Kluwer Arbitration Blog

# Time to Upgrade: Review of the Swedish Arbitration Act

Anja Ipp (Climate Change Counsel) · Saturday, October 17th, 2015

The Swedish Arbitration Act ["Act"] is currently under review. In 2014, 15 years after the Act first entered into force, a committee was given the task of assessing how well it has worked in practice and how it measures up internationally. According to the committee's terms of reference, the primary motivation behind the review is to make arbitration in Sweden even more attractive for both Swedish and international actors. In April 2015, the committee issued an extensive report, concluding that the current law has worked well overall, but that a few improvements are in order. Some of them are highlighted here.

Several of the suggested revisions are designed to clarify and improve the procedures for challenging an arbitral award in court. First, reflecting the increasing number of international arbitrations in Sweden, the committee proposes that proceedings for setting aside awards should be conducted in English if a party so requests. According to this proposal, written submissions, written evidence, and witness examinations may be presented and conducted in English. The court's decisions, however, would still be rendered in Swedish — with a simultaneous English translation if requested. (Translations of most arbitration-related court decisions are already available at the Swedish Arbitration Portal.) The committee further proposes a change in the applicable procedural rules, so that set aside proceedings would be primarily in writing, and exclusively decided by the Svea Court of Appeal, which is the court that already decides the vast majority of such cases.

In sum, these first few proposed revisions aim for improved efficiency by means of streamlined proceedings before a specialist court, with no need for the translation of submissions or evidence.

Another set of proposed revisions relate to the grounds on which a party can challenge an award in court. The current legislation distinguishes between grounds for *setting aside* an arbitral award and grounds for declaring an award *invalid*. Under the Act, an arbitral award may be set aside upon motion of a party (1) if it was not covered by a valid arbitration agreement, (2) if the tribunal exceeded its mandate, (3) if Sweden was not the proper place of arbitration, (4) if an arbitrator was appointed contrary to the parties' agreement, (5) if an arbitrator failed to meet the impartiality standard or did not possess full legal capacity, or (6) if a procedural irregularity affected the outcome of the case. As for invalidity grounds, there are only three: the violation of public policy, non-arbitrability of the issues decided, and the failure to meet certain formal requirements. Whereas an application to set aside an award must be filed within three months, there is no time limit for the invalidity claims. The distinction between these two sets of grounds upon which an award can be challenged is sometimes perceived as unnecessary or confusing. The committee

therefore proposes to repeal the provision on invalidity of an award, and make the violation of public policy another ground for setting aside an award.

With regard to the grounds for setting aside an arbitral award, the most significant proposed change relates to excess of mandate. Most (of the very few) awards that Swedish courts have set aside in recent years were set aside based on the ground that the arbitrators had exceeded their mandate. Currently, the Act stipulates that an award can be set aside if "the arbitrators made the award after the expiration of the time period decided by the parties, *or if the arbitrators otherwise exceeded their mandate*" (emphasis added). The committee proposes to separate this provision into two independent grounds, one relating to the time limit for issuing an award, and the other relating to the substance of an award. The new provision would further specify that when it comes to a substantive excess of mandate, the award should be set aside only to the extent that the outcome of the case has been affected.

The suggested reforms of the grounds on which an award can be challenged serve to bring greater legal certainty, in particular for non-Swedish parties, to whom the current provisions on invalidity of an award may appear somewhat unusual.

There are several other suggested reforms that are worth mentioning. First, the Act is currently silent on how arbitrators should determine which substantive law to apply in a dispute. The proposal suggests that the law selected by the parties should apply, and in the absence of party agreement, the tribunal should determine the applicable substantive law taking into account the legal rules to which the dispute has closest connection. Second, under the Act, a party can bring a positive or negative declaratory claim in district court regarding the tribunal's jurisdiction at any point during the proceedings. This can lead to uncertainty and, in unfortunate cases, dual proceedings. Therefore, the committee suggests that such claims may no longer be brought once arbitration has been initiated; instead, the tribunal's decision affirming its own jurisdiction may be appealed to the Svea Court of Appeal within 30 days. Finally, the committee proposes changing a provision that relates to arbitrators' fees. Under the Act, a party can challenge arbitrators' fees in district court. The proposal is to create an exception to the rule, so that it does not apply to arbitrators' fees set by an arbitration institution.

The Arbitration Institute of the Stockholm Chamber of Commerce ("SCC"), several government agencies, and arbitration-related associations were invited to comment on the committee's report. In its comments, the SCC expressed a general agreement with the committee's findings and recommendations, and emphasized the importance of a modern arbitration law that is consistent with international trends. Today, more than half of the arbitrations filed with the SCC involve at least one non-Swedish party, and 120 bilateral investment treaties refer to the SCC rules or to Stockholm as a seat of arbitration. For these and other reasons, the new law must be user-friendly and accessible also to the non-Swedish parties.

The deadline for commenting on the proposed revisions has now passed, and the legislative process will continue, with the aim of a revised Act entering into force in July 2016.

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