Svea Court of Appeal confirms mandate of arbitral tribunals seated in Sweden to hold main hearings remotely

by *Practical Law Arbitration* with *Advokatfirman Delphi*

Legal update: case report | Published on 13-Jul-2022 | Sweden

In *Bergsala SDA AB v ICA Sverige AB (Svea Court of Appeal, Case No. T 7158-20)*, the Svea Court of Appeal confirmed the power of a Stockholm-seated arbitral tribunal to hold a remote hearing.

Speedread

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The Svea Court of Appeal has confirmed the power of a Stockholm-seated arbitral tribunal to hold a remote hearing.

In Sweden, as elsewhere, the Covid 19-pandemic prompted an increased use of remote hearings in arbitration. Under the Swedish Arbitration Act (SAA), which applies to all arbitrations seated in Sweden, each party has a right to an oral hearing, unless the parties have agreed otherwise. The rapid transition to remote hearings has caused some to take the view that remote hearings cannot be deemed oral hearings within the meaning of the SAA and that proceedings involving such hearings may infringe upon the parties' rights to due process.

In this case, the Svea Court of Appeal confirmed the mandate of an arbitral tribunal to hold main hearings remotely, even when there is an objection by one of the parties. The court's conclusion was subject to an overall assessment of suitability and ensuring that the use of technology allowed for good communication. (*Bergsala SDA AB v. ICA Sverige AB (Svea Court of Appeal, Case No. T 7158-20) (30 June 2022)*.)

Background

Section 24 of the Swedish Arbitration Act (SAA) provides that an oral hearing shall be held upon a party's request, provided the parties have not agreed otherwise.

Article 32 of the SCC Arbitration Rules 2017 (SCC Rules) provides that a hearing shall be held if requested by a party, or if the arbitral tribunal deems it appropriate.

Section 21 of the SAA and Article 23 of the SCC Rules further require the arbitral tribunal to conduct the arbitration in an impartial, efficient and expeditious manner, giving each party an equal and reasonable opportunity to present its case. They also entitle the tribunal to conduct the arbitration in a manner that it considers appropriate, subject to any agreement between the parties.

Facts

Bergsala and ICA entered into a framework agreement, pursuant to which Bergsala would sell certain products to ICA, as well as other entities within the ICA group. In 2019, Bergsala initiated an SCC arbitration against ICA, requesting that the arbitral tribunal order ICA to pay compensation to Bergsala for lighting products that had been delivered by Bergsala to ICA, but not paid for by ICA. ICA objected on several grounds to the alleged duty to pay and counterclaimed compensation for damages.

Following the outbreak of the Covid-19 pandemic, ICA requested that the main hearing scheduled to take place on 25-29 May and 1 June 2020 be rescheduled to August 2020, referring to the importance of in-person witness examinations and difficulties in the preparations. These difficulties included arranging in-person meetings between ICA's arbitration counsel and witnesses, arising from public and internal restrictions relating to the pandemic. The arbitral tribunal finally decided that the hearing would be held by digital means on the scheduled dates, with the tribunal attending the hearing in-person.

Following the hearing, the arbitral tribunal rendered its award, granting Bergsala's requested relief and partially granting ICA's requested relief. ICA challenged the award on several grounds at the Svea Court of Appeal.

In the challenge proceedings, ICA argued, among other things, that the arbitral tribunal's refusal to hold an in-person physical hearing meant that the award, and the manner in which it arose, was clearly incompatible with the basic principles of the Swedish legal system. In the alternative, ICA contended that the tribunal, for the same reason, committed a challengeable procedural error and that, in any event, the arbitration proceedings had not ensured ICA's right to due process. In this regard, ICA alleged, among other things, that it had not been able to present its case and evidence, which, in its view influenced or probably influenced the outcome of the arbitration. Accordingly, the arbitral tribunal committed a challengeable procedural error.

Bergsala denied ICA's allegations. Bergsala argued, among other things, that the arbitral tribunal had the mandate to hold the hearing through digital means, that ICA had had the opportunity to participate in the hearing in person had it so chosen, and that due process had been maintained in the proceedings.

Decision

The Svea Court of Appeal rejected ICA's challenge.

The court first analysed whether the award should be set aside on the basis of the alleged errors by the arbitral tribunal. It noted that although the SAA did not define the term oral hearing, the *travaux préparatoires* to the SAA mentioned that section 24 of the SAA, providing for the right to an oral hearing, was drafted taking into account the rules of the Swedish Code of Judicial Procedure (SCJP) regarding the parties' right to a main hearing in court and Article 6 of the ECHR, providing for the right to a fair trial. The court noted also that, according to the *travaux préparatoires* to the SAA, in the absence of an agreement by the parties, the question of when the hearing should be held and how it should be conducted was to be determined by the arbitrators.

The court went on to point out that the SCJP did not provide for an absolute right for a party to be physically present at a hearing; it was for the court to decide whether participation through digital means would be sufficient.

The Svea Court of Appeal concluded that although the SAA did not contain corresponding rules, the background and purpose of section 24 of the SAA conveyed that the provision was technology neutral and that it, in itself, did not rule out participation through digital means. The same also applied to article 32 of the SCC Arbitration Rules 2017, which provided the right to a hearing upon a party's request.

According to the court, unless the parties have agreed otherwise, it must be considered within the mandate of the arbitral tribunal to decide whether the hearing should be conducted in person or remotely, regardless of whether one of the parties objected to remote participation.

However, the court stressed the duty of an arbitral tribunal to assess in each case if a hearing with elements of remote participation was suitable. To that end, the arbitral tribunal, should ensure that the parties have a reasonable opportunity to present their respective cases and ensure that the dispute is handled in an impartial, practical and speedy manner. The court also noted specifically that the adopted technical solutions must enable good communication.

On the facts of the case, the court found that the arbitral tribunal's decision to hold the main hearing with remote participation was taken following the tribunal's preceding decision, to hold the main hearing on the scheduled dates, and ICA's response that no one on its side would participate in person. When allowing remote participation, the arbitral tribunal did not, however, refuse to allow the parties and witnesses to appear in person at the hearing venue with the members of the tribunal. Therefore, the court concluded that the arbitral tribunal did not refuse ICA in-person participation in the hearing.

As regards the conduct of the proceedings, the court noted that, although the case involved a large number of witnesses, there was a strong interest in avoiding additional delays in resolving the dispute and also an uncertainty as to the further development of the pandemic. Here, the means of communication during the hearing were acceptable and the parties had been given the opportunity to communicate with each other, the members of the tribunal and witnesses. None of the reasons against holding the hearing on the scheduled dates, as invoked by ICA, could be deemed as a valid impediment to the hearing. The court therefore concluded that the proceedings were not contrary to the right to due process and that the parties were given a reasonable opportunity to present their respective cases.

For the above reasons, the Svea Court of Appeal rejected both ICA's request to set-aside the award on the basis of challengeable procedural errors by the arbitral tribunal and ICA's request to declare the award invalid as being contrary to the basic principles of the Swedish legal system.

The Court of Appeal allowed an appeal of the judgment to the Swedish Supreme Court. However, an appeal of the judgment also requires leave by the Supreme Court.

Comment

Following the outbreak of the Covid-19-pandemic, the right to an oral hearing under the SAA caused some controversy as to whether a hearing conducted through digital means could be regarded as oral, in the sense referred to in section 24 of the SAA. Some authors took the view that the legislator, when drafting the SAA, only had in-person hearings in mind, that in-person and remote hearings were two different types of hearing, and that the latter type could not be regarded as an oral hearing.

Others have argued that the SCJP expressly permits the court to decide that a party or other person will participate in a hearing by audio or audio-visual means, that the outer limits for remote participation should be set by the available technology, and that a remote hearing qualifies as an oral hearing under the SAA.

The judgment of the Svea Court of Appeal provides important guidance on the interpretation of the right to an oral hearing in arbitrations seated in Sweden. Although on the facts of the case the court found that the arbitral tribunal did not refuse ICA in-person participation in the hearing, its conclusions generally confirm the mandate of an arbitral tribunal to hold main hearings remotely, even when there is an objection by one of the parties, but subject to an overall suitability assessment and where technical conditions allow for good communication.

Case: *Bergsala SDA AB v. ICA Sverige AB, Svea Court of Appeal, 30 June 2022, Case No. T 7158-20 (30 June 2022)*.

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