Arbitration in the financial sector in the Nordic region?

A few remarks and reflections on one recent survey and two recent cases

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Some key findings

1. Arbitration preferred over litigation and SCC most popular rules (52 %, i.e. much more than ICC and LCIA together). But: “Other Sectors” [i.e. banks and others] preferred litigation!

2. Preferred foreign substantive law in international law is Swedish! English law second place, German law third place. But: “a clear majority of respondents in the financial sector favoring English law”.

3. Slightly over half of the disputes domestic (52 %).

4. Of all of the large disputes 9 % about banking/finance.
An ISDA-case in the Swedish courts

Lehman v. SEK

* ISDA 2002 Master Agreement
* New York-law
* No arbitration clause or venue
* Early termination due to LBHI Chapter 11
* Non-defaulting party, SEK, made replacement transactions
* Lehman was in the money – dispute over size of ”Loss” (some 40 replacement transactions under dispute)
* Dispute over interest rate and start date
An ISDA-case in the Swedish courts *cont.*

Lehman v. SEK

* Dispute over repayment obligation re ”collateral” paid from Lehman to SEK
* Value of dispute roughly 80 MUSD
* Why Swedish courts?
* How was/is the case dealt with?
* Time, costs and number of experts etc?
* Would arbitration have been an alternative?
The one and only case handled by the Review Board under the Support Act (Swe: Prövningsnämnden)

D. Carnegie & Co (DCCo) /. The Swedish National Debt Office (NDO) & v.v.

* NDO, being the Support Agency under the Support Act granted a support loan to Carnegie Investment Bank (CIB), a subsidiary of listed DCCo. DCCo pledged the shares in CIB and another subsidiary as collateral. CIB lost its license to conduct banking and securities activities and had severe financial problems. NDO enforced the pledge and assumed ownership of the pledged shares. The objectives were to safeguard financial stability (avoid a “Swedish Lehman”) and to minimize the cost for the Swedish taxpayers. The shares of CIB and the other subsidiary was subsequently sold in a controlled auctions, i.e. ordinary M&A deals.
The one and only case handled by the Review Board under the Support Act (Swe: Prövningsnämnden) cont.

D. Carnegie & Co (DCCo) /. The Swedish National Debt Office (NDO) & v.v.

* The pledge agreement prescribed valuation of the shares with a one sided right for DCCo to appeal the valuations to the Review Board. Other disputes to be handled by ordinary courts.

* DCCo’s position: Unlawful enforcement, i.e. “We still own the shares”. And wrong values, approx difference 5.5 billion SEK. Thus, two disputes.

* Both disputes domestic. Swedish law governing.
The one and only case handled by the Review Board under the Support Act (Swe: Prövningsnämnden) cont.

D. Carnegie & Co (DCCo) /. The Swedish National Debt Office (NDO) & v.v.

* Why Review Board and Swedish Courts?
* How were the disputes dealt with?
* Time, costs and number of experts etc?
* Would arbitration have been an alternative?
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