Sweden Adopts Revisions to Modernize its Arbitration Act

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Introduction

On November 21, 2018, the Swedish Parliament adopted revisions to the Swedish Arbitration Act with the aim of modernizing it to further facilitate effective and attractive international and domestic arbitration in Sweden. The welcomed revisions will become effective for arbitrations commenced from March 1, 2019,[fn] The exceptions for application to arbitrations commenced after March 1, 2019 are: Sections 41 (simplified court procedure for contesting arbitrator compensation) applies to proceedings brought to court after March 1, 2019; Section 43, para. 2, (oral evidence-taking in English in challenge proceedings) applies to challenges commenced after March 1, 2019; and Section 45 (a) (permission for appeal in challenge proceedings to the Supreme Court), apples to challenge judgments made after March 1, 2019. [/fn] following a nearly five-year long legislative process to update the twenty-year old Arbitration Act of 1999, generating two earlier Kluwer blog posts by Brian Kotick and Anja Havedal Ipp. The revisions continue to reflect the influence that the UNCITRAL Model Law also had on the 1999 Act, while the Swedish Act retains its current approach and unique features. This short post highlights the key features of the revisions.

Jurisdictional Objections

One of the most notable revisions provides for a new procedure for judicial review of jurisdiction. Under the current Act, parties have had the option of bringing a declaratory action to the District Court to determine jurisdiction prior to or during an arbitration, with the arbitrators entitled to continue the proceedings concurrent with the court proceedings. Parties also have had the option of challenging an Award on jurisdictional grounds in set-aside proceedings at the Court of Appeal. The revisions to Sections 2 and 4 (a) of the Act, allow parties to bring declaratory actions to determine jurisdiction only prior to the commencement of arbitration, unless the other party does not object to such concurrent proceedings after commencement of arbitration. The revisions include a new provision allowing arbitrators to decide jurisdiction in an order that a party may appeal to the Court of Appeal within 30 days, resulting in a final jurisdiction decision. During the judicial review, the arbitration may continue. This approach reflects Article 16 of the Model Law and brings with it some issues that will be likely be addressed in future Swedish practice. Parties should be careful to observe the shortened time for an appeal for such an order as compared to challenging an Award on jurisdictional grounds.

Appointment of the Tribunal

Under the current Act, when an arbitrator appointed by a party can no longer act or has been removed for reasons that existed when the arbitrator was appointed, and when the Parties have not agreed to a procedure for appointment and replacement, (such as under arbitral institutional rules of the SCC or ICC), the District Court will appoint the replacement arbitrator upon the request of a party. The revisions allow for the party who appointed the original arbitrator to appoint the replacement arbitrator unless the court finds reasons not to allow such an appointment, for example delay or obstruction. (Section 16). If the original arbitrator must be replaced due to circumstances arising after the appointment, the party appointing the original arbitrator may appoint the replacement arbitrator, unless the parties have agreed otherwise. (Section 16, para 2.).

As complex arbitrations increasingly involve multi-parties, the revisions address

the appointment of the arbitral tribunal in such cases when the parties have not agreed otherwise, which they typically would by agreeing to arbitral institute rules such as the SCC or ICC. When the parties have not agreed to a procedure for appointment, the Act provides that the district court will appoint. The revisions provide that upon the request of a party, the court shall appoint the entire tribunal in multi-party situations, including releasing any arbitrator previously appointed by the Claimant, unless the parties agree otherwise. (Section 14, para 2).

Consolidation of arbitrations

While modern rules of arbitration, such as the SCC 2017 Rules, provide for consolidation and joinder, the current Act has not addressed these issues. The revisions have added a provision allowing a party to request the District Court to consolidate an arbitration with another when three conditions are met: the parties agree to consolidate, it is advantageous to consolidate, and the same arbitrators are appointed. (Section 23 (a)). The court may also separate the arbitrations if justified. (Id.). This provision would not be applicable when parties have agreed to arbitral rules providing for consolidation procedures; and, consequently, the Act's consolidation provision would be used in ad hoc proceedings.

Determination of the Applicable Substantive Law

The current Act does not provide for the determination of the substantive law applicable to the dispute. The revisions provide that the arbitrators shall apply the law or set of legal rules the parties have agreed to, which unless otherwise indicated will be the substantive law and not a reference to such law's choice of law rules. (Section 27, para. 1). If the parties have not agreed to the applicable law, the arbitrators may directly decide this issue. (Section 27, para. 2). Arbitrators may only decide ex aequo et bono or as amiable compositeur if the parties have so agreed. (Section 27, para.3).

Terminology

Two revisions refer to terminology without having any significant impact on

existing Swedish practice. The term “seat” of an arbitration replaces the term “place” of arbitration to ensure the legal distinction between the legal seat and the place where hearings or other matters may take place (Section 22 of the Act). The current Act refers to the impartiality of arbitrators but not to the independence , however, in practice both impartiality and independence have been required of arbitrators. The revisions add the term “independence” to ensure clarity. (Section 8).

Termination of Arbitration

Pursuant to the current Act, once an arbitration is commenced it must be terminated with an Award. This unique requirement may cause difficulties when the parties settle, withdraw a case, or fail to pay the advance on costs, and when rules, such as the ICC, require scrutiny of an Award. The revisions allow the arbitrators to dismiss the case with an order, (Section 27), subject to certain provisions relating to the termination of the proceedings through an Award, (such as Section 36).

Excess of Mandate

Excess of mandate is a ground for setting aside an Award under the current Act. Readers familiar with the Swedish arbitration will recognize that the current Act requires that a procedural error “must probably have affected the outcome of the case” to justify setting aside a challenged Award, (unlike the Model Law), while this has not been a requirement under the Act for excess of mandate. The revisions will now impose this causality requirement also for setting aside an Award for excess of mandate. (Section 34.3).

Challenge Procedure

To increase the efficiency of challenge procedures, the revisions have decreased the time-limit for bringing a challenge from three months to two months from receipt of the Award. Parties should be aware that all of the grounds for challenge must be brought within this two-month period, (Section 34), which can be difficult

when reviewing the records, consulting with clients, translating materials, and preparing filing submissions. Section 33 of the Act has not been revised and provides no time limit for attacking "invalid awards", namely when an Award violates public policy, the dispute is not arbitrable, or the Award is not in writing nor signed. (Section 33). The revisions have decreased the time period for contesting termination decisions (Section 36) and arbitrators' compensation (Section 41) to two months.

The revisions provide a court may, upon the request of a party, allow the parties in challenge proceedings to take oral evidence in English, without translation to Swedish. This applies to both the Courts of Appeal and the Supreme Court (Section 45).

The current Act provides for an appeal of a challenge judgment from the Court of Appeal to the Supreme Court when the Court of Appeal provides permission for such an appeal, which is made with regard to the importance of the issues and establishing precedents. Currently, such an appeal is not limited to particular issues in the case. The revisions provide that upon such permission from the Court of Appeal, the Supreme Court may grant or deny leave for appeal and may determine which issues it will hear and decide. (Section 43).

Conclusion

The revisions to the Swedish Arbitration Act enhance and increase the effectiveness of the already pro-arbitration legal environment for international and domestic arbitration in Sweden. The new provisions may raise some new issues when put into practice, but will not dramatically change the landscape of Swedish arbitration. The revisions are designed to support party autonomy and to interface with the modern rules and practice of international arbitration.

The author was a government- appointed expert in the committee mandated to investigate and propose revisions to the Swedish Arbitration Act. Her views are entirely her own.