

The Revised Swedish Arbitration Act: Noteworthy Developments in the *Lex Arbitri* of a Leading Jurisdiction for International Arbitration

March 12, 2019

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 1, 2019.

While the recently-adopted amendments do not effectuate a large-scale reform of Sweden's curial law, certain revisions will make an important contribution to the attractiveness of Sweden as a seat for international arbitrations. This alert memorandum highlights noteworthy features of the reformed Act.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

FRANKFURT

Richard Kreindler
+49 69 97103 160
rkreindler@cgsh.com

Harry Nettleau
+49 69 97103 117
hnetteau@cgsh.com

Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

LONDON

James Brady
+44 20 7614 2364
jbrady@cgsh.com

Milo Molfa
+44 20 7614 2212
mmolfa@cgsh.com

2 London Wall Place
London EC2Y 5AU, England
T: +44 20 7614 2200
F: +44 20 7600 1698

PARIS

Aren Goldsmith
+33 1 40 74 68 51
agoldsmith@cgsh.com

12, rue de Tilsitt
75008 Paris, France
T: +33 1 40 74 68 00
F: +33 1 40 74 68 88



1. The previous Swedish Arbitration Act 1999

The previous Swedish Arbitration Act of 1999 (“SAA 1999”)¹ 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 (“ML”).² The SAA 1999 remains applicable to arbitration proceedings that were commenced before the revised Swedish Arbitration Act of 2019 (“SAA 2019”)³ entered in force.⁴

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.⁵ However, its provisions only apply to the extent that the parties have not derogated from them – where permissible – by individual agreement or by selecting a set of arbitration rules. Thus, the main field of application of the SAA 2019 should be, on the one hand, *ad hoc* arbitration proceedings with a seat in Sweden, and, on the other hand, those features of the *lex arbitri* which are not (and/or cannot be) addressed

through party agreement or institutional rules, such as setting-aside proceedings.

3. Noteworthy changes in the revised Swedish Arbitration Act 2019

By means of the revisions in the SAA 2019, the Swedish legislator intended to adapt the Swedish Arbitration Act to more 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 in the SAA 2019 are summarized in the following:

a. Multiple parties or multiple arbitrations

The SAA 2019 introduces a provision on appointing arbitrators⁶ in multi-party arbitration proceedings. If multiple respondents cannot agree on a joint arbitrator appointment, a respondent party may request the district court to appoint arbitrators on behalf of all parties, including the release of any arbitrator already appointed (*e.g.*, by the claimant).⁷

Furthermore, the SAA 2019 now includes a provision to deal with multiple parallel arbitrations by way of consolidating arbitrations where three conditions are met⁸:

¹ An English translation of the [SAA 1999](#) is available on the website of the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”).

² See Nilsson/Andersson in: Franke/Magnusson/Ragnwaldh/Wallin, *International Arbitration in Sweden*, 2013, chapter 1, paras. 20-21, 39.

³ An English translation of the [SAA 2019](#) is available on the website of the SCC.

⁴ 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, which relates to court actions relating to the award of compensation to arbitrators; Section 43 para. 2 SAA 2019, which relates to the requirement of a leave to appeal in order to appeal a court of appeal’s decision (see fn. 13); and Section 45a SAA 2019, which addresses the possibility of

presenting oral evidence in the English language (without Swedish interpretation) in certain court proceedings (see *infra* Part 3.f).

⁵ See *supra* Part 1, fn. 4 and Section 46 SAA 2019, which, as a linguistic clarification, uses the word “*seated*” instead of “*take place*,” which is the term that was used in the previous Section 46 SAA 1999.

⁶ On the subject of arbitrators, Section 8 SAA 2019 added clarifying language providing that an arbitrator must be “*impartial and independent*,” whereas the previous Section 8 SAA 1999 merely refers to the obligation to be “*impartial*.”

⁷ Section 14 para. 3 SAA 2019.

⁸ Section 23a SAA 2019. Similarly, provisions on the consolidation of arbitration proceedings have been introduced or broadened in recent rule changes of arbitration institutions, which would take precedence over the SAA 2019 if the parties chose such rules to apply to the arbitration, cf. Article 15 SCC Rules; Article 8 DIS Rules.

- i. The parties agree to the 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 appointment, the district court appoints the new arbitrator. The SAA 2019 modifies this mechanism by requiring the district court to follow the suggestion for a new arbitrator from the party that originally appointed the arbitrator whose seat on the arbitral tribunal has become vacant, unless there are circumstances speaking against such an approach.⁹

c. Jurisdictional objections

The SAA 2019 makes a significant change to jurisdictional objections compared to the SAA 1999. The SAA 1999 allows for a declaratory decision by a district court on the arbitral tribunal's jurisdiction over the dispute, which may be sought at any point before or during the arbitration.¹⁰ In contrast, the SAA 2019 limits court review of the arbitral tribunal's jurisdiction in two significant ways:

First, once the arbitration proceedings are pending, a party is no longer able to directly call

upon a state court to review the arbitral tribunal's jurisdiction over the other party's objection.¹¹

Second, if the arbitral tribunal renders an interim decision affirming its jurisdiction, a party seeking judicial review of the arbitral tribunal's decision must file a corresponding request with a court of appeals within a 30-day period.¹² The SAA 2019 assigns jurisdiction over such decisions to the court of appeals, which will also be the competent court for reviewing the arbitral tribunal's jurisdiction in the context of setting-aside proceedings.¹³

While judicial review of jurisdiction is pending, the arbitral tribunal may continue the arbitration and may render an award.¹⁴

d. Determination of the applicable substantive law by the arbitral tribunal

The SAA 1999 does not provide a mechanism for determining the substantive law to be applied to the dispute. The SAA 2019 now fills this gap.¹⁵ 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 being provided by the SAA 2019. The arbitral tribunal may also decide *ex aequo et bono*, which however requires – as is common¹⁶ – the consent of all parties.

⁹ Section 16 para. 1 SAA 2019.

¹⁰ See *Öhlström* in: Franke/Magnusson/Ragnwaldh/Wallin, *International Arbitration in Sweden*, 2013, chapter 4, paras. 29-34.

¹¹ Sections 2 and 4a para. 1 SAA 2019.

¹² Section 2 para. 2 SAA 2019. This provision is consistent with Article 16(3) ML and similar to provisions in other national laws, *see, e.g.*, Section 1040(3) German Code of Civil Procedure.

¹³ Section 43 para. 1 SAA 2019. Article 43 para. 2 SAA 1999 provides that such a decision by the court of appeal may only be appealed to the Swedish supreme court if the court of appeals grants leave to do so. The revised Article 43 para. 2 SAA 2019 refines this appeal procedure by

additionally requiring the supreme court's leave to appeal.

¹⁴ Section 2 para. 2 SAA 2019.

¹⁵ Section 27a SAA 2019, which is similar to Article 28 ML, but does not include the provision in Article 28 para. 4 ML that “[i]n all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”

¹⁶ *See, e.g.*, Section 1051(3) German Code of Civil Procedure; Article 21(3) ICC Rules; Article 27(3) SCC Rules; Article 24.4 DIS Rules.

e. Termination of arbitration proceedings

Whereas the SAA 1999 stipulated that an arbitration proceeding can only be terminated by rendering an award,¹⁷ the SAA 2019 permits the arbitral tribunal to dismiss the arbitration by means of a “*decision*” (as opposed to an award).¹⁸ This revision accommodates scenarios such as a withdrawal of claim, a failure by the parties to pay an advance on costs, or a settlement without an accompanying request for confirmation of the settlement in the form of an award.

f. Setting-aside of arbitral awards

The revisions in the SAA 2019 also brought about changes concerning setting-aside proceedings for arbitral awards rendered in Sweden, two of which 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 the revised SAA 2019.¹⁹ While the SAA 1999 made irregularities in the course of the proceeding a ground for setting aside the award, subject to the requirement that this “*probably influenced the outcome of the case*,”²⁰ the causality requirement now also applies under the SAA 2019 to an excess of mandate, which is a separate ground for setting aside an award.

Second, the time limit for a party to bring a setting-aside action after receipt of the award has been reduced from three months to two months in the SAA 2019.²¹ Practitioners should take particular note of this revised deadline.

In addition, the possibility should be noted that oral evidence in setting-aside proceedings before a Swedish court of appeals may be taken in the English language (without interpretation into

Swedish), pursuant to the SAA 2019.²² This accommodation may be helpful to foreign parties. However, written briefing and the court’s decision will still be in the Swedish language.

4. Summary and Conclusion

While the SAA 1999 will maintain its relevance for pending arbitrations, practitioners will need to consider the SAA 2019 for all future arbitration proceedings with a seat in Sweden. Overall, the revised provisions enhance the efficiency of the arbitration framework created under the SAA 1999. The former regime, which permitted parallel litigation before the Swedish courts and arbitral tribunal over arbitral jurisdiction, created a risk of duplicative proceedings with resulting 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 conducting oral proceedings in English will be appealing to many international parties.

...

CLEARY GOTTlieb

¹⁷ Section 27 para. 1 SAA 1999.

¹⁸ Section 27 paras. 1 and 3 SAA 2019. Pursuant to Section 27 para. 3 SAA 2019, The provisions of the SAA 2019 that concern arbitral awards also apply to such decisions, to the extent applicable.

¹⁹ Section 34 para. 1 no. 3 SAA 2019.

²⁰ Section 34 para. 1 no. 6 SAA 1999. See also Section 34 para. 1 no. 7 SAA 2019.

²¹ Section 34 para. 4 SAA 2019. The new two-month period to request the setting-aside of an award is thus shorter than the three-month time limit pursuant to Article 34(3) ML or, *e.g.*, Section 1059(3) German Code of Civil Procedure.

²² Section 45a para. 1 SAA 2019. This option is now available for all setting-aside proceedings that are filed after March 1, 2019, *i.e.*, also with regard to arbitration proceedings that were commenced before March 1, 2019.