The Revised Swedish Arbitration Act: Some Noteworthy Developments

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Introduction

Nearly 20 years after the enactment of the Swedish Arbitration Act of 1999, a revised version of the Swedish Arbitration Act entered into force on March 1st, 2019.[fn] *See also* here (reporting on the background and process of revising the Swedish Arbitration Act).[/fn] As addressed below, this update enacts improvements to Sweden's former arbitration law, which contained certain features that were less than ideal. The revised Act makes a positive contribution to the attractiveness of one of Europe's leading jurisdictions for international arbitration.

1. The Previous Swedish Arbitration Act 1999

The previous Swedish Arbitration Act of 1999 ("**SAA 1999**") entered into force on April 1, 1999, as the result of Sweden's endeavor to modernize its arbitration law taking inspiration from the UNCITRAL Model Law on International Commercial Arbitration of 1985.[fn] *See Nilsson/Andersson* in: Franke/Magnusson/Ragnwaldh/Wallin, International Arbitration in Sweden, 2013, chapter 1, paras. 20-21, 39.[/fn] The SAA 1999 remains applicable to arbitration

proceedings that were commenced before the revised Swedish Arbitration Act of 2019 ("**SAA 2019**") entered in force. An unofficial English translation of the SAA 2019, which was prepared on behalf of the Arbitration Institute of the Stockholm Chamber of Commerce, is available here.

2. Application of the Revised Swedish Arbitration Act 2019

The SAA 2019 applies to arbitration proceedings that were commenced after the SAA 2019 entered into force on March 1, 2019 and that have a seat in Sweden. As an exception, a limited number of provisions of the SAA 2019 apply to certain types of court proceedings commenced after the SAA 2019 entered into force, irrespective of whether the underlying arbitration commenced prior to the entry into force of the SAA 2019. The relevant provisions are:

- Section 41 SAA 2019, regarding court actions relating to the award of compensation to arbitrators;
- Section 43 para. 2 SAA 2019, regarding the requirement to secure leave to appeal certain decisions related to arbitral awards; and
- Section 45a SAA 2019, regarding the possibility of presenting oral evidence in the English language in certain court proceedings related to arbitration.

It is important to note that the provisions of the SAA 2019 apply to the extent that the parties have not derogated from them, for example, by agreeing to the application of specific institutional procedural rules. Thus, the SAA 2019 will generally be applicable in connection with *ad hoc* arbitration proceedings with a seat in Sweden.

3. Noteworthy Changes in the Revised Swedish Arbitration Act 2019

Through the SAA 2019, the Swedish legislator intended to adapt the Swedish Arbitration Act to recent developments in international arbitration, to fill certain gaps in the existing statutory regime, and to provide certain clarifications to that regime. Noteworthy changes and additions found in the SAA 2019 are the following:

a) Multiple Parties or Multiple Arbitrations

Section 14 para. 3 SAA 2019 addresses arbitrator appointments in multi-party proceedings: If multiple respondents cannot agree on a joint arbitrator

appointment, a respondent party may request that the district court appoint arbitrators on behalf of all parties. This may result in the excusal of any arbitrator who has already been appointed.

Furthermore, the new Section 23a SAA 2019 features a mechanism that permits the consolidation of multiple arbitrations where:

(i)The parties agree to consolidation;

(ii)The consolidation will benefit the administration of the arbitration; and

(iii)The same arbitrators have been appointed in both cases.

(b) Replacement of Arbitrators

If an arbitrator resigns or is released due to circumstances which were known at the time of the appointment, the district court appoints the new arbitrator upon request of a party. Section 16 para. 1 SAA 2019 now requires the district court to follow the suggestion for a new arbitrator from the party that originally appointed the arbitrator who needs to be replaced, unless there are circumstances speaking against such an approach.

(c) Judicial Review of the Arbitral Tribunal's Jurisdiction

The SAA 2019 adopts a significant change in relation to objections to the arbitral tribunal's jurisdiction. The SAA 1999 allowed for a declaratory decision by a district court on the arbitral tribunal's jurisdiction over the dispute, which could be sought at any time before or during the arbitration.[fn] *See Öhlström* in: Franke/Magnusson/Ragnwaldh/Wallin, International Arbitration in Sweden, 2013, chapter 4, paras. 29-34.[/fn] By contrast, the SAA 2019 limits court review of the arbitral tribunal's jurisdiction:

First, when the arbitration proceedings are pending, a party may no longer, over another party's objection, seek court review of the arbitral tribunal's jurisdiction.[fn] *See* Sections 2 and 4a para. 1 SAA 2019.[/fn]

Second, if the arbitral tribunal renders an interim decision affirming its jurisdiction, a party's request for review has to be filed with a court of appeals within a 30-day period pursuant to Section 2 para. 2 SAA 2019. The same court of appeals will also be competent to review the arbitral tribunal's jurisdiction in the context of set-

aside proceedings pursuant to Section 43 para. 1 SAA 2019.

Moreover, Section 2 para. 2 SAA 2019 provides that while judicial review of jurisdiction is pending, the arbitral tribunal may continue the arbitration and may render an award.

(d) Determination of the Applicable Substantive Law by the Arbitral Tribunal

Section 27a SAA 2019 introduces a mechanism for determining the substantive law to be applied to the dispute. The arbitral tribunal shall apply the parties' chosen substantive law (without regard to conflict-of-law rules). Absent such a choice, the arbitral tribunal is tasked with determining the applicable substantive law, without further guidance under the SAA 2019. The arbitral tribunal may also decide *ex aequo et bono*, which however requires – as is common – the consent of all parties.

(e) Termination of Arbitration Proceedings

Whereas Section 27 para. 1 SAA 1999 stipulated that an arbitration proceeding can only be terminated by rendering an award, Section 27 paras. 1 and 3 SAA 2019 permits the arbitral tribunal to dismiss the arbitration by means of a "*decision*" (as opposed to an award). This revision accommodates scenarios such as a withdrawal of claim or a settlement without an accompanying request for confirmation of the settlement in the form of an award.

(f) Setting-Aside of Arbitral Awards

Two revisions in the SAA 2019 concerning set-aside proceedings for arbitral awards rendered in Sweden should be noted in particular:

First, the ground for setting aside an arbitral award on the basis that the arbitrators exceeded their mandate is now subject to a causality requirement. In order to set aside an award, Section 34 para. 1 no. 3 SAA 2019 requires not just that the arbitrators exceeded their mandate, but also that they did so "*in a manner that probably influenced the outcome*" of the case.

Second, the time limit for a party to bring a set-aside action, after receipt of the award, has been reduced from three months to two months in Section 34 para. 4 SAA 2019.

In addition, oral evidence in set-aside proceedings before a Swedish court of appeals may now be taken in the English language pursuant to the new Section 45a para. 1 SAA 2019. This option is now available for all set-aside proceedings that are filed after March 1, 2019, *i.e.*, also with regard to arbitration proceedings that were commenced before March 1, 2019. This accommodation may be helpful to foreign parties.

Conclusion

While the SAA 1999 will maintain its relevance for pending arbitrations, practitioners should be aware of the new features found in the SAA 2019 for future arbitration proceedings with a seat in Sweden. Overall, the revised provisions increase the efficiency of the arbitration framework created under the SAA 1999. The former regime, which permitted parallel litigation before the Swedish courts and an arbitral tribunal over arbitral jurisdiction, created a risk of duplicative proceedings resulting in increases in costs and uncertainty for disputing parties. The elimination of that regime represents a positive step for Sweden's arbitration law. Likewise, the adoption of a clear mechanism to break impasses in connection with multi-party appointments is helpful. Finally, the possibility of taking oral evidence in court in English will be appealing to many international parties.

Sweden has long maintained a reputation as a leading seat for international arbitrations in Europe, with a particular appeal to parties from Eastern Europe. Sweden is also noteworthy for what appears to be a liberal approach to arbitrations involving disputes under EU competition law.[fn] *See* A. Goldsmith, "Arbitration and EU Antitrust Follow-on Damages Actions," ASA Bulletin, Vol 34-1 (2016), p. 23 (discussing Swedish case law and related commentary); *see also* here (discussing case law in EU member state courts related to arbitration and follow-on damages actions).[/fn] Indeed, Section 1 para. 3 SAA 2019 provides: "*Arbitrators may rule on the civil law effects of competition law as between the parties.*"

The recent revisions to the Sweden's arbitration regime will help to preserve Sweden's position among Europe's leading seats for international arbitration.

The views expressed herein are those of the authors only and should not be construed otherwise.