

MANIFEST LACK OF JURISDICTION?

A SELECTION OF DECISIONS OF THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE CONCERNING THE *PRIMA FACIE* EXISTENCE OF AN ARBITRATION AGREEMENT (2005-2009)

David Ramsjö and Siri Strömberg^{**}

1. INTRODUCTION

It is a well-known principle in international arbitration that arbitration is not legally permissible if the subject matter of the dispute is not arbitrable or if the dispute in question is not covered by a valid arbitration agreement. Once an institutional arbitration has been commenced, some administering institutions are empowered to decide, by an initial and summary procedure, if they are entitled to continue to administer the dispute. A primary function of said institution will thus be to make a *prima facie* determination of the validity and applicability of the arbitration agreement, *i.e.* to assess whether a valid arbitration agreement exists, whether it applies to the dispute at hand and whether the agreement is subject to the arbitration rules of that particular institute.¹

The Arbitration Institute of the Stockholm Chamber of Commerce (“the SCC”) decides on jurisdictional issues if the respondent has raised a jurisdictional objection, which will usually be done in the respondent’s answer to the claimant’s request for arbitration. From January 2005—when a presentation on SCC *prima facie* decisions was last published in the Stockholm Arbitration Report²—through December 2009, 720 arbitral proceedings were commenced at the SCC using the SCC Arbitration Rules or the Rules for Expedited Arbitrations. Jurisdictional decisions were issued in 131 of these cases. In the overwhelming majority of cases (125 out of 131) the Board of Directors of the SCC (“the Board”) concluded that the SCC did not manifestly lack jurisdiction over the dispute.

The aim of this article is to provide examples from the SCC caseload with a view to illustrating the various types of objections the SCC faces when making *prima facie* jurisdictional decisions. A brief overview of the basic principles governing such decisions by various institutions will also be presented.

· David Ramsjö is a former Trainee at the Arbitration Institute of the Stockholm Chamber of Commerce and the Legal Department of the Stockholm Chamber of Commerce.

** Siri Strömberg is an Associate at Mannheimer Swartling. She previously worked as a Legal Counsel leading a division of the Secretariat at the Arbitration Institute of the Stockholm Chamber of Commerce.

¹ Lindskog, Stefan, *Skiljeförfarande – En kommentar*, Norstedts Juridik AB (2005), p. 279. See also Öhrström, Marie, *Stockholms Handelskammars Skiljedomsinstitut: En handbok och regelkommentar för skiljeförfaranden*, Norstedts Juridik (2005), p. 60.

² See Magnusson and Larsson, *infra* note 3.

2. THE SCC RULES ON PRIMA FACIE JURISDICTIONAL DECISIONS³

Institutional arbitration provides a procedural framework within which the arbitration proceedings will be concluded, and it entails the application of a set of procedural rules that will apply to arbitral proceedings as well as the involvement of an institutional body such as the SCC.⁴ The SCC is comprised of the Board and the Secretariat. The SCC does not itself decide disputes; its function is to administer domestic and international arbitrations in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (“the Rules”) and other procedures or rules agreed upon by the parties, as well as to provide information concerning arbitration and mediation matters. Pursuant to Appendix I of the Rules, the Board is empowered to make *prima facie* jurisdictional decisions.

The *prima facie* decisions made by the Board constitute a threshold which jurisdictional objections must climb over before being allowed further deliberations by the arbitrators.⁵ Provisions regarding *prima facie* decisions on jurisdiction are found in Articles 9 and 10 of the Rules. According to Article 9, the Board shall -if necessary- decide whether the SCC manifestly lacks jurisdiction over the dispute. Such *prima facie* jurisdictional decisions are made after the initial exchange of written submissions when the respondent, in its answer pursuant to Article 5, has made an express challenge to the existence, validity or applicability of the arbitration agreement. Article 10 provides that the Board shall dismiss a case, in whole or in part, where the SCC manifestly lacks jurisdiction over the dispute.⁶ Such decisions are thus taken before the case has been referred to a tribunal.

The jurisdictional threshold before the SCC has been described as fairly low.⁷ It may often be sufficient that the claimant states that a valid arbitration clause exist making reference to the SCC and its rules and that the SCC has competence to handle the dispute. In order for a claim to be summarily dismissed on jurisdictional grounds by the Board the deficiency of the arbitration clause should be evident.⁸ A request may for example be dismissed if the arbitration clause clearly refers to some other arbitration institute than the SCC or clearly provides for *ad hoc* arbitration.⁹ Another example is where a claimant relies in a number of

³ For recent SCC case studies regarding *prima facie* decisions by the SCC Board see Magnusson, Annette, *Prima Facie Decisions on Jurisdiction*, Stockholm Arbitration Report (SAR) 2000:2, pp. 171 and Magnusson, Annette, Larsson, Hanna, *Recent Practice of the Arbitration Institute of the Stockholm Chamber of Commerce. Prima Facie Decisions on jurisdiction and Challenges of Arbitrators*, SAR 2004:2, pp.47-84. For discussion on *prima facie* decisions of the SCC during the years 1993-96, see Edlund, Lars, Söderlund, Christer, *A Valid Agreement to Arbitrate? Swedish and International Arbitration 1996*, Yearbook of the Arbitration Institute of the Stockholm Chamber of Commerce, pp. 8-16.

⁴ Blanke, Gordon, *Institutional versus Ad Hoc Arbitration: A European Perspective*, ERA Forum (2008) 9:275-282, p. 277.

⁵ Magnusson, Larsson (n 3) p. 49.

⁶ When revising the SCC Rules in 2007, the English wording was changed from the wording of the 1999 SCC Rules. Article 7 of the 1999 SCC Rules read; “..if it is clear that the SCC lacks jurisdiction over the dispute” The change in terminology is merely linguistic expression and should not be given any substantive meaning. The Swedish term used in the rules (“*uppenbart*”) has remained unchanged throughout the various revisions of the rules. See Magnusson, Annette, Shaughnessy, Patricia, *The 2007 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce*, Stockholm International Arbitration Review (SIAR) 2006:3, p. 46. See also Magnusson, SAR 2000:2 (n 3) p. 172.

⁷ Magnusson, Larsson (n 3) p. 50.

⁸ Öhrström (n 1) p. 139. See also Gernandt, Johan, *The Swedish Perspective on Arbitration and Conciliation Concerning China*, ICCA Congress series no. 12, 2005, p. 48.

⁹ Franke, Ulf, *The Arbitration Institute of the Stockholm Chamber of Commerce*, Nordic Journal of Commercial Law, issue 2003 #1.

contracts in its request for arbitration but not all of the arbitration clauses contained in those contracts refer to the SCC.¹⁰ If the Board decides that it does not manifestly lack jurisdiction over the dispute, the SCC will proceed to appoint the chairman of the arbitral tribunal or a sole arbitrator. When the tribunal has been appointed and the advance has been provided as set out in Articles 9 and 45 of the Rules, the SCC will refer the case to the tribunal.

The referral of a case to a tribunal does not necessarily mean that the jurisdictional objection raised by the respondent is ill-founded; the Board has only determined that the SCC does not manifest lack jurisdiction over the case.¹¹ This does not prejudice the Respondent from raising such objections before the tribunal. Should the Respondent maintain its objection in the proceedings, the tribunal will make its own jurisdictional determination.¹² The tribunal's decision will be based on a more thorough and complete examination of the merits of the objection. For example, the tribunal may conduct separate hearings on jurisdictional questions, such as whether the arbitration agreement is no longer valid or whether there ever was a valid arbitration agreement in the first place.¹³ If the tribunal find itself lacking competence, its decision will take the form of an award according to Section 27, first paragraph, first sentence of the Swedish Arbitration Act (1999:116) provided that the seat of the arbitration is Swedish.

3. RECENT *PRIMA FACIE* JURISDICTIONAL DECISIONS BY THE SCC BOARD: CASE STUDIES

Parties who intend to refer a future dispute to arbitration at the SCC are encouraged to include in their contracts the model clauses provided by the SCC. These clauses can be found in a number of variations to suit the parties' wishes; clauses referring to the Arbitration Rules or the Rules for Expedited Arbitrations only, and various combination clauses giving greater flexibility when the size and character of any dispute is more difficult to predict.¹⁴ Standard

¹⁰ Magnusson, Shaughnessy, (n 6) p. 47. There are situations where the Board raises the issue of jurisdiction *ex officio*. This is highly unusual but may take place in cases where the respondent has not submitted any answer at all and the arbitration clause in question makes no reference to the SCC. It should however be noted that the likelihood for a dismissal in such cases are relatively small. See *Id*, p. 46.

¹¹ Edlund, Söderlund (n 3) p. 10.

¹² In accordance with the principle of *Kompetenz-Kompetenz*, cf. the Swedish Arbitration Act, Section 2. See Madsen, Finn, *Commercial Arbitration in Sweden – A Commentary on the Arbitration Act (1999:116) and the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce*, third edition, Oxford University Press (2007), pp. 87 for the question when an objection by a party regarding the arbitrators' lack of jurisdiction before the tribunal must be raised. See also Heuman, Lars, *Skiljemannarätt*, Norstedts Juridik, Stockholm (1999) pp. 288-296.

¹³ According to Section 2 of the Swedish Arbitration Act either of the parties may at any time during or prior to the proceedings turn to the court for a declaratory judgment regarding the issue of jurisdiction in order to have the matter decided finally. See Öhrström (n 1) p. 139. Section 2, second paragraph, first sentence of the Swedish Arbitration Act provides that a decision declaring that the Tribunal possess jurisdiction to resolve the dispute is not binding and is not subject to legal force, SOU 1994:81 p. 156 and Govt. Bill 1998/99:35 p. 124. In Svea Court of Appeals' judgement of 7 April 2009 in case T 58-08, *Russian Federation vs. RosInvestCo UK Limited* the Court held that such decision by the arbitrators cannot be challenged on the basis of Sections 34 or 36 of the Swedish Arbitration Act.

¹⁴ The SCC Model Arbitration Clause for the Arbitration Rules reads as follows: "Any dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce."

arbitration clauses provided by arbitral institutions will ensure the *prima facie* workability of the arbitration procedure in the event of a dispute.¹⁵

The arguments advanced by respondents when objecting to the jurisdiction of the SCC are varied. For instance, objections are made to the arbitration proceedings as such, claiming that no agreement to arbitrate has been concluded, or to the SCC's competence to handle the dispute, claiming that the clause provides for *ad hoc* arbitration or for arbitration supervised by another institution. Other objections assert that the dispute does not fall within the arbitration agreement. Respondents also sometimes contest the jurisdiction of the SCC on the basis that the claimant has not observed the pre-arbitral negotiation stage provided for in the arbitration agreement,¹⁶ or that the arbitration clause is pathological¹⁷ and therefore invalid.¹⁸

In the following, a selection of seven SCC cases is presented. In each case the *prima facie* decision rendered by the SCC Board is provided along with arguments raised by the parties before the Board and, where applicable, the tribunal's decision. The purpose is not to review the actions of the parties involved in the cases presented below, but rather to provide an insight to jurisdictional matters raised before the SCC.

3.1 SCC Arbitration V (002/2005)

The Respondent objected to the SCC's jurisdiction on the ground that the dispute ought to be resolved by ad hoc arbitration.

I. Nationality of the Parties

Claimant: French

Respondent: Russian

II. Nationality of the Arbitrators

Swedish and Russian (chairperson was never appointed)

III. Language of the Contract

¹⁵ Blanke (n 4), p. 277.

¹⁶ In SCC Arbitration V (024/2002), the arbitration clause provided that in the event of a dispute or difference in connection with the contract, the parties should seek to resolve any such dispute or difference by mutual consultation. If they failed to do so, then any dispute in connection with the agreement would be finally settled in accordance with the SCC Rules. The respondent initially claimed that the SCC did not have jurisdiction to hear the dispute and asserted that the claimant had failed to prove that the parties had conducted mutual consultation prior to the reference to arbitration. The Board concluded that it was not clear that the SCC lacked jurisdiction over the dispute. See Final Arbitral Award rendered in 2003 in SCC case 24/2002, SIAR 2004:2 p. 147 et seq. with observations by Mary O'Connor, *id.* p. 181 et seq. For examples concerning multi-tiered dispute resolution clauses in ICC arbitration cases and the question of the parties' obligation to attempt amicable dispute resolution before arbitration, see Figueres Jiménez, Dyalá, *Multi-Tiered Dispute Resolution Clauses in ICC Arbitration*, ICC International Court of Arbitration Bulletin, Vol. 14/No. 1 – Spring 2003, pp. 71.

¹⁷ In SCC Arbitration V (007/2005), the arbitration clause provided for disputes to be submitted to "*the International Commercial Arbitration Court in Stockholm, Sweden.*" For observations hereto see Schöldström, Patrik, SIAR 2007:1, p. 175 et seq. For a discussion of the essential functions of an arbitration clause and ways to avoid greater or lesser pathologies, see Davis, *supra* note 22.

¹⁸ For further discussion see Öhrström (n 1) pp. 140 as well as the notes included therein.

English

IV. Arbitration Clause

“All disputes arising in connection with the validity, interpretation and performance of this agreement, which cannot directly be settled in an amicable way between the parties to this agreement, shall be decided without recourse to the ordinary courts by a court of arbitration in Stockholm consisting of the three arbitrators to be appointed

- *one by the Lender*
- *one by the Borrower*
- *the third as chairman by the two arbitrators above.*

In case the two first named arbitrators cannot agree upon the appointment of one third arbitrator within thirty days, this arbitrator shall be nominated by the Chamber of Commerce in Stockholm.

If the Lender or the Borrower does not choose this arbitrator within thirty days after such a request has been made by one of the parties to this agreement, the Chamber of Commerce in Stockholm shall appoint this arbitrator as well.

[...]

This agreement shall be governed and construed in accordance with the laws of France. The arbitration procedure shall be governed by the laws of Sweden.”

V. Background

A dispute had arisen out of a loan agreement under which the respondent was obliged to repay a loan principal in several equal payments. The claimant commenced arbitration with the SCC, claiming that the respondent was in default under the agreement.

VI. Arguments Raised

The Respondent

In its Answer to the Request for Arbitration, the Respondent objected to the SCC's jurisdiction, stating that the parties' agreement made no reference to arbitration pursuant to the SCC Rules. The only reference made was to the Stockholm Chamber of Commerce as the appointing authority. Such reference could not be considered as amounting to an agreement to conduct arbitration under the SCC Rules.

In conclusion, the Respondent held that the arbitration clause in the parties' agreement *“ma[de] a clear reference to arbitration in accordance with the Swedish Arbitration Act”* and that *“there [were] no express or implied terms to the effect that arbitration [should] be conducted pursuant to the SCC Rules.”*

The Claimant

The Claimant submitted comments on the Respondent's Answer to the Request for Arbitration and contended that *“contrary to Respondent's assertion, the Parties did agree in their contract that disputes would be resolved by arbitration under the auspices of the SCC”* and that *“this [was] the most rational interpretation of the arbitration clause which provide[d] for arbitration 'by a court of arbitration in Stockholm.’”*

The only court of arbitration in Stockholm known to the parties was the SCC. The Claimant held that it was “*highly unlikely that the Parties to the agreement were aware of the existence of any other arbitral institution in Sweden when they signed the Agreement.*” It was therefore, according to the Claimant, “*probable that the Parties intended to designate the SCC to administer any arbitration commenced pursuant to Article 8.01 of the Agreement.*”

VII. *Prima Facie* Decision by the Board

The SCC manifestly lacks jurisdiction over the dispute.

3.2 SCC Arbitration V (010/2005)¹⁹

The Respondent objected to the jurisdiction of the SCC on the ground that the agreement to arbitrate was against public order.

I. Nationality of the Parties

Claimant: Austrian

Respondents: Egyptian

II. Nationality of the Arbitrators

Swedish, Austrian and Egyptian

III. Language of the Contract

English

IV. Arbitration Clause

“11. Arbitration:

All disputes in connection with this Contract of execution thereof shall be settled friendly through negotiations.

In case no settlement can be reached, the case may then be submitted for arbitration to the Arbitration Committee of Sweden and accepted by both parties in accordance with its arbitrage rules of procedure.

The arbitrage award is final and binding upon both parties. Arbitration fee shall be borne by the losing party.”

V. Background

According to a purchase agreement between the parties, the Claimant had agreed to purchase equipment used in the construction industry from the Respondent. A dispute arose regarding

¹⁹ For an analysis of the case, see Capper, Phillip, Arbitral awards, Interlocutory Arbitral Award Rendered in 2006 in SCC case 10/2005, Observations by Phillip Capper, SIAR 2007:2, pp 235-261.

the delivered equipment and the Claimant commenced arbitration at the SCC with reference to the arbitration clause in the parties' purchase agreement.

VI. Arguments Raised

The Respondents

The Respondents challenged the jurisdiction of the SCC on the ground that the dispute was not arbitrable. According to the Respondent, the arbitration clause would have been considered incapable and inoperative in Egypt since the Egyptian courts would consider the agreement to arbitrate the dispute in Sweden null and void as it would be against public order. Consequently, even if the Respondents should agree to refer the case to arbitration under the SCC Rules, the award would never be enforceable in Egypt. Thus, the SCC Board was asked to dismiss the claim.

The Claimant

The Claimant responded that the arbitration clause was operative and without condition. The parties had agreed to appeal to the "*Arbitration Committee of Sweden*." The Claimant held that "[t]he *Arbitration Institute of the Stockholm Chamber of Commerce* was not excluded. Neither party asked for another arbitration committee. There was no case for the SCC to dismiss the case."

VII. Prima Facie Decision by the Board

It is not clear that the SCC lacks jurisdiction over the dispute.

VIII. Decision on Jurisdiction by the Arbitral Tribunal

After referral to the tribunal, the Respondents developed the grounds for its objection to the jurisdiction of the SCC. Several grounds were brought forward:

- (i) the parties had not attempted to settle the dispute as required in the arbitration clause. Consequently, the Claimant's Request for Arbitration was premature;
- (ii) the arbitration clause required a new agreement between the parties to arbitrate; such agreement had not been concluded;
- (iii) the arbitration clause referred to the "*Arbitration Committee of Sweden*" but there is no such committee and the clause does not give the SCC jurisdiction over the dispute;
- (iv) the arbitration clause was against Egyptian public policy;
- (v) the Tribunal had not been properly constituted;
- (vi) the Claimant had no standing as a party to the contract;
- (vii) one of the two Respondents objected to the jurisdiction since it was not party to the contract or the arbitration clause.

The Claimant objected to all grounds brought forward by the Respondents.

The arbitral tribunal decided on jurisdiction in the affirmative and the proceedings were continued.

3.3 SCC Arbitration V (047/2006)

The Respondent objected to the jurisdiction of the SCC on the ground that the parties had agreed to ad hoc arbitration.

I. Nationality of the parties

Claimant: German

Respondent: Belgian

II. Nationality of the Arbitrator

French

III. Language of Contract

English

IV. Arbitration Clause

“Arbitration: Any disputes and differences arising out of or in connection with the present Contract are to be settled, without recourse to Courts of Law, by the Arbitration Court of Stockholm (Sweden) in accordance to the procedure and regulations of said Court.”

V. Background

A dispute had arisen out of a sales contract between the Claimant and the Respondent. The Respondent had allegedly failed to fulfil some of its obligations under the contract and thereby caused the Claimant damages. The Claimant commenced arbitration at the SCC, relying on the arbitration clause inserted in the parties’ contract, and claimed damages due to the Respondent’s breach of the contract.

VI. Arguments Raised

The Respondent

The Respondent contested the jurisdiction of the SCC on two grounds. The first was that the Respondent had not signed the contracts on which the Claimant relied and was “*therefore not bound by these contracts, at least not by the supplementary conditions which include[d] the arbitration clause.*”

The second ground was that the relevant clause did not refer to the SCC with sufficient precision. The Respondent argued that “[*e*]ven if Respondent were to be bound by these contracts, the relevant arbitration clause [*did*] not provide for arbitration before the SCC /.../”. The Claimant had wrongfully commenced arbitration with the SCC to which there was no reference in the contracts. Consequently, should the arbitration clause be binding upon the Respondent, any arbitration “*should be conducted in Stockholm, according to the general provisions of the Swedish Arbitration Act - SFS 1999:116.*”

The Claimant

The Claimant argued that the parties had intended to refer disputes to SCC arbitration. The agreement was not drafted by lawyers. Accordingly, the same precision as one may expect from a lawyer is not to be expected. When the parties referred disputes to arbitration in Stockholm, the only known arbitral body was the SCC. The fact that the arbitration clause did not entirely accurately identify the SCC should not change the fact that this had been the parties' intention.

VII. *Prima Facie* Decision by the SCC Board

It is not clear that the SCC lacks jurisdiction over the dispute.

VIII. Decision on Jurisdiction by the Arbitral Tribunal

The tribunal concluded that the disputes under the contract and the separate agreements thereto were to be decided by arbitration under the SCC Rules.

In its final award, the tribunal noted that *“strictly speaking, there is no arbitral institution called the ‘Arbitration Court of Stockholm’.* However, it is generally recognized that one can look beyond the wording of an arbitration clause if the true intention of the parties was to refer to a certain arbitral body.” The tribunal further held that *“the question is whether a reasonable person of the same kind as Respondent would have understood [the arbitration agreement] to mean the SCC. The parties clearly wanted an arbitral body in Stockholm, Sweden.”* The tribunal was satisfied that a reasonable person in the same place as the Respondent would have intended to refer the dispute to the SCC when using the expression of the arbitration clause and the Respondent's objection was therefore dismissed.

3.4 SCC Arbitration F (037/2007)

The Respondent objected to the jurisdiction of the SCC on the ground that the parties had agreed to arbitration with another institution than the SCC.

I. Nationality of the Parties

Claimant: Swedish

Respondent: Chinese

II. Nationality of the Arbitrator

Italian

III. Language of Contract

English

IV. Arbitration Clause

“Any difference or dispute arising out of or in connection with this contract shall be settled by arbitration at the Stockholm Chamber of Commerce in Stockholm, Sweden, according to its expedited arbitration rules. Their rules to be final and binding.”

Handwritten in the Respondent's version of the agreement next to the arbitration clause was the following:

"Beijing, China International Econo. and Trade Arbitration Comission."

V. Background

The dispute concerned the Respondent's failure to give effect to the contractual delivery of certain good according to a sale and purchase agreement. The Claimant submitted a Request for Arbitration to the SCC under the Rules for Expedited Arbitration and referred to the arbitration clause in the parties' agreement.

VI. Arguments Raised

The Respondent

The Respondent submitted a brief Answer to the Request for Arbitration and submitted another version of the agreement. The other version of the agreement ("the Respondent's version") included some handwritten modifications and the signature of both parties. Among the clauses that were modified was the arbitration clause which, in the Respondents' version, provided for arbitration at the China International Economic and Trade Arbitration Commission (CIETAC). In its Answer, the Respondent held that "*[t]he evidential contract they [the Claimant] offered [was] invalid, it [was] without our [the Respondent] signature.*"

The jurisdiction of the SCC was challenged on these grounds and the Respondent argued that the dispute should be settled by arbitration under the CIETAC Rules.

The Claimant

The Claimant denied all knowledge of the reference to CIETAC arbitration in Respondent's version, claiming that it had never before seen the document submitted by the Respondent and did not recognise the handwritten alterations in the agreement submitted by the Respondent.

VII. Prima Facie Decision by the SCC Board

The SCC does not manifestly lack jurisdiction over the dispute.

VIII. Decision on Jurisdiction by the Arbitral Tribunal

The tribunal decided that it had jurisdiction over the dispute, including both the issue of the validity of the agreement and the issue of the alleged subsequent modification to the arbitration clause.

Regarding the modification of arbitration clause, the tribunal considered it "*...quite unconvincing that the Parties [should] have made handwritten modifications to the Original Text, with obvious linguistic errors and poor esthetical quality, and that both [should] have signed such poorly modified text. Under so unusual circumstances the Arbitral Tribunal would need some corroboration to consider the Altered Text as actually agreed upon between the parties.*" The Respondent did not provide evidence that the altered text had been dispatched to or by the Claimant. In this context the tribunal also considered evidence provided by the Claimant that there was a custom between the parties to agree to SCC

Arbitration. The tribunal was therefore of the opinion that the agreement with the handwritten changes did not reflect the consent of both parties.

3.5 SCC Arbitration F (067/2007)

The Respondent objected to the jurisdiction of the SCC on the ground that the parties had agreed to ad hoc arbitration.

I. Nationality of the Parties

Claimant: Swedish
Respondent: Swedish

II. Nationality of the Arbitrators

No arbitrators were appointed

III. Language of Contract

Swedish

IV. Arbitration Clause

The Standard Form Contract:²⁰

“Any dispute between the forwarding agent and his principal may, with the exception as set out below, not be referred to court but shall be decided in accordance with Swedish law under the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.”

[Unofficial translation]

The Storage Agreement:²¹

“Any dispute arising out of or in connection with this contract shall be decided under Swedish law through arbitration in Stockholm according to the Swedish Arbitration Act.”

[Unofficial translation]

V. Background

The dispute related to a Storage agreement under which the Respondent had agreed to store goods from the Claimant. The Claimant commenced arbitration proceedings at the SCC, claiming compensation for damages due to the Respondent’s failure to fulfil the terms and conditions set out in the storage agreement.

²⁰Swedish wording: ”Tvister mellan speditören och hans uppdragsgivare får, med nedan angivet undantag, icke hänskjutas till domstol utan skall avgöras enligt svensk rätt genom skiljedom enligt Stockholms Handelskammarens Skiljedomsinstitutets regler...”

²¹Swedish wording: ”Tvist med anledning av detta avtal ska avgöras enligt Svensk rätt genom skiljeförfarande i Stockholm enligt lagen om skiljemän”.

The storage agreement included a reference to a standard form contract. That contract included an arbitration clause referring to the SCC while the Storage agreement referred disputes to *ad hoc* arbitration in Sweden.

VI. Arguments Raised

The Respondent

The Respondent contested the jurisdiction of the SCC and argued that the dispute should be settled by *ad hoc* arbitration in accordance with the arbitration clause in the storage agreement. The arbitration clause of the standard form contract, to which the Claimant referred, was not applicable. The arbitration clause of the parties' storage agreement should have priority to the one in the standard form contract.

The Claimant

The Claimant argued that the dispute concerned the Respondent's liability for the goods. Pursuant to the standard form contract, the Respondent's liability was governed by the standard form contract, which referred disputes to the SCC. Disputes concerning liability should thus be settled by the SCC.

VII. Prima Facie Decision by the Board

The SCC manifestly lacks jurisdiction over the dispute.

3.6 SCC Arbitration V (098/2007)

The Respondent objected to the jurisdiction of the SCC on the ground that the parties had agreed to refer disputes to ordinary court proceedings.

I. Nationality of the parties

Claimant: German

Respondent: American

II. Nationality of the Arbitrators

Swedish, German and Swedish

III. Language of the Contract

English

IV. Arbitration Clause

Section 18 in the First Contract:

“Arbitration: All disputes in connection with this contract or the execution thereof shall be settled by friendly negotiation. If no settlement can be reached, the case shall be submitted to the international trade arbitration commission in accordance with the provisional rules of the procedure promulgated by the

arbitration commission. The decision made by the Arbitration Commission shall be accepted as final and binding upon both parties; neither party shall seek recourse to a law court or other authorities to appeal for Revision of the decision. Arbitration fee shall be borne by the losing party.”

Section 19 of the First Contract:

“Place of Arbitration: The Arbitration shall take place in Sweden by ARBITRATION INSTITUTE OF STOCKHOLM CHAMBER OF COMMERCE; STOCKHOLM SWEDEN. “

Section 12 in the Second Contract:

“Applicable Law Construction. The parties acknowledge that this Agreement is to be performed in Iowa and thus, shall be governed by the laws of the State of Iowa. The parties, by their execution of this Agreement, submit to the jurisdiction of the courts of the State of Iowa and agree that venue shall be in Sioux County, Iowa. The language of all parts of this Agreement shall be construed as a whole, according to its fair meaning, and not strictly for or against any of the parties.”

V. Background

The parties had entered into an agreement regarding purchase and delivery of equipment (the “First Contract”). Following a dispute as to alleged defect deliveries under the First Contract the parties entered into a second contract as a settlement agreement (the “Second Contract”). The First Contract contained a dispute resolution clause referring disputes to arbitration in Sweden while the dispute resolution clause in the Second Contract referred disputes to the courts of the State of Iowa. The Claimant commenced arbitration at the SCC on the basis of the arbitration clause in the First Contract.

VI. Arguments Raised

The Claimant

Prior to the Claimant’s Request for Arbitration at the SCC, the Respondent had initiated court proceedings against the Claimant in a court in Iowa. Before the SCC, the Claimant therefore requested *“an interlocutory decision, positively affirming the sole and exclusive jurisdiction of the Arbitration Institute of the Stockholm Chamber of Commerce for all claims out of or in connection with the business relationship under the First and the Second Contract or the breach, termination of invalidity thereof.”*

The Claimant argued that the Second Contract only amended, not superseded, the First Contract and that all claims brought forward by the Claimant were *“in connection with”* the First Contract and its execution and were therefore subject to the First Contract’s mandatory arbitration clause.

As regarded the SCC’s *prima facie* decision, the Claimant argued that the Board had no reason to dismiss the case since *“further examination [would be] required in order to fully evaluate the jurisdictional objections of the Respondent /.../ An Arbitral Tribunal should therefore be established.”*

The Respondent

In its Answer to the Request for Arbitration, the Respondent held that *“the Federal District Court for the Northern District of Iowa [had been] made aware of the arbitration clause”* and

had found that “*arbitration was not warranted.*” The Respondent argued that the Claimant had acted “*inconsistently with any right to arbitrate*” and that “*the arbitration provision contained in the purchase agreement [was] null and void.*” For these reasons, the SCC did not have jurisdiction over the dispute.

In any event, the Second Contract contained no arbitration provision and, as such, the Respondent “*expressly object[ed] to any assertion of jurisdiction over said agreement by the Arbitral Tribunal.*” Furthermore “*[the Claimant] waived any right to arbitrate that it may have had when it entered into the second agreement with [The Respondent], the settlement agreement. That agreement explicitly supersede[d] the first agreement, [did] not include any arbitration clause and explicitly provide[d] for jurisdiction in the Iowa courts.*”

VII. Prima Facie Decision by the Board

The SCC manifestly lacks jurisdiction over the dispute arising out of the Second Contract. Any claims relating thereto shall therefore be dismissed.

The SCC does not manifestly lack jurisdiction over the dispute arising out of the First Contract.

VIII. Decision on Jurisdiction by the Arbitral Tribunal

The case was referred to an arbitral tribunal consisting of three arbitrators. The jurisdictional issue raised by the Respondent was determined in a separate award. The arbitrators held that the core of the dispute on jurisdiction was to establish the effect of the Second Contract on the arbitration clause in the First Contract. It was considered clear that the Second Contract included a dispute resolution clause that was binding on the parties. Consequently, the application of the First Contract’s arbitration clause was excluded in respect of matters covered by the Second Contract. As a result, the arbitrators found, as also the SCC did, that they lacked jurisdiction over matters that were covered by the Second Contract. Having examined whether there were any claims arising only out of the First Contract, three out of four of the Claimant’s claims were dismissed without prejudice due to lack of jurisdiction.

3.7 SCC Arbitration V (123/2009)

The Respondent objected to the SCC’s jurisdiction on the ground that the Claimant was not a party to the arbitration agreement.

I. Nationality of the Parties

Claimant: Finnish
Respondent: Swedish

II. Nationality of the Arbitrators

All three arbitrators were from Sweden

III. Language of the Contract

English

IV. Arbitration Clause

“Arbitration

If the dispute cannot be resolved through friendly consultation within thirty (30) days after the date of notice of such dispute, such dispute must be settled finally and exclusively by arbitration as provided herein by any Party submitting the dispute to arbitration.

Any dispute, controversy or claim arising out of or in connection with this Contract, or the breach, termination or invalidity thereof, which cannot be settled as aforesaid, shall be finally settled by arbitration in accordance with the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

The Arbitral Tribunal shall be composed of three arbitrators. Each party shall appoint one arbitrator and the two arbitrators shall appoint a third arbitrator who shall be the chairman of the Arbitral Tribunal.

The place of Arbitration shall be Stockholm, Sweden.

The language used in the arbitral proceedings shall be English or Swedish.”

V. Background

The agreement in question had originally been signed by the Respondent and another company, Company X. According to the agreement, the Respondent undertook to deliver to Company X drawings and technical information regarding a barge that Company X was to construct. Due to alleged defects of the delivered drawings, Company X claimed compensation for damages but the Respondent refused to pay. Subsequently, Company X transferred the outstanding claim for damages to the Claimant who commenced arbitration at the SCC, referring to the arbitration clause in the agreement between the Respondent and Company X.

VI. Arguments Raised

The Respondent

In the Answer to the Request for Arbitration, the Respondent held that the Claimant was not a party to the agreement between the Respondent and Company X and therefore objected to the jurisdiction of the SCC.

According to the Respondent, Company X had only transferred the outstanding claim for damages and the transfer did not mean that the Claimant had succeeded to other rights and obligations under the agreement between the Respondent and Company X. The Claimant had not become party to the agreement and could thus not invoke the arbitration clause inserted therein.

The Claimant

The Claimant was given the opportunity to comment on the jurisdictional objection. In its submitted comments, the Claimant argued that the transferred claim regarded defects of the delivered drawings under the agreement. In that way, the Claimant had acquired rights under the agreement and the arbitration clause was to be applied on the dispute.

VII. *Prima Facie* Decision by the SCC Board

The SCC does not manifestly lack jurisdiction over the dispute.

4. CONCLUSION

One can conclude that the grounds for contesting the jurisdiction of the SCC may vary from case to case, which in turn naturally depends on the wording of the arbitration clause at issue. Statistics show that although jurisdictional objections are raised in approximately one of every seventh proceeding commenced at the SCC, a low number of cases have resulted in a decision where *prima facie* jurisdiction was denied. The cases discussed above where the SCC have lacked jurisdiction are thus exceptions from the frequent outcome where the SCC assumes *prima facie* jurisdiction of the dispute. The importance of properly drafting arbitration clauses should however not be overlooked. Poorly drafted arbitration clauses afford opportunities for a variety of jurisdictional objections regarding the validity, interpretation or scope of the arbitration agreement which in most cases will result in an increase of the time spent by the tribunal in deciding its own competence and, as a consequence, the costs for the parties' counsel in the proceedings.

As illustrated by the abovementioned cases, the reference to the SCC and its Rules should be made clear so as to exclude any doubt to the competence of the SCC. The easiest and most efficient way of doing this is to adopt the model clauses that can be found on the SCC website. These model clauses are available in a number of variations to best suit the parties' wishes, including combination clauses that offer flexibility when the size and character of the dispute may be difficult to predict in advance.