

Chapter XII – SCC Rules –

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I. Introduction

- 1 The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) provides rules for the resolution of commercial and investment (i.e. treaty based) arbitration disputes, the main set of rules is the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Rules). The overriding purpose of the SCC Rules is to accommodate the need for business and investors to have disputes settled swiftly, confidentially and professionally.

In addition the SCC on a regular basis holds training courses, roundtable 2 discussions and international conferences on arbitration and takes part in debates and endeavors to make the legislature aware of the need for business to have disputes settled speedy and with competence. Furthermore, the SCC includes a mediation institute with its own rules for alternative dispute resolution.

The SCC was founded as early as 1917. In the seventies Stockholm developed 3 into a popular venue for disputes between parties from the former Soviet Union and parties from the Western Europe and the US, as Sweden was regarded as a neutral country during the cold world war. Stockholm is still well known for its specialized knowledge in so-called East-West dispute resolution, which today also includes parties from China.

In the nineties the SCC recorded a considerable increase in cases, not least in 4 international proceedings. And the increase of the SCC caseload has continued. Today almost 200 new arbitration proceedings are commenced each year under the SCC Rules. About 50 per cent of the cases are international, i.e. involve at least one non-Swedish party. The SCC cases cover many different commercial fields and legal issues. Among the more frequently appearing types of disputes are supply of goods, mergers and acquisitions, shareholders' agreements, joint ventures, license and service contracts.¹

This commentary deals with the SCC Rules which came into force on 1 January 5 2010. Furthermore, this commentary, for ease of reference, presupposes that the seat of arbitration is Sweden and that, hence, the Swedish Arbitration Act is applied (*lex arbitri*). It should be underlined, though, that arbitration under the SCC Rules may take place anywhere in the world.

II. SCC's Model Arbitration Clause

Any dispute, controversy or claim arising out of or in connection with this 6 contract, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

Recommended additions:

The arbitral tribunal shall be composed of three arbitrators/a sole arbitrator. 7

The seat of arbitration shall be [...].

The language to be used in the arbitral proceedings shall be [...].

This contract shall be governed by the substantive law of [...].

III. Commentary

1. The Arbitration Institute of the Stockholm Chamber of Commerce

Article 1 About the SCC

The Arbitration Institute of the Stockholm Chamber of Commerce (the 8 "SCC") is the body responsible for the administration of disputes in accordance with the "SCC Rules"; the Arbitration Rules of the Arbitration Institute of the

¹ More statistics can be found on the SCC's website www.sccinstitute.com.

Stockholm Chamber of Commerce (the “Arbitration Rules”) and the Rules for Expedited Arbitrations of the Stockholm Chamber of Commerce (the “Rules for Expedited Arbitrations”), and other procedures or rules agreed upon by the parties. The SCC is composed of a board of directors (the “Board”) and a secretariat (the “Secretariat”). Detailed provisions regarding the organisation of the SCC are set out in Appendix I.

- 9 Article 1 expounds the role of the SCC in the conduct of arbitration proceedings under its auspices. Some of the SCC’s most important tasks are appointment of arbitrators, serving the request for arbitration on the respondent, decision-making in case of challenges to arbitrators and determining the arbitration costs (i.e. fee to the arbitral tribunal and the SCC).
- 10 For the SCC to have the right to administer a dispute the contracting parties must have agreed so. Usually this is made in an arbitration clause in the parties’ business contract. The parties may also have entered into a separate arbitration agreement after the emergence of the dispute.
- 11 Moreover the SCC on a regular basis acts as an Appointing Authority in UNCITRAL arbitration cases or in purely *ad hoc* cases conducted pursuant to the Swedish Arbitration Act. In such cases the SCC’s role is usually limited to a certain task, such as appointing arbitrators, deciding the fee to the arbitral tribunal or determining a challenge to an arbitrator.
- 12 The Board of the Stockholm Chamber of Commerce nominates the members of the SCC Board, which consists of a chairperson, a maximum of three deputy-chairpersons and a maximum of twelve other board members. Since 1 January 2006 the SCC Board consists of both Swedish and non-Swedish members – and presently the latter members form a majority. This genuinely international organization ensures that the SCC’s decisions and procedures comply with international best practices and that the SCC appointed arbitrators come from all over the world and possess relevant legal expertise, language skills and experience.
- 13 In SCC arbitration, the Board’s task is to make decisions in accordance with the provisions of the SCC Rules, inter alia deciding *prima facie* on the SCC’s jurisdiction, appointing arbitrators, removing arbitrators due to lack of impartiality and independence, fixing advance payments as regards the arbitration costs.² Such decisions are taken at the frequently held Board meetings. The Board has a quorum if two of its members are present.³ If votes are tied then the chairman has a casting vote.
- 14 The day-to-day case administration is handled by the Secretariat, which is led by a Secretary General, assisted by a Deputy Secretary General. The case management is processed by three divisions, each consisting of a legal counsel (case manager) and an assistant.

² Cf. Article 9.

³ Resolutions may be adopted by the chairman or deputy chairmen in urgent cases. Cf. Article 7 Attachment I to the SCC Rules.

2. Commencement of the Proceedings

Article 2 Request for arbitration

15

A Request for Arbitration shall include:

- (i) a statement of the names, addresses, telephone and facsimile numbers and e-mail addresses of the parties and their counsel;
- (ii) a summary of the dispute;
- (iii) a preliminary statement of the relief sought by the Claimant;
- (iv) a copy or description of the arbitration agreement or clause under which the dispute is to be settled;
- (v) comments on the number of arbitrators and the seat of arbitration; and
- (vi) if applicable, the name, address, telephone number, facsimile number and e-mail address of the arbitrator appointed by the Claimant.

Arbitration proceedings are initiated when the claimant submits to the SCC Secretariat a request for arbitration. A registration fee shall be paid at the same time of making such submission.⁴ The request for arbitration must contain sufficient address details to identify the parties and for the Secretariat to be able to forward the request for arbitration to the respondent.

The request for arbitration shall summarize the dispute. Briefly composed background information to the dispute is normally sufficient.

The type and complexity of the dispute dictates whether the arbitral tribunal should consist of one or three arbitrators (in the event that the parties have not already agreed on the number of arbitrators in their arbitration agreement)⁵ The nature of the case may also affect the level of the arbitral tribunal's and the SCC's compensation.

The request for relief shall be formulated separately from the circumstances asserted but only has to be preliminary. However, in the statement of claim a specific request for relief shall be stated.⁶ The provisional claim is however necessary in the request for arbitration since its value forms the basis of the amount of the advance on costs. So, if the claimant's claim is of a declaratory character, the Secretariat will request the Claimant to estimate the value of such claim. The Board then determines the advance on costs on the basis of such information provided and according to its assessment of the scope and type of dispute.

According to the wording, a description of the arbitration clause is sufficient, though most requests for arbitration include a copy of the entire business contract including the arbitration clause. It may be noted that further items of evidence and documents do not have to be submitted at this early stage of the proceedings.

If the parties have not agreed upon the number of arbitrators, the SCC may, in accordance with Article 12, decide whether the arbitral tribunal should consist of one or three arbitrators. Three arbitrators is usually the rule in SCC proceedings but it may sometimes be more appropriate to nominate a sole arbitrator. If the claimant wishes to advance arguments concerning the number of arbitrators then it should do so in the request for arbitration so that the respondent has an opportunity to

⁴ Cf. Article 3.

⁵ Cf. Article 13 (6).

⁶ Cf. Article 24 (1) (i).

agree to it or decline hereto. If a sole arbitrator shall decide the dispute then the parties are granted an opportunity to jointly nominate the arbitrator.⁷

- 22 The parties also have an opportunity to bring forward their opinions in relation to the seat of the proceedings. The seat is, however, often already set out in the arbitration agreement. If the parties choose Stockholm as seat the Swedish Arbitration Act is applied to the proceedings and any subsequent challenge proceedings. If the parties have not agreed on the seat of arbitration such decision is made by the SCC Board.⁸
- 23 Sometimes the claimant argues in the request for arbitration on what law the arbitral tribunal shall apply when deciding the subject matter. The law applicable is, however, not decided by the SCC Board but by the arbitral tribunal, given that the parties have not agreed on applicable law in their arbitration agreement. The same applies for the language for the proceedings.⁹
- 24 If the arbitral tribunal shall consist of three arbitrators the default rule is that each party appoints one arbitrator and the SCC Board appoints the third, presiding, arbitrator.¹⁰ Should the arbitral tribunal entail three arbitrators, the request for arbitration shall state details of whom the claimant appoints.

25 Article 3 Registration fee

(1) Upon filing the Request for Arbitration, the Claimant shall pay a Registration Fee. The amount of the Registration Fee shall be determined in accordance with the Schedule of Costs (Appendix III) in force on the date when the Request for Arbitration is filed.

(2) If the Registration Fee is not paid upon filing the Request for Arbitration, the Secretariat shall set a time period within which the Claimant shall pay the Registration Fee. If the Registration Fee is not paid within this time period, the Secretariat shall dismiss the Request for Arbitration.

- 26 A registration fee shall be paid at the same time as the request for arbitration is submitted to the SCC Secretariat. No deferral of the payment is possible. The registration fee is €1,500 exclusive of VAT.¹¹ Instructions on how the payment has to be made are to be found on the SCC website, www.sccinstitute.com.
- 27 The SCC confirms receipt of the request for arbitration and the payment of the registration fee. If no such payment is made the request for arbitration is dismissed.

28 Article 4 Commencement of arbitration

Arbitration is commenced on the date when the SCC receives the Request for Arbitration.

- 29 Arbitration proceedings are initiated by the request for arbitration being filed with the SCC Secretariat in accordance with § 2. If the request for arbitration is seriously defective, the Secretariat calls on the claimant to complete the application,

⁷ Cf. Article 13 (2).

⁸ Cf. Articles 9 (v) and 20.

⁹ Cf. Articles 21 and 22.

¹⁰ Cf. Article 13 (3).

¹¹ Cf. SCC table of costs, Attachment III to the SCC Rules, Article 1 (1).

in which case the arbitration proceedings start when the necessary completion is fulfilled and provided to the Secretariat.¹²

The timing of the commencement of the proceedings may be crucial for the question of whether the limitation of liability in time has been interrupted or whether legal action has been made according to statutory provisions or stipulations in the parties' contract.¹³

Article 5 Answer

31

(1) The Secretariat shall send a copy of the Request for Arbitration and the documents attached thereto to the Respondent. The Secretariat shall set a time period within which the Respondent shall submit an Answer to the SCC. The Answer shall include:

- (i) any objections concerning the existence, validity or applicability of the arbitration agreement; however, failure to raise any objections shall not preclude the Respondent from subsequently raising such objections at any time up to and including the submission of the Statement of Defence;
- (ii) an admission or denial of the relief sought in the Request for Arbitration;
- (iii) a preliminary statement of any counter claims or set-offs;
- (iv) comments on the number of arbitrators and the seat of arbitration; and
- (v) if applicable, the name, address, telephone number, facsimile number and e-mail address of the arbitrator appointed by the Respondent.

(2) The Secretariat shall send a copy of the Answer to the Claimant. The Claimant shall be given an opportunity to submit comments on the Answer.

(3) Failure by the Respondent to submit an Answer shall not prevent the arbitration from proceeding.

When the request for arbitration has been filed and the registration fee has been paid the SCC Secretariat passes the request for arbitration including its attachments on to the respondent. The Secretariat invites the respondent to submit comments on the request for arbitration. More detailed requirements regarding notices and communications in SCC arbitration are contained in § 8.¹⁴

The respondent is normally given two weeks to comment on the request for arbitration. Any time periods may, however, be extended or shortened if requested or otherwise be deemed appropriate by the SCC.¹⁵ Should no such comments be provided by the respondent the SCC sends a reminder letter with notice that the proceedings will continue with or without comments from the respondent.¹⁶

The respondent's answer shall contain all the details necessary for the SCC Board to be able to make any decisions required. If important items of information are missing, the SCC sends a request for further details.¹⁷

¹² Cf. Article 6.

¹³ Cf. Section 45, paragraph 1, of the Swedish Arbitration Act, SOU 1994:81 p. 135, Prop. 1998/99:35 p. 102 *et seq.*, Heuman p. 324, Lindskog p. 1135 *et seq.* and Kvarn/Olsson pp. 87 and 152 *et seq.*

¹⁴ The same requirements are applied by the arbitral tribunal's sending of documents (cf. Article 33).

¹⁵ Cf. Article 7.

¹⁶ Cf. Article 5 (3).

¹⁷ Cf. Article 6.

- 35 The respondent's comments should contain any objections to the SCC's and the arbitral tribunal's jurisdiction. It may be noted, however, failure to do so does not preclude the respondent to raise such objections in the statement of defence. If the respondent raises any jurisdictional objections in its answer, the SCC Board shall *prima facie* assess its competence. The case will be dismissed if the SCC manifestly lacks jurisdiction over the dispute.¹⁸
- 36 In most cases, however, the SCC finds itself competent to accept the case and refer such to the arbitral tribunal for further assessment of the jurisdictional objection in accordance with the principle of *Kompetenz-Kompetenz*.
- 37 Furthermore, the respondent shall present its position with regard to the claimant's relief sought, i.e. state whether it admits or rejects such claims. The respondent's answer should also contain provisional details covering any possible counterclaims or set-offs. Any such claims from the respondent are added to the claimant's claim and together they constitute the amount in dispute, which forms the bases for the compensation to the arbitral tribunal and the SCC.
- 38 In the same way as the claimant may, in its request for arbitration, propose the number of arbitrators and the seat of arbitration, the respondent may do the same in its answer. If the respondent is to appoint an arbitrator then information about the selected person shall be set out in the answer.
- 39 The respondent's answer is communicated to the claimant. It is a fundamental principle in the SCC case administration that the parties should take equal note of all briefs, documents and other material submitted to the SCC or to the arbitral tribunal.¹⁹
- 40 The important rule laid down in Article 5 (3), namely that arbitration proceedings may be continued even if the respondent fails to provide an answer, is a fundamental principle of arbitration law safeguarding the efficiency of the proceedings.²⁰
- 41 If the respondent does not get in touch with the Secretariat, the case manager will notify the arbitral tribunal of these circumstances whereupon the tribunal, as a general rule, writes to the respondent and encourages it to take part in the proceedings. Should, however, the respondent decide not to participate this decision does not constitute an impediment to further processing (i.e. *ex parte* proceedings are allowed under the SCC Rules).²¹

42 Article 6 Request for further details

The Board may request further details from either party regarding any of their written submissions to the SCC. If the Claimant fails to comply with a request for further details, the Board may dismiss the case. If the Respondent fails to comply with a request for further details regarding its counterclaim or set-off, the Board may dismiss the counterclaim or set-off. Failure by the Respondent to otherwise comply with a request for further details shall not prevent the arbitration from proceeding.

¹⁸ Cf. Article 10 (i).

¹⁹ Cf. Article 8 and 33 as well as Prop. 1998/99:35 p. 112 *et seq.*

²⁰ Cf. Section 24, paragraph 3 in the Swedish Arbitration Act and *Lindskog* p. 708 *et seq.*

²¹ Cf. Article 30.

If decisive information is missing in any of the parties' submissions, the Secretariat may request further details. If no such is submitted and if the comments of the parties are so incomplete that the SCC considers that it is not in a position to process the proceedings, the request for arbitration shall be wholly or partially dismissed. This is, however, extraordinary rare. Should the registration fee, the arbitration agreement or – if applicable – details of the appointed arbitrator be missing, then the SCC serves the respondent with the request for arbitration first after receiving such completion. 43

Article 7 Time periods 44

The Board may, on application by either party or on its own motion, extend any time period which has been set for a party to comply with a particular direction.

The Secretariat normally sets short periods of time. Any party may, however, apply for an extension and, if there are acceptable reasons for doing so, the SCC may grant such applications. If one party applies for an extension of more than a few days, the SCC seeks to obtain the opposing party's comments before approving or rejecting the application. 45

Article 8 Notices 46

(1) Any notice or other communication from the Secretariat or the Board shall be delivered to the last known address of the addressee.

(2) Any notice or other communication shall be delivered by courier or registered mail, facsimile transmission, e-mail or any other means of communication that provides a record of the sending thereof.

(3) A notice or communication sent in accordance with paragraph (2) shall be deemed to have been received by the addressee on the date it would normally have been received given the chosen means of communication.

Communications in SCC arbitration proceedings are normally conducted by e-mail. The requirement concerning communications as laid down in Article 8 also applies to the arbitral tribunal's communications.²² 47

From time to time respondents in SCC arbitrations tries to avoid service of the request for arbitration. Excessively strict provisions concerning notices would, therefore, lead to the prevention for the claimant to have its case heard. In order to evade this, the SCC has established that service of documents shall be regarded as having taken place if satisfactory measures have been made by the SCC to reach the respondent (or the claimant for that matter). 48

Under Article 8 the sending of documents must be made in a way that can be certified. This provision is inspired by the corresponding rule in the UNCITRAL Model Law²³ The Secretariat, however, are more careful than set out in the above article and usually sends the request for arbitration to the respondent by registered mail (in the case of a Swedish respondent) or by courier (in the case of a non- 49

²² Cf. Article 33.

²³ The UNCITRAL Model law has a similar provision in Article 3.

Swedish respondent) – i.e. in a way that provides an acknowledgement of the receipt of the documents.²⁴

50 **Article 9 Decisions by the Board**

When necessary the Board shall:

- (i) **decide whether the SCC manifestly lacks jurisdiction over the dispute pursuant to Article 10 (i);**
- (ii) **decide whether to consolidate cases pursuant to Article 11;**
- (iii) **decide the number of arbitrators pursuant to Article 12;**
- (iv) **make any appointment of arbitrators pursuant to Article 13;**
- (v) **decide the seat of arbitration pursuant to Article 20; and**
- (vi) **determine the Advance on Costs pursuant to Article 45.**

51 After the initial exchange of briefs as laid down in Article 2 and Article 5 is concluded the case is presented to the SCC Board.

52 The Board examines any jurisdictional objections on the basis of the documents submitted by the parties. No hearing on jurisdiction takes place before the Board. For the case to be dismissed at this stage it shall be established that the SCC manifestly lacks jurisdiction over the dispute.²⁵ If the dispute is passed on to the arbitral tribunal, and the respondent maintains its objection, the tribunal makes an in-depth examination of its jurisdiction in line with the internationally accepted principle of *Kompetenz-Kompetenz*. Usually further submissions and evidentiary documents are provided to the tribunal. If necessary, separate hearings on the question of jurisdiction may take place.

53 The most important task of an arbitration institution is ensuring that an arbitral tribunal is set up so that the dispute can be resolved. The manner of constitution of the tribunal is decided by the parties. Should no such agreement exist, or should either party fail to comply with the agreement, the SCC assists the parties.²⁶

54 The number of arbitrators is decided by the parties. In the absence of such decision the Board determines whether the arbitrators should be three or one. Three arbitrators is the general rule under the SCC Rules but a sole arbitrator may be appointed in minor and less complex cases.²⁷

55 Should the arbitral tribunal consist of three arbitrators each of the parties appoints one arbitrator and the SCC Board appoints the third arbitrator, who acts as the tribunal's chairperson.²⁸ Where the arbitral tribunal shall consist of a sole arbitrator the parties shall appoint such jointly. If they fail to do so the arbitrator is appointed by the Board.²⁹

²⁴ Dahlberg Kolga/Öhrström Proper Notification: A Crucial Element of Arbitral Proceedings, 27 *Journal of International Arbitration* 5, 2010.

²⁵ For an overview of *prima facie* decisions by the SCC, see Magnusson SAR 2000:2 p. 171 *et seq.* and Magnusson/Larsson SIAR 2004:2 p. 47 *et seq.* and Ramsjö/Strömberg SIAR 2009:2, p. 55.

²⁶ Cf. Article 12 and Article 13 (1).

²⁷ In this regard it may be noted that under the SCC Rules for Expedited Arbitration disputes are always decided by a sole arbitrator.

²⁸ Cf. Article 13 (3).

²⁹ Cf. Article 13 (2).

If the parties have not stipulated or otherwise agreed on the seat of arbitration, 56 the Board determines such issue.³⁰ The parties are expressly encouraged to give their opinion on the seat in their correspondence with the SCC.³¹ The seat for arbitration must not be confused with the place of hearings or deliberations. Under the SCC Rules it is allowed to conduct hearings at another location than the seat of arbitration.³²

Another important task of the Board is establishing the advance on costs, i.e. an 57 amount intended to cover the final arbitration costs (the arbitral tribunal's fee, the SCC's fee and any expenses of the tribunal or the SCC) which are based on the amount in dispute.³³ The advance on costs shall be paid to the SCC in order for the case to be referred to the tribunal.³⁴

Article 10 Dismissal

58

The Board shall dismiss a case, in whole or in part, if:

- (i) the SCC manifestly lacks jurisdiction over the dispute; or
- (ii) the Advance on Costs is not paid pursuant to Article 45.

The SCC dismisses a request for arbitration in exceptional cases only. The 59 grounds for dismissal are; (i) the advance on costs has not been paid, (ii) failure to comply with a request for further details under Article 6 or (iii) the SCC manifestly lacks jurisdiction.

The SCC undertakes only a summarized investigation on its jurisdiction over the 60 dispute. The SCC's assessment in this regard is of a *prima facie* character and no jurisdictional hearings take place. The decision on jurisdiction lies with the SCC Board. Only if it is obvious that the SCC does not possess the competence the request for arbitration, or a part of the case, is dismissed. It often suffices that the SCC is named in the clause and that the claimant asserts that the SCC has jurisdiction. It can be established from the SCC caseload that the threshold for allowing cases is low.³⁵

Consequently, the SCC often refers the case to the appointed arbitral tribunal, 61 which subsequently carries out a more precise analysis of its competence if the party maintains its jurisdictional objection. And it is, of course, possible for the arbitral tribunal to come to another conclusion than the SCC.

It may be noted that under the Swedish Arbitration Act it is the state courts that 62 have the final saying when it comes to the tribunal's jurisdiction. A party may bring an action to a court requesting a declaratory judgment rejecting the tribunal's jurisdiction or a party may challenge the arbitral award on the ground that the tribunal lacked jurisdiction.³⁶

³⁰ There is more on this in the comments on Article 20 (1).

³¹ Cf. Articles 2 (v) and 5 (1) (iv).

³² Cf. Article 20 (2).

³³ There is more on this in the comments on Article 45.

³⁴ Cf. Article 19.

³⁵ For an overview of *prima facie* decisions by the SCC, see *Magnusson SAR 2000:2 p. 171 et seq.* and *Magnusson/Larsson SIAR 2004:2 p. 47 et seq.*, *Ramsjö/Strömberg SIAR 2009:2, p. 55.* See comments on an SCC award covering the competence of *Capper* in *SIAR 2007:2 p. 235 et seq.* and comments on an objection to the competence in an SCC arbitration award, in the investment contract dispute (BIT), by *Wilson* in *SIAR 2006:3 p. 89 et seq.*

³⁶ Cf. Section 2 and 34 of the Swedish Arbitration Act.

- 63 Jurisdictional objections normally relate to the existence, validity or application of the arbitration agreement. Common objections in the SCC caseload are; the dispute does not fall within the scope of the arbitration agreement, the respondent (or the claimant) is not a party to the arbitration agreement, the signature on the contract has been falsified, one of the parties were unauthorized to sign the contract, lack of adequate settlement negotiations between the parties as set out in a two-tiered arbitration agreement or the dispute is the subject of *res judicata* or *lis pendens*.
- 64 The payment of the advance on costs is a prerequisite for the SCC to continue its case administration and refer the case to the arbitral tribunal. Sometimes the respondent (or claimant) omits to pay its portion of the advance amount. If so the claimant (or respondent) may choose to pay the opposing party's share of the advance on costs in order to keep the proceedings running. Then such party may request the arbitral tribunal to render a separate award on for reimbursement of the payment.³⁷ This opportunity was introduced in the 2007 SCC Rules and has since proven to be a useful tool for the parties to SCC arbitration.³⁸

65 **Article 11 Consolidation**

If arbitration is commenced concerning a legal relationship in respect of which an arbitration between the same parties is already pending under these Rules, the Board may, at the request of a party, decide to consolidate the new claims with the pending proceedings. Such decision may only be made after consulting the parties and the Arbitral Tribunal.

- 66 The chances to consolidate cases under the SCC Rules were improved in the 2007 SCC Rules. Before that the SCC could only consolidate arbitration cases if the parties consented hereto.
- 67 Consolidation against the will of one of the parties is, however, still fairly extraordinary in SCC proceedings. To consolidate cases they have to concern the same legal relationship, it has to be the same parties and the same set of arbitration rules shall apply. Further, the SCC will consult with the parties and the arbitral tribunal before making its decision.
- 68 So far it appears as if the SCC Board has been rather restrictive if one of the parties opposes to consolidation. When deciding whether or not to consolidate cases, attention should be paid to whether such action would cause inappropriate delay and costs and whether a consolidation might lead to problems in relation to the enforcement of the arbitral award.

3. Composition of the Arbitral Tribunal

69 **Article 12 Number of arbitrators**

The parties may agree on the number of arbitrators. Where the parties have not agreed on the number of arbitrators, the Arbitral Tribunal shall consist of three arbitrators, unless the Board, taking into account the complexity of the case,

³⁷ Cf. Article 45 (4).

³⁸ More on separate awards on costs in *Walters* SCC Practice: Separate Awards for Advance on Costs 1 January 2007–31 December 2011, published on the SCC website in 2012.

the amount in dispute or other circumstances, decides that the dispute is to be decided by a sole arbitrator.

In SCC proceedings three arbitrators are usually appointed if the parties have not decided otherwise.³⁹ The SCC Board may, however, if it deems it appropriate considering the circumstances of the dispute, appoint a sole arbitrator to decide the case. The Board may decide to appoint a sole arbitrator on its own motion but more frequently it does so after a request from one of the parties.⁴⁰

When deciding on the number of arbitrators the SCC Board carries out an overall assessment of the case, taking the degree of difficulty, the nature of the case and the amount in dispute into consideration. If the Board determines that a single arbitrator shall decide the dispute, then the parties have the opportunity to appoint such arbitrator jointly within 10 days.⁴¹

In addition it should be mentioned that according to the SCC Rules, more than three arbitrators may be appointed should the parties so wish. However, this is extraordinary rare.

Article 13 Appointment of arbitrators

(1) The parties may agree on a different procedure for appointment of the Arbitral Tribunal than as provided under this Article. In such cases, if the Arbitral Tribunal has not been appointed within the time period agreed by the parties or, where the parties have not agreed on a time period, within the time period set by the Board, the appointment shall be made pursuant to paragraphs (2)–(6)

(2) Where the Arbitral Tribunal is to consist of a sole arbitrator, the parties shall be given 10 days within which to jointly appoint the arbitrator. If the parties fail to make the appointment within this time period, the arbitrator shall be appointed by the Board.

(3) Where the Arbitral Tribunal is to consist of more than one arbitrator, each party shall appoint an equal number of arbitrators and the Chairperson shall be appointed by the Board. Where a party fails to appoint arbitrator(s) within the stipulated time period, the Board shall make the appointment.

(4) Where there are multiple Claimants or Respondents and the Arbitral Tribunal is to consist of more than one arbitrator, the multiple Claimants, jointly, and the multiple Respondents, jointly, shall appoint an equal number of arbitrators. If either side fails to make such joint appointment, the Board shall appoint the entire Arbitral Tribunal.

(5) If the parties are of different nationalities, the sole arbitrator or the Chairperson of the Arbitral Tribunal shall be of a different nationality than the parties, unless the parties have agreed otherwise or unless otherwise deemed appropriate by the Board.

(6) When appointing arbitrators, the Board shall consider the nature and circumstances of the dispute, the applicable law, the seat and language of the arbitration and the nationality of the parties.

³⁹ The same applies under Article 10 of the UNCITRAL Model law.

⁴⁰ Sometimes the Secretariat recommends the parties to agree on a sole arbitrator. This may occur, for instance, if the amount in dispute is rather low or if the case is of a less complex nature.

⁴¹ Cf. Article 13 (2).

- 74 As previously pointed out the parties have the opportunity to specify how the arbitrators are to be appointed. The party autonomy governs the appointment procedure – as well as many other features in the SCC Rules.⁴² A new feature of the 2007 SCC Rules is that the parties expressly may jointly appoint a sole arbitrator to decide their case. They shall jointly appoint him or her within 10 days,⁴³ otherwise the SCC Board will appoint the arbitrator. The time period may be extended if the parties are in agreement that they require more time to appoint the arbitrator.
- 75 If the arbitral tribunal shall be a three member panel, each party appoints one arbitrator and the SCC Board appoints the third, who becomes the chair person of the tribunal. In the request for arbitration the claimant shall specify whom it has appointed as arbitrator⁴⁴ and in its answer the respondent shall state whom it appoints.⁴⁵ The Secretariat will ask for additional information if such appointment statements are missing in the parties' briefs.⁴⁶
- 76 Sometimes the respondent attempts to obstruct the proceedings. It may even be so that the respondent purposely fails to participate in the proceedings (*ex parte*) throughout the entire arbitral procedure. A counterparty, which hinders the proceedings, must not deprive the other party of the right to have its case heard. If the respondent does not appoint an arbitrator, despite being reminded by the Secretariat to do so, that does not constitute an impediment to further processing of the proceedings.⁴⁷ The Board then appoints an arbitrator on behalf of the respondent.
- 77 When more than two parties are involved in a dispute (multi party) or the dispute emanates from more than one contract (multi contract) both consolidation issues, which have been dealt with above,⁴⁸ and issues as regards the constitution of the tribunal may arise. If the arbitral tribunal shall consist of a single arbitrator, then he or she is appointed in the normal way.⁴⁹ If, however, the arbitral tribunal shall consist of three arbitrators, then the parties may either agree that the SCC appoints all of them or they may apply § 13 (4). Such provision states that in cases there are several parties on the claimant or on the defendant sides, these shall jointly appoint an equal number of arbitrators. If the parties on one of the sides cannot agree or fail to jointly appoint their arbitrator, the Board appoints the entire tribunal (i.e. including the counterparty's arbitrator) in order to keep the balance and equal treatment as between the parties.⁵⁰
- 78 If the parties are from different countries, then the chairperson or the sole arbitrator shall be from a third country (i.e. not from any of the parties' home

⁴² There are, however, limitations to the parties' freedom. Arbitration clauses containing stipulations that the arbitral tribunal should be appointed in a way that is very disadvantaged to one of the parties may be regarded as invalid. Cf. NJA 1974 p.573.

⁴³ In the 2007 SCC Rules the time period for the joint appointment was 30 days but in 2010 such was reduced to 10 days in order to speed up the procedure.

⁴⁴ Cf. Article 2 (vi).

⁴⁵ Cf. Article 5 (1) (v).

⁴⁶ Cf. Article 6.

⁴⁷ Cf. Article 5 (3) and Article 30.

⁴⁸ Cf. Article 11.

⁴⁹ Cf. Article 13 (2).

⁵⁰ The provision has its origin in the French *Dutco* decision (*Siemens v. Dutco* from the *Cour de Cassation*, 1992) establishing that the fundamental principle of equal treatment must also apply to the appointment of arbitrators in multi-party proceedings.

jurisdictions). All arbitrators must be impartial and independent. Nonetheless, as the presiding arbitrator plays a leading part in the arbitration proceedings, it is of the utmost importance that he or she is completely neutral in relation to the parties and their positions.

The SCC Board may, however, deviate from this third country principle if there are particular reasons for doing so. In such cases the Secretariat normally gets in touch with the parties and asks them whether they are in agreement with the chairperson (or the sole arbitrator) being from the same country as one of the parties. If one of the parties objects then the Board follows the main rule and appoints an individual from a third country.

The SCC appoints arbitrators of Swedish or foreign nationality. Needless to say, the arbitrators must have far-reaching understanding of business, trade and commerce. Beyond that, their appropriateness is judged against the circumstances of the individual case. The following conditions, among others, are taken into account:

- The subject matter and type of dispute
- The applicable law
- The nationality of the parties and any co-arbitrators
- The seat of arbitration
- The language to be used in the proceedings
- Any party-agreed competence requirements
- Whether the arbitral tribunal is intended to consist of one arbitrator sitting alone
- Possible prejudicial situations, and
- The business or industry in which the parties operate
- Whether one of the parties is a country or a public entity

Article 14 Impartiality and independence

81

(1) Every arbitrator must be impartial and independent.

(2) Before being appointed as arbitrator, a person shall disclose any circumstances that may give rise to justifiable doubts as to his/her impartiality or independence. If the person is appointed as arbitrator, he/she shall submit to the Secretariat a signed statement of impartiality and independence disclosing any circumstances which may give rise to justifiable doubts as to that person's impartiality or independence. The Secretariat shall send a copy of the statement of impartiality and independence to the parties and the other arbitrators.

(3) An arbitrator shall immediately inform the parties and the other arbitrators in writing where any circumstances referred to in paragraph (2) arise during the course of the arbitration.

All arbitrators must be neutral. Hence, the requirements for impartiality and independence apply equally in relation to the chairperson (or the sole arbitrator) and in relation to the arbitrators appointed by the parties. Moreover, the arbitration agreement may also contain provisions requiring the arbitrator to have specific qualifications (such as a specific training or specific language knowledge). Failure to meet these demands leads to the removal.

In addition to impartiality and independence, the SCC does not set any special requirements for arbitrators. Hence, Swedish and foreign citizens may be arbitrators under the SCC Rules. The SCC has no list or panel of arbitrators that the parties

have to select their arbitrator from. This gives the parties – and the SCC Board – full freedom to appoint the arbitrator they find appropriate given the circumstances of the case.

- 84 Naturally, the SCC considers conflicts of interest to be most undesirable and acts with the utmost strictness in the appointment process.⁵¹ It is an internationally acknowledged principle that arbitrators must be completely impartial and independent in relation to the parties.⁵²
- 85 There must therefore exist no circumstances giving rise to question of confidence in the impartiality or independence of the arbitrator, i.e. there must not exist an external matter of fact of any kind as a result of which an arbitrator's capacity or will to be objective is brought into doubt. If any such circumstance does exist then it has a disqualifying effect and the arbitrator is prejudiced. That the arbitrator adopts *de facto* an impartial manner is thus of no consequence.⁵³ The assessment is purely objective.
- 86 Arbitrators have a far-reaching obligation to disclose information. This obligation applies throughout the entire proceedings.⁵⁴ When a party informs the SCC Secretariat that an arbitrator has been nominated, a confirmation form is then sent to him or her. The same applies for arbitrators nominated by the SCC. On the form the arbitrator shall certify that he or she is impartial and independent and disclose any circumstances that might be capable of diminishing confidence in his or her impartiality and independence. The arbitrator must sign the form and deliver it to the Secretariat, which sends a copy to the parties and to the other arbitrators.
- 87 No direct sanction has been provided for against arbitrators who fail to supply the necessary information.⁵⁵ But if it is doubtful whether a particular circumstance constitutes a lack of impartiality or independence, then the fact that the arbitrator has kept silent about it may be the factor leading to it being affirmed that it does just that.⁵⁶

88 Article 15 Challenge to arbitrators

(1) A party may challenge any arbitrator if circumstances exist which give rise to justifiable doubts as to the arbitrator's impartiality or independence or if he/she does not possess qualifications agreed by the parties. A party may challenge an arbitrator whom it has appointed or in whose appointment it has participated, only for reasons of which it becomes aware after the appointment was made.

⁵¹ Cf. *Öhrström SAR 2002:1 Page 35 et seq.*, *Magnusson/Larsson SIAR 2004:2 p.47 et seq.* and *Jung SIAR 2008:1 p.1 et seq.*

⁵² Cf. Section 8 in the Swedish Arbitration Act, Prop. 1998/99:35 p.82 *et seq.*, *Lindskog p. 451 et seq.*, IBA Guidelines on Conflicts of Interest, Article 10.1 of the UNCITRAL rules and the article by *Dougier* on the neutrality of arbitrators in *SIAR 2004:2 p. 1 et seq.*

⁵³ Cf. *Lindskog p. 447 et seq.*

⁵⁴ Cf. Section 9 in the Swedish Arbitration Act, Prop. 1998/99:35 p. 85 *et seq.* and *Madsen p. 126 et seq.* Requirements covering the duty to disclose information are to be found in Article 12 (1) of the UNCITRAL Model law and in Article 9 of the UNCITRAL rules.

⁵⁵ In this connection it must, however, be noted that under Article 47 it is incumbent on arbitrators to act in the spirit of the provisions and to take whatever measures are appropriate to ensure that the awards handed down are enforceable.

⁵⁶ Further comment on the importance of information omitted is to be found in *SOU 1994:81 p. 266* and Prop. 1998/99:35 Page 219, *Heuman p. 232* and *Lindskog p. 471 et seq.*

(2) A challenge to an arbitrator shall be made by submitting a written statement to the Secretariat setting forth the reasons for the challenge within 15 days from when the circumstances giving rise to the challenge became known to the party. Failure by a party to challenge an arbitrator within the stipulated time period constitutes a waiver of the right to make the challenge.

(3) The Secretariat shall notify the parties and the arbitrators of the challenge and give them an opportunity to submit comments on the challenge.

(4) If the other party agrees to the challenge, the arbitrator shall resign. In all other cases, the Board shall make the final decision on the challenge.

A challenge to an arbitrator usually relates to circumstances that are capable of unsettling confidence in an arbitrator's impartiality or independence. A challenge may, however, also relate to the fact of the arbitrator is not in dispose of the qualifications on which the parties have agreed. Examples of such qualifications that the parties have agreed would be that the arbitrator must be fluent in a specific language or must possess particular specialist knowledge.

Any party that considers an arbitrator to be biased must bring a challenge within 15 days, calculated from the day on which the party learnt of the circumstance that it regards as the reason for the lack of impartiality or independence. The opportunity to have an arbitrator removed is lost if the challenge is not brought in the time allowed.⁵⁷ A challenge to an arbitrator must be expressed in writing and shall set forth the reasons for the challenge. It shall be directed to the Secretariat.

When a challenge to an arbitrator comes into the Secretariat, such is passed on to the opposing party and the arbitrators. All have a chance to submit comments on the challenge within a week. Sometimes further correspondence takes place as between the parties, the arbitrators and the Secretariat.

The SCC Board decides on challenges to arbitrators. Such decisions are final. Assessment is made on the basis of the written statements made by the parties and arbitrators, if any. No oral hearing takes place. Apart from considering the SCC Rules and practice the Board is also guided by *lex arbitri*, (i.e. the applicable Arbitration Act), by the IBA Guidelines on Conflicts of Interest, by international best practice and doctrine.⁵⁸ The SCC Board, as a general rule, does not provide reasons for its decision.

The arbitral tribunal may continue the proceedings irrespective of a pending challenge to an arbitrator.⁵⁹ If a party learns of some circumstance that gives rise to justifiable doubts as to an arbitrator's impartiality and independence only after the arbitral award has been rendered, then the award may be set aside in subsequent challenge proceedings in the state courts.⁶⁰

Article 16 Release from appointment

94

(1) The Board shall release an arbitrator from appointment where:

(i) the Board accepts the resignation of an arbitrator;

⁵⁷ The same period of time applies under Article 11.1 of the UNCITRAL rules.

⁵⁸ Cf. *Öhrström SAR 2002:1 p. 35 et seq.*, *Magnusson/Larsson SIAR 2004:2 p. 47 et seq.* and *Jung SIAR 2008:1 p.1 et seq.*

⁵⁹ Cf. Section 10, paragraph 3 in the Swedish Arbitration Act.

⁶⁰ Cf. Section 34, item 5 in the Swedish Arbitration Act.

- (ii) a challenge to the arbitrator under Article 15 is sustained; or
- (iii) the arbitrator is otherwise prevented from fulfilling his/her duties or fails to perform his/her functions in an adequate manner.

(2) Before the Board releases an arbitrator, the Secretariat may give the parties and the arbitrators an opportunity to submit comments.

95 Whether an arbitrator in any SCC proceedings has to be released from his or her appointment, is determined the SCC Board. The above provision encompasses all cases in which the SCC decides on the removal of arbitrators. The most frequent reason for arbitrators being released is that the Board confirms a party's challenge to an arbitrator. If the arbitrator released was originally appointed by the Board the Board appoints a new arbitrator. If, however, the arbitrator was appointed by one of the parties then that party usually nominates a new arbitrator. The same applies if the arbitrator himself or herself chooses to withdraw due to the challenge action.⁶¹

96 If an arbitrator is unable or unwilling to carry out his or her task, then the Board can displace him or her. The purpose of this provision is to guarantee efficient and fair arbitral proceedings and to hinder obstruction.

97 Article 17 Replacement of arbitrators

(1) The Board shall appoint a new arbitrator where an arbitrator has been released from his/her appointment pursuant to Article 16, or where an arbitrator has died. If the arbitrator being replaced was appointed by a party, that party shall appoint the new arbitrator, unless otherwise deemed appropriate by the Board.

(2) Where the Arbitral Tribunal consists of three or more arbitrators, the Board may decide that the remaining arbitrators shall proceed with the arbitration. In making its decision, the Board shall take into account the stage of the arbitration and other relevant circumstances. Before making such decision, the parties and the arbitrators shall be given an opportunity to submit comment.

(3) Where an arbitrator has been replaced, the newly composed Arbitral Tribunal shall decide whether and to what extent the proceedings are to be repeated.

98 If an arbitrator has been released from his or her appointment or has died then a new one is usually appointed. The arbitral tribunal decides whether, and if so how, the proceedings have to be repeated. If the arbitrator was nominated by the SCC then the Board appoints the new one. If an arbitrator appointed by a party has to be replaced then the party that appointed the original arbitrator normally appoints the new one. The Board only intervenes if there are reasons against the party itself taking part in the nomination. That might be the case, for instance, if the party had originally appointed an arbitrator, who clearly was biased and if there is reason to assume that the party would again nominate an arbitrator who is not impartial and independent.

99 It may be noted, that there is the opportunity for the remaining arbitrators to continue the proceedings alone in what is known as a truncated tribunal.⁶² This

⁶¹ Cf. Article 17 (1).

⁶² Cf. SIAR 2007:2 p. 211 *et seq.*, where there are comments by *Giovannini* on a Swedish arbitration award that was announced by a truncated tribunal.

avoids that additional time and costs are spent on repeating the process due to a new member of the tribunal. Truncated tribunals are, though, very rare but may appear if the arbitral award is to be rendered in short time. The Board decides whether the two arbitrators shall proceed with the arbitration after consultation with the arbitrators and the parties.

4. The Proceedings Before the Arbitral Tribunal

Article 18 Referral to the Arbitral Tribunal 100

When the Arbitral Tribunal has been appointed and the Advance on Costs has been paid, the Secretariat shall refer the case to the Arbitral Tribunal.

When the arbitral tribunal is appointed and the advance on costs has been paid, 101 the case is referred by the Secretariat to the tribunal which thereafter, in principle, takes over the management of the case.⁶³ Specific decisions, however, continue to be the responsibility of the SCC (e.g. extension of time for rendering the award). The arbitral tribunal is also called upon to get in touch with the Secretariat if the amount of the advance on costs should be increased (or decreased) due to the parties adjustments of their claims.

The timing of the referral is important as the time allowed for rendering the 102 arbitral award begins with the referral day.⁶⁴ The arbitral tribunal shall render the award within six months from the referral of the case.

In connection with the referral, the Secretariat sends the arbitrators all docu- 103 ments relating to the case – i.e. submissions from the parties as well as any attachments and further correspondence as between the Secretariat and the parties. Also the letter including the SCC Board’s decisions is provided to the tribunal.

Article 19 Conduct of the arbitration 104

(1) Subject to these Rules and any agreement between the parties, the Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate.

(2) In all cases, the Arbitral Tribunal shall conduct the arbitration in an impartial, practical and expeditious manner, giving each party an equal and reasonable opportunity to present its case.

The SCC Rules offer a framework for the contentious proceedings. The above 105 article contains overriding guidelines for the tribunal’s conduct of the case⁶⁵, but detailed provisions as regards the filing of submission, evidence procedure, hearings etc are agreed upon by the tribunal and the parties.

The arbitral tribunal must at all times respect the agreements as set out in the 106 parties’ arbitration agreement or at a later stage – this accord with the fundamental principle of party autonomy. The arbitral award may otherwise be set aside due to excess of mandate or procedural error on behalf of the tribunal.⁶⁶ The tribunal must, of course, also take the requirements of the SCC Rules and the applicable

⁶³ SCC has nothing equivalent to the ICCs Terms of Reference.

⁶⁴ Cf. Article 37.

⁶⁵ See Article 19 for the corresponding provision in the UNCITRAL Model law.

⁶⁶ Cf. Section 34 in the Swedish Arbitration Act.

arbitration act (*lex arbitri*) into consideration. Moreover, the tribunal has a duty to take all appropriate measures to ensure the recognition and enforceability of the arbitral award.⁶⁷ There is a separate provision covering the arbitrators' confidentiality.⁶⁸

- 107 The SCC Rules set forth that the arbitral tribunal shall make sure that the dispute is dealt with impartially, expediently and swiftly. The tribunal shall conduct the proceedings appropriately and cost-effectively. To promote the expediency of the proceedings an arbitral tribunal consisting of several arbitrators shall have a chairperson⁶⁹, who initiates the drafting of a time schedule for the proceedings, leads the hearings and the tribunal's meetings. The chairperson may also take specific decisions regarding the procedure alone.⁷⁰
- 108 It is important that the arbitral tribunal does everything in its power to advance the proceedings and that the schedule is maintained without jeopardizing the quality and legal certainty. How rapidly a dispute can be processed of course depends on the type of dispute and its degree of difficulty and scope; the starting point, however, is that the proceedings shall be concluded within six months.⁷¹
- 109 The arbitral tribunal must not treat any of the parties preferentially. This is an imperative of the fundamental principle of due process. Both parties shall have the same opportunities to present their cases and shall have the same right to be heard. The party-appointed arbitrator must in no way act as representatives of the party that has appointed him or her.⁷²

110 Article 20 Seat of arbitration

(1) Unless agreed upon by the parties, the Board shall decide the seat of arbitration.

(2) The Arbitral Tribunal may, after consultation with the parties, conduct hearings at any place which it considers appropriate. The Arbitral Tribunal may meet and deliberate at any place which it considers appropriate. If any hearing, meeting, or deliberation is held elsewhere than at the seat of arbitration, the arbitration shall be deemed to have taken place at the seat of arbitration.

(3) The award shall be deemed to have been made at the seat of arbitration.

- 111 The arbitral award shall contain details of the seat of the arbitration.⁷³ The seat is of legal importance and does not have to correspond to the geographical venue at which the hearing or the deliberations of the arbitral tribunal took place. Neither is it of any legal importance where the arbitral award is signed. Instead the seat determines:

– the nationality of the arbitral award,

⁶⁷ Cf. General clause in Article 47.

⁶⁸ Cf. Article 46.

⁶⁹ Cf. Article 13 (3) and Prop. 1998/99:35 Page 111.

⁷⁰ Cf. Article 35 (2).

⁷¹ Cf. Article 37.

⁷² Cf. SOU 1994:81 Pages 116 and 217, Prop. 1998/99:35 Pages 83 and 217, Lindskog Page 394 *et seq.* and Page 643, Schöldström SvJT 2000 Page 865 *et seq.*

⁷³ Cf. Article 36 (2). The same applies under Section 31 of the Swedish Arbitration Act.

- the law to be applied to the arbitration agreement and to the arbitral proceedings⁷⁴,
- the competence of national courts in case of a subsequent challenge of the arbitral award, and
- the competence of national courts for the support in taking of evidence.

First and foremost the parties stipulate the seat of the arbitration. The parties 112 may agree on the seat in the arbitration agreement or at some later stage (for instance, in their correspondence via the Secretariat). If the parties cannot agree then the SCC Board determines the seat of arbitration under § 9 (iv) of the SCC Rules.

When making such decision the Board, among other things, takes into con- 113 sideration the residence(s) of the parties, the residence(s) of the arbitrators, practical aspects, cost-effectiveness and legitimate expectations of the parties when drafting the arbitration agreement. One may often assume that the parties in international proceedings, by choosing the SCC Rules, intended that the dispute should be decided in Stockholm.

As mentioned above, it is possible to conduct oral hearings, to have meetings or 114 deliberations at some place other than the seat of arbitration.⁷⁵ This may sometimes be preferred for practical reasons and cost-effectiveness. It may be noted, that consultation with the parties must take place prior to the arbitrators deciding to conduct any hearing at some other location than the seat of arbitration.

Article 21 Language

115

(1) Unless agreed upon by the parties, the Arbitral Tribunal shall determine the language(s) of the arbitration. In so determining, the Arbitral Tribunal shall have due regard to all relevant circumstances and shall give the parties an opportunity to submit comments.

(2) The Arbitral Tribunal may request that any documents submitted in languages other than the language(s) of the arbitration be accompanied by a translation into the language(s) of the arbitration.

If the parties are not in agreement, then the arbitral tribunal (i.e. not the SCC) 116 decides on the language of the arbitral proceedings on the basis of the language used as between the parties throughout their business co-operation, the nationalities of the parties, the language of the contract and the arbitration clause etc.⁷⁶

The SCC Secretariat's case management is only carried out in either Swedish, 117 English, French, German or Russian. So it may happen that the Secretariat handles proceedings in one language but that the arbitral tribunal later decides on the use of some other language for the continuing proceedings after the referral.

Article 22 Applicable law

118

(1) The Arbitral Tribunal shall decide the merits of the dispute on the basis of the law(s) or rules of law agreed upon by the parties. In the absence of such

⁷⁴ Which should not be confused with the substantive law applicable to the real dispute under Article 22.

⁷⁵ See NJA 2010 p. 508.

⁷⁶ Cf. Article 22 in the UNCITRAL Model law and Article 17 of the UNCITRAL rules.

agreement, the Arbitral Tribunal shall apply the law or rules of law, whichever it considers to be most appropriate.

(2) Any designation made by the parties of the law of a given state shall be deemed to refer to the substantive law of that state and not to its conflict of laws rules.

(3) The Arbitral Tribunal shall decide the dispute *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.

- 119 When discussing the applicable law, one must distinguish between the following:
- (i) the law to be applied to the merits of the case,
 - (ii) the law to be applied to the arbitration agreement⁷⁷, and
 - (iii) the law to be applied to the arbitral proceedings (*lex arbitri*).
- 120 Article 22 of the SCC Rules relates only to point (i) above, i.e. which national legislation shall be applied by the arbitral tribunal when deciding the subject matter.⁷⁸
- 121 It is customary internationally that cross-border business contracts stipulate the law to be applied.⁷⁹ If arbitrators, contrary to the agreement between the parties, have applied the laws of some other country, the arbitral award may be set aside in subsequent challenge proceedings before the state courts due to excess of mandate.⁸⁰
- 122 If the parties are unable to agree on the applicable law then the arbitral tribunal decides on the law or the rules of law that it considers the most suitable. The tribunal should endeavor to find the legal provisions that are most closely connected to the dispute.⁸¹ Several different circumstances are taken into account here, including the residence(s) of the parties, the place and content of the contract and the seat of arbitration.
- 123 The arbitral tribunal may only judge according to fairness if the parties have granted the arbitral tribunal the authority to do that.⁸² This is rarely the case.

124 Article 23 Provisional timetable

After the referral of the case to the Arbitral Tribunal, the Arbitral Tribunal shall promptly consult with the parties with a view to establishing a provisional timetable for the conduct of the arbitration. The Arbitral Tribunal shall send a copy of the provisional timetable to the parties and to the Secretariat.

- 125 The arbitral proceedings must be planned in order to ensure the process is effectively executed. The chairperson of the arbitral tribunal has a duty to take particular responsibility for this. As soon as the case has been referred to the

⁷⁷ Cf. Section 48 in the Swedish Arbitration Act.

⁷⁸ There are corresponding provisions in Article 33.1 of the UNCITRAL rules.

⁷⁹ Cf. Article 28.1 of the UNCITRAL Model law.

⁸⁰ Cf. Section 34 §, item 2 in the Swedish Arbitration Act. Cf. Article on when the arbitral tribunal may deviate from the agreement of the parties on the law to be applied, *Cordero Moss* SIAR 2005:1 p. *et seq.*

⁸¹ Cf. The Convention of Rome, Article 4, Prop. 1998/99:35 pp. 122*et seq.* and 194 *et seq.*, *Heuman* p. 692 *et seq.*, *Lindskog* p. 1184 *et seq.*, *Hobér* Yearbook of the Arbitration Institute of the Stockholm Chamber of Commerce, 1994, p. 7 *et seq.* and *Möller* SAR 1999:1 p. 57 *et seq.* Cf. also comments on SCC arbitration awards covering the the law to be applied by *Schöldström* in SIAR 2007:1 p. 155 *et seq.* and *Capper* in SIAR 2007:2 p. 235 *et seq.*

⁸² Cf. SOU 1994:81 Page 153, Prop. 1998/99:35 p. 123 and *Heuman* p. 495.

tribunal, a provisional timetable shall be drawn up in consultation with the parties. The Secretariat shall receive a copy hereof. The timetable shall, *inter alia*, contain the following information:

- Dates for submitting briefs (statement of claim, statement of defence and further correspondence)⁸³
- Day(s) for the hearing⁸⁴ and
- Day for rendering the arbitral award.⁸⁵

Article 24 Written submissions

126

(1) The Claimant shall, within the period of time determined by the Arbitral Tribunal, submit a Statement of Claim which shall include, unless previously submitted:

- (i) the specific relief sought;
- (ii) the material circumstances on which the Claimant relies; and
- (iii) the documents on which the Claimant relies.

(2) The Respondent shall, within the period of time determined by the Arbitral Tribunal, submit a Statement of Defence which shall include, unless previously submitted:

- (i) any objections concerning the existence, validity or applicability of the arbitration agreement;
- (ii) a statement whether, and to what extent, the Respondent admits or denies the relief sought by the Claimant;
- (iii) the material circumstances on which the Respondent relies;
- (iv) any counterclaim or set-off and the grounds on which it is based; and
- (v) the documents on which the Respondent relies.

(3) The Arbitral Tribunal may order the parties to submit additional written submissions.

In consultation with the parties the arbitral tribunal determines the date on 127 which the statement of claim has to be submitted. In the request for arbitration a preliminary request for relief was sufficient but in the statement of claim the request for relief must be specifically set forth.

The claims may, on certain conditions, be changed in the course of the proceed- 128 ings.⁸⁶ Then the SCC will recalculate the advance on costs based on the new claims and, if increased amount on dispute, may request the parties to pay additional advance.

The facts of the matter being asserted by the claimant in support of its claim shall 129 be included in the statement of claim and any written evidence shall be attached to the statement of claim.

In the same way, the arbitral tribunal decides when the statement of defence shall 130 be submitted. The respondent shall comment on the claimant's statement of claim (i.e. whether it rejects or admits the claimant's claim). Furthermore, any counterclaim, set-off or jurisdictional objection shall be put forth in the statement of

⁸³ Cf. Article 24.

⁸⁴ Cf. Article 27.

⁸⁵ Cf. Articles 36 and 37.

⁸⁶ Cf. Article 25 with reference to change in the statement of claim.

defence.⁸⁷ If the arbitral tribunal considers it necessary it may call upon the parties to submit further written statements.

- 131 In the letter accompanying the referral of the case to the arbitral tribunal, the tribunal is called upon to send copies of the statement of claim and statement of defence to the SCC Secretariat.

132 **Article 25 Amendments**

At any time prior to the close of proceedings pursuant to Article 34, a party may amend or supplement its claim, counterclaim, defence or set-off provided its case, as amended or supplemented, is still comprised by the arbitration agreement, unless the Arbitral Tribunal considers it inappropriate to allow such amendment or supplement having regard to the delay in making it, the prejudice to the other party or any other circumstances.

- 133 The claimant and the respondent have the opportunity to amend their claim, defence, counterclaim or set off in the course of the proceedings.⁸⁸ The opportunity to bring forward new claims, to change existing ones and to assert new legal grounds refer to minor adjustment to a claim already presented as well as to enlargement of the dispute by a further claim. A party is also entitled to amend its claim by withdrawal or reduction.

- 134 As already mentioned, the SCC has nothing equivalent to the ICC's "Terms of Reference".⁸⁹ But anyhow there is a limit in this respect of when it is too late, or inappropriate for any other reason, for amendments. If the arbitral proceedings have already been declared closed in accordance with Article 34 then amendments are normally no longer allowed. The proceedings are declared closed by the arbitral tribunal when the parties have had the opportunity to present their arguments to an appropriate extent.⁹⁰

- 135 An absolute requirement for amendments is that the claim, counterclaim etc still is subject to the arbitration agreement after the amendment. Furthermore, the arbitral tribunal should not consider the amendment to be inappropriate. In doing such assessment the tribunal shall consider the timing of the amendment as well as any delay and additional costs caused by the amendment.⁹¹

- 136 The respondent must, of course, have a reasonable opportunity to react to the amendment – i.e. defend itself against any new assertions and claims. If a party is disadvantaged by an amendment brought relatively late in the proceedings the arbitral tribunal may take this into consideration in its cost allocation decision.⁹²

137 **Article 26 Evidence**

(1) The admissibility, relevance, materiality and weight of evidence shall be for the Arbitral Tribunal to determine.

⁸⁷ Cf. Article 5 (1) (i) and Article 31.

⁸⁸ Cf. SOU 1994:81 pp. 140 and 277, Prop. 1998/99:35 pp. 108 and 227, *Heuman* p. 424, *Lindskog* p. 684 and *Olsson/Kvart* p. 105.

⁸⁹ Cf. Article 19 of the ICC rules. See also Articles 18 and 20 of the UNCITRAL rules.

⁹⁰ Cf. Article 19 (2).

⁹¹ Cf. UNCITRAL Model law Article 23 (2).

⁹² Cf. Article 43 (5) and Prop. 1998/99:35 p.108.

(2) The Arbitral Tribunal may order a party to identify the documentary evidence it intends to rely on and specify the circumstances intended to be proved by such evidence.

(3) At the request of a party, the Arbitral Tribunal may order a party to produce any documents or other evidence which may be relevant to the outcome of the case.

It is up to the arbitral tribunal to examine the value of the evidence presented by the parties and to weigh the pieces of evidence against each other. In cross-border cases involving parties from various legal cultures, it can be beneficial to apply the IBA Rules on the Taking of Evidence.

The parties stipulate the evidence procedure. This right of the parties is, however, restricted by the arbitral tribunal's right to dismiss evidence that has been presented to it.⁹³ Dismissal is an option, for instance, if the piece of evidence is of no significance to the dispute or if a dismissal is justified by the point in time at which the evidence it is presented.⁹⁴ If the arbitral tribunal has unjustifiably dismissed a piece of evidence then the arbitral award may be set aside in subsequent challenge proceedings.⁹⁵

The arbitral tribunal may not accept any oath or assurance of truth. Neither may it impose any fines or apply other coercive measures to procure an item of evidence sought.⁹⁶ On the request of a party, the arbitral tribunal may therefore allow that the hearing of evidence be undertaken before a state court.⁹⁷

The third paragraph deals with the presentation. The arbitral tribunal may call upon a party to present a document or some other evidence that it regards as relevant to the case. The tribunal does not, however, have the opportunity to obtain the presentation of such evidence by compulsion. If a party refuses to present a document voluntarily, the party that has demanded its presentation may, after asking the tribunal for permission, apply to a court for a decision to present it.⁹⁸ Swedish law has a relatively restrictive attitude to requests for production of documents as compared to the Common Law approach.⁹⁹

Article 27 Hearings

142

(1) A hearing shall be held if requested by a party, or if deemed appropriate by the Arbitral Tribunal.

(2) The Arbitral Tribunal shall, in consultation with the parties, determine the date, time and location of any hearing and shall provide the parties with reasonable notice thereof.

⁹³ Cf. *Heuman* p. 439 *et seq.* and *Madsen* p. 219 *et seq.*

⁹⁴ Cf. Comments by *Ramberg* and *Ping* on the SCC arbitration award covering new evidence in the hearing in SIAR 2004:2 p. 191 *et seq.*

⁹⁵ Cf. Section 34, paragraph 1, item 6 in the Swedish Arbitration Act.

⁹⁶ Cf. Section 25, paragraph 3 in the Swedish Arbitration Act, Prop. 1998/99:35 p. 116 *et seq.*, *Heuman* p. 468 *et seq.* and *Madsen* p. 222 *et seq.*

⁹⁷ Cf. Section 26 in the Swedish Arbitration Act and *Madsen* p. 229 *et seq.* For more on the acceptance of evidence in international arbitration proceedings, see *Alvarez and Mills International Arbitration Court Decisions*, p. 23 *et seq.*

⁹⁸ Cf. Section 44, paragraph 2, in the Swedish Arbitration Act.

⁹⁹ There is more on discovery in *Alvarez and Mills International Arbitration Court Decisions*, p. 23 *et seq.*

(3) Unless otherwise agreed by the parties, hearings will be held in private.

- 143 In large and complex arbitrations it may save time and cost to hold a “case-management conference” at an early stage of the proceedings. At such conference a hearing schedule can be planned and agreed upon.
- 144 The provisional timetable, as laid down in Article 23 of the SCC Rules, usually contains the date for the hearing.
- 145 The hearing is generally initiated by the presentation of the claims and the reasons hereof. Then the parties have an opportunity to present factual statements and written evidence. After this, possible examinations of parties, witnesses and experts take place. The hearing ends with final pleading from both parties. In major cases the hearings may last several days or even weeks.¹⁰⁰
- 146 It is important that all parties have the same opportunities to present their arguments at the hearing. This rule rests on the fundamental principles of due process, impartiality and fair treatment.¹⁰¹ If the parties are treated unequally the arbitral award may be set aside in subsequent challenge proceedings.¹⁰²
- 147 As mentioned in the comments to Article § 20 (2), the place where the hearing takes place does not have to be the same as the seat of the arbitration. The arbitral tribunal may therefore choose the location deemed most practical due to the domicile of the parties, arbitrators, counsel and witnesses.¹⁰³

148 Article 28 Witnesses

(1) In advance of any hearing, the Arbitral Tribunal may order the parties to identify each witness or expert they intend to call and specify the circumstances intended to be proved by each testimony.

(2) The testimony of witnesses or party-appointed experts may be submitted in the form of signed statements.

(3) Any witness or expert, on whose testimony a party seeks to rely, shall attend a hearing for examination, unless otherwise agreed by the parties.

- 149 The arbitral tribunal must not administer any oaths or demand assurances of truth,¹⁰⁴ neither may the tribunal impose any fines or apply other coercive measures to procure an item of evidence sought. A party may, however, demand the acceptance of evidence before a state court.¹⁰⁵ If a party wishes to have an item of evidence accepted before a court it must, in the first place, turn to the arbitral tribunal to request its approval for this action. Any such request should be granted if the measure applied for is justified with respect to the investigation of the subject matter.¹⁰⁶

¹⁰⁰ Costs of the hearing (such as meeting room, travel, hotel accommodation and meals, “technical equipment”, interpreters) are considered as expenditure of the arbitral tribunal under Article 43 (1) (iii) and are included in the costs of the arbitration proceedings.

¹⁰¹ Cf. Article 19 (2).

¹⁰² Cf. Section 34, item 6 of the Swedish Arbitration Act.

¹⁰³ See NJA 2010 p. 508.

¹⁰⁴ Cf. Article 26.

¹⁰⁵ Cf. Section 26 in the Swedish Arbitration Act and Article 27 of the UNCITRAL Model law.

¹⁰⁶ Under Section 44, paragraph 2 in the Swedish Arbitration Act, the arbitrators decide at which district court the application has to be lodged.

The arbitral tribunal may request the parties to state their witnesses and the 150
factual matters that they intend to be proved by the witness statements. The same
applies to expert witnesses appointed by the parties.¹⁰⁷ The parties are allowed to
submit witness or party-appointed expert statements.¹⁰⁸ These must be signed but
no official authentication is required. Written witness statements occur more
frequently in international arbitration than in purely Swedish disputes.

All witnesses and experts are heard at the hearing, unless the parties have agreed 151
otherwise. If there are no written witness statements the witness usually first of all
make a context-setting presentation, after which both parties have the opportunity
to put questions. The arbitrators may also put questions.

Article 29 Experts appointed by the Arbitral Tribunal 152

(1) After consultation with the parties, the Arbitral Tribunal may appoint one 152
or more experts to report to it on specific issues set out by the Arbitral Tribunal
in writing.

(2) Upon receipt of a report from an expert appointed by the Arbitral Tribunal,
the Arbitral Tribunal shall send a copy of the report to the parties and shall give
the parties an opportunity to submit written comments on the report.

(3) Upon the request of a party, the parties shall be given an opportunity to
examine any expert appointed by the Arbitral Tribunal at a hearing.

It is not only the parties who may appoint experts.¹⁰⁹ The arbitral tribunal may 153
also find need for the assistance from experts in order to better understand the case
and prepare its decision in the best possible way. If so the tribunal must set down in
writing the questions to which it seeks the experts provide answers.

The parties are afforded the opportunity to submit comments on the fact that the 154
arbitral tribunal wishes to appoint an expert, on whom the tribunal wishes to appoint
and on the question(s) to be dealt with. Furthermore, the expert report shall be served
on the parties so that they have the opportunity of commenting on it and, at the time
of the hearing, the parties may interrogate the tribunal-appointed expert(s).

If the arbitral tribunal appoints an expert then a clear framework for his or her 155
compensation shall be established. The expert's fee and any disbursements are
regarded as part of the costs of the arbitral tribunal and, thus, shall be included in
the arbitral award.¹¹⁰

Article 30 Default 156

(1) If the Claimant, without showing good cause, fails to submit a Statement of
Claim in accordance with Article 24, the Arbitral Tribunal shall terminate the
proceedings provided the Respondent has not filed a counterclaim.

(2) If a party, without showing good cause, fails to submit a Statement of
Defence or other written statement in accordance with Article 24, or fails to
appear at a hearing, or otherwise fails to avail itself of the opportunity to present

¹⁰⁷ Cf. notes on an expert nominated by a party in *Heuman* p. 457.

¹⁰⁸ Cf. Comments on the English arbitration award covering experts in the arbitration proceed-
ings, *Bishop/Deutsch* International Arbitration Court Decisions, p. 373 *et seq.*

¹⁰⁹ Cf. Article 28.

¹¹⁰ Cf. Article 43 (1) (iii) and § 3 in Attachment II to the SCC Rules.

its case, the Arbitral Tribunal may proceed with the arbitration and make an award.

(3) If a party without good cause fails to comply with any provision of, or requirement under, these Rules or any procedural order given by the Arbitral Tribunal, the Arbitral Tribunal may draw such inferences as it considers appropriate.

- 157 The consequences of the acts of a negligent party, as laid down in Article 30, are fundamental and internationally accepted. Their objective is to minimize damage as a result of obstruction on behalf of one of the parties to a dispute. Failure to participate in the proceedings may, however, be remedied if an acceptable reasons for the passivity can be demonstrated – e.g. if the party was not properly notified and, thus, had no knowledge of the arbitration proceedings.¹¹¹
- 158 If the claimant does not submit a statement of claim, the arbitral proceedings are normally ended.¹¹² Obstruction on the part of the claimant is, for natural reasons, exceptionally rare. If the respondent does not submit a statement of defence, the proceedings are nonetheless continued.¹¹³ The same applies if the claimant or the respondent fails to submit any further documentation, to appear at the hearing, or to participate in some other way.
- 159 In arbitral proceedings in which just one party participates (so-called *ex parte* proceedings), the arbitral tribunal must even so undertake a material examination of the merits of the case and the documents submitted.¹¹⁴ The absence of one party thus does not imply that the arbitrators accept what the participating party has presented.
- 160 The arbitral tribunal has the power to penalize the negligence of a party in various ways. When assessing the evidence, it may construe the improper attitude to the conduct of the proceedings to such party's disadvantage.¹¹⁵ That means that the tribunal may, for instance, interpret the refusal by a party to present a document as though it is in possession of it and that the information in it is disadvantageous to that party.¹¹⁶ The provision on negative inference are set out in Article 30 (3) of the SCC Rules. As previously mentioned, the costs of the arbitral proceedings may also be imposed on a willful party.¹¹⁷

161 Article 31 Waiver

A party, who during the arbitration fails to object without delay to any failure to comply with the arbitration agreement, these Rules or other rules applicable to

¹¹¹ *Dahlberg Kolga/Öhrström* Proper Notification: A Crucial Element of Arbitral Proceedings, 27 *Journal of International Arbitration* 5, 2010.

¹¹² Cf. also Article 28.1 of the UNCITRAL rules.

¹¹³ If the SCC has not heard from the respondent during the introductory correspondence, then the Secretariat informs the arbitral tribunal accordingly in connection with the referral of the case. Then the tribunal itself shall attempt to get in touch with the respondent in order to motivate it to participate. Cf. Article 5 (3).

¹¹⁴ Cf. Section 24, paragraph 3 of the Swedish Arbitration Act, SOU 1994:81 pp. 151 and 279, Prop. 1998/99:35 pp. 112, 121 and 228, *Cars* p. 115, *Heuman* p. 412 *et seq.* and 534 and *Lindskog* p. 711 *et seq.*

¹¹⁵ Cf. *Heuman* p. 420 *et seq.*

¹¹⁶ See Article 26 (3) on waiver.

¹¹⁷ Cf. Articles 43 (5) and 44.

the proceedings, shall be deemed to have waived the right to object to such failure.

A party that is of the opinion that an irregularity of any kind has appeared during the arbitral proceedings shall object hereto immediately. Otherwise the right to raise an objection is forfeited. Consequently, it is not allowed that a party behave passively during the arbitral proceedings and react first once the arbitral award has been rendered – i.e. bringing challenge action requesting the award to be set aside due to such irregularity.¹¹⁸

A party that participates in the arbitral proceedings without raising proper objections may generally be regarded as having accepted that a valid arbitration agreement exists. It must not, however, be assumed that a party has accepted the authority of the arbitral tribunal just because the party has appointed an arbitrator.¹¹⁹

If a party has objected to the jurisdiction of the arbitral tribunal but the tribunal finds itself vested with jurisdiction, the objecting party shall clearly protest against the tribunal's affirmative decision on jurisdiction and state that it maintains its right to subsequently challenge the award due to lack of jurisdiction. If not, the party will be deemed to have waived its right in this regard.

Article 32 Interim measures

165

(1) The Arbitral Tribunal may, at the request of a party, grant any interim measures it deems appropriate.

(2) The Arbitral Tribunal may order the party requesting an interim measure to provide appropriate security in connection with the measure.

(3) An interim measure shall take the form of an order or an award.

(4) Provisions with respect to interim measures requested before arbitration has been commenced or a case has been referred to an Arbitral Tribunal are set out in Appendix II.

(5) A request for interim measures made by a party to a judicial authority is not incompatible with the arbitration agreement or with these Rules.

Sometimes a party may have a justified suspicion that the opposing party will sabotage future enforcement of the arbitral award or take other actions that might be damaging to the other party. For this reason a court or an arbitral tribunal may decide on interim measures in the course of the proceedings.

An arbitral tribunal may determine on interim measures unless the parties have agreed otherwise.¹²⁰ The provision in Article 32 (1) refers to all kinds of safeguarding measures (to maintain or restore the status quo, to take action or refrain from taking action and to preserve evidence pending determination of the dispute), which the tribunal finds appropriate.

¹¹⁸ Cf. corresponding provisions in Article 30 of the UNCITRAL rules. Cf. also SOU 1994:81 pp. 180 and 255 *et seq.* and Prop. 1998/99:35 pp. 148 and 156.

¹¹⁹ Cf. Section 34, paragraph 2 in the Swedish Arbitration Act and Article 16 in the UNCITRAL Model law.

¹²⁰ Cf. Section 25, paragraph 4 of the Swedish Arbitration Act, Prop. 1998/99:35 p. 72 *et seq.* and 185 *et seq.* and *Madsen* p. 225 *et seq.* Also the UNCITRAL Model law contains thorough provisions covering the arbitral tribunal's authority to resolve on temporary safeguarding measures (see Article 17).

- 168 The arbitral tribunal may demand that the party, which requests the interim measure, makes an appropriate security available to cover any loss that might arise for the opposing party due to the measure.
- 169 The decision on an interim measure may take the form of an order or in the form of a separate arbitral award. The latter form may improve the chances for the requesting party to be able to enforce the interim measures decision if it is not voluntarily complied with by the opposing party. In Sweden, as in many other jurisdictions, however, arbitral tribunals' decisions on interim measures are not enforceable – irrespective of the labeling hereof.
- 170 Since 1 January 2010, the SCC may appoint an emergency arbitrator, i.e. an arbitrator who solely decides on interim measures. A party may apply for the appointment of an emergency arbitrator before the case has been referred to the arbitral tribunal or even before arbitration has been commenced. This purpose of this fairly new feature was to assist the parties in providing a tool for swift and efficient interim measures. The SCC Board seeks to appoint an emergency arbitrator within 24 hours from receiving the application. And the emergency arbitrator shall make its decision on interim measures within five days. Detailed provisions on the emergency arbitrator procedure and the costs for such services are set out in Appendix II of the SCC Rules.¹²¹
- 171 The SCC Rules does not prevent a party to, prior to or in the course of the arbitral proceedings, apply for interim measures with a state court, for example in the opposing party's home country or in a country where the opposing party has assets.¹²² It is, however, not always an attractive option for a party to bring such an action in a foreign court system.

172 **Article 33 Communications from the Arbitral Tribunal**

Article 8 shall apply to communications from the Arbitral Tribunal.

- 173 The parties shall have the opportunity to inspect all briefs, documents and other material concerning the dispute, which are submitted to the SCC or the arbitral tribunal by the opposing party or from a third party. This rule is very elementary and ensures a fair and transparent procedure.¹²³ The same requirements for the sending of documents apply regardless of whether it is the SCC or the arbitral tribunal that is the sender. More information is found in the commentary to Article 8 above.

174 **Article 34 Close of proceedings**

The Arbitral Tribunal shall declare the proceedings closed when it is satisfied that the parties have had a reasonable opportunity to present their cases. In exceptional circumstances, prior to the making of the final award, the Arbitral Tribunal may reopen the proceedings on its own motion, or upon the application of a party.

¹²¹ *Lundstedt SCC Practice: Emergency Arbitrator*, published on the SCC website in 2011.

¹²² Cf. Article 9 of the UNCITRAL Model law and Article 26.3 of the UNCITRAL rules.

¹²³ Cf. Section 24, paragraph 2 of the Swedish Arbitration Act and Prop. 1998/99:35 p. 112 *et seq.* The principle is also contained in the UNCITRAL Model law, Article 24 (3).

The arbitral tribunal shall declare the proceedings closed when the parties have presented their arguments to a proper extent. It is important that the tribunal makes it its task to ensure that the arbitral award is rendered within the time stipulated¹²⁴ and that the tribunal prevent obstructive measures by any of the parties. 175

To close the arbitral proceedings is normally uncomplicated. The parties and the tribunal are, in most cases, in agreement when the time is appropriate for closure. Normally this occurs when the main hearing has taken place (if no post-hearing briefs have been agreed upon). After closure no further briefs may be submitted.¹²⁵ In exceptional circumstances, the tribunal may resume the proceedings, for instance if a late but justified amendment or supplement of a claim is put forth.¹²⁶ 176

5. Awards and Decisions

Article 35 Awards and decisions

177

(1) When the Arbitral Tribunal consists of more than one arbitrator, any award or other decision of the Arbitral Tribunal shall be made by a majority of the arbitrators or, failing a majority, by the Chairperson.

(2) The Arbitral Tribunal may decide that the Chairperson alone may make procedural rulings.

A decision on a subject matter that has been referred to arbitrators is called an arbitral award. This definition encompasses both decisions as regards the entire dispute or decisions as regards parts of the dispute – i.e. a separate award.¹²⁷ Any other decisions that close the proceedings (e.g. dismissal due to lack of jurisdictions or due to the fact that the parties have reached a settlement agreement) are also arbitral awards. Arbitral awards are final and legally binding. 178

Decisions that do not fall within the definition of an arbitral award, as stated above, are called orders. Such are not final and have no legal force. Thus, the arbitral tribunal may, if it deems appropriate, change its orders in the course of the proceedings.¹²⁸ Under the Swedish Arbitration Act an arbitral tribunal's decisions on its jurisdiction shall take the form of an order, if affirmative, and the form of an arbitral award if the tribunal dismisses the request for arbitration due to lack of jurisdiction over the dispute.¹²⁹ 179

The opinion supported by the majority of the votes of the arbitral tribunal prevails.¹³⁰ Sometimes, though, there is no majority, in which case the chairperson's opinion prevails.¹³¹ If, for example, all three arbitrators wish to award different 180

¹²⁴ Cf. Article 37.

¹²⁵ Cf. Article 29 of the UNCITRAL rules.

¹²⁶ Cf. Article 25.

¹²⁷ Cf. Article 38.

¹²⁸ Cf. SOU 1994:81 p. 155, Prop. 1998/99:35 p. 124, *Heuman* p. 538 *et seq.* and *Möller SAR* 1999:1 p. 57 *et seq.*

¹²⁹ Cf. Section 27 in the Swedish Arbitration Act.

¹³⁰ Cf. *Madsen's* and *Eriksson's* article in *SIAR* 2006:2 p.1 *et seq.* on the arbitral tribunal's deliberations and reasoned arbitral awards.

¹³¹ There are corresponding rules on voting in Article 31 of the UNCITRAL rules and in § 30 of the Swedish law on arbitration proceedings. The UNCITRAL Model law, however, contains no provisions on casting vote of the chairperson.

amounts in damages; chairperson A: EUR 30,000, co-arbitrator B: EUR 40,000 and co-arbitrator C: EUR 50,000 then EUR 30,000 would be awarded. In practice, however, arbitrators would normally seek to find a common solution.¹³²

181 It is intended that the conduct of the proceedings is effectively and expediently arranged through a chairperson.¹³³ The arbitral tribunal therefore often decides that the chairperson alone should be able to make decisions covering the planning and procedure.

182 Article 36 Making of awards

(1) The Arbitral Tribunal shall make its award in writing, and, unless otherwise agreed by the parties, shall state the reasons upon which the award is based.

(2) An award shall include the date of the award and the seat of arbitration in accordance with Article 20.

(3) An award shall be signed by the arbitrators. If an arbitrator fails to sign an award, the signatures of the majority of the arbitrators or, failing a majority, of the Chairperson shall be sufficient, provided that the reason for the omission of the signature is stated in the award.

(4) The Arbitral Tribunal shall deliver a copy of the award to each of the parties and to the SCC without delay.

(5) If any arbitrator fails without valid cause to participate in the deliberations of the Arbitral Tribunal on an issue, such failure will not preclude a decision being made by the other arbitrators.

183 Arbitral proceedings are, as mentioned above, finalized by an arbitral award.¹³⁴ The arbitral award must be issued in writing, it shall be signed by the arbitrators and include the date and seat of arbitration.¹³⁵ The award is invalid unless these requirements are not fulfilled.¹³⁶ The SCC has issued a model award included in its Arbitrator's Guidelines.¹³⁷

184 Arbitral awards that closes the proceedings without decision on the merits of the case (e.g. as a consequence of a withdrawal of the request for arbitration or dismissal of a case due to lack of jurisdiction) can, under the Swedish Arbitration Act, be appealed to a state court. Therefore, such awards shall include instructions of rights of appeal.¹³⁸ In addition, the Swedish Arbitration Act provides that the arbitrators' compensation may be appealed.¹³⁹ For this reason, an award shall include instructions also to this point.

185 Arbitral awards shall state the reasons upon which it is based, unless the parties have agreed otherwise.

¹³² Prop. 1998/99:35 pp. 128 and 231, *Lindskog* p. 845 f and *Öhrström* p. 213.

¹³³ Cf. Comments on Articles 13(3) and 19 (2).

¹³⁴ Cf. Section 27 of the Swedish Arbitration Act and Article 32 (3) of the UNCITRAL Model law.

¹³⁵ Cf. Section 31 of the Swedish Arbitration Act. The provisions of the UNCITRAL Model law on the form of the arbitration award are included in Article 31.

¹³⁶ Cf. Section 33, item 3 of the Swedish Arbitration Act.

¹³⁷ These Guidelines are found on the SCC website www.sccinstitute.com.

¹³⁸ Cf. Section 36 of the Swedish Arbitration Act.

¹³⁹ Cf. Section 41 of the Swedish Arbitration Act, NJA 2008 p. 1118 and *Franke/Öhrström JT* 2008–09 p. 677 *et seq.* and *Schöldström/Öhrström*, SIAR 2008:3.

The arbitral award shall state the seat of arbitration. If the parties have not 186 determined the seat such decision it taken by the SCC Board.¹⁴⁰

An arbitral award without the arbitrators' signatures is normally invalid.¹⁴¹ It 187 does, however, occur that an arbitrator is prevented from signing the award (e.g. because of illness or death). In such cases it is sufficient that that the other arbitrators sign the award. The same applies if one arbitrator simply refuses to sign the arbitral award.¹⁴² The chairperson may also, if needed, sign the arbitration award alone. If not all arbitrators have signed the arbitral award the reason for this shall be included in the award. It is also permissible for a dissenting opinion to be attached to the arbitral award.¹⁴³

The arbitral tribunal must serve the award to the parties and the SCC Secretariat 188 immediately after it has been rendered. Article 8 and 33 of the SCC Rules apply in this regard, however, it is recommended the tribunal ensures that the parties confirm the receipt of the award. Pursuant to the Swedish Arbitration Act, various periods of time for bringing actions in the Swedish courts start to run from the day on which a party receives the award.¹⁴⁴

The SCC does not have any service equivalent to the ICCs "scrutiny of award"¹⁴⁵ 189 but if the SCC Secretariat identifies any obvious miscalculations or similar it usually notifies the tribunal. When the Secretariat receives the final award an invoice is drawn up on the basis of the division of the arbitration costs as between the parties as established in the award.¹⁴⁶ Fees and reimbursement of any expenses are paid directly to the arbitrators. The same applies to the SCC's charges and costs. The payments are drawn from the advance on costs provided to the SCC at the outset of the proceedings.¹⁴⁷

If all the arbitrators have had the opportunity to participate in the deliberations 190 but one of them has, without valid reasons, nonetheless chosen not taken part, then the other arbitrators may continue the proceedings alone as a so-called truncated tribunal.¹⁴⁸ An alternative may be for a party to request that the absent arbitrator be formally released from his or her assignment by the SCC.¹⁴⁹

Article 37 Time limit for final award

191

The final award shall be made not later than six months from the date upon which the arbitration was referred to the Arbitral Tribunal pursuant to Article 18. The Board may extend this time limit upon a reasoned request from the Arbitral Tribunal or if otherwise deemed necessary.

¹⁴⁰ Cf. Articles 9 (iv) and 20 (1).

¹⁴¹ Cf. Section 33, item 3 of the Swedish Arbitration Act.

¹⁴² Cf. Article 36 (5) of the SCC Rules.

¹⁴³ *Heuman* p. 512 and *Öhrström* p. 216.

¹⁴⁴ Cf. Sections 34, 41 and 42 of the Swedish Arbitration Act.

¹⁴⁵ Cf. Article 27 of the ICC rules.

¹⁴⁶ Cf. Article 43 (5).

¹⁴⁷ Cf. Article 45.

¹⁴⁸ Cf. Article 17 (2). Acceptable reasons for absence may, for instance, be illness or some other external circumstance on which the arbitrator has no influence. The provision has no equivalence in the UNCITRAL rules.

¹⁴⁹ Cf. Articles 16 (1) (iii) and 17 (2).

- 192 The arbitral tribunal has a period of six months in which it shall render the final arbitral award. Under the SCC Rules for Expedited Arbitration, the period of time is three months.
- 193 The period of time starts to run at the time of the referral of the case to the arbitral tribunal, which takes place once the tribunal is constituted and the parties have paid the advance on costs.¹⁵⁰ One month before the award shall be rendered, the SCC Secretariat sends the arbitral tribunal a letter reminding it of the day for the making of the award.
- 194 Sometimes, however, the conduct of the case requires more time, in such case the tribunal may apply for an extension of the time allowed for making the arbitration award. Such an application must be substantiated and is to be directed to the SCC, which seeks comments from the parties prior to its decision.
- 195 If the award is not issued in time, the arbitration agreement is deemed to have expired, which is a ground for setting aside an arbitral award under the Swedish Arbitration Act.¹⁵¹
- 196 **Article 38 Separate award**
The Arbitral Tribunal may decide a separate issue or part of the dispute in a separate award.
- 197 Any decision on the subject matter that has been referred to the arbitral tribunal is designated as an arbitration award. This applies irrespective of whether it concerns the entire dispute or parts of it. The tribunal may, thus, render partial arbitral awards covering a specific issue of the dispute.¹⁵²
- 198 A typical example of when a partial arbitral award may be practical is if the arbitral tribunal deals with the liability issue as a first step and renders an award to that effect. And, thereafter, renders an award concerning any amount of damages to be paid. In international disputes it does occur that the tribunal makes a separate award on the law to be applied.¹⁵³
- 199 Moreover, a tribunal in SCC proceedings may, on application by a party, make a separate award on the payment of the advance on costs.¹⁵⁴
- 200 **Article 39 Settlement or other grounds for termination of the arbitration**
(1) If the parties reach a settlement before the final award is made, the Arbitral Tribunal may, upon the request of both parties, record the settlement in the form of a consent award.
(2) If the arbitration for any other reason is terminated before the final award is made, the Arbitral Tribunal shall issue an award recording the termination.
- 201 This Article refers to settlement or other reasons for the arbitration proceedings ending prematurely, i.e. before the arbitral tribunal has decided the subject matter.

¹⁵⁰ Cf. Article 18.

¹⁵¹ Cf. Section 34, item 2, of the Swedish Arbitration Act, *Lindskog* p. 151*et seq.*, *Heuman* p. 137 and *Öhrström* p. 223.

¹⁵² Cf. Section 27 of the Swedish Arbitration Act, Prop. 1998/99:35 p. 123*et seq.* and *Lindskog* p. 826 *et seq.* There is a corresponding provision in Article 32 of the UNCITRAL rules.

¹⁵³ Cf. Article 22.

¹⁵⁴ Cf. Article 45 (4).

III. Commentary – Art 41 Correction and interpretation of an award 202–209 SCC Rules

Even if the case is terminated before a final award on the merits is made the arbitral proceedings must be terminated in the form of an award.¹⁵⁵

Under the Swedish Arbitration Act, arbitral awards ending the proceedings 202 without the subject matter being decided can be reviewed by the state courts.¹⁵⁶ Such an action must be brought within three months from when the party received the award.¹⁵⁷ The award must include instructions on how to appeal the award.

If the parties have reached a settlement agreement such may be recorded in the 203 arbitral award, enabling a party to apply for enforcement if the opposing party does not comply with the agreed terms of the settlement.

Other reasons for arbitration proceedings ending prematurely without a decision 204 on the merits of the case might be that the tribunal dismisses the request for arbitration due to lack of jurisdiction or if the claimant withdraws its request for arbitration.

The fee of the arbitral tribunal is reduced if the proceedings end prematurely. The 205 SCC decides what fees are appropriate considering the work performed by the tribunal compared to a full procedure ending with an award on the merits of the case.

Article 40 Effect of an award 206

An award shall be final and binding on the parties when rendered. By agreeing to arbitration under these Rules, the parties undertake to carry out any award without delay.

An arbitral award is final and binding on the parties and no appeal on the merits 207 of the case is permitted. Consequently, the award may not be attacked with the assertion that the arbitral tribunal made mistakes in their assessment of the evidence or when applying the law on the factual circumstances. An award may, however, be attacked in a challenge procedure whereby a party requests the award to be set aside.¹⁵⁸

The parties have undertaken an obligation to act in accordance with the arbitral 208 award. This is stipulated in the second sentence of Article 40 of the SCC Rules.

Article 41 Correction and interpretation of an award 209

(1) Within 30 days of receiving an award, a party may, upon notice to the other party, request that the Arbitral Tribunal correct any clerical, typographical or computational errors in the award, or provide an interpretation of a specific point or part of the award. If the Arbitral Tribunal considers the request justified, it shall make the correction or provide the interpretation within 30 days of receiving the request.

(2) The Arbitral Tribunal may correct any error of the type referred to in paragraph (1) above on its own motion within 30 days of the date of an award.

¹⁵⁵ Cf. Section 27 in the Swedish Arbitration Act and Article 30 of the UNCITRAL Model law.

¹⁵⁶ Cf. Section 36 of the Swedish Arbitration Act.

¹⁵⁷ Cf. Section 43 of the Swedish Arbitration Act and Prop. 1998/99:35 p. 171 *et seq.*

¹⁵⁸ Cf. Section 34 of the Swedish Arbitration Act. An award may also be invalid under Section 33 of the Act.

(3) Any correction or interpretation of an award shall be in writing and shall comply with the requirements of Article 36.

- 210 When the arbitral tribunal has rendered a final award, its task is considered concluded and they no longer have to concern themselves with the dispute.¹⁵⁹ An explicit exception to this rule, however, is the possibilities relating to any corrections to and interpretation of the arbitral award and to the making of a supplementary arbitration award.¹⁶⁰
- 211 As mentioned in the comments to Article 36, the SCC, unlike for instance the ICC, does not examine the arbitral tribunal's draft award.¹⁶¹ If, however, the Secretariat, finds an obvious typing mistake or something similar in the award that should be corrected, then it informs the tribunal's chairperson hereof. It may be noted that the opportunity to correct an award is restricted to errors that have the unambiguous character of "slips".¹⁶²
- 212 The arbitral tribunal may also explain a specific point or part of the arbitration award. An interpretation, unlike a correction, does not constitute any modification of the award but is solely a clarification.
- 213 A party must apply for a correction or an interpretation of the award within 30 days from when the party received the award. The opposing party shall be informed of the request for such measures and will normally be given an opportunity to provide comments before the tribunal takes its decision. If the tribunal considers the request to be justified, it has a period of 30 days in which to correct or explain the award.
- 214 If the arbitral tribunal itself discovers an error of the kind mentioned above it may correct the arbitration award on its own initiative. The correction must in that case take place within 30 days from the date the award was rendered.¹⁶³ The tribunal should, however, not explain the award if no party so has requested.
- 215 The correction or interpretation must comply with the usual requirements for an arbitral award. Thus, such shall be given in writing, be dated, state the seat and be signed by the arbitrators.¹⁶⁴ Though it is possible for the chairperson only to sign.¹⁶⁵
- 216 **Article 42 Additional award**
Within 30 days of receiving an award, a party may, upon notice to the other party, request the Arbitral Tribunal to make an additional award on claims presented in the arbitration but not determined in the award. If the Arbitral Tribunal considers the request justified, it shall make the additional award within 60 days of receipt of the request. When deemed necessary, the Board may extend this 60 day time limit.

¹⁵⁹ Cf. Article 37.

¹⁶⁰ Cf. Section 32 of the Swedish Arbitration Act, which was formulated with the UNCITRAL Model law as its example (Cf. Article 33).

¹⁶¹ Cf. ICC's Scrutiny of Award (see Article 27 of the ICC rules).

¹⁶² Cf. SOU 1994:81 p. 167, Prop. 1998/99:35 p. 136 and *Heuman* p. 556.

¹⁶³ Cf. Article 36 (2). Cf. *Lindskog* p. 877.

¹⁶⁴ Cf. Article 36 of the SCC Rules and Section 31 of the Swedish Arbitration Act.

¹⁶⁵ Cf. Article 36 (3).

Additional awards are allowed for if the arbitral tribunal has unintentionally not assessed a claim that was brought to it. A party must request the additional award within 30 days, calculated from when the party received the original award. The opposing party shall be informed of the request and normally be given an opportunity to comment before the arbitral tribunal makes its decision.

In line with the requirements relating to correction and interpretation, the provision is formulated as a possibility and not as an obligation, for the tribunal to make an additional award. If the tribunal is of the opinion that the request is justified, it has a period of 60 days in which to render an additional award. The SCC Board may extend the time allowed if it considers it necessary.

The additional award shall comply with the usual requirements for an arbitral awards.¹⁶⁶ It must thus be given in writing, be dated, detail the arbitral tribunal's domicile, be signed, and be served on the parties immediately.

6. Costs of the arbitration

Article 43 Costs of the Arbitration

220

(1) The Costs of the Arbitration consist of:

- (i) the Fees of the Arbitral Tribunal;
- (ii) the Administrative Fee; and
- (iii) the expenses of the Arbitral Tribunal and the SCC.

(2) Before making the final award, the Arbitral Tribunal shall request the Board to finally determine the Costs of the Arbitration. The Board shall finally determine the Costs of the Arbitration in accordance with the Schedule of Costs (Appendix III) in force on the date of commencement of the arbitration pursuant to Article 4.

(3) If the arbitration is terminated before the final award is made pursuant to Article 39, the Board shall finally determine the Costs of the Arbitration having regard to when the arbitration terminates, the work performed by the Arbitral Tribunal and other relevant circumstances.

(4) The Arbitral Tribunal shall include in the final award the Costs of the Arbitration as finally determined by the Board and specify the individual fees and expenses of each member of the Arbitral Tribunal and the SCC.

(5) Unless otherwise agreed by the parties, the Arbitral Tribunal shall, at the request of a party, apportion the Costs of the Arbitration between the parties, having regard to the outcome of the case and other relevant circumstances.

(6) The parties are jointly and severally liable to the arbitrator(s) and to the SCC for the Costs of the Arbitration.

The SCC Board determines the arbitration costs.¹⁶⁷ The costs are determined according to the tables laid down in the Schedule of Costs in Appendix III of the SCC Rules. The basis for the costs is the amount in dispute.¹⁶⁸

¹⁶⁶ Cf. Articles 31 and 36 of the Swedish Arbitration Act.

¹⁶⁷ Cf. Sections 37–42 of the Swedish Arbitration Act, which deal with the arbitrators' right to reasonable compensation.

¹⁶⁸ The amount in dispute consists of the claim, counterclaim and set-off. There is more on this in the comments on Article 45 and in Articles 1 and 2 in Attachment II to the SCC Rules.

- 222 As soon as the tribunal has rendered its final award, such is to be forwarded to the parties and to the SCC Secretariat.¹⁶⁹ When the Secretariat receives the award the fees are paid to the arbitrators and the SCC from the advance on costs.
- 223 The arbitrators' fees are, as mentioned, dependent on the size of the value in dispute. The SCC fee system is thus transparent and permits the parties (and the arbitrators) to make an assessment of the costs (fees) in advance. The SCC's fee is also established based on the amount in dispute. Furthermore, reasonable expenses of the arbitrators or the SCC that have arisen in the course of the proceedings are reimbursed. The Schedule of Costs, Appendix III, Article 1–3, includes further information on arbitrators' fees, the SCC's administrative fee and expenses.
- 224 The tribunal shall request the SCC to determine the arbitration costs well in time before the award shall be rendered. The request shall contain information explaining the work performed, the time spent and further details on the conduct of the proceedings (such as number of hearing days, the extent of the correspondence and any orders made). In most cases the SCC fixes the fees preliminary decided at the outset. But in some case the proceedings may have required more work than was originally estimated, whereupon the fees are adjusted accordingly.¹⁷⁰
- 225 The SCC's decision concerning the final arbitration costs is delivered to the arbitral tribunal, which includes such in the arbitral award. The costs shall be broken down into the individual amounts for each arbitrator (i.e. their fees and compensation for expenses).¹⁷¹ The same applies for the SCC's administrative fee. Under Swedish law, the tribunal's compensation can be appealed before the state courts.¹⁷² So if the seat of arbitration is Sweden the arbitral award shall contain information on how the tribunal's compensation can be appealed.
- 226 If the parties reach a settlement agreement or withdraw the case for other reasons, the arbitral tribunal's compensation decreases, as the arbitration does not require the same amount of work as predicted at the outset of the proceedings. The preliminary fees decided by the SCC assume that the case goes all the way until a final award. When adjusting the fees the SCC considers, *inter alia*, when the case is closed,¹⁷³ what kind of work the tribunal has performed¹⁷⁴ and how much time the tribunal has spent working on the case.
- 227 The arbitral tribunal decides on the apportionment of liability for the arbitration costs as between the parties.¹⁷⁵ The outcome of the case is, of course, a crucial factor but the tribunal may take other circumstances into consideration as well. It may well be that the claimant's request for relief on damages has been admitted but not to the extent of the amount requested. If one party has suffered any disadvantage as a result of the opposing party's obstruction or delay during the proceedings, the tribunal may also take such factors into account.

¹⁶⁹ Cf. Article 36 (4).

¹⁷⁰ For further guidance in this regard see the comments to § 45.

¹⁷¹ Cf. Section 37, paragraph 2 of the Swedish Arbitration Act.

¹⁷² Cf. Section 41 of the Swedish Arbitration Act, NJA 2008 Page 118 and *Franke/Öhrström* JT 2008–09 p. 677 *et seq.* and *Schöldström/Öhrström* SIAR 2008:3.

¹⁷³ Taken into consideration, above all, is whether the proceedings were closed before or after the hearing.

¹⁷⁴ E.g. decision on jurisdiction, decision on taking of evidence, decision on interim measures.

¹⁷⁵ Article 40 of the UNCITRAL rules contains similar provisions.

The parties may already have determined in the arbitration agreement how the liability for the arbitration costs should be divided as between them; the financially stronger party may, for instance, take full responsibility for the costs. This occasionally occurs in for example CEO or franchise contracts. The parties are, however, jointly and severally liable for the payment of the arbitration costs.¹⁷⁶

Article 44 Costs incurred by a party

Unless otherwise agreed by the parties, the Arbitral Tribunal may in the final award upon the request of a party, order one party to pay any reasonable costs incurred by another party, including costs for legal representation, having regard to the outcome of the case and other relevant circumstances.

The arbitral tribunal as a general rule also decides on how the costs incurred by the parties shall be divided as between them. The outcome of the case and other relevant facts influence how the tribunal decides on this matter – i.e. the same basis of assessment as for the arbitration costs.¹⁷⁷

The costs must be reasonable in order to be reimbursable. The arbitral tribunal decides whether the costs are, per se, reimbursable, and whether the amount demanded is reasonable. The parties may also submit comments on or admit the other party's costs for the proceedings.

The parties' costs mainly consist of counsel's fee and costs. It may be noted that in most cases such cost element is considerably higher than the compensation to the arbitral tribunal and the SCC.

Article 45 Advance on Costs

(1) The Board shall determine an amount to be paid by the parties as an Advance on Costs.

(2) The Advance on Costs shall correspond to the estimated amount of the Costs of Arbitration pursuant to Article 43 (1).

(3) Each party shall pay half of the Advance on Costs, unless separate advances are determined. Where counterclaims or set-offs are submitted, the Board may decide that each of the parties shall pay the advances on costs corresponding to its claim. Upon a request from the Arbitral Tribunal or if otherwise deemed necessary, the Board may order parties to pay additional advances during the course of the arbitration.

(4) If a party fails to make a required payment, the Secretariat shall give the other party an opportunity to do so within a specified period of time. If the required payment is not made, the Board shall dismiss the case in whole or in part. If the other party makes the required payment, the Arbitral Tribunal may, at the request of such party, make a separate award for reimbursement of the payment.

(5) At any stage during the arbitration or after the Award has been made, the Board may draw on the Advance on Costs to cover the Costs of the Arbitration.

(6) The Board may decide that part of the Advance on Costs may be provided in the form of a bank guarantee or other form of security.

¹⁷⁶ Cf. comments on Articles 9 and 45.

¹⁷⁷ See more on this in the commentary to Article 43 (5).

- 234 The SCC Board determines the arbitration costs – i.e. the arbitrators’ and the SCC’s compensation. The arbitration costs are assessed at the outset of the proceedings and are paid by the parties in the form of an advance on costs at the initial phase of the proceedings.¹⁷⁸
- 235 Before the case is referred to the arbitral tribunal, the SCC Board thus establishes an advance on costs, which corresponds to the estimated arbitration costs under Article 43 (1). These costs consist of the arbitrators’ fees, the SCC’s administrative fee and any expenses. The starting point, thus, is that the advance on costs shall cover the final arbitration costs.
- 236 The structure of the arbitration costs is transparent thanks to the fact that SCC’s system is based on the amount in dispute. This amount is made up of the total value of the claim as well as any counter-claim and/or set-off.¹⁷⁹ If the amount in dispute does not emerge from the submissions made by the parties (for instance, if a declaratory award is requested) the advance on costs is fixed on the basis of relevant circumstances.¹⁸⁰ The SCC Secretariat then requests the parties to provide comments or estimations as to the amount in dispute. Taken into account in addition to the parties’ estimation of the amount are the type and complexity of the proceedings.
- 237 The arbitrators’ fees are calculated on the basis of the table in the Schedule of Costs as included in the SCC Rules. The chairperson’s fee is normally determined at median level pursuant to the table. However, if special reasons exist, the SCC Board may decide to move the fee upward or downward in the span for each amount in dispute taking into account the estimated workload of the arbitrators.
- 238 In exceptional cases, the SCC Board may deviate from the fee amounts given in the table.¹⁸¹ The fee table has a cap at EUR 100 million. If the amount in dispute exceeds such level, the SCC determines the fee based on the circumstances of the individual case focusing on the complexity of the case and the time needed for the tribunal to decide the subject matter. As the chairperson plays a leading part on the arbitral tribunal, he or she receives a higher fee than the co-arbitrators, who usually receive 60 per cent of the chairperson’s fee.¹⁸²
- 239 The SCC’s administrative fee, like the arbitrators’ fees, depends on the amount in dispute and is also determined in accordance with the table included in the Schedule for Costs attached to the SCC Rules.¹⁸³ In exceptional cases, the SCC’s fee may be fixed outside the table¹⁸⁴ but it is restricted to a maximum of EUR 60,000.
- 240 In addition to the arbitrators’ fees and the SCC’s fee, the SCC Board determines the remuneration that the parties must pay for any reasonable expenses (such as hearing room, interpreters, travel costs, per diem, hotel or tribunal-appointed experts)¹⁸⁵ incurred by the arbitral tribunal and/or the SCC.¹⁸⁶

¹⁷⁸ The same applies under Article 41 of the UNCITRAL rules.

¹⁷⁹ Cf. Article 1 (3) and Article 2 (2) in Appendix III to the SCC Rules. The www.sccinstitute.com website provides a calculator with which one can easily determine the approximate level of the costs of the arbitration proceedings if one enters the amount in dispute.

¹⁸⁰ Cf. Article 1 (3) and Article 2 (2) Appendix III of the SCC Rules.

¹⁸¹ Cf. Article 1 (4) Appendix III of the SCC Rules.

¹⁸² Cf. Article 1 (2) Appendix III of the SCC Rules.

¹⁸³ Cf. Article 2 (1) – (2) Appendix III of the SCC Rules.

¹⁸⁴ Cf. Article 2 (3) Appendix III of the SCC Rules.

¹⁸⁵ There is more on this in the Arbitrator’s Guidelines on www.sccinstitute.com.

¹⁸⁶ Cf. Article 3 Appendix III of the SCC Rules.

Unless otherwise agreed by the parties, they shall pay half the advance on costs. 241
The SCC Board may, however, decide on separate advance on costs if a counter claim or set-off is submitted. Separate advances are fixed, first and foremost, if the amounts claimed by the parties differ considerably. Then the SCC fixes advances for each side that correspond to such party's claims.

The SCC may decide that additional advance on costs shall be paid in the course 242
of the proceedings. This is for example the case if the amount in dispute has increased, if more money is necessary for the tribunal's expenses or if the tribunal advises that the conduct of the proceedings requires more work than was foreseen in the first place. If the parties do not provide such additional advance on costs, the part of the case that is not covered by the advance payments made is dismissed (e.g. a new counterclaim).

A feature which was introduced in the 2007 SCC Rules is that the tribunal may 243
issue a separate arbitral award on payment of advance on costs.¹⁸⁷ This includes situations where, for example, the claimant has paid its share and also the respondent's share of the advance on costs. Then the tribunal may in an award order the respondent to reimburse the claimant for that payment.

The compensation to the arbitrators' and the SCC is paid out after the arbitral 244
award has been rendered. In exceptional cases, the SCC can reimburse an arbitrator in advance, i.e. in the course of the proceedings.

7. General Rules

Article 46 Confidentiality 245

Unless otherwise agreed by the parties, the SCC and the Arbitral Tribunal shall maintain the confidentiality of the arbitration and the award.

A fundamental feature of arbitration is its confidentiality.¹⁸⁸ Hearings take place 246
behind closed doors¹⁸⁹ and the SCC as well as the arbitral tribunal are committed to maintain confidentiality under the SCC Rules. In order for the parties to be subject to this confidentiality duty, however, there has to be an explicit agreement to this effect.¹⁹⁰

If the arbitrators or the SCC disregard the duty of confidentiality a liability to pay 247
damages may be created. A precondition for this, though, is that the disregard must have been willful or grossly negligent.¹⁹¹

Article 47 Enforcement 248

In all matters not expressly provided for in these Rules, the SCC, the Arbitral Tribunal and the parties shall act in the spirit of these Rules and shall make every reasonable effort to ensure that all awards are legally enforceable.

¹⁸⁷ See more about on separate arbitral awards in the commentary to Article 38.

¹⁸⁸ Cf. *Aboul-Enein* in SIAR 2007:2 p. 25 *et seq.* on the confidentiality of commercial arbitration proceedings.

¹⁸⁹ Cf. Article 27 (3).

¹⁹⁰ Cf. NJA 2000 p. 538 and *Aboul-Enein/Aksen/Reid/Greenwood* International Arbitration Court Decisions Page 799 *et seq.*

¹⁹¹ Cf. Article 48.

249 This general clause underlines the obligation of all participants to an SCC arbitration to be loyal vis-à-vis the proceedings and to support in making the arbitral award enforceable. If a party breaches any such obligations under an arbitration agreement, the disadvantaged party should be entitled to legal consequences, something that ensues from the general principles of contract law.¹⁹² Furthermore, the SCC Rules provide that the parties commit themselves to obeying the provisions of the arbitral award immediately.¹⁹³

250 **Article 48 Exclusion of liability**

Neither the SCC nor the arbitrator(s) are liable to any party for any act or omission in connection with the arbitration unless such act or omission constitutes willful misconduct or gross negligence.

251 The arbitrators and the SCC shall carry out their tasks diligently.¹⁹⁴ It is, however, a precondition for the SCC's or the arbitrators' liability for damages that any loss was caused by willfulness or gross negligence on their part. Conceivable situations for liability to compensate may be that the arbitrator delays the proceedings and thereby makes the proceedings more costly for the parties, that an arbitrator's misconduct leads to the award being set aside in a challenge proceedings or that the arbitrator disregards its duty to maintain confidentiality.¹⁹⁵

¹⁹² For example, compensation in damages. Cf. *Lindskog* p. 122 and 142 *et seq.*

There is more on the consequences of the behaviour of a negligent party in the comments on Article 30.

¹⁹³ Cf. Article 40.

¹⁹⁴ Cf. Comments on the English arbitration award (*AT&T et al. v. Saudi Cable*) covering misconduct of arbitrators, Slate II, by *Roney/Frossard/Azzali/Coppo* in *International Arbitration Court Decisions*, p. 385 *et seq.* and comments on the Australian arbitration award on the same subject by *Bannon and Stulic* in *International Arbitration Court Decisions*, p. 1 *et seq.*

¹⁹⁵ Cf. Article 48.

Appendix I: Organization**Article 1 About the SCC** 252

The Arbitration Institute of the Stockholm Chamber of Commerce (the “SCC”) is a body providing administrative services in relation to the settlement of disputes. The SCC is part of the Stockholm Chamber of Commerce, but is independent in exercising its functions in the administration of disputes. The SCC is composed of a board of directors (the “Board”) and a secretariat (the “Secretariat”).

Article 2 Function of the SCC 253

The SCC does not itself decide disputes. The function of the SCC is to:

- (i) administer domestic and international disputes in accordance with the SCC Rules and other procedures or rules agreed upon by the parties; and
- (ii) provide information concerning arbitration and mediation matters.

Article 3 The Board 254

The Board shall be composed of one chairperson, a maximum of three vice-chairpersons and a maximum of 12 additional members. The Board shall include both Swedish and non-Swedish nationals.

Article 4 Appointment of the Board 255

The Board shall be appointed by the Board of Directors of the Stockholm Chamber of Commerce (the “Board of Directors”). The members of the Board shall be appointed for a period of three years and are eligible for re-appointment in their respective capacities for one further three year period only, unless exceptional circumstances apply.

Article 5 Removal of a member of the Board 256

In exceptional circumstances, the Board of Directors may remove a member of the Board. If a member resigns or is removed during a term of office, the Board of Directors shall appoint anew memberfortheremainderoftheterm.²²

Article 6 Function of the Board 257

The function of the Board is to take the decisions required of the SCC in administering disputes under the SCC Rules and any other rules or procedures agreed upon by the parties. Such decisions include decisions on the jurisdiction of the SCC, determination of advances on costs, appointment of arbitrators, decisions upon challenges to arbitrators, removal of arbitrators and the fixing of arbitration costs.

Article 7 Decisions by the Board 258

Two members of the Board form a quorum. If a majority is not attained, the Chairperson has the casting vote. The Chairperson or a Vice Chairperson may take decisions on behalf of the Board in urgent matters. A committee of the Board may be appointed to take certain decisions on behalf of the Board. The Board may delegate decisions to the Secretariat, including decisions on advances on costs, extension of time for rendering an award, dismissal for non-payment of registration fee, release of arbitrators and fixing of arbitration costs. Decisions by the Board are final.

Article 8 The Secretariat 259

The Secretariat acts under the direction of a Secretary General. The Secretariat carries out the functions assigned to it under the SCC Rules. The Secretariat may also take decisions delegated to it by the Board.

260 Article 9 Procedures

The SCC shall maintain the confidentiality of the arbitration and the award and shall deal with the arbitration in an impartial, practical and expeditious manner.

Appendix II: Emergency Arbitrator**261 Article 1 Emergency Arbitrator**

(1) A party may apply for the appointment of an Emergency Arbitrator until the case has been referred to an Arbitral Tribunal pursuant to Article 18 of the Arbitration Rules.

(2) The powers of the Emergency Arbitrator shall be those set out in Article 32 (1)–(3) of the Arbitration Rules. Such powers terminate when the case has been referred to an Arbitral Tribunal pursuant to Article 18 of the Arbitration Rules or when an emergency decision ceases to be binding according to Article 9 (4) of this Appendix.

262 Article 2 Application for the appointment of an Emergency Arbitrator

An application for the appointment of an Emergency Arbitrator shall include:

- (i) a statement of the names and addresses, telephone and facsimile numbers and e-mail addresses of the parties and their counsel;
- (ii) a summary of the dispute;
- (iii) a statement of the interim relief sought and the reasons therefore;
- (iv) a copy or description of the arbitration agreement or clause on the basis of which the dispute is to be settled;
- (v) comments on the seat of the emergency proceedings, the applicable law(s) and the language(s) of the proceedings; and
- (vi) proof of payment of the costs for the emergency proceedings pursuant to Article 10 (1)-(2) of this Appendix.

263 Article 3 Notice

As soon as an application for the appointment of an Emergency Arbitrator has been received, the Secretariat shall send the application to the other party.

264 Article 4 Appointment of the Emergency Arbitrator

(1) The Board shall seek to appoint an Emergency Arbitrator within 24 hours of receipt of the application for the appointment of an Emergency Arbitrator.

(2) An Emergency Arbitrator shall not be appointed if the SCC manifestly lacks jurisdiction over the dispute.

(3) Article 15 of the Arbitration Rules applies except that a challenge must be made within 24 hours from when the circumstances giving rise to the challenge of an Emergency Arbitrator became known to the party.

(4) An Emergency Arbitrator may not act as an arbitrator in any future arbitration relating to the dispute, unless otherwise agreed by the parties.

265 Article 5 Seat of the emergency proceedings

The seat of the emergency proceedings shall be that which has been agreed upon by the parties as the seat of the arbitration. If the seat of the arbitration has not been agreed by the parties, the Board shall determine the seat of the emergency proceedings.

- Article 6 Referral to the Emergency Arbitrator** 266
 Once an Emergency Arbitrator has been appointed, the Secretariat shall promptly refer the application to the Emergency Arbitrator.
- Article 7 Conduct of the emergency proceedings** 267
 Article 19 of the Arbitration Rules shall apply to the emergency proceedings, taking into account the urgency inherent in such proceedings.
- Article 8 Emergency decisions on interim measures** 268
 (1) Any emergency decision on interim measures shall be made not later than 5 days from the date upon which the application was referred to the Emergency Arbitrator pursuant to Article 6 of this Appendix. The Board may extend this time limit upon a reasoned request from the Emergency Arbitrator, or if otherwise deemed necessary.
 (2) Any emergency decision on interim measures shall:
 (i) be made in writing;
 (ii) state the date when it was made, the seat of the emergency proceedings and the reasons upon which the decision is based; and
 (iii) be signed by the Emergency Arbitrator.
 (3) The Emergency Arbitrator shall promptly deliver a copy of the emergency decision to each of the parties and to the SCC.
- Article 9 Binding effect of emergency decisions** 269
 (1) An emergency decision shall be binding on the parties when rendered.
 (2) The emergency decision may be amended or revoked by the Emergency Arbitrator upon a reasoned request by a party.
 (3) By agreeing to arbitration under the Arbitration Rules, the parties undertake to comply with any emergency decision without delay.
 (4) The emergency decision ceases to be binding if:
 (i) the Emergency Arbitrator or an Arbitral Tribunal so decides;
 (ii) an Arbitral Tribunal makes a final award;
 (iii) arbitration is not commenced within 30 days from the date of the emergency decision; or
 (iv) the case is not referred to an Arbitral Tribunal within 90 days from the date of the emergency decision.
 (5) An Arbitral Tribunal is not bound by the decision(s) and reasons of the Emergency Arbitrator.
- Article 10 Costs of the emergency proceedings** 270
 (1) The party applying for the appointment of an Emergency Arbitrator shall pay the costs of the emergency proceedings upon filing the application.
 (2) The costs of the emergency proceedings include:
 (i) the fee of the Emergency Arbitrator which amounts to EUR 12,000; and
 (ii) the application fee which amounts to EUR 3,000.26
 (3) Upon a request from the Emergency Arbitrator or if otherwise deemed appropriate, the Board may decide to increase or reduce the costs having regard to the nature of the case, the work performed by the Emergency Arbitrator and the SCC, and other relevant circumstances.
 (4) If payment of the costs of the emergency proceedings is not made in due time, the Secretariat shall dismiss the application.

(5) At the request of a party, the costs of the emergency proceedings may be apportioned between the parties by an Arbitral Tribunal in a final award.

Appendix III: Schedule of Costs

Arbitration Costs

271 Article 1 Registration Fee

(1) The Registration Fee referred to in Article 3 of the Arbitration Rules amounts to EUR 1 500.

(2) The Registration Fee is non-refundable and constitutes a part of the Administrative Fee in Article 3 below. The Registration Fee shall be credited to the Advance on Costs to be paid by the Claimant pursuant to Article 45 of the Arbitration Rules.

272 Article 2 Fees of the Arbitral Tribunal

(1) The Board shall determine the fee of a Chairperson or sole arbitrator based on the amount in dispute in accordance with the table below.

(2) Co-arbitrators shall each receive 60 percent of the fee of the Chairperson. After consultation with the Arbitral Tribunal, the Board may decide that a different percentage shall apply.

(3) The amount in dispute shall be the aggregate value of all claims, counterclaims and set-offs. Where the amount in dispute cannot be ascertained, the Board shall determine the Fees of the Arbitral Tribunal taking all relevant circumstances into account.

(4) In exceptional circumstances, the Board may deviate from the amounts set out in the table.

273 Article 3 Administrative Fee

(1) The Administrative Fee shall be determined in accordance with the table below.

(2) The amount in dispute shall be the aggregate value of all claims, counterclaims and set-offs. Where the amount in dispute cannot be ascertained, the Board shall determine the Administrative Fee taking all relevant circumstances into account.

(3) In exceptional circumstances, the Board may deviate from the amounts set out in the table.

274 Article 4 Expenses

In addition to the Fees of the arbitrator(s) and the Administrative Fee, the Board shall fix an amount to cover any reasonable expenses incurred by the arbitrator(s) and the SCC. The expenses of the arbitrator(s) may include the fee and expenses of any expert appointed by the Arbitral Tribunal pursuant to Article 29 of the Arbitration Rules.

275 Arbitrators' Fees

Amount in dispute (EUR)	Fee of the Chairman/Sole Arbitrator	
	Minimum (EUR)	Maximum (EUR)
to 25,000	2,500	5,500
from 25,001 to 50,000	2,500 + 2 % on the amount above 25,000	5,500 + 14 % on the amount above 25,000

Amount in dispute (EUR)	Fee of the Chairman/Sole Arbitrator	
	Minimum (EUR)	Maximum (EUR)
from 50,001 to 100,000	3,000 + 2 % on the amount above 50,000	9,000 + 4 % on the amount above 50,000
from 100,001 to 500,000	4,000 + 1 % on the amount above 100,000	11,000 + 5 % on the amount above 100,000
from 500,001 to 1,000,000	8,000 + 0.8 % on the amount above 500,000	31,000 + 2.4 % on the amount above 500,000
from 1,000,001 to 2,000,000	12,000 + 0.5 % on the amount above 1,000,000	43 000 +2.5 % on the amount above 1,000,000
from 2,000,001 to 5,000,000	17,000 + 0.2 % on the amount above 2,000,000	68 000 + 0.8 % on the amount above 2,000,000
from 5,000,001 to 10,000,000	23,000 + 0.1 % on the amount above 5,000,000	92,000 + 0.68 % on the amount above 5,000,000
from 10,000,001 to 50,000,000	28,000 + 0.03 % on the amount above 10,000,000	126,000 + 0.15 % on the amount above 10,000,000
from 50,000,001 to 75,000,000	40,000 + 0.02 % on the amount above 50,000 000	186,000 + 0.16 % on the amount above 50,000,000
from 75,000,001 to 100,000,000	45,000 + 0.012 % on the amount above 75,000,000	226,000 + 0.02 % on the amount above 75,000,000
from 100,000,001	To be determined by the Board	To be determined by the Board

Administrative Fee

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Amount in dispute (EUR)	Administrative Fee (EUR)
Up to 25,000	1,500
from 25,001 to 50,000	1,500 + 4 % on the amount above 25,000
from 50,001 to 100,000	2,500 + 2 % on the amount above 50,000
from 100,001 to 500,000	3,500 + 1.6 % on the amount above 100,000
from 500,001 to 1,000,000	9,900 + 0.8 % on the amount above 500,000
from 1,000,001 to 2,000,000	13,900 + 0.5 % on the amount above 1,000,000
from 2,000,001 to 5,000,000	18,900 + 0.1 % on the amount above 2,000,000
from 5,000,001 to 10,000,000	21,900 + 0.14 % on the amount above 5,000,000
from 10,000,001 to 50,000,000	28,900 + 0.02 % on the amount above 10,000,000
from 50,000,001 to 75,000,000	36,900 + 0.02 % on the amount above 50,000,000
from 75 000 001	41,900 + 0.01 % on the amount above 75,000,000
	Maximum 60,000

The costs of the arbitration can easily be calculated at www.sccinstitute.com

IV. Specific Abbreviations and Acronyms

277 BIT	Bilateral Investment Treaty
JT	<i>Juridisk tidskrift vid Stockholms universitet</i> (Stockholm University Law Review)
NJA	<i>Nytt juridiskt arkiv, avdelning I</i> (Supreme Court reports, Sweden)
Prop.	<i>Proposition</i> (Swedish Government Bill)
SAR	Stockholm Arbitration Report
SCC	Stockholm Chamber of Commerce
SIAR	Stockholm International Arbitration Review
SOU	<i>Statens offentliga utredningar</i> (Official reports series of Swedish legislative and investigations commissions)
SvJT	<i>Svensk juristtidning</i> (Swedish law journal)