Kluwer Arbitration Blog

Call for Review: Ambiguity in the Swedish Arbitration Act Regarding the Law Applicable to the Arbitration Agreement

Asade Pourmand (Stockholm University) · Monday, July 4th, 2016

Under the Swedish law, when the parties failed to choose the applicable law, their arbitration agreement is governed by the law of the seat of the arbitration, provided that the parties have specified the seat in their agreement. That much is clear. However, when the parties have not stipulated a seat in their agreement, there is cause for concern.

Section 48 of the Swedish Arbitration Act (SAA) governs the law applicable to the arbitration agreement. It provides that absent a choice of law by the parties, the law of the country where, "*by virtue of the agreement*", the proceedings have taken or will take place, governs the arbitration agreement.

The wording of section 48, "*by virtue of the agreement*", can be interpreted as meaning that the seat of the arbitration must have been specified in the arbitration agreement. In fact, this interpretation was upheld by scholars: "Section 48 provides that the law of the place of arbitration governs the arbitration agreement – provided that the parties have agreed on that place of arbitration in their arbitration clause (Christer Danielsson, *International Arbitration in Sweden: A Practitioner's Guide*, (Kluwer Law International, 2013), p. 152, emphasis added)."

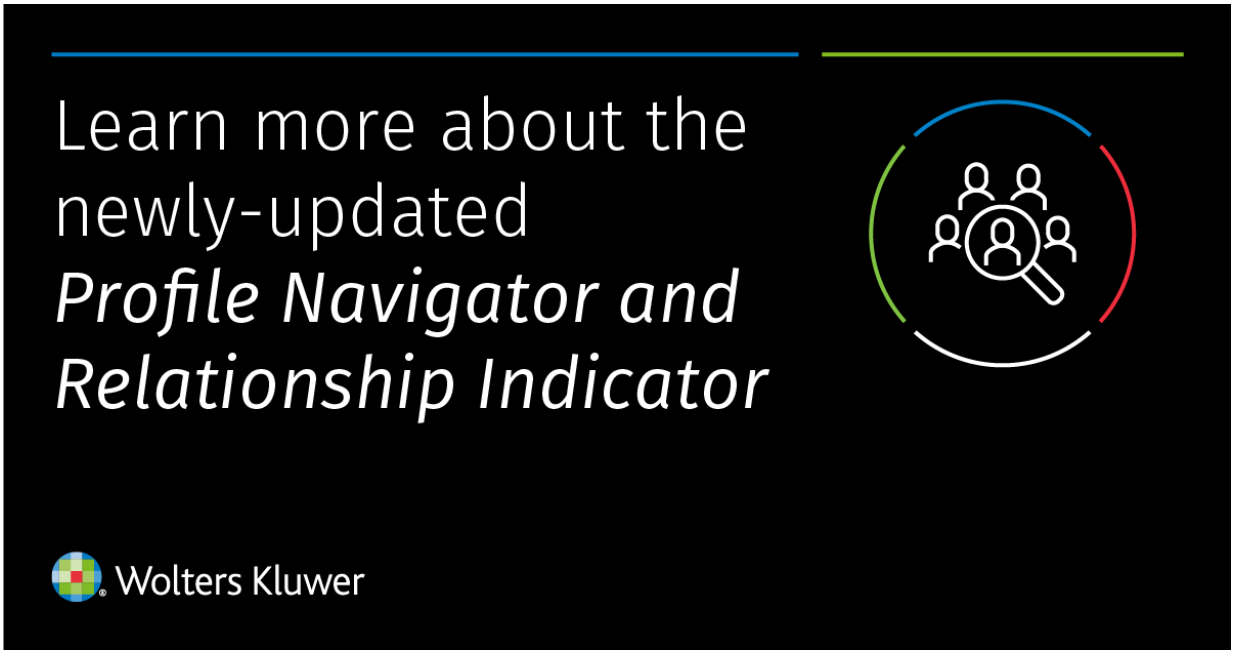
However, although the wording of section 48 supports this interpretation, the wording of the Government Bill that preceded the SAA does not. The Government Bill provides that the parties' demonstrated intention on a choice of seat, may suffice to warrant an application of the law of that seat to the arbitration agreement. Also, the Government Bill states that a choice of seat by an arbitral institution or the arbitrators, mandated by the parties' arbitration agreement, fulfills the requirement under section 48 (see Government Bill 1998/99:35, pages 193, 245). These conclusions are, however, not easily made by reading the SAA. The discrepancy between the language of section 48 and the intention of the legislator as expressed in the Government Bill can lead to great ambiguity where international practitioners are not familiar with the often untranslated Swedish preparatory works.

The SAA is currently under review (see previous post on this). In spite of the ambiguity in section 48, the law applicable to the arbitration agreement is not one of

the issues that are under review. The problem might have been overlooked, as in the vast majority of cases, the law applicable to the arbitration agreement or the seat of the arbitration is stipulated by the parties in their agreement. However, in the context of international commercial arbitration, where the stakes are often high, a commercial party should be able to determine the content of Swedish law without ambiguities that might result in an increase in legal costs and lengthy proceedings for the parties. Hence, although the problem might not often arise in practice, it is of principal importance with respect to clarity and efficiency.

Internationally, there are many rules that provide for the default application of the law of the seat of the arbitration to the arbitration agreement. Under Articles V(1)(a) of the New York Convention and Article 36(1)(a)(i) of the Model Law, the "*law of the country where the award was made*" applies, absent a choice of law by the parties. Also, article 16.4 of the LCIA Rules provides that the law applicable to the arbitration agreement is the law of the seat of the arbitration. These rules do, however, not provide that the seat must have been agreed upon in the arbitration agreement.

A measure of rethinking is necessary. In the interest of providing clarity in the legislation, the Swedish legislator could perhaps remove "*by virtue of the agreement*" from section 48 of the SAA. The phrase fulfils no apparent purpose, as the prevalent legal position in Sweden seems to be that it is not required that the seat of the arbitration must have been chosen expressly in the arbitration agreement. Eliminating the ambiguous language would not only remove what, at a first glance, could be interpreted as a form requirement, but also, would align the SAA to the international practice.



This entry was posted on Monday, July 4th, 2016 at 6:05 am and is filed under Arbitration Agreements, Arbitration clause, Law governing the arbitration agreement, Sweden
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.