Kluwer Arbitration Blog

The Swedish Government Revives Efforts to Modernise the Arbitration Act

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After almost 20 years, the Swedish Arbitration Act ("SAA" or "Act") may be getting a well-deserved face lift. In February 2014, the Swedish Government decided to take definitive steps to begin modernising the Act. The purpose of the reform was to bring Swedish arbitration law more in line with certain advancements in arbitration and to address some practical gaps – making it more effective and attractive to users. The Government appointed an investigative committee, composed of established Swedish arbitration practitioners, to conduct an inquiry into the existing Act ("Inquiry"). On 1 April 2015, the committee filed its Inquiry, entitled "Review of the Arbitration Act" ("Översyn av lagen om skiljeförfarande"), which reviewed the existing law, noted certain pitfalls, and suggested new text for potential eventual adoption. However, since the Inquiry, the discussion of reform had gone stale – until now.

The Government recently consulted Swedish universities, organisations and institutions in hopes to redraft the Inquiry into a more focused proposal ("Proposal"). During the re-drafting process, some of the Inquiry's suggestions were discarded. Among the discarded suggestions were: (i) the suggestion to repeal Section 33 of the Act, i.e. eliminating the differentiation between grounds for invalidity and setting aside an award; and (ii) the suggestion to include an express rule whereby an arbitral tribunal may order security measures via special awards.

On 1 March 2018, the Government sent the Proposal to the Swedish Council on Legislation, entitled "A Modernisation of the Arbitration Act", aiming for its approval and entry into force on 1 March 2019.

There are a few amendments listed in the Proposal that are worth pointing out:

1. An arbitral tribunal's decision on jurisdiction can be appealed to the Court of Appeal.
The Problem: In accordance with Section 2 of the SAA, arbitrators may decide on their own jurisdiction. If the arbitration has commenced and the tribunal has rendered a decision on jurisdiction, then the party dissatisfied with that decision may challenge it before the District Courts. However, despite the challenge to the decision, a tribunal may still continue the arbitration and even render an award. Should a party challenge the award on the ground that the tribunal lacked jurisdiction, the venue for such a

challenge would be the Svea Court of Appeal. Thus, a situation exists in which the parties are faced with two concurrent court proceedings, in two different courts, hearing the same jurisdictional challenge.

The Proposal: The law should introduce a rule whereby a challenge a tribunal's positive decision on jurisdiction during the arbitral proceedings shall be referred to the Svea Court of Appeal. This rule would simultaneously be a bar to challenges in the District Court.

2. In the absence of an agreement between the parties, the arbitral tribunal will designate the applicable substantive law.
The Problem: Currently, there is no provision in the Act that establishes how an arbitral tribunal shall determine the applicable substantive law to the dispute, in the absence of the parties' agreement. A tribunal can determine the applicable substantive law by referring to the conflict of laws rules or, as the SCC Arbitration Rules suggest, the tribunal can have full discretion to determine the law it deems appropriate.

The Proposal: Parties are free to agree on the applicable substantive law or a regulatory framework for the dispute. The tribunal must respect the parties' agreement. However, if the parties have not agreed on the applicable law, then the arbitrators are to decide on the applicable law as they see fit. The tribunal may decide the dispute ex aequo et bono if the parties have expressly authorised it to do so.

3. Several arbitrations may be consolidated under certain circumstances.
The Problem: There is no regulation in the current Act that governs the possibility to consolidate two or more arbitrations. In the preparatory works to the Act, the explanation for omitting such a provision was to avoid a potential conflict with the principle of party autonomy. However, since the Act entered into force, similar provisions on consolidation have been introduced into the Dutch arbitration act and the SCC and the ICC Arbitration Rules.

The Proposal: The law should introduce the possibility that two or more arbitrations may be consolidated under certain circumstances. The circumstances necessary for consolidation should be: (i) the appointment of same arbitrators in all respective proceedings; (ii) the arbitrators' decision that consolidation would be beneficial to the arbitrations; and (iii) no objections to consolidation from the parties. The proceedings may be subsequently severed; however, the arbitrators should consider how to memorialize such a division and address the issues of costs.

4. The ground to challenge an award for an excess of mandate should include the requirement that the excess of mandate likely affected the outcome of the dispute.
The Problem: The main principle that arbitration should resolve disputes quickly and effectively should also apply to challenge proceedings. It is, therefore, pivotal that the domestic courts and the parties are not burdened with unnecessary challenges. As the law stands now, there is a risk that a losing party could challenge an award despite the fact that, if successful, there would be no practical difference to the outcome of

the dispute.

The Proposal: A provision should be included in the Act whereby a requirement is imposed on a party challenging an award on the ground of the excess of mandate to prove that that excess affected the outcome of the dispute. This amendment would have a deterrent effect for the parties since they will now be aware that not all excess of mandate will lead to a successful challenge to an award.

Other suggested amendments presented in the Proposal included shortening the time limit to challenge an award to two months and introducing the possibility for a court to hear oral evidence in English without the use of translation services. With such concrete amendments to the Act expected to enter into force next year, it will be interesting to see what proposals survive scrutiny from the Swedish Council on Legislation and in what form.

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