

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**Q. Could you provide an overview of recent trends and developments in investor-treaty arbitration in Sweden? How would you describe the volume of such disputes over the last 12 months or so?**

**A.** The first ever investor-state arbitration with Sweden as responding state was notified in December 2019 when a foreign prospector raised a claim against Sweden under the Energy Charter Treaty (ECT) (*Aura*). The dispute relates to mining rights. Apart from this case, there are a number of setting aside proceedings in investor-state cases pending in Swedish courts. For example, *PL Holdings v The Republic of Poland*, which is a case based on a bilateral investment treaty (BIT). This case is currently being handled by the Swedish Supreme Court, which has referred an issue to the Court of Justice of the European Union (CJEU) for a preliminary ruling. Moreover, *The Kingdom of Spain v Novenergia II - Energy & Environment (SCA), SICAR*, is the first of several cases concerning the application of the CJEU's judgment in *Achmea* to proceedings under the *ECT*. The case is currently being handled by the Svea Court of Appeal.

**Q. What are some of the common causes of investor-treaty disputes in Sweden? What role are bilateral and multilateral investment treaties playing?**

**A.** It is difficult to draw any conclusions from only one investor-state dispute with Sweden as the responding state. However, it is fair to say that political decisions and agendas based on environmental concerns, such as in *Aura*, may become an increasing area of investor-state disputes in future. This also touches on the fine line between investment treaty protection and democratically made political decisions, which has been the main focus of the debate lately.

**Q. Do you believe the current investor-state dispute settlement system works well? Would you recommend any reforms to the system?**

**A.** The current investor-state dispute settlement system works well and is outstanding compared to other dispute resolution mechanisms. In comparison to

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*The debate regarding investor-state arbitration has not been intense in Sweden. That said, criticisms of the current system are similar to those voiced in other jurisdictions, in particular on the idea that the system undermines democracy.*

other jurisdictions, the debate regarding investor-state arbitration has not been intense in Sweden. That said, criticisms of the current system are similar to those voiced in other jurisdictions, in particular on the idea that the system undermines democracy. These critical voices most often belong to non-lawyers, or at least to people with no experience of investor-state arbitration. Even though the current system is robust, we believe it has to be reformed in order to gain public acceptance. More transparency could be one outcome in this respect. The possibility of having substantive issues appealed to a central higher court for investor-state disputes is another reform which would ease the pressure on the current system. However, it is difficult to see how such a reform could be made. Furthermore, the CJEU's judgment in *Achmea* and its application to the ECT will need to be resolved in order to gain legal clarity as regards the EU member states' position under the ECT.

**Q. How would you characterise the challenges involved in enforcing an arbitral award against sovereign and state**

*Hannes Snellman*

**entities? What lessons can parties learn from recent arbitration decisions?**

**A.** The answer is twofold. Firstly, if an arbitral award against a sovereign state or a state agency is to be enforced in that state, this may certainly be challenging. In particular, this is the case where the subject matter of the dispute is politically sensitive, or where the awarded amount is high. In most cases, enforcement of such awards is better avoided in the state against which the award is rendered. Secondly, enforcement against a sovereign state or a state agency in another state where the state has assets may pose other problems. Namely, a defence based on sovereign immunity. In the landmark case *Sedelmeyer v The Russian Federation*, the Swedish Supreme Court confirmed that immunity from enforcement covers property for state purposes – most often real estate for diplomatic functions – but not state property used for commercial purposes. In *Sedelmeyer*, the Supreme Court found that the real estate at issue was not used for state official activities and thus did not have immunity from enforcement.

**Q. What steps do parties need to take in relation to structuring their overseas investments to ensure they qualify to receive investment treaty protection?**

**A.** Investment treaty protection in a specific case follows the applicable BIT or multilateral investment treaty (MIT). Hence, the party seeking protection for its investment must, first of all, ensure that it qualifies as an investor with regard to the BIT or the MIT. If there is no BIT or MIT available between the investor's jurisdiction and the state in which the investment is to be made, the investor needs to establish a subsidiary or affiliate in a jurisdiction covered by the BIT or MIT to see the investment through. Secondly, the investment must qualify as such under the BIT or MIT. This means that a party that seeks investment treaty protection must carefully study the available BIT or MIT in order to understand the scope of the protection.

**Q. What essential advice would you offer to an investor embroiled in a dispute**

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**with a foreign government? Do emerging markets pose any particular problems?**

**A.** To commence a dispute against a state based on a BIT or a MIT often results in lengthy arbitral proceedings and high costs. Accordingly, an investor commencing such proceedings must be well-funded and have a long-term goal. Even if the arbitral proceedings result in a successful award, setting aside proceedings and enforcement may drag on for years. Before commencing such proceedings, an investor should analyse whether the subject matter of the dispute is politically sensitive or only commercial. Moreover, could the arbitral award have precedential effects on other similar cases? These questions are important since the driving force of states is not generally commercial concerns. From an investor-state dispute perspective, emerging markets do not pose particular problems. In some cases, it may even be beneficial since emerging markets are dependent on foreign investment and thus more eager to push their reputation as an investor-friendly jurisdiction.

**Q. How do you predict the geopolitical and economic outlook will influence investor-treaty claims and disputes?**

**A.** What we are seeing now is increasing protectionism and a disruption in economic globalisation, with the US in particular, but also in some states in the EU, terminating free trade and investment treaties. In the short term, this may result in an increase in investor-state disputes. Long term, there is a risk of a decreasing number of foreign investments, which certainly would also affect the number of investor-state disputes. However, a deglobalisation of the economy and a lack of foreign investments may result in a rebound once reality bites. ❑

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