The European Arbitration Review

2024

Sweden

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Sweden

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Summary

In summary

This article provides a brief overview of arbitration in Sweden and an overview of dispute resolution pursuant to the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the SCC Institute), as well as an insight into recent developments concerning the SCC Institute. Moreover, this article provides insight into a sample of recent Swedish case law in the field of arbitration.

Discussion points

- Background to the role of Sweden and the SCC Institute in international arbitration
- The Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce and key changes in its latest version
- The SCC Express
- The SCC Platform
- The SCC Arbitrators' Council
- Recent Swedish case law in the field of arbitration

Referenced in this article

- The Arbitration Institute of the Stockholm Chamber of Commerce
- The Swedish Arbitration Act
- The Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce
- The Swedish Supreme Court, Case T 1569-19 (published in NJA 2022 s 965)
- The Swedish Supreme Court, Case Ö 4116-22

Introduction

Sweden has a long-standing tradition of resolving civil disputes through arbitration. In 1734, Sweden passed a law that allowed parties to resolve certain forms of disputes by means of arbitration, and in the late 1800s Sweden adopted its first comprehensive arbitration act. Moreover, over the course of the 20th century, Sweden positioned itself as a popular venue for international arbitration. During the Cold War, parties from the United States (and other Western countries), the Soviet Union and China regarded Sweden as a neutral venue and the Arbitration Institute of the Stockholm Chamber of Commerce (the SCC Institute) as a

neutral administrator of disputes. Therefore, they frequently included arbitration clauses in their agreements that stipulated that the seat of arbitration should be Stockholm, Sweden, and that the arbitration should be administrated by the SCC Institute.

During the past 10 years, the SCC has had 143 to 213 new cases every year, of which around half have been international arbitrations. In 2022, 143 new cases were registered with the SCC of which 41 per cent involved parties from countries other than Sweden.-[1] As regards the administration of investment treaty disputes, the SCC Institute ranks as the second-largest institution in the world.[2] In short, Sweden continues to be one of the world-leading forums for international arbitration.

Several factors may explain why Sweden has established itself as one of the most popular venues for international arbitration. It is often recognised that the Swedish justice system demonstrates a high degree of efficiency and respect for the rule of law. As noted above, Sweden has a long-standing tradition of solving domestic as well as international commercial disputes through arbitration. Further, Sweden has promoted itself internationally by being an active participant when rules and standards pertaining to international arbitration have been adopted.

Notably, the Swedish government has recently taken steps to maintain and develop Sweden's position as a hub for international arbitration. In August 2018, the government introduced a new bill titled 'A Modernisation of the Arbitration Act'. The bill contained several proposals intended to make the law even more easily accessible to Swedish and foreign parties and lawyers alike, and to ensure that Sweden remains a popular venue for international arbitration. The revised Arbitration Act entered into force on 1 March 2019.

In the following section, we provide a brief introduction to ***the*** SCC Rules and to SCC arbitrations.

Brief introduction to the SCC Rules

Many of the provisions set out in the Swedish Arbitration Act are optional. Thus, to a large extent, the parties may decide whether their procedure shall be governed by the Arbitration Act or other rules. For example, the parties may agree that an arbitration shall be governed by a set of rules provided by an institution. As mentioned, institutional arbitration is very common in Sweden and most of these proceedings are administered by the SCC Institute and governed by the SCC Rules.

The latest version of the SCC Rules entered into force on 1 January 2023. The SCC Rules govern all fundamental aspects of the arbitral proceedings including, for example: the initiation of proceedings; the composition of the arbitral tribunal; challenge to arbitrators; the proceedings before the arbitral tribunal; evidence; interim measures, awards and decisions; time limits for the final award; and the cost of the arbitration. Of course, the SCC Rules also provide the parties and the arbitral tribunal with a great deal of freedom to agree on a procedure as they see fit.

Where the parties have not agreed on the number of arbitrators, the SCC Institute shall decide whether the arbitral tribunal shall consist of one or three arbitrators, having regard to the complexity of the case, the amount in dispute and any other relevant circumstances. If the arbitral tribunal shall consist of three arbitrators (and if the parties have not agreed

otherwise), each party shall appoint one arbitrator and the board of the SCC Institute appoints the chair. If the parties are of different nationalities, the chair (or the sole arbitrator) must be of a different nationality from the parties (unless the parties have agreed otherwise or the SCC Institute otherwise deems it appropriate). In practice, arbitrators from many different countries act as arbitrators in SCC arbitrations. It may also be noted that the board of the SCC Institute includes nationals from several different countries.

Moreover, it is noteworthy that the SCC Institute is the second-largest arbitration institute in the world (after the International Centre for Settlement of Investment Disputes) for the administration of investment disputes and that the SCC Rules include an appendix that sets out provisions that apply specifically to investor treaty disputes (ie, disputes based on a treaty providing for arbitration of disputes between an investor and a state).[3]

The SCC Rules have been adopted with the aim of ensuring a speedy and efficient proceeding. At the outset, a general rule prescribes that the arbitral tribunal and the parties must act in an efficient and expeditious manner. Furthermore, under the SCC Rules, the arbitral tribunal must promptly arrange a case management conference with the parties to organise, schedule and establish procedures for the conduct of the arbitration. Immediately after the case management conference, the tribunal must establish a timetable, including the date for rendering the award. The aim of ensuring speedy and efficient proceedings also underpins several other provisions set out in the SCC Rules, such as article 43, which provides that the final award must be rendered no later than six months from the date on which the case was referred to the arbitral tribunal, unless the SCC Board decides to extend this time limit upon a reasoned request from the arbitral tribunal or if otherwise deemed necessary. Statistics for 2022 confirm that arbitration under the SCC Rules tends to result in expeditious proceedings: more than half of the awards were rendered within six to 12 months of the time of registration.[4]

2023 SCC Rules

As mentioned, the latest version of the SCC Arbitration Rules entered into force on 1 January 2023.[5] The latest revision entails changes to the SCC Arbitration Rules, the SCC Rules for Expedited Arbitrations, the SCC Mediation Rules, the SCC Rules for Express Dispute Assessment and the SCC Procedures for UNCITRAL cases.

Key changes made in the latest version of the SCC Arbitration Rules and the SCC Rules for the Expedited Arbitrations include the following:

- new provisions clarifying that the arbitral tribunal may decide on whether hearings shall be conducted in person or remotely;
- removal of the agreement on the number of arbitrators as a recommended addition to the SCC model clause;
- inclusion of a possibility for the arbitral tribunal to terminate the arbitral proceedings by way of an order (rather than an award) if the proceedings shall be terminated prior to rendering the final award for any other reason than a settlement through consent award; and
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a change according to which a decision to terminate a case in whole or in part due to a failure to pay the advance on costs shall be made by the arbitral tribunal after the referral of the case to the arbitral tribunal.

The SCC Rules for Expedited Arbitration

As mentioned above, the SCC framework also allows parties to choose a particular form of expedited arbitral proceedings by agreeing before or after the dispute has arisen that the dispute shall be resolved in accordance with the SCC Rules for Expedited Arbitration. Under these rules, the parties are only allowed to make a limited number of written submissions. In addition, written submissions must be brief and the time limits for the filing of submissions may not (as a main rule) exceed 15 working days. Furthermore, under the Rules for Expedited Arbitration, the arbitration shall be decided by a sole arbitrator, and the time limit for a final award is three months from the date on which the case was referred to the arbitrator.

Further, a hearing can be held only at the request of a party and if the arbitrator considers the reasons for the request to be compelling. In 2022, a majority of the awards rendered under this framework were rendered within six months.[6]

Emergency arbitrators

In 2010, the SCC Institute became one of the first arbitration institutes in the world to offer the appointment of emergency arbitrators. A party that wishes to seek a decision on interim measures may file a request with the SCC Institute to have an emergency arbitrator appointed in accordance with the rules set out in an appendix to the SCC Rules and the SCC Rules for Expedited Arbitration. In such a case, the SCC Board shall seek to appoint an emergency arbitrator within 24 hours of receipt of the application and a decision on interim measures must be made no later than five days from the date on which the application was referred to the emergency arbitrator under the relevant SCC rule. The emergency decision is binding on the parties when rendered, and by agreeing to arbitration under the SCC Rules, the parties undertake to comply with any emergency decision without delay. However, the emergency decision ceases to be binding, for example, if arbitration is not commenced within 30 days from the date of the emergency decision or if the arbitral tribunal so decides. Moreover, the arbitral tribunal is not bound by the decisions and reasoning of the emergency arbitrator. During 2022, two emergency arbitrator proceedings were commenced. In both cases, an emergency arbitrator was appointed within 24 hours, and decisions were rendered on average after eight days.[7]

SCC Express

In 2021, the SCC Institute launched a new set of rules called 'The SCC Rules for Express Dispute Assessment' (the SCC Express) and the first SCC Express was requested in June 2023. The SCC Express is a dispute resolution tool designed to help resolve a disagreement between business partners on an issue that needs to be investigated quickly, and where there is a wish to explore an alternative to a full-length arbitration or court proceedings. The SCC Express procedure is based on the consent of all parties involved, and it is not conditioned

upon that the parties have agreed to resolve disputes according to arbitration under the SCC Rules.

In short, in SCC Express proceedings, a party to a dispute may request that the SCC Board appoints a neutral assessor (the Neutral) to evaluate issues of fact or law relating to the dispute. The other party or parties are invited to respond to the request. If the other party or parties consent(s) to the request, the SCC Board shall appoint the Neutral. The Neutral manages the proceedings closely and plays an active role in the proceedings. As a general rule, the Neutral shall then deliver their findings no later than 21 days after the date the request was referred to the Neutral. The findings must be made in writing and include the Neutral's position and reasoning on the issues presented by the parties. The parties can agree to make the assessment contractually binding or use the non-binding findings to guide settlement discussions or other ways forward. The purpose is to help parties reach an end to the dispute while keeping time and costs down.[8]

The SCC Platform

Since September 2019, all new SCC arbitrations have been administered on the SCC Platform, which is a secure digital platform for communication and file sharing between the SCC, parties and the tribunal. The SCC itself states that the SCC Platform 'provides participants with a secure and efficient way of communicating and filing all case materials in the arbitration, such as procedural orders, submissions and exhibits, and will constitute the forum through which the SCC communicates with the parties, counsel and arbitrators throughout the proceedings.'[9]

Moreover, the SCC also offers an ad hoc platform for providing the same secure and efficient communication also in ad hoc arbitrations.[10]

The SCC Arbitrators' Council

The SCC Arbitrators' Council is an advisory body established in 2022 to foster relations between the SCC Institute and arbitral practitioners worldwide. The members of the Arbitrators' Council are recognised arbitration specialists in their respective jurisdictions and are elected by the SCC for a period of two years and act as SCC ambassadors assisting the SCC Institute to raise awareness and promote international arbitration and to widen the network of its users in each region. The Council holds an annual general meeting in Stockholm to discuss its past and future activities but may also arrange additional meetings whenever required.

The members of the Council work pro bono and are not involved in the SCC's case management. The Council members also act as the SCC's advisers with respect to significant legal developments in their respective region.[11]

Recent case law

As a country with a long-standing tradition of arbitration, case law concerning arbitration agreements is always developing. Below, we will briefly describe two cases concerning

arbitration agreements adjudicated by the Swedish Supreme Court in 2022 and 2023, respectively.

The Swedish Supreme Court, Case 4116-22

On 17 May 2023, the Swedish Supreme Court adjudicated case Ö 4116-22 which has been named 'Husqvarna's arbitration agreement' (***Husqvarnas skiljeavtal*** in Swedish). In essence, the case concerned the question of the requirements for a party to be considered bound by an arbitration clause contained in a framework agreement and in general terms and conditions.

In a case concerning the purchase of goods a seller brought an action against the buyer at the District Court requesting the release of the remaining payment for a delivery of goods to the buyer in 2020. The buyer objected that the action should be dismissed as the dispute was covered by an arbitration agreement between the parties. In brief, the buyer argued, inter alia, that the seller was bound to settle the dispute through arbitration because of arbitration clauses in a framework agreement entered into between the parties in 2007 regarding conditions for future call-offs. The buyer further stated that the purchase orders to which the deliveries in question related referred to the buyer's general terms and conditions, which contained an arbitration clause. The seller contested that the dispute should be resolved through arbitration, stating, inter alia, that the agreement concluded in 2007 had become ineffective and that the buyer had in any event terminated that agreement in 2016. As regards the reference to the buyer's general terms and conditions in the purchase orders, the seller argued that it had not had reason to pay attention to it.

Both the District Court and the Court of Appeal concluded that the dispute was covered by the parties' arbitration agreement and thus prevented any judicial proceedings regarding the matter in a general court. The question for the Supreme Court was whether there was an arbitration agreement in force between the parties that prevented the judicial proceedings.

Initially, the Supreme Court described what generally applies to the conclusion of arbitration agreements. The Supreme Court stated that the question of whether an arbitration agreement has been concluded shall be assessed according to general contract law principles and that this also applies when there is an arbitration clause in a standard-form contract. As a starting point, the Supreme Court stated that a party must become aware of a standard-form contract before the conclusion of the agreement for the standard-form contract to become part of the agreement. A reference to a standard-form contract containing an arbitration clause may be sufficient for the contracting parties to be considered bound by the clause. The Supreme Court pointed out that, as a rule, a counterparty may become bound by an arbitration agreement even if the counterparty has not actually read the standard-form contract before the conclusion of the agreement, if the reference to the standard-form contract is clearly stated and the terms are available to the counterparty. If an arbitration clause is unexpected, surprising or particularly burdensome, the Supreme Court stated that higher standards should be set for it to be binding. In commercial contractual relationships, however, an arbitration clause is, as a starting point, neither surprising nor particularly burdensome.

The Supreme Court then described the scope of arbitration agreements. According to section 1(1) of the Arbitration Act, arbitration agreements may relate to future disputes concerning a legal relationship specified in the agreement. With reference to the preparatory

works, the Supreme Court stated that there is a requirement of concreteness regarding arbitration agreements, which is intended to give the parties the opportunity to survey the consequences of the arbitration agreement. With regard to arbitration agreements included in standard-form contracts, the Supreme Court stated that the description of the contractual relationship established between the parties through a standard-form contract may be sufficiently concrete for an arbitration agreement regarding future disputes concerning both the standard-form contract and subsequent call-off agreements to be considered to relate to a legal relationship within the meaning of section 1(1) of the Arbitration Act. Accordingly, the Supreme Court concluded that section 1(1) of the Arbitration Act does not require that an arbitration agreement can only relate to disputes concerning already concluded agreements. Furthermore, the Supreme Court stated that an arbitration clause in a standard-form contract can also become binding with respect to disputes concerning a call-off agreement, in that an arbitration clause in the standard-form contract may supplement and become part of a call-off agreement. Lastly, the Supreme Court stated that the scope of application of an arbitration agreement in general is determined according to customary principles of contract interpretation.

Regarding the agreement from 2007 stipulating conditions for future call-offs, the Supreme Court stated that the orders placed by the buyer between the years 2014–2016 were covered by the arbitration clause in the 2007 agreement. The question was, however, whether the arbitration clause had subsequently ceased to apply or for other reasons would not apply to the deliveries made by the seller in 2020, since the parties had had some discussions concerning a termination of their contractual relationship in 2016. However, the Supreme Court concluded that the arbitration clause in the 2007 agreement applied to the deliveries in question in 2020 and thus prevented the seller's action from being settled in the general court. However, the Supreme Court pointed out that even if the arbitration clause in the 2007 framework agreement had not applied to the deliveries, the deliveries would still have been covered by the arbitration clause included in the buyer's general terms and conditions, which were clearly referred to in the purchase orders. The Supreme Court held that these general terms and conditions had been available for the seller to read, as the orders stated a web address where the terms and conditions were available.

In sum, the Supreme Court dismissed the seller's action on the grounds that the dispute was covered by an arbitration clause.

The Swedish Supreme Court, Case T 1569-19 (published in NJA 2022 s 965)

The case concerned an action for annulment and challenge of two arbitral awards which had been rendered on the basis of an arbitration clause in an intra-EU investment agreement. The case also concerned the question of whether the principles laid down by the Court of Justice of the European Union in ***Achmea***, C-284/16, EU:C:2018:158, not only render such an arbitration clause invalid but also prevent an investor and a member state from concluding an ad hoc arbitration agreement for a specific dispute through their behaviour in the proceedings.

The background to the case was an agreement on the mutual promotion and protection of investments which was concluded between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the People's Republic of Poland in 1987 ('the investment treaty'). Between 2010 and 2013, PL Holdings, a company registered in Luxembourg, acquired shares in two

Polish banks which merged in 2013, but shortly after the merger a financial authority in Poland decided to suspend PL Holdings' voting rights on the shares in the bank and that the shares had to be sold. PL Holdings sold the shares thereafter.

Subsequently, PL Holdings initiated arbitration proceedings under the SCC Arbitration Rules against Poland based on an arbitration clause in the investment treaty. Poland objected that PL Holdings was not to be regarded as an investor within the meaning of the investment treaty and that the arbitral tribunal lacked jurisdiction to adjudicate the dispute. In a subsequent submission, Poland also objected to the validity of the arbitration treaty on the grounds that the arbitration clause in the investment treaty was contrary to EU law. The arbitral tribunal rendered two awards through which it concluded, inter alia, that it had jurisdiction to hear the dispute, that Poland had breached the investment treaty and that PL Holdings was entitled to damages.

Poland brought an action before the Svea Court of Appeal seeking the annulment or setting aside of the two arbitral awards on the grounds that the arbitration clause on which the arbitral tribunal's jurisdiction was based was contrary to EU law and thus invalid. Poland argued that the arbitral awards should be annulled either because they related to a matter that may not be decided by arbitrators or because the arbitral awards had been made on the basis of a provision that is clearly incompatible with the basic principles of the Swedish legal system (***ordre public***). PL Holdings disputed that there were grounds to annul or set aside the arbitral awards and argued that the conclusions in ***Achmea*** were more limited in scope than Poland claimed and that ***Achmea*** did not prevent a member state and an investor from entering into an ad hoc arbitration agreement after the arbitration had been initiated.

The Court of Appeal noted that the principles established by the Court of Justice in ***Achmea*** were applicable to the dispute between the parties and that this entailed that the arbitration clause in the investment treaty was invalid. However, the Court of Appeal concluded that the invalidity did not prevent a member state and an investor from entering into an ad hoc arbitration agreement, which was the case between Poland and PL Holdings in the arbitral proceedings.

Poland appealed the Court of Appeal's judgment and one of the questions for the Swedish Supreme Court was whether the principles established by the EU Court of Justice in ***Achmea*** not only rendered such arbitration clauses invalid, but also prevented an investor and a member state from concluding an ad hoc arbitration agreement for a specific dispute through their behaviour in the proceedings.

Following a request for a preliminary ruling from the Supreme Court, the EU Court of Justice held that articles 267 and 344 TFEU must be interpreted as precluding national legislation which authorises a member state to conclude with an investor from another member state an ad hoc arbitration agreement that allows the continuation of arbitration proceedings initiated on the basis of an invalid arbitration clause such as that at issue in Achmea.

Based on the preliminary ruling of the EU Court of Justice, the Supreme Court stated that an arbitration procedure based on the arbitration clause like the one in the present case may result in an arbitral tribunal applying or interpreting EU law. Since the Swedish legal system only allows for limited judicial review of arbitral awards, the Supreme Court concluded that the full effect of EU law cannot be guaranteed in such cases and such an arbitration clause is therefore liable to undermine both the principle of mutual trust between member states and the preservation of the specificity of EU law. Moreover, the Supreme Court concluded that

such clauses are to be deemed as incompatible with the principle of sincere cooperation and undermine the autonomy of EU law.

Based on the above, the Supreme Court held that an arbitral award made on the basis of a clause such as the one at issue must be regarded as having been obtained in an unlawful manner, since it is incompatible with the fundamental rules and principles governing the legal order in the EU and thus also in Sweden. Moreover, the Supreme Court stated that it follows from the foregoing that upholding the arbitral awards in question would be manifestly incompatible with the ***ordre public*** of Sweden, why both the special award and the final award shall be declared invalid. Accordingly, both arbitral awards were declared invalid with reference to section 33 of the Swedish Arbitration Act.

Footnotes

[1] See the SCC Institute's website, available at https://sccarbitrationinstitute.se/om-scc/scc-statistik.

[2] See the SCC Institute's website, available at https://sccinstitute.com/statistics/investment-disputes-2021/.

[3] See the SCC Institute's website, available at https://sccarbitrationinstitute.se/en/our-services/investment-disputes.

[4] See the SCC Institute's website, available at https://sccarbitrationinstitute.se/en/about-scc/scc-statistics.

[5] See the SCC Institute's website, available at https://sccarbitrationinstitute.se/en/news-events/news/2023-scc-rules-what-are-changes.

[6] See the SCC Institute's website, available at https://sccarbitrationinstitute.se/en/about-scc/scc-statistics.

[7] See the SCC Institute's website, available at https://sccarbitrationinstitute.se/en/about-scc/scc-statistics.

[8] See the SCC Institute's website, available at https://sccinstitute.com/our-services/scc-express/.

[9] See the SCC Institute's website, available at https://sccinstitute.com/scc-platform/.

[10] See the SCC Institute's website, available at https://sccinstitute.com/scc-platform/ad-hoc-platform/.

[11] See the SCC Institute's website, available at https://sccarbitrationinstitute.se/en/about-scc/contact/scc-arbitrators-council.

IN SUMMARY

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concerning the SCC Institute. Moreover, this article provides insight into a sample of recent Swedish case law in the field of arbitration.

DISCUSSION POINTS

- Background to the role of Sweden and the SCC Institute in international arbitration
- The Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce and key changes in its latest version
- The SCC Express
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- Recent Swedish case law in the field of arbitration

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INTRODUCTION

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BRIEF INTRODUCTION TO THE SCC RULES

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The latest version of the SCC Rules entered into force on 1 January 2023. The SCC Rules govern all fundamental aspects of the arbitral proceedings including, for example: the initiation of proceedings; the composition of the arbitral tribunal; challenge to arbitrators; the proceedings before the arbitral tribunal; evidence; interim measures, awards and decisions; time limits for the final award; and the cost of the arbitration. Of course, the SCC Rules also provide the parties and the arbitral tribunal with a great deal of freedom to agree on a procedure as they see fit.

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THE SCC RULES FOR EXPEDITED ARBITRATION

As mentioned above, the SCC framework also allows parties to choose a particular form of expedited arbitral proceedings by agreeing before or after the dispute has arisen that the dispute shall be resolved in accordance with the SCC Rules for Expedited Arbitration. Under these rules, the parties are only allowed to make a limited number of written submissions. In addition, written submissions must be brief and the time limits for the filing of submissions may not (as a main rule) exceed 15 working days. Furthermore, under the Rules for Expedited Arbitration, the arbitration shall be decided by a sole arbitrator, and the time limit for a final award is three months from the date on which the case was referred to the arbitrator.

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In short, in SCC Express proceedings, a party to a dispute may request that the SCC Board appoints a neutral assessor (the Neutral) to evaluate issues of fact or law relating to the dispute. The other party or parties are invited to respond to the request. If the other party or parties consent(s) to the request, the SCC Board shall appoint the Neutral. The Neutral manages the proceedings closely and plays an active role in the proceedings. As a general rule, the Neutral shall then deliver their findings no later than 21 days after the date the request was referred to the Neutral. The findings must be made in writing and include the Neutral's position and reasoning on the issues presented by the parties. The parties can agree to make the assessment contractually binding or use the non-binding findings to guide settlement discussions or other ways forward. The purpose is to help parties reach an end to the dispute while keeping time and costs down.[8]

THE SCC PLATFORM

Since September 2019, all new SCC arbitrations have been administered on the SCC Platform, which is a secure digital platform for communication and file sharing between the SCC, parties and the tribunal. The SCC itself states that the SCC Platform 'provides participants with a secure and efficient way of communicating and filing all case materials in the arbitration, such as procedural orders, submissions and exhibits, and will constitute the forum through which the SCC communicates with the parties, counsel and arbitrators throughout the proceedings.'[9]

Moreover, the SCC also offers an ad hoc platform for providing the same secure and efficient communication also in ad hoc arbitrations.[10]

THE SCC ARBITRATORS' COUNCIL

The SCC Arbitrators' Council is an advisory body established in 2022 to foster relations between the SCC Institute and arbitral practitioners worldwide. The members of the Arbitrators' Council are recognised arbitration specialists in their respective jurisdictions and are elected by the SCC for a period of two years and act as SCC ambassadors assisting the SCC Institute to raise awareness and promote international arbitration and to widen the network of its users in each region. The Council holds an annual general meeting in Stockholm to discuss its past and future activities but may also arrange additional meetings whenever required.

The members of the Council work pro bono and are not involved in the SCC's case management. The Council members also act as the SCC's advisers with respect to significant legal developments in their respective region.[11]

RECENT CASE LAW

As a country with a long-standing tradition of arbitration, case law concerning arbitration agreements is always developing. Below, we will briefly describe two cases concerning arbitration agreements adjudicated by the Swedish Supreme Court in 2022 and 2023, respectively.

The Swedish Supreme Court, Case 4116-22

On 17 May 2023, the Swedish Supreme Court adjudicated case Ö 4116-22 which has been named 'Husqvarna's arbitration agreement' (***Husqvarnas skiljeavtal*** in Swedish). In essence, the case concerned the question of the requirements for a party to be considered bound by an arbitration clause contained in a framework agreement and in general terms and conditions.

In a case concerning the purchase of goods a seller brought an action against the buyer at the District Court requesting the release of the remaining payment for a delivery of goods to the buyer in 2020. The buyer objected that the action should be dismissed as the dispute was covered by an arbitration agreement between the parties. In brief, the buyer argued, inter alia, that the seller was bound to settle the dispute through arbitration because of arbitration clauses in a framework agreement entered into between the parties in 2007 regarding conditions for future call-offs. The buyer further stated that the purchase orders to which the deliveries in question related referred to the buyer's general terms and conditions, which contained an arbitration clause. The seller contested that the dispute should be resolved through arbitration, stating, inter alia, that the agreement concluded in 2007 had become ineffective and that the buyer had in any event terminated that agreement in 2016. As regards the reference to the buyer's general terms and conditions in the purchase orders, the seller argued that it had not had reason to pay attention to it.

Both the District Court and the Court of Appeal concluded that the dispute was covered by the parties' arbitration agreement and thus prevented any judicial proceedings regarding the matter in a general court. The question for the Supreme Court was whether there was an arbitration agreement in force between the parties that prevented the judicial proceedings.

Initially, the Supreme Court described what generally applies to the conclusion of arbitration agreements. The Supreme Court stated that the question of whether an arbitration agreement has been concluded shall be assessed according to general contract law principles and that this also applies when there is an arbitration clause in a standard-form contract. As a starting point, the Supreme Court stated that a party must become aware of a standard-form contract before the conclusion of the agreement for the standard-form contract to become part of the agreement. A reference to a standard-form contract containing an arbitration clause may be sufficient for the contracting parties to be considered bound by the clause. The Supreme Court pointed out that, as a rule, a counterparty may become bound by an arbitration agreement even if the counterparty has not actually read the standard-form contract before the conclusion of the agreement, if the reference to the standard-form contract is clearly stated and the terms are available to the counterparty. If an arbitration clause is unexpected, surprising or particularly burdensome, the Supreme Court stated that higher standards should be set for it to be binding. In commercial contractual relationships, however, an arbitration clause is, as a starting point, neither surprising nor particularly burdensome.

The Supreme Court then described the scope of arbitration agreements. According to section 1(1) of the Arbitration Act, arbitration agreements may relate to future disputes concerning a legal relationship specified in the agreement. With reference to the preparatory works, the Supreme Court stated that there is a requirement of concreteness regarding arbitration agreements, which is intended to give the parties the opportunity to survey the consequences of the arbitration agreement. With regard to arbitration agreements included in standard-form contracts, the Supreme Court stated that the description of the contractual relationship established between the parties through a standard-form contract may be sufficiently concrete for an arbitration agreement regarding future disputes concerning both the standard-form contract and subsequent call-off agreements to be considered to relate to a legal relationship within the meaning of section 1(1) of the Arbitration Act. Accordingly, the Supreme Court concluded that section 1(1) of the Arbitration Act does not require that an arbitration agreement can only relate to disputes concerning already concluded agreements. Furthermore, the Supreme Court stated that an arbitration clause in a standard-form contract can also become binding with respect to disputes concerning a call-off agreement, in that an arbitration clause in the standard-form contract may supplement and become part of a call-off agreement. Lastly, the Supreme Court stated that the scope of application of an arbitration agreement in general is determined according to customary principles of contract interpretation.

Regarding the agreement from 2007 stipulating conditions for future call-offs, the Supreme Court stated that the orders placed by the buyer between the years 2014–2016 were covered by the arbitration clause in the 2007 agreement. The question was, however, whether the arbitration clause had subsequently ceased to apply or for other reasons would not apply to the deliveries made by the seller in 2020, since the parties had had some discussions concerning a termination of their contractual relationship in 2016. However, the Supreme Court concluded that the arbitration clause in the 2007 agreement applied to the deliveries in question in 2020 and thus prevented the seller's action from being settled in the general court. However, the Supreme Court pointed out that even if the arbitration clause in the 2007 framework agreement had not applied to the deliveries, the deliveries would still have been covered by the arbitration clause included in the buyer's general terms and conditions, which were clearly referred to in the purchase orders. The Supreme Court held that these general

terms and conditions had been available for the seller to read, as the orders stated a web address where the terms and conditions were available.

In sum, the Supreme Court dismissed the seller's action on the grounds that the dispute was covered by an arbitration clause.

The Swedish Supreme Court, Case T 1569-19 (published In NJA 2022 S 965)

The case concerned an action for annulment and challenge of two arbitral awards which had been rendered on the basis of an arbitration clause in an intra-EU investment agreement. The case also concerned the question of whether the principles laid down by the Court of Justice of the European Union in ***Achmea***, C-284/16, EU:C:2018:158, not only render such an arbitration clause invalid but also prevent an investor and a member state from concluding an ad hoc arbitration agreement for a specific dispute through their behaviour in the proceedings.

The background to the case was an agreement on the mutual promotion and protection of investments which was concluded between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the People's Republic of Poland in 1987 ('the investment treaty'). Between 2010 and 2013, PL Holdings, a company registered in Luxembourg, acquired shares in two Polish banks which merged in 2013, but shortly after the merger a financial authority in Poland decided to suspend PL Holdings' voting rights on the shares in the bank and that the shares had to be sold. PL Holdings sold the shares thereafter.

Subsequently, PL Holdings initiated arbitration proceedings under the SCC Arbitration Rules against Poland based on an arbitration clause in the investment treaty. Poland objected that PL Holdings was not to be regarded as an investor within the meaning of the investment treaty and that the arbitral tribunal lacked jurisdiction to adjudicate the dispute. In a subsequent submission, Poland also objected to the validity of the arbitration treaty on the grounds that the arbitration clause in the investment treaty was contrary to EU law. The arbitral tribunal rendered two awards through which it concluded, inter alia, that it had jurisdiction to hear the dispute, that Poland had breached the investment treaty and that PL Holdings was entitled to damages.

Poland brought an action before the Svea Court of Appeal seeking the annulment or setting aside of the two arbitral awards on the grounds that the arbitration clause on which the arbitral tribunal's jurisdiction was based was contrary to EU law and thus invalid. Poland argued that the arbitral awards should be annulled either because they related to a matter that may not be decided by arbitrators or because the arbitral awards had been made on the basis of a provision that is clearly incompatible with the basic principles of the Swedish legal system (***ordre public***). PL Holdings disputed that there were grounds to annul or set aside the arbitral awards and argued that the conclusions in ***Achmea*** were more limited in scope than Poland claimed and that ***Achmea*** did not prevent a member state and an investor from entering into an ad hoc arbitration agreement after the arbitration had been initiated.

The Court of Appeal noted that the principles established by the Court of Justice in ***Achmea*** were applicable to the dispute between the parties and that this entailed that the arbitration clause in the investment treaty was invalid. However, the Court of Appeal concluded that the invalidity did not prevent a member state and an investor from entering into an ad hoc arbitration agreement, which was the case between Poland and PL Holdings in the arbitral proceedings.

Poland appealed the Court of Appeal's judgment and one of the questions for the Swedish Supreme Court was whether the principles established by the EU Court of Justice in ***Achmea*** not only rendered such arbitration clauses invalid, but also prevented an investor and a member state from concluding an ad hoc arbitration agreement for a specific dispute through their behaviour in the proceedings.

Following a request for a preliminary ruling from the Supreme Court, the EU Court of Justice held that articles 267 and 344 TFEU must be interpreted as precluding national legislation which authorises a member state to conclude with an investor from another member state an ad hoc arbitration agreement that allows the continuation of arbitration proceedings initiated on the basis of an invalid arbitration clause such as that at issue in Achmea.

Based on the preliminary ruling of the EU Court of Justice, the Supreme Court stated that an arbitration procedure based on the arbitration clause like the one in the present case may result in an arbitral tribunal applying or interpreting EU law. Since the Swedish legal system only allows for limited judicial review of arbitral awards, the Supreme Court concluded that the full effect of EU law cannot be guaranteed in such cases and such an arbitration clause is therefore liable to undermine both the principle of mutual trust between member states and the preservation of the specificity of EU law. Moreover, the Supreme Court concluded that such clauses are to be deemed as incompatible with the principle of sincere cooperation and undermine the autonomy of EU law.

Based on the above, the Supreme Court held that an arbitral award made on the basis of a clause such as the one at issue must be regarded as having been obtained in an unlawful manner, since it is incompatible with the fundamental rules and principles governing the legal order in the EU and thus also in Sweden. Moreover, the Supreme Court stated that it follows from the foregoing that upholding the arbitral awards in question would be manifestly incompatible with the ***ordre public*** of Sweden, why both the special award and the final award shall be declared invalid. Accordingly, both arbitral awards were declared invalid with reference to section 33 of the Swedish Arbitration Act.

Endnotes

1 See the SCC Institute's website, available at https://sccarbitrationinstitute.se/om-scc/scc-statistik. ^ Back to section

2 See the SCC Institute's website, available at https://sccinstitute.com/statistics/investment-disputes-2021/. ^ Back to section

3 See the SCC Institute's website, available at https://sccarbitrationinstitute.se/en/our-services/investment-disputes. ^ Back to section

4 See the SCC Institute's website, available at https://sccarbitrationinstitute.se/en/about-scc/scc-statistics. ^ Back to section

5 See the SCC Institute's website, available at https://sccarbitrationinstitute.se/en/news-events/news/2023-scc-rules-what-are-changes. ^ Back to section

6 See the SCC Institute's website, available at https://sccarbitrationinstitute.se/en/about-scc/scc-statistics. Back to section

7 See the SCC Institute's website, available at https://sccarbitrationinstitute.se/en/about-scc/scc-statistics. Back to section

8 See the SCC Institute's website, available at https://sccinstitute.com/our-services/scc-express/. Back to section

9 See the SCC Institute's website, available at https://sccinstitute.com/scc-platform/. Back to section

10 See the SCC Institute's website, available at https://sccinstitute.com/scc-platform/ad-hoc-platform/. Back to section

11 See the SCC Institute's website, available at https://sccarbitrationinstitute.se/en/about-scc/contact/scc-arbitrators-council. Back to section

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