

**PRIMA FACIE DECISIONS ON JURISDICTION OF THE ARBITRATION
INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE: TOWARDS
CONSOLIDATION OF A ‘PRO ARBITRATION’ APPROACH**

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1. Introduction

The Arbitration Institute of the Stockholm Chamber of Commerce (the “SCC”) is the most important arbitration institution in Sweden and one of the leading institutions at the international level¹. As such, the SCC administers arbitral proceedings, mainly, but not exclusively, under its own Rules of Arbitration (the “SCC Rules”). The SCC is composed of a Secretariat and a Board. While the former provides a trained staff for the administration of arbitrations², the latter is empowered to take all relevant decisions for proceedings.

According to Articles 9(i) and 10(i) of the SCC Rules the Board has the exclusive authority to take *prima facie* decisions on any objection or challenge to SCC jurisdiction over a dispute. Such decisions are taken before the case has been referred to the arbitral tribunal³. Therefore, *prima facie* decisions made by the Board on SCC jurisdiction constitute a threshold which parties must satisfy, or else the dispute would not proceed to further deliberations by the arbitrators⁴. As will be discussed below, the threshold is a very straightforward one: the SCC would only dismiss a case when it *manifestly* lacks jurisdiction over a dispute.

The purpose of this article is to analyse developments of decisions on jurisdiction taken by the Board during the 2010 – 2012 period. In order to do so, part two of this paper will discuss the scope and applicability of the SCC’s jurisdictional threshold. This discussion is complemented by a brief commentary on the rules and practice of other international arbitration institutes. Part three conducts a study that examines fourteen (14) cases in which respondents objected to SCC jurisdiction. Finally, this paper concludes in part four by arguing that the SCC, through its jurisdictional threshold, has maintained and is consolidating a ‘pro-arbitration’ doctrine.

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¹ Hobér, K., *International Commercial Arbitration in Sweden* (Oxford, United Kingdom; Oxford University Press, 2011), 9.

² Blackaby, N., and Partasides, C., with Redfern, A., and Hunter, M., *Redfern and Hunter on International Arbitration* (5th Ed) (Oxford, United Kingdom; Oxford University Press, 2009), 52-54.

³ Articles 9(i), 10(i) and 18 of the SCC Rules.

⁴ Ramsjö, D., and Strömberg, S., *Manifest Lack of Jurisdiction? A Selection of Decisions of The Arbitration Institute of the Stockholm Chamber of Commerce concerning the Prima Facie Existence of an Arbitration Agreement (2005-2009)*, 2 *Stockholm International Arbitration Review* 55 (2009), p. 56.

2. Scope and Applicability of the SCC's Jurisdictional Threshold

2.1. SCC Practice

Pursuant to Articles 9(i) and 10(i) of the SCC Rules this Institute has one straightforward and very low jurisdictional threshold, since it must be manifest or obvious that the SCC lacks jurisdiction. Therefore, any jurisdictional objection will have to be based on the SCC's manifest lack of jurisdiction over a dispute. By contrast, the tribunal's jurisdiction may be challenged on a very wide range of grounds, including, but not limited to, the arbitrability of the dispute or the existence and/or validity of the arbitration agreement⁵.

As a general rule, jurisdictional issues are decided by the Board at the request of a party, and not at the initiative of the SCC. This is so because the parties may agree at any time with respect to the validity and scope of the arbitration agreement. Nevertheless, the SCC may consider reviewing jurisdictional issues *ex officio* if the respondent has not been in contact with the SCC at all, or – and this is an even rarer event – if the request for arbitration concerns a non-arbitrable issue⁶.

The Board's *prima facie* jurisdictional decisions are made after the initial exchange of written submissions when the respondent, in its Answer to the Request for Arbitration, has expressly objected to the SCC's jurisdiction⁷. However, it is worth noting that failure to raise any objection on jurisdiction in the Answer to the Request for Arbitration does not preclude the respondent from subsequently raising such objections at any time up to, and including, submission of the Statement of Defence⁸.

Since the Board's decisions on jurisdiction are taken without oral hearings being held, a manifest lack of jurisdiction has to be derived out of the arbitration agreement, or, in some exceptional cases, from other documents filed by either party during this initial phase of the proceedings⁹. Board decisions are preceded by the Secretariat's recommendation on the question of SCC jurisdiction.

In practice, the Board would conclude that the SCC has jurisdiction over a dispute if this Institute is mentioned, in one way or other, in a valid arbitration agreement¹⁰. Furthermore, as will be seen below, the SCC would assert jurisdiction even if the Institute's name is mentioned incorrectly, or even if the clause generally refers to an arbitration court located in Stockholm.

As a result, situations where the SCC manifestly lacks jurisdiction are basically limited to three main scenarios: (i) where the arbitration agreement contains an unambiguous reference to another arbitration institution (e.g. ICC, LCIA, ICSID); (ii) where the language of the

⁵ Ramsjö and Strömberg, *op cit.* note 4, p. 56.

⁶ Hobér *op cit.* note 1, 195-196.

⁷ Pursuant to Article 5 of the SCC Rules.

⁸ Magnusson, A., and Shaughnessy, P., *The 2007 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce*, 3 *Stockholm International Arbitration Review* 33 (2006), p. 45.

⁹ Hobér *op cit.* note 1, 195-196.

¹⁰ Ramsjö and Strömberg, *op cit.* note 4, p. 57.

arbitration agreement clearly shows that the parties intended *ad hoc* arbitration¹¹; and (iii) cases in which the claimant relies on several contracts as the legal framework of the relationship, and the cause of the dispute, but not all of the arbitration clauses contained in those contracts refer to the SCC, or to institutional arbitration¹².

Now, if the Board decides that it does not manifestly lack jurisdiction over the dispute, it will proceed to appoint the chairman of the arbitral tribunal or a sole arbitrator, unless the parties have agreed to a different mechanism for appointing the arbitrators. Pursuant to Article 18 of the SCC Rules, when the tribunal has been appointed and the advance has been provided¹³, the Secretariat will refer the case to the tribunal¹⁴.

However, as mentioned above, referral of a case to a tribunal does not imply that the tribunal has jurisdiction or that the parties are forbidden to raise further jurisdictional objections. It only means that the Board has *prima facie* determined that the SCC does not manifestly lack jurisdiction over the dispute. Accordingly, despite the Board's decision the parties can still challenge the jurisdiction of the Arbitral Tribunal, and the latter may still decide, depending on the facts and circumstances of the case, that it does not have jurisdiction over the dispute¹⁵.

If the Arbitral Tribunal is confronted with a jurisdictional challenge, its decision on the matter will be based on a more thorough and complete examination of the merits of the objection. For this purpose, the parties may submit evidence and the tribunal may conduct separate hearings on jurisdictional questions¹⁶.

In view of the above, it has been said that the Board does not resolve any complicated jurisdictional issue, since these are for arbitrators to decide¹⁷. That may be so if one compares the complexity of deciding whether a particular dispute is covered by the arbitration agreement *vis-à-vis* the less demanding exercise of determining whether the parties referred to SCC arbitration or not. Nevertheless, complicated jurisdictional decisions are not always taken exclusively by the arbitrators. More often than not the Board is confronted with difficult decisions on jurisdiction which not only require thorough examination and analysis, but also nurture SCC practice and understanding of its own jurisdictional threshold.

2.2. Other International Arbitral Institutions

It is noteworthy that not all international arbitral institutions have adopted this practice of empowering the centre or court to take *prima facie* decisions on jurisdiction. The International Court of Arbitration of the International Chamber of Commerce¹⁸ ("ICC"), the Cairo Regional Centre for International Commercial Arbitration¹⁹ ("CRCICA") and the China International Economic and Trade Arbitration Commission are among those institutions that have empowered their respective boards or courts of arbitration to decide an objection to their

¹¹ Hobér, *op cit.* note 1, 195-196.

¹² Ramsjö and Strömberg, *op cit.* note 4, p. 57.

¹³ See Articles 9(vi) and 45 of the SCC Rules.

¹⁴ Ramsjö and Strömberg, *op cit.* note 4, p. 57.

¹⁵ According to Article 5 of the SCC Rules. See Ramsjö and Strömberg, *op cit.* note 4, p. 57.

¹⁶ Ramsjö and Strömberg, *op cit.* note 4, pp. 57-58.

¹⁷ Hobér, *op cit.* note 1, 195-196.

¹⁸ See Articles 6(3) and 6(4) of the Rules of Arbitration of the International Chamber of Commerce.

¹⁹ See Article 6 of the CRCICA Arbitration Rules.

jurisdiction, and thus to dismiss a case if they conclude that the institute has no jurisdiction over the dispute.

Although each set of rules is different, the one that clearly most resembles the SCC's jurisdictional threshold is the one used by the CRCICA. Indeed, under Article 6 of the CRCICA Arbitration Rules that Centre may, with the approval of its Advisory Committee, decide not to proceed with the arbitral proceedings "*if it manifestly lacks jurisdiction over the dispute*".

It can be said, at least to a certain extent, that the International Centre for Settlement of Investment Disputes ("ICSID") has also adopted this practice regarding decisions on jurisdiction. On the one hand, Article 6(1)(b) of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings authorize the Secretary-General to refuse to register a request for arbitrations if he/she finds, on the basis of the information contained in the request for arbitration, that the dispute is "*manifestly outside the jurisdiction of the Centre*". For example, in 1985 the ICSID Secretary-General refused to register a case because the dispute related to a mere commercial sale and could not be qualified as an investment²⁰.

On the other hand, both the ICSID Convention²¹ and the ICSID Rules of Procedure for Arbitration Proceedings²² provide that any objection to the jurisdiction of that Centre or to the competence of the Arbitral Tribunal shall be decided by the latter, as a preliminary question or as part of the merits of the dispute. Accordingly, under the ICSID system the authority to decide any jurisdictional challenge rests solely on the arbitral tribunal; nevertheless, the Secretary-General can dismiss a case if he/she considers that the Centre manifestly lacks jurisdiction.

Finally, the rules of arbitration of the London Court of International Arbitration²³, of the Permanent Court of Arbitration²⁴, of the International Centre for Dispute Resolution²⁵ and of the Singapore International Arbitration Centre²⁶, each in its own form, expressly provide that the arbitral tribunal has the exclusive authority to decide any jurisdictional challenge, either as a separate award or as part of the award on the merits.

²⁰ Blackaby and Partasides, with Redfern and Hunter, *op cit.* note 2, 477.

²¹ Article 41 of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

²² Rule 41.

²³ See Articles 23 of the London Court of International Arbitration Rules of Arbitration.

²⁴ See Article 21 of the Permanent Court of Arbitration Optional Rules for Arbitration.

²⁵ See Article 15 of the International Centre for Dispute Resolution Rules for International Arbitration.

²⁶ See Article 25 of the Arbitration Rules of the Singapore International Arbitration Centre.

3. SCC Case Studies (2010 – 2012)

This part of the paper will analyse fourteen (14) cases in which, during the 2010-2012 period, the jurisdiction of the SCC was challenged. The purpose is not only to review the decisions taken by the Board, but also to examine the arguments presented by the parties, both the objecting and the opposing one, and the wording of the relevant agreement to arbitrate.

3.1. Arbitration V 028/2010

Nationality of the Parties

Claimant: Great Britain

Respondent: Sweden

Seat of Arbitration

Växjö, Sweden

Nationality of the Sole Arbitrator

Sweden

Language of the Contract

English

Arbitration Agreement

“Any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. The tribunal shall be set up with a sole arbitrator, who shall be appointed by the Institute. The arbitration proceedings shall take place in Växjö, Sweden and be held in English. The award shall be reasoned and be given in English”

Background

The Parties entered into a settlement agreement by means of which Respondent undertook to buy shares from Claimant. However, according to Claimant Respondent only paid for a portion of the agreed amount, so the former commenced SCC arbitration seeking payment of the amounts allegedly owed by Respondent.

Respondent’s objection to SCC Jurisdiction

Respondent objected to SCC jurisdiction arguing that the agreement containing the arbitration clause was void in its entirety because it was concluded by fraudulent means. According to Respondent, Claimant’s representatives lacked the authority to enter into such agreement.

Claimant’s Reply

Claimant explained that, before commencing SCC arbitration, it had filed a complaint before national courts against Respondent. The latter’s defense in these court proceedings was based on the existence and validity of this arbitration agreement, so there was no basis to deny the validity of the agreement before the SCC.

Prima Facie Decision by the SCC Board

The SCC does not manifestly lack jurisdiction over the dispute.

3.2. Arbitration V 082/2010

Nationality of the Parties

Claimant: Sweden

Respondent: Sweden

Seat of Arbitration

Stockholm

Nationality of the Sole Arbitrator

Sweden

Language of the Contract

English

Arbitration Agreement

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

“The arbitral tribunal shall be composed of a sole arbitrator.

“The place of arbitration shall be Stockholm.

“The language to be used in the arbitral proceedings shall be Swedish, but documents originally drafted in English may be submitted in English”.

Background

The Parties entered into a sales contract. Claimant initiated SCC arbitration arguing that Respondent had breached the contract and seeking compensation for costs and damages.

Respondent’s objection to SCC Jurisdiction

Respondent objected to SCC jurisdiction based on the fact that the commercial relationship on which Claimant relied was not covered by the contract that contained the arbitration clause, and so the agreement to arbitrate was not applicable to this dispute. Respondent further explained that Claimant had entered into a new contractual relationship with a third party, which was not related at all to the contract invoked by the former. Therefore, for Respondent held that the cause of Claimant’s claims was not covered by the contract that contained the arbitration agreement, thus there was no obligation to arbitrate that dispute.

Claimant’s Reply

Claimant contested the jurisdictional challenge and submitted that both parties had entered into a contract with the third party, thus the arbitration clause should be construed as including the third party. As a result under the relevant contract, which contained the arbitration agreement, Claimant had an unconditional right to pursue claims against Respondent, regardless of the presence of the third party.

***Prima Facie* Decision by the SCC Board**

The SCC does not manifestly lack jurisdiction over the dispute.

Decision on Jurisdiction by the Arbitral Tribunal

The Arbitral Tribunal, in its decision on jurisdiction, concluded that the contract on which the claimant relied, which contained the arbitration clause, constituted the contractual framework of the legal relationship that gave rise to the dispute, thus its jurisdiction was confirmed.

3.3. Arbitration F 086/2010

Nationality of the Parties

Claimant: Sweden

Respondent: Sweden

Seat of Arbitration

Stockholm

Language of the Contract

English

Arbitration Agreement

“Any dispute arising between the Principal and the Contractor, except in cases covered by the following paragraph, shall be settled before a Court of Arbitration in Stockholm, Swedish Law being applicable both to the Arbitration procedure and to the judgement of the dispute”.

Background

The Parties entered into a contract for services, by means of which Respondent undertook to assist Claimant in an application. Since the application was denied, Claimant commenced arbitration stating that Respondent was negligent and seeking to recover its costs.

Respondent’s objection to SCC Jurisdiction

Respondent objected to the jurisdiction of the SCC arguing that the contract provided for *ad hoc* arbitration in Stockholm, and not for SCC arbitration, especially since neither the SCC nor the SCC Rules were mentioned in the arbitration agreement.

Claimant’s Reply

In its reply, Claimant submitted that the contract really referred to a Court of Arbitration in Stockholm, and that the most important and renowned Court of Arbitration there was the SCC, so there could be no doubt that the parties agreed on SCC arbitration.

***Prima Facie* Decision by the SCC Board**

The SCC manifestly lacks jurisdiction over the dispute. The case was dismissed.

3.4. Arbitration V 113/2010

Nationality of the Parties

Claimant: Great Britain

Respondent: Sweden

Seat of Arbitration

Stockholm

Nationality of the Arbitrators

Chairperson: Sweden

Arbitrator appointed by Claimant: Sweden

Arbitrator Appointed by Respondents: Sweden

Language of the Contract

English

Arbitration Agreement

“Any dispute, controversy or claim arising out of or in connection with this Agreement, 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.

“The arbitral tribunal shall be composed of three arbitrators.

“The place of arbitration shall be Stockholm, Sweden”.

Background

The Parties entered into a share purchase agreement by means of which Claimant acquired from Respondent some shares in a company. Afterwards, a number of the sites where the company operated were found to be contaminated. Pursuant to the contract, costs in relation to this pollution were borne by Respondent until the latter decided that the claims were time-barred. Claimant then commenced SCC arbitration seeking payment of those pollution costs and compensation for damage caused by Respondent's actions.

Respondent's objection to SCC Jurisdiction

Respondent objected to the jurisdiction of the SCC based on the fact that there was no valid arbitration agreement between the Parties, given that Claimant was not a party to the share purchase agreement. According to Respondent, said agreement was not assignable by any party without the prior written consent of the other, something Respondent asserted that it had not given, so Claimant had no rights or obligations under the contract nor under the arbitration clause therein contained.

Claimant's Reply

Claimant contested the challenge by arguing that the agreement was fully enforceable between the Parties, especially since Claimant was a successor to one of the original parties to the contract, and it is a well-established principle in arbitration that arbitration agreements follow the successors of the parties. Claimant also submitted that the transfers of rights and

obligations were not conditional upon consent from Respondent as the transfer was a direct consequence under the applicable law.

***Prima Facie* Decision by the SCC Board**

The SCC does not manifestly lack jurisdiction over the dispute.

3.5. Arbitration F 145/2010

Nationality of the Parties

Claimant: Sweden

Respondent: France

Seat of Arbitration

Stockholm

Nationality of the Sole Arbitrator

Sweden

Language of the Contract

English

Arbitration Agreement

“Any dispute, controversy or claim arising out of or in connection with this agreement, or the breach, invalidity or termination thereof, shall be finally settled by arbitration in accordance with the Rules for Expedited Arbitrations of the Arbitration Institute of the Stockholm Chamber of Commerce. The place of arbitration shall be Stockholm”.

Background

The Parties entered into an agreement by means of which Claimant was to deliver products to Respondent. According to Claimant, Respondent failed to pay some outstanding invoices, so the former initiated SCC arbitration seeking payment of the invoices plus compensation for damage.

Respondent’s objection to SCC Jurisdiction

Respondent objected to the jurisdiction of the SCC arguing that it had not entered into an arbitration agreement with Claimant, given that the latter never provided Respondent with the French version of the general conditions referred to in the orders for delivery. Among those general conditions was the arbitration clause, so Respondent had no knowledge of any arbitration agreement and it had not consented to arbitrate any dispute.

Claimant’s Reply

Claimant submitted that it did provide Respondent with the French version of the general conditions of the contract. Furthermore, Claimant asserted that Respondent consented to the contract and to the legal relationship as it was executed by the Parties, a relationship that was governed by an arbitration clause in case a dispute should arise between them.

***Prima Facie* Decision by the SCC Board**

The SCC does not manifestly lack jurisdiction over the dispute.

3.6. Arbitration V 005/2011

Nationality of the Parties

Claimant: Kazakhstan

Respondents: Spain

Seat of Arbitration

Stockholm

Nationality of the Arbitrators

Chairperson: Sweden

Arbitrator appointed by Claimant: Kazakhstan

Arbitrator Appointed by Respondents: Spain

Language of the Contract

English

Arbitration Agreement

“Arbitration shall be conducted by an impartial council of three persons, one designated by the Owner, one by the Architect and the third by mutual agreement between the Owner and the Architect. If the two parties cannot reach such an agreement, the litigation will be settled according to the Stockholm Arbitration Court”.

Background

The Parties entered into an agreement by means of which Respondent undertook to design a construction project for Claimant. According to Claimant, Respondent failed to comply with the terms of the contract, so the former commenced SCC arbitration seeking compensation for damages.

Respondent’s objection to SCC Jurisdiction

Respondent objected to the jurisdiction of the SCC arguing that the parties agreed on an arbitration system different from SCC Arbitration. According to Respondent, the arbitration agreement stipulated SCC arbitration as a secondary choice viable only if the primary arbitration process should result in being unviable. Since the parties had not tried to proceed with the first option for arbitration, the SCC had no jurisdiction over the dispute.

Claimants’ Reply

Claimant opposed the jurisdictional challenge filed by Respondent, and explained that the arbitration clause provided for SCC arbitration as the first and only choice. According to Claimant, the arbitration clause established a mechanism for appointing arbitrators, which is in accordance with the practice of international arbitration and the SCC Rules, so that the SCC will appoint the chairman if the parties cannot agree on the chairman. Therefore, the SCC is the only institute with jurisdiction over this dispute.

Prima Facie Decision by the SCC Board

The SCC does not manifestly lack jurisdiction over the dispute.

3.7. Arbitration V 026/2011

Nationality of the Parties

Claimant: Italy

Respondent: Ukraine

Seat of Arbitration

Stockholm

Nationality of the Sole Arbitrator

Sweden

Language of the Contract

English

Arbitration Agreement

“The Seller and the Buyer will take measures to settle amicably all disputes and differences, which may arise under the present Contract or in connection with it.

“If the Parties cannot agree upon an amicable settlement within 90 days since the first negotiations took place, then all disputes and differences are to be submitted without recourse to the ordinary courts to The Arbitration Institute of the Stockholm Chamber of Commerce, Sweden for settlement in accordance with the rules of arbitration procedure of this Institute. The Award of the Arbitration will be final and binding upon the parties”.

Background

The parties entered into a contract for sale and purchase of certain goods. According to Claimant, Respondent had only effected partial payment for the goods. Therefore, Claimant commenced SCC arbitration seeking payment of the outstanding debt plus interest.

Respondent’s objection to SCC Jurisdiction

Respondent objected to the jurisdiction of the SCC based on the fact that the contract established that there should be a ninety (90) day period in which the parties had to take all measures in order to reach an amicable settlement of the dispute. Respondent submitted that the Parties had not taken those measures and that the change of its physical location prevented it from having proper communication with Claimant. Moreover, Respondent argued that, according to the contract, jurisdiction over the dispute rested solely with national courts.

Claimant’s Reply

Claimant asserted that it had complied with the ninety (90) day period for amicable settlement of the dispute. However, Respondent never answered any of Claimant’s invitations and communications for discussing the dispute, and so Claimant could not be punished for Respondent’s negligence in attending to a potential dispute. Additionally, Claimant submitted that the arbitration clause was clear enough in establishing arbitration, and not court litigation, as the final mechanism for resolving any and all disputes.

Prima Facie Decision by the SCC Board

The SCC does not manifestly lack jurisdiction over the dispute.

3.8. Arbitration V 068/2011

Nationality of the Parties

Claimant: Russia

Respondent: Germany

Seat of Arbitration

Stockholm

Nationality of the Sole Arbitrator

United States

Language of the Contract

English and Russian (no express indication as to which version prevailed)

Arbitration Agreement

“In the case the Parties fail to reach an accommodation (sic.), any and all disputes or claims arising out of or in connection with this contract shall be governed and resolved exclusively by the International Arbitration Court in Stockholm (Sweden). The Parties agree hereby that International Law shall apply in case of settlement of any disputes arising out or in connection with this Contract”

“This Contract shall be governed by the regulations of the International Chamber of Commerce, Paris (France) with regard to Force Majeure circumstances”.

Background

Parties entered into a contract for the sale of a determined product. Claimant alleged that Respondent failed to comply with payment and other obligations under the contract. In view of this circumstance, Claimant commenced arbitration proceedings before the SCC.

Respondent’s objection to SCC Jurisdiction

Respondent objected to the jurisdiction of the SCC and submitted that the ICC was the institution that had jurisdiction over the dispute, mainly because one of the main issues in dispute between the parties related to a *force majeure* event.

Alternatively, Respondent argued that the Parties really had agreed to *ad hoc* arbitration, and not to institutional arbitration, since the contract did not specifically identify the SCC as the administering institution. Moreover, according to the objecting party a literal translation of the Russian version of the arbitration clause provides for submission of disputes to “*an/the International Arbitral Tribunal in the city of Stockholm*”.

Claimant’s Reply

Claimant responded to the objection by arguing that from both the Russian and the English versions of the contract it was clear that the parties’ intention was to settle their disputes by arbitration administered by a specific institution in Stockholm, and the SCC is the only proper arbitral institution in this city. Claimant further explained that an arbitral award rendered pursuant to an interpretation of the clause as referring to SCC arbitration would be enforceable under the law of the place where an eventual award would be enforced against Respondent.

Prima Facie Decision by the SCC Board

The SCC does not manifestly lack jurisdiction over the dispute.

Decision on Jurisdiction by the Arbitral Tribunal

The Arbitral Tribunal came to the conclusion that the arbitration clause was not overridden because the Parties intended, in another clause, to refer *force majeure*-related disputes to ICC arbitration. According to the tribunal, that clause was not an arbitration clause and so there was no need to read it together with the arbitration agreement. The Tribunal also established that from the arbitration clause it was clear that the Parties had agreed to arbitration under the auspices of an institution based in Stockholm, and not to *ad hoc* arbitration. The sole arbitrator then concluded that such institution is the SCC, not only given its preeminent position in the resolution of East-West commercial disputes, but because it would be surprising that the parties had decided to submit their disputes to some other institution in Stockholm than the SCC.

3.9. Arbitration V 087/2011

Nationality of the Parties

Claimant: Denmark

Respondents: Poland

Seat of Arbitration

Stockholm

Nationality of the Arbitrators

Chairperson: Austria

Arbitrator appointed by Claimant: Poland

Arbitrator Appointed by Respondents: Poland

Language of the Contract

English

Arbitration Agreement

“This Agreement shall be governed by, and construed in accordance with, the laws of the Republic of Poland. Any and all disputes arising out of, or relating to, this Agreement, including any disputes as to the validity of this Agreement, shall be, subject to the provisions of Polish law, providing for the exclusive jurisdiction of Polish courts, submitted for resolution to the Arbitration Institute of the Stockholm Chamber of Commerce in accordance with its rules (the “Rules”). The arbitration shall consist of three arbitrators appointed in accordance with the Rules. The place of arbitration shall be Stockholm, Sweden, and upon request by any of the parties, the language of the arbitration shall be English.”

Background

The Parties entered into an agreement for the sale of an enterprise. However, the Parties disputed whether Respondents were liable for losses Claimant incurred as a result of enforcement against it of a claim brought by a creditor against the enterprise it bought. Accordingly, Claimant commenced SCC arbitration seeking a declaration that Respondent had breached the contract and consequent damages.

Respondent's objection to SCC Jurisdiction

Respondents challenged SCC jurisdiction arguing that this dispute did not stem from the agreement and was therefore not covered by the arbitration clause therein contained. According to Respondents, the claim filed by the creditor was derived from circumstances which were not part of the enterprise bought by Claimant, given that the third party claim was the result of an erroneously conducted court dispute. As a result, for Respondents the third party claim was not covered by the warranties in the agreement, thus the dispute fell outside the scope of the arbitration agreement.

Claimants' Reply

In its opposition to Respondents' jurisdictional challenge, Claimant contested that this dispute stemmed from the agreement and was therefore covered by the arbitration clause. According to Claimant, if it had not bought the enterprise from Respondents, then the third party claim would not have been addressed or enforced against Claimant.

Prima Facie Decision by the SCC Board

The SCC does not manifestly lack jurisdiction over the dispute.

Decision on Jurisdiction by the Arbitral Tribunal

The Arbitral Tribunal, in its separate award on jurisdiction, came to the conclusion that the subject-matter of the dispute was based on the stipulations of the main agreement, so the applicability of the arbitration clause could not be contested, since the latter provided that any and all disputes arising out of, or relating to said agreement, should be submitted to SCC arbitration.

3.10. Arbitration V 128/2011

Nationality of the Parties

Claimant: Russia

Respondents: China

Seat of Arbitration

Stockholm

Nationality of the Sole Arbitrator

Swedish

Language of the Contract

Russian / English

Arbitration Agreement

"All and any disputes related to or in connection with the present Contract shall be solved amicably.

"In case the Parties fail to reach agreement, the dispute issues, disagreements or claims shall be submitted for settlement to the International Arbitration Court at the International Chamber of Commerce of Stockholm, Sweden in accordance with its Arbitration Rules and international legislation

“The venue for arbitration shall be International Arbitration Court at the International Chamber of Commerce of Stockholm, Sweden.

“Arbitration shall be in English language.

“Decision of the Arbitration court shall be final and binding for both parties”.

Background

The Parties entered into a sale and purchase agreement, pursuant to which Respondent undertook to sell and deliver products to Claimant at a price previously agreed. Claimant argued that Respondent had not delivered the products, despite the former having made the correspondent an advance payment. Claimant then commenced SCC arbitration seeking repayment of the advance payment and damages for breach of contract.

Respondent’s objection to SCC Jurisdiction

Respondent did not file an Answer to the Request for Arbitration, even though the SCC received confirmation that the Request for Arbitration was duly delivered to Respondent.

Claimants’ Reply

Claimant submitted that they wished to proceed with the arbitration despite the fact that Respondent had not filed an Answer.

***Prima Facie* Decision by the SCC Board**

The SCC does not manifestly lack jurisdiction over the dispute.

3.11. Arbitration V 196/2011

Nationality of the Parties

Claimant: United States

Respondents: Russia

Seat of Arbitration

Stockholm

Nationality of the Arbitrators

Chairperson: Sweden

Arbitrator appointed by Claimant: United States

Arbitrator Appointed by Respondents: Russia

Language of the Contract

English

Arbitration Agreement

“The Fouders (sic.) should take all reasonable efforts for a mutually favourable settlement of all discrepancies and disputes by means of discussion, caused by the present Treaty, its change, addition and termination, as well as its lawfulness.

“In case when such discrepancies or disputes cannot be settled by friendly negotiations, such discrepancies or disputes should be ultimately settled by the arbitration composed of three arbitrators. The arbitrators shall be appointed and act in accordance with the Rules of the Institute of Arbitration of the Chamber of Commerce in Stockholm. The place for arbitration should be Stockholm, Sweden. Any decision of the arbitrators shall be final.

“The arbitrators shall use the Swedish substantive law and procedural rules for the analysis and interpretation of the present treaty. The trial of cases in the arbitration should be in English and the arbitrators make a decision also in English”.

Background

The Parties entered into a joint venture agreement. Claimant commenced SCC arbitration arguing that Respondent had not complied with its contractual obligations and seeking compensation for damages.

A few years earlier, Claimant had initiated SCC arbitration against Respondent but did not manage to deposit the advance on costs fixed at that time and the proceedings were accordingly terminated.

Respondent’s objection to SCC Jurisdiction

Respondent objected to the jurisdiction of the SCC arguing that, pursuant to Section 5 of the Swedish Arbitration Act (SAA), Claimant’s failure to deposit its share of the advance on costs in the first arbitration constituted a waiver of Claimant’s right to arbitrate the dispute. Respondent further suggested that Claimant may have initiated proceedings against Respondent before a national court, which in Respondent’s submission confirmed that Claimant had waived its right to arbitrate.

Claimants’ Reply

Claimant opposed the jurisdictional objection by denying that Section 5 of the SAA applied to this case, given that that Section provides that when a party fails to deposit the advance on costs it is waiving its right to object to the exercise of jurisdiction by national courts. Additionally, Claimant denied having initiated any proceedings before the national court against Respondent.

Prima Facie Decision by the SCC Board

The SCC does not manifestly lack jurisdiction over the dispute.

3.12. Arbitration V 067/2012

Nationality of the Parties

Claimant: Ukraine

Respondents: Russia

Seat of Arbitration

Stockholm

Language of the Contract

Russian

Arbitration Agreement

English version:

“All controversies arising out of this Contract shall be settled directly by the Seller and the Buyer.

“Otherwise, the disputes shall be settled by Stockholm Arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce.

“Applicable law is Swedish”²⁷.

Background

Pursuant to a supply agreement entered into by the Parties, Claimant delivered some equipment to Respondent. Claimant initiated SCC arbitration alleging that it had not received payment in accordance with the agreement.

Respondent’s objection to SCC Jurisdiction

Respondent objected to the jurisdiction of the SCC stating that the contracting parties had not agreed to settle their disputes under the SCC Rules, but, instead, under the ICC Rules with Stockholm as the seat of arbitration. Therefore, according to Respondent this was an ICC and not an SCC arbitration.

Claimants’ Reply

Claimant opposed the jurisdictional challenge by arguing that the parties had agreed to settle their disputes by *“Stockholm Arbitration”*, and that the SCC is the permanent arbitration body in Stockholm carrying out arbitration proceedings. Therefore, for Claimant it was obvious that the SCC had jurisdiction over the dispute.

Prima Facie Decision by the SCC Board

The SCC manifestly lacks jurisdiction over the dispute. The case was dismissed.

3.13. Arbitration V 097/2012

Nationality of the Parties

Claimant: Germany

Respondents: China

Seat of Arbitration

Stockholm

Nationality of the Sole Arbitrator

Sweden

Language of the Contract

²⁷ Translated into English by the SCC Secretariat.

English

Arbitration Agreement

“All disputes in connection with this Contract or the execution thereof, shall be settled amicably through friendly negotiation between two parties. In case no settlement can be reached through negotiation, the case in dispute shall then be submitted for arbitration to the Arbitration Institute of the Stockholm Chamber of Commerce. The arbitral award is final and binding upon both parties. The arbitration expenses shall be born by the losing party, unless otherwise awarded by the arbitral organization”.

Background

The Parties entered into nine (9) contracts for delivery of certain products. Although the products were delivered by Respondents as agreed, Claimant argued that those products were defective, and, in consequence, it commenced SCC arbitration seeking compensation for damage.

Respondent’s objection to SCC Jurisdiction

Respondents objected to the jurisdiction of the SCC based on the fact that Claimant supposedly relied on a wrong version of the contracts for initiating arbitration. According to Respondents, the correct version of the contracts contained an arbitration clause referring to arbitration in China, and not to SCC arbitration.

Claimants’ Reply

Claimant opposed the jurisdictional objection by submitting that it relied on the proper version of the contracts, which referred to SCC arbitration. The arbitration clauses referring to arbitration in China were included in the preliminary drafts of the contracts and were later disposed of when the parties agreed to arbitration in Stockholm.

Prima Facie Decision by the SCC Board

The SCC does not manifestly lack jurisdiction over the dispute.

3.14. Arbitration V 101/2012

Nationality of the Parties

Claimant: Germany

Respondents: Lithuania

Seat of Arbitration

Stockholm

Nationality of the Sole Arbitrator

Sweden

Language of the Contract

German

Arbitration Agreement

Original German version:

“Die Parteien vereinbaren hiermit, dass jegliche, sich auf die Ausführung der Regelungen des vorliegenden Vertrags beziehenden Streitigkeiten des vorliegenden Vertrags beziehenden Streitigkeiten durch Vereinbarung zwischen den Parteien beigelegt werden und dass jeglicher sich aus dem gegenwärtigen Vertrag ergebenden Streitigkeiten nach der Vergleichs und Schiedsordnung der Internationalen Handelskammer von einem oder mehreren gemäß dieser Ordnung ernannten Schiedsrichtern endgültig entschieden werden.

“Das für diesen Vertrag zuständige Schiedsgericht ist das Schiedsgericht der Stockholmer Handelskammer (Stockholm Chamber of Commerce, SCC).

“Die Schiedsgerichtsordnung liegt diesem Vertrag in Deutscher- und litauischer Sprache bei”.

English version:

“The Parties hereby agree that any disputes between the Parties referring to the fulfillment of the duties hereunder shall be settled by the arrangements made by the Parties, and that any disputes arising here from shall be finally resolved in accordance with the Rules of Arbitration of the International Chamber of Commerce by one or several arbitrators appointed in line with the said rules.

“The Arbitration Court at the Stockholm Chamber of Commerce (SCC) shall be the court competent for this Contract.

“The Rules of Arbitration were attached hereto in the German and the Lithuanian language version”²⁸.

Background

The Parties entered into a delivery agreement by means of which Claimant agreed to produce, deliver and install a product in Respondent’s facilities. Claimant asserted that, after installation of the product, it was unable to put the product into operation. In view of this circumstance, Claimant initiated SCC arbitration seeking monetary relief, an order for Respondent to provide security, and declaratory relief stating that Claimant had never been in default of its contractual obligations.

Respondent’s objection to SCC Jurisdiction

Respondent objected to the jurisdiction of the SCC arguing that the parties’ intention was to refer the dispute to the Arbitration Court at the International Chamber of Commerce in Lithuania, that is, the Vilnius Court of Commercial Arbitration.

Claimants’ Reply

According to Claimant the arbitration clause clearly referred to SCC arbitration, in that the SCC was expressly mentioned in that clause. Moreover, Claimant submitted that the parties never agreed to arbitration at the Vilnius Court of Commercial Arbitration and that Respondent’s interpretation of the contract to that effect lacked any support.

²⁸ The translation into English was provided by Claimant in the Request for Arbitration.

***Prima Facie* Decision by the SCC Board**

The SCC does not manifestly lack jurisdiction over the dispute.

4. Conclusion

This study on recent developments of *prima facie* decisions on jurisdiction taken by the Board during the last two (2) years provides evidence that the SCC has maintained and is consolidating a ‘pro-arbitration’ approach. Indeed, the Board has sought to give effect to arbitration agreements whenever and wherever possible, and has certainly not been persuaded to narrow its scope, despite repeated requests by respondents to do so. For this purpose, the Board has interpreted arbitration agreements in an extensive manner, based on the principle that the parties’ intention to arbitrate their disputes should prevail, even over an unfortunate drafting of the arbitration agreement.

Therefore, an unambiguous mention of an arbitration court in Stockholm would suffice for the Board to conclude that the SCC does not manifestly lack jurisdiction over the dispute. Otherwise it would be very challenging for the Board to conclude that the SCC has jurisdiction over disputes in which the relevant arbitration agreement refers to the “*Court of Arbitration of the Chamber of Commerce and Industry in Stockholm*”, to the “*Stockholm Arbitration Court*” or to the “*International Arbitration Court in Stockholm*”.

It is not surprising then that during the last two years the Board decided only in three (3) cases that this Institute manifestly lacks jurisdiction over the dispute. As mentioned above, the decision in one of those cases was a product of the parties’ agreement on manifest lack of jurisdiction, so the Board was not engaged in an analysis of the relevant arbitration agreement. By contrast, the two other cases involved typical situations where the SCC manifestly lacks jurisdiction, as outlined in Section 2.1 of this paper: an explicit reference to another arbitration institution²⁹ and a clear agreement to *ad hoc* arbitration³⁰.

It remains to be seen if the Board accepts a jurisdictional challenge based on the absence of agreement between the parties referring settlement of their disputes to SCC arbitration. Although from 2010 to 2012 all objections to the jurisdiction of the SCC in which respondent argued that it was not a party to the arbitration agreement did not succeed, the author is of the opinion that a case could occur in which such a challenge may prevail. For that purpose, it would be necessary, besides the non-existence of an arbitration agreement between the parties, for the claimant to fail to submit any argument extending or applying the arbitration agreement to the respondent.

These case studies have also evidenced that jurisdictional challenges based on the nullity or invalidity of the arbitration clause or on the fact that the dispute is not covered by the arbitration agreement, or on a waiver of the right to arbitration, does not succeed at this preliminary stage before the Board. Instead, a jurisdictional challenge based on these grounds may prevail before the arbitral tribunal, although it is understandable that, bearing in mind an eventual challenge to the award, a respondent would raise its jurisdictional objections at every opportunity that presents itself, whether before the Board, or the arbitral tribunal, or both³¹.

²⁹ See Arbitration F 086/2010.

³⁰ See Arbitration V 067/2012.

³¹ Regarding the grounds for challenging and setting aside an arbitral award, Section 34 of the Swedish Arbitration Act expressly provides that: “A party shall not be entitled to rely upon a circumstance which,

Now, however beneficial this pro-arbitration approach of the SCC may be for the parties and for arbitration as a mechanism of international dispute settlement, parties and their counsel should never underestimate the importance of ensuring that the wording adopted in the arbitration agreement is adequate to fulfil their intentions and needs. Accordingly, the arbitration agreement should be drafted so as to make clear that resolving disputes by arbitration, whether institutional or *ad hoc*, is an obligation clearly and unambiguously established in the relevant clause³².

It is surprising and, to a certain extent, disappointing, that arbitration clauses are still being neglected and regarded as ‘midnight clauses’. Considerable amounts of time and money will be saved if proper attention is paid to the arbitration clause, an exercise that does not demand a considerable amount of time or analysis³³. It is precisely in that spirit that the SCC has drafted and published model clauses that are available in a number of variations to best suit the parties’ wishes, including combination clauses that offer flexibility when the size and character of the dispute may be difficult to predict in advance³⁴.

through participation in the proceedings without objection, or in any other manner, he may be deemed to have waived”. It is noteworthy that other arbitral laws worldwide contain similar provisions, such as the English Arbitration Act 1996, the Belgian Judicial Code and the Dutch CCP. See Blackaby and Partasides, with Redfern and Hunter, *op cit.* note 2, 593.

³² Blackaby and Partasides, with Redfern and Hunter, *op cit.* note 2, 108.

³³ Hobér, *op cit.* note 1, 102-103.

³⁴ Ramsjö and Strömberg, *op cit.* note 4, p. 73.