

Development of Arbitration in North-South Relationships

Conference in Sharm el-Sheikh, Egypt 19-20 November 2009

**International Arbitration before
the Arbitration Institute of the Stockholm Chamber of Commerce**

by

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1. Introduction

Only a few decades ago international commercial arbitration, and particularly arbitration in commercial matters between North and South, meant proceedings in the country of either party. Frequently arbitration clauses provided for arbitration in the country of the defendant.

When international trade expanded in the 1960's, however, those involved in international trade gradually became aware of that such clauses entailed certain disadvantages.

Clauses calling for arbitration at the place of the defendant could complicate, or duplicate, procedures when, as often occur, there are counter-claims, so that in practical effect, both parties are defendants. Such clauses also tend to encourage legal and commercial maneuvering by a party attempting to put itself in the position of defendant and thereby forcing arbitration in its local forum.

Moreover, lawyers often prefer to write contracts knowing where any disputes will be arbitrated for only with such knowledge can the contract be drafted in the light of procedural or other factors characteristic of the chosen place. While this aspect may not be as important when both parties are from countries having similar legal systems, it may have practical significance in transactions which must cross legal gaps which, no doubt, still exist between many countries in the world.

In international arbitration it is also very important both for the smooth functioning of arbitral proceedings and the compliance with the result thereof, i.e. the arbitral award, that the parties are confident that the dispute will be determined in an independent and neutral manner. Such confidence is more readily gained if the proceedings are to take place in a neutral forum rather than in the country of the other party, even if proceedings in that country would be both fair and just.

The recognition that arbitration at the place of the defendant was often not mutually acceptable led, beginning in the 1960's and early 1970's, to the practice of providing in contracts that any disputes will be arbitrated in a third country, not the country of either party. The first step in this direction was taken in 1977 when the then USSR Chamber of Commerce and Industry, the American Arbitration Association and the Stockholm Chamber of Commerce joined to make available new arrangements for the arbitration of contract disputes which arose between American corporations and Soviet foreign trade organizations.

The main feature of the new arrangements was a model arbitration clause to be inserted in contracts between corporation in the United States and Soviet foreign trade organizations. Known as the "Optional Arbitration Clause for Use in Contracts in USA-USSR Trade 1977", it provided for arbitration to take place in Stockholm in cooperation with the Stockholm Chamber of Commerce.

In 1992 this Agreement was replaced by a new Agreement between the Chamber of Commerce and Industry of the Russian Federation and the American Arbitration Association. This new Agreement, which is modelled on the 1977 Agreement is called the *Optional Arbitration Clause for use in Contracts in USA-Russian Trade and Investment 1992*, or, in short, US-Russian Optional Clause Agreement. It also provides for arbitration to take place in Stockholm in cooperation with the Stockholm Chamber of Commerce.

The practice to provide for arbitration in Sweden in US-Russian relations soon became common practice also in other East-West trade relations.

After the AAA and the USSR Chamber entered into their agreement in 1977, the Chinese arbitration institute, China International Economic and Trade Arbitration Commission ("CIETAC"), also became interested in Sweden as a forum for the resolution of Chinese-related disputes. It has since become customary for Chinese companies to choose the Arbitration Institute of the Stockholm Chamber of Commerce (the "SCC Institute").

Over the years the SCC Institute has handled many disputes relating to the Arab countries.

2. The Arbitration Institute of the Stockholm Chamber of commerce

The SCC Institute was established already in 1917 and has over the past few decades emerged as one of the leading international arbitral institutions in the world. It is one of the oldest arbitration institutions in the world. In most cases handled by the Institute both parties are from other countries than Sweden. So, in that sense, the SCC Institute is a truly international institution.

The SCC Institute is an entity within the Stockholm Chamber of Commerce. It is, however, functionally independent and decisions of the Board of the Institute are final and not subject to review by the Chamber.

The day-to-day activities of the SCC Institute are handled by its secretariat headed by a secretary general. The staff of the secretariat is multilingual, and also include Russian-speaking personnel.

The present SCC Rules came into force in 1999 and are available in Russian, English, French, German, Chinese and Swedish.

Apart from the SCC Rules the SCC Institute has also adopted Rules for Expedited Arbitrations. These Rules, which are mainly aimed at the resolution of minor, uncomplicated disputes, offer a rapid, inexpensive procedure.

Like other arbitral institutions, the SCC Institute does not settle disputes itself. Its main function is to assist the parties in getting an arbitral tribunal appointed as soon as possible after a request for arbitration has been filed, i.e. to take all measures which may be requested for the proper constitution of the arbitral tribunal.

As will appear from the description of the SCC procedures the Rules are designed to achieve a rapid and inexpensive procedure, without administrative superstructure. See also the SCC procedures in a nutshell on the chart on the last page.

3. The Arbitration Agreement

3.1 The Recommended Arbitration Clause

The drafting of arbitration clauses is a problem in international arbitration. The clauses are too often incorrect in one aspect or the other. The reason is probably that many, if not most, contract negotiators are non-lawyers with limited or no knowledge or experience in international arbitration. Also, often very limited time is devoted to the drafting of the arbitration clause.

This practice has resulted in many poorly drafted arbitration clauses. It is sometimes even difficult to make out from the clause what institution the parties have had in mind as appointing authority or administrative agency, and what such institution is supposed to do.

Since there is no other institution in Stockholm or Sweden, which administers international arbitration, the SCC Institute, in most cases, has assumed jurisdiction. But there are, of course, risks with defective names, particularly if also often other parts of the clause is incorrect or inconceivable.

To be on the safe side it is advisable to follow the model arbitration clause which the SCC Institute offers as close as possible. It reads as follows.

"Any dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce."

It is, of course, possible to use a different form of wording or to make modifications or additions. However, as indicated, it is important that the reference to the SCC Institute and its Rules is made quite clear so as to exclude any doubt to the competence of the Institute.

3.2 Recommended Additions

The Institute suggests three additions to the clause. The first one refers to the number of arbitrators. If the parties want the case to be decided by any number of arbitrators other than three, which is the number provided for in the Rules, that should be stated in the clause.

The other additions suggested by the Institute refer to the place of arbitration and to the language(s) to be used in the proceedings.

If not agreed upon by the parties the place of arbitration is decided by the SCC Institute, and the language by the arbitrators.

The Institute recommends the following wording:

"The Arbitral tribunal shall be composed of ... arbitrators (a sole arbitrator).

The place of arbitration shall be ...

The language(s) to be used in the arbitral proceedings shall be ..."

3.3 The Recommended Governing Law Clause

The Institute also recommends a governing law clause which reads as follows.

"This contract shall be governed by the substantive law of ..."

It is, of course, not always possible for the parties to agree on the law to be applied, and in such event it will be decided by the arbitrators. Yet, if it has already been agreed upon by the time the arbitration starts, that will, no doubt, save time. Prior agreement also enables the parties to avoid any uncertainty as to the outcome of arbitrators' decisions thereon, and they will accordingly be in a better position to prepare their case.

4. Composition of the Arbitration Tribunal

4.1 Appointment of Arbitrators

4.1.1 Number of Arbitrators and Manner of Their Appointment

As indicated, the SCC Rules provide for an arbitral tribunal of three arbitrators, unless the parties have agreed otherwise. Each party appoints one arbitrator and the SCC Institute the third arbitrator, who is the chairman of the tribunal.

Although the third arbitrator thus is appointed by the SCC Institute, the parties may have an influence on the choice in so far as a common wish by the parties on the individual to be appointed will normally be followed by the Institute.

If a party fails to appoint an arbitrator within the time specified by the SCC Institute, then the Institute will make the appointment.

If the dispute is limited in size, it is often advisable, for cost reasons, to provide for one arbitrator. This alternative is, however, very seldom opted for in contracts with Russian parties. As there also are minor cases originating from Russian contracts I would suggest that the sole-arbitrator-alternative is selected more often, both for cost and time reasons.

4.1.2 Qualifications

There are no restrictions, as to nationality or otherwise, regarding the identity of the arbitrators. Nor are there any lists from which the arbitrators must be picked. The parties are thus free to appoint anyone as arbitrators and very often they appoint nationals of their own respective countries.

It is important to note, however, that all arbitrators, even those appointed by the parties, are required to be independent and are not treated nor do they act as agents of the parties.

4.1.3 Disclosure

The SCC Rules contain a disclosure rule requiring every prospective arbitrator to disclose to those who approach him in connection with a possible appointment "any circumstances which might be deemed to diminish trust in his impartiality or independence". These circumstances include, to give some examples, a family or business tie with a party or the fact that he has served as a party's lawyer. The Rule is modelled on Article 9 of the UNCITRAL Arbitration Rules.

This disclosure requirement is continuous in so far as an arbitrator also must immediately disclose any disqualifying circumstances which he becomes aware of in the course of the arbitral proceedings. In such case he shall inform both the parties and his co-arbitrators.

4.2 Challenge of Arbitrators

An arbitrator may be challenged before the SCC Institute. A challenge shall be made immediately but in any event within thirty days of the date on which the allegedly disqualifying circumstances became known to the party. Failure to notify a challenge within the prescribed time is deemed to constitute a waiver of the right to make such challenge.

The challenge shall be notified to the SCC Institute, the arbitrators and each party.

Decisions on challenges are made by the SCC Institute.

4.3 Discharge of Arbitrators

Unlike some other arbitral institutions administering international arbitrations, the SCC Institute exercises no control over the appointment by parties of arbitrators, and appointees need not, therefore, be approved in advance. However, the Institute may discharge an arbitrator either on the ground of disqualification or misconduct. Before such decision is taken the Institute shall solicit the views of the parties and the arbitrators.

If an arbitrator is discharged the Institute shall appoint another arbitrator. This is the case whether or not the discharged arbitrator was appointed by the Institute or a party. However, if the arbitrator had been appointed by a party, such party shall be consulted by the Institute before the appointment.

Let me add in this context, however, that there has been very few problems, indeed, in Russian cases as far as the arbitrators are concerned.

5. Procedures

5.1 General

5.1.1 Representation and Assistance

The parties may be represented or assisted by any person of any nationality. No specific legal or other qualifications are required. If a party desires to obtain the assistance of a Swedish lawyer, there is normally no difficulty in finding one who is experienced in international matters and fluent in the language or languages concerned.

5.1.2 Place of Arbitration

The parties may agree on any place of arbitration within or outside Sweden. Even if the locale is in Sweden, hearings and other meetings may be held abroad. If, for instance, there are several witnesses to be heard at a certain place it may be cost-effective to hold a hearing in such place. In cases with parties from the Arabic countries, hearings can be held in Cairo or Sharm el-Sheik..

5.1.3 Language

The parties may agree on any language or languages for the proceedings. If the parties cannot agree on the language, the question will be decided by the arbitrators. If needed, interpretation will be arranged.

5.2 How Proceedings are Commenced

5.2.1 Request for Arbitration

The SCC Rules provide for a simplified initial procedure consisting of a brief request for arbitration rather than a full demand coupled with documentary evidence.

Apart from the names and addresses of the parties, the request should contain a brief account of the dispute and a preliminary statement of the relief claimed. The arbitrator appointed by the claimant should also be named at the time of the request.

5.2.2 Dismissal

After having received the request the SCC Institute will, as a preliminary matter, determine whether there is a *prima facie* agreement to arbitrate. If it is obvious that the Institute lacks competence over the dispute the request will be dismissed. This may occur, for example, if the arbitration clause refers to some other arbitration institution than the SCC Institute.

5.2.3 The Respondent's Reply

If the SCC Institute determines that it has competence over the dispute the request for arbitration will be communicated to the respondent, who will be asked to submit a reply within the time fixed by the Institute.

The reply is meant to mirror the request for arbitration and is envisaged to be correspondingly brief. It should comment on the request for arbitration and name the arbitrator appointed by the respondent.

If the respondent wants to make a counterclaim or plead a set-off, a statement to that effect shall also be made in the reply.

If the arbitration clause is ambiguous the respondent sometimes objects to the jurisdiction of the SCC Institute in an attempt to delay or disrupt the arbitration. Such attempts are seldom successful but underline the importance of clear-cut arbitration clauses.

5.2.4 Decisions of the SCC Institute

In practice, it is often necessary for the SCC Institute to engage in correspondence with parties to clarify points in the initial stages of proceedings.

When the exchange of written submission has been concluded the SCC Institute will make another prima facie determination of its jurisdiction. If it is not obvious that jurisdiction is lacking the Institute will proceed to appoint the chairman of the arbitral tribunal.

The SCC Institute will also determine the place of arbitration unless the parties have done so, and fix the amount of the deposit, or advance of costs as it is called in the Rules.

As soon as the chairman of the arbitral tribunal has been appointed and the advance has been provided, the SCC Institute will refer the case to the arbitral tribunal.

Referral of a case to the arbitral tribunal normally marks the end of involvement on the part of the SCC Institute in proceedings under its Rules and the beginning of the six-months-period within which the award must be rendered.

5.3 Procedure before the Arbitrators

5.3.1 Statements of Claim and Defence

The parties and arbitrators have a considerable freedom to adopt the procedure they consider best suited to the circumstances of the case so long as each party is given a sufficient opportunity to present his case. The SCC Rules deal with the procedure very summarily and in general terms.

However, the Rules provide for certain aspects of the proceedings before the arbitral tribunal.

Section 18 provides for the initial submissions of the parties - the statements of claim and defence.

5.3.2 Amendment to Claim and Defence

A party may amend his claim and defence in the course of the proceedings under two conditions, namely

- 1) if his case, as amended, is still comprised by the arbitration agreement and
- 2) if the arbitral tribunal does not consider it inappropriate having regard to the point of time at which the request is made and the prejudice that may be caused to the other party.

5.3.3 Hearings

The SCC rules, in article 25, also deal with oral hearings and state, *inter alia*, that an oral hearing shall be arranged if requested by either party, or if the Arbitral Tribunal considers it appropriate.

The oral part of the proceedings often takes the form of one or several preparatory (preliminary) meetings and a main hearing, sometimes also called final hearing.

The preparatory hearing is normally held for the purpose of clarifying the parties' positions on the various issues. The preparatory hearing may in some cases also offer an opportunity for the tribunal to find out whether there may be a possibility of reconciling the parties and have them settle the dispute, wholly or in part, by an amicable settlement.

5.3.4 Evidence

Unless otherwise agreed, both written and oral evidence may be submitted and there are in principle no restrictions upon the admissibility of evidence in Swedish arbitration proceedings. Only if the evidence is irrelevant, non-essential or the proof can be established by other means, which are more convenient or less expensive, may the arbitral tribunal refuse to accept evidence submitted to it.

5.3.5 Expert

The arbitrators may appoint an expert unless both parties agree to the contrary. Although it is not laid down in the Rules it is the practice to draw up terms of reference for an expert with the agreement of the parties and to allow parties to cross-examine the expert engaged by the tribunal.

5.3.6 Failure of party to appear

It occurs in international arbitration that a party chooses not to participate in the proceedings, neither in writing nor orally. Probably such parties believe that they, by not taking part in the proceedings, will not be affected of the result thereof, i.e. the arbitral award. This is of course not correct. It is common practice in international arbitration that failure of a party to appear at a hearing or otherwise to comply with an order of the arbitral tribunal will not stop the proceedings. This principle is laid down also in the SCC Rules.

5.3.7 Waiver of procedural irregularities

The SCC Rules also contain a waiver-rule to the effect that a party shall be deemed to have waived his right to invoke any deviation from the arbitration agreement, the SCC Rules or other rules applicable to the proceedings if he fails to object within a reasonable time.

5.4 The Award

5.4.1 Time for making the award

If the dispute is not settled amicably in the course of the proceedings, which is very common, the arbitrators will make an award.

As mentioned earlier the award shall be made not later than six months after the case has been referred to the arbitrators. The SCC Institute may, however, at the request of a party or the arbitrators, extend this period.

5.4.2 Contents of the Award

The award must be in writing and signed by at least a majority of the arbitrators. It must also be accompanied by reasons.

The award may be decided by a majority, or in the case of an equality of votes, by the chairman alone. A decision could therefore always be obtained.

6. Cost of Arbitration

6.1 The Arbitrators' Fees

The arbitrators' fees, which is the main cost of arbitration, are fixed by the SCC Institute according to the amount in dispute.

6.2 Advance on Costs

At the outset of the arbitration both parties will be asked to pay a deposit - or advance on costs as it is called in the SCC Rules - to cover the estimated costs of arbitration, including the arbitrators' fees, the administrative fee of the SCC Institute as well as other costs. A Table of costs for

determining the amount of the advance is included in the SCC Rules. The amount is normally calculated between maximum and minimum and is in most cases equivalent to the final cost of arbitration.

7. Recognition and Enforcement of Awards

The Model Law, in articles 35 and 36, also includes provisions on recognition and enforcements of awards, which conform with those of the 1958 New York Convention

The instances of court involvement mentioned above are exclusive under the Model Law and most laws based on the Model Law. That is the real importance of the rule contained in article 5 that there be no other court intervention. There is no power of courts to restrain the arbitral process, for example – and I mention instances which have happened – if a party gets second thoughts on an earlier agreed place of arbitration, or where a party insists that arbitral proceedings must take place in the jurisdiction of the chosen substantive law, or where an allegedly forged document is to be seized during arbitral proceedings to serve as evidence in criminal proceedings, or where a party reneges on an agreement about the language of the proceedings, referring to the Human Rights Convention embodying your right to speak your own language. This restrictive line is important for the efficiency of international commercial arbitration.

8. Conclusion

The SCC Rules puts great emphasis on speed and low costs. Party autonomy is another key element. The parties are free to appoint arbitrators of their own choice without any restrictions, to select the venue, to determine the applicable law and, by and large, to design the procedure. This is important because one dispute is not the other alike. They differ in size, complexity, type and number of parties, subject-matters and many other aspects. Flexibility makes it possible to adapt the arbitration to the circumstances of dispute and thereby reduce time and costs.

The Arbitration Institute of the Stockholm Chamber of Commerce is a world famous and well recognized centre for international arbitration. The SCC Institute is, amongst others, experienced in dealing with arbitration proceedings involving parties from the Arab countries. I believe that you will find the proceedings to be conducted in a fair, speedy and reasonable manner and at reasonable costs.

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