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# Swedish court confirms that oral hearings may be conducted virtually

Westerberg & Partners Advokatbyrå AB | Arbitration & ADR - Sweden



JESPER TIBERG



OLOF OLSSON

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In April 2021 a claimant argued before the Swedish Svea Court of Appeal that an arbitral award should be set aside because the arbitral tribunal had decided that a hearing on the merits should be held virtually, despite the claimant's objections.<sup>(1)</sup> The Court of Appeal has now rendered its judgment on this case.<sup>(2)</sup>

### Background

Similar to article 24 in the United Nations Commission on International Trade Law (UNCITRAL) Model Law, section 24 of the Swedish Arbitration Act (SAA) provides that, if either party so requests, an oral hearing will be held prior to the determination of an issue which has been referred to the arbitrators, provided that the parties have not agreed otherwise. A similar provision can also be found in article 32 of the Arbitration Rules of the Stockholm Chamber of Commerce (the SCC rules): "A hearing shall be held if requested by a party, or if the arbitral tribunal deems it appropriate."

### Facts

In May 2019, the supplier filed a request for arbitration under the SCC rules in Sweden against the buyer. An oral hearing was scheduled to be held in May and June 2020. When it became clear that the pandemic would jeopardise the possibility of arranging a hearing, the chair of the arbitral tribunal (a former justice of the Swedish Supreme Court) brought the issue to the attention of the parties. As a result, an alternative date was set in August 2020 should it not be possible to hold the hearing in May and June. In April 2020 the arbitral tribunal decided that, against the objection of the buyer, the hearing should be held as planned in May and June 2020, but that the hearing should be held virtually. Consequently, the hearing was later conducted virtually. At the hearing, counsel for both sides, all witnesses and the arbitral tribunal participated via a videoconference call. The award was rendered in June 2020.

The buyer challenged the award and requested that the Svea Court of Appeal set it aside. The buyer invoked several legal grounds and provisions as basis for its action. Among other things, the buyer argued that procedural irregularities in the course of the proceedings had occurred, which were likely to have affected the outcome of the arbitration – namely, that:

- the arbitral tribunal had refused to hold an oral hearing in person, which violated the SCC rules and the SAA; and
- due process requirements had been set aside, as the buyer's counsel had been prevented from participating personally at the hearing due to, among other things, restrictions relating to covid-19, and that the assessment of the credibility of the witnesses was of great importance and required examination in person at a physical hearing. Also, the buyer argued that some of the supplier's witnesses had been present in the same room as the supplier's counsel, which constituted a violation of the principle of equal treatment of the parties.

### Decision

The Court began its reasoning by referring to provisions in the SAA and the SCC rules stating that an arbitral tribunal has a duty to conduct the arbitration in an appropriate, impartial, effective and expeditious manner, taking the parties' instructions into consideration.<sup>(3)</sup> The Court continued by noting that there was no definition of the term "oral hearing" but that it was apparent from the official record of negotiation to the SAA that the relevant provisions prescribing a right to a hearing originated from the Swedish Code of Judicial Procedure and the rules therein provided the right to a fair trial. Additionally, the Court noted that under the Code of Judicial Procedure, it is the court that decides whether a hearing should be held physically, and that the right to a fair trial does not include an absolute right to a physical hearing.

The Court concluded that, in absence of an agreement between the parties, it is within the scope of a tribunal's mandate to decide whether the hearing will be held physically or virtually. When making its decision, the tribunal must consider the specific circumstances of the arbitration and determine whether it is appropriate that the hearing be held virtually. It should then take into consideration the parties' ability to present their arguments and the tribunal's ability to conduct the arbitration in an impartial, appropriate and expeditious manner. The Court did not find that the tribunal's decision to hold a virtual hearing amounted to a procedural irregularity, and thus upheld the award.<sup>(4)</sup>

### Comment

The question of whether an arbitral tribunal may decide that a hearing will be held virtually has been discussed intensively over the past two-and-a-half years. It appears that the Court intended for the judgment to provide guidance for the future, as it elaborated on the legal arguments quite extensively. The Court also decided that the judgment was subject to appeal to the Supreme Court, which a court of appeal can do if a challenge case turns on an issue of precedential value that has not been firmly decided by way of leading cases. Unfortunately, the buyer did not appeal the judgment, which means that this case will not provide further guidance on the matter of precedential value. However, the judgment is likely to be invoked as the leading case in Sweden, and possibly, since the provisions in the SAA and the SCC rules are similar to the Model Law, as guidance outside of Sweden as well.

*For further information on this topic please contact [Jesper Tiberg](#) or [Olof Olsson](#) at Westerberg & Partners Advokatbyrå Ab by telephone (+46 8 5784 03 00) or email ([jesper.tiberg@westerberg.com](mailto:jesper.tiberg@westerberg.com) or [olof.olsson@westerberg.com](mailto:olof.olsson@westerberg.com)). The Westerberg & Partners Advokatbyrå Ab website can be accessed at [www.westerberg.com](http://www.westerberg.com).*

#### **Endnotes**

- (1) For more information see "Do parties have an absolute right to dispute in person in Sweden?".
- (2) Svea Court of Appeal, case No. T 7158-20.
- (3) Section 21 of the SAA and article 23 of the SCC rules.
- (4) The Court found that the buyer's argument that the supplier's witnesses sat with the supplier's counsel was precluded because the buyer had not objected in time.