THE EUROPEAN CIRCUIT

– Arbitration Event, 20 September 2018, Stockholm

Opening address

The Role of Institutions in International Arbitration: the SCC perspective

An address depicting the role of the SCC in international arbitration, the challenges and opportunities currently facing the institution and how it can stay relevant in tomorrow's marketplace.

I. Introduction

It is an honour to have been asked to give the opening address for this year's annual conference of the European Circuit and to welcome some of you to Stockholm for the first time and welcome back those of you who have been here before.

You have arrived in a town which quite extraordinarily is home to one of the world's leading arbitration institutions. Not only for commercial arbitration but also investment arbitration.

II. The SCC

The Arbitration Institute of the Stockholm Chamber of Commerce was established in 1917. It rose to prominence on the global arbitration arena as the result of events which took place in the 70's and 80's.

During the Cold War, a need for impartial venues in neutral jurisdictions for the resolution of commercial East-West disputes arose. Sweden had conducted a policy of non-alignment in foreign affairs, and for this had earned a reputation as a neutral, middle-ground country.

In 1977, representatives of the US and the Soviet Union met in Washington DC to discuss a procedure that would work for the resolution of East-West trade disputes. International arbitration was the method agreed upon but where? Stockholm was not the first place to be discussed by the parties. France, the UK, Switzerland and China were among those places considered but then discarded. Eventually, the parties agreed on Sweden and Stockholm as neutral ground for the resolution of trade disputes between the East and the West. The agreement was codified in the so-called Optional Clause Agreement entered into by the American Arbitration Association and the USSR Chamber of Commerce and Industry.

A second major event that helped raise the profile of the Stockholm Chamber of Commerce as a forum for international East-West trade disputes took place in 1984 when following a co-operation agreement between the China Council for the Promotion of International Trade (CCPIT) and the Stockholm Chamber of Commerce, the Chinese government accepted the Stockholm Chamber of Commerce and the SCC Rules as the only alternative dispute resolution forum to CIETAC arbitration for international transactions involving Chinese parties.

A decade later, another milestone in SCC history was reached when the SCC in 1993 registered its first investor-state dispute. Today, more than 100 bilateral investment treaties (BITs) refer investor-state disputes to Stockholm. By the end of last year, 100 investor-state disputes had been filed with the SCC, the majority of them under the SCC Rules. These numbers make the SCC the second largest institute in the world to administer this kind of dispute, second only to ICSID.

Today, around half of the SCC caseload comprises of international disputes, involving parties from 30-40 countries each year. The disputes vary greatly in character and stem from a wide range of sectors. Although we are no longer the only international arbitration institute at which cross-border disputes

involving Chinese parties can be settled, the SCC is still strong on East-West disputes, investment and energy-related arbitration.

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Last year we celebrated the SCC's centennial.

We did so by paying particular tribute to the importance of international arbitration for trade, economic development and the peaceful resolution of disputes.

During the past 100 years, many thousands of commercial cross-border disputes have been resolved through arbitration. Arbitration has facilitated economic development and brought prosperity to many regions in the world. It is a testament, to the belief which the international community has in international arbitration and the power that it possesses today, that 159 states have signed and ratified the New York Convention since 1958, making it one of, if not, THE most successful international treaty in history.

International arbitration offered states a peaceful means to solve complex inter-state disputes avoiding the resort to force and loss of lives, such as the Indo-Pakistan Western Boundary Case in the 60's and the Taba-case between Egypt and Israel in the 80's. Both of which were presided by Judge Gunnar Lagergren, our very own unsung Swedish hero.

And for those of you who are interested in the subject of how international arbitration has played an important role for international relations, I recommend you to read "Arbitrating for Peace". It depicts 14 landmark international arbitration cases which made a difference in inter-state disputes, but also in some commercial disputes with geopolitical dimensions.

And for the majority of the past 100 years, international arbitration was the preferred mechanism to resolve disputes relating to foreign direct investment, offering a level of protection to investors deciding to take their

enterprising into another jurisdiction than that of their own and the possibility to work out any dispute with the Host State on a level playing field.

All of these three scenarios - commercial, inter-State and investor-State arbitration - all promote trade, economic development and peace.

Not bad, say I.

III. The challenges and opportunities for the SCC and the arbitration community at large

David Rivkin, who is previous vice Chair of the SCC Board and the Immediate Past President of the International Bar Association, he mentions in the SCC centennial documentary "The Quiet Triumph" that "[i]nternational arbitration is the grease that helps the economies flow and brings us benefits around the world". I believe most of us would agree with this statement.

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There has been a global rise in trade over the past 150 years. The rise has not been steady, but fluctuated, most often as a consequence of war after which countries were weary of international cooperation and instead engaged in protectionism at the expense of collective interests, which led to that their own interests were eventually undermined. This was the scenario that pre-ceded the Second World War. Economic insecurity fed political insecurity which led to collective breakdowns and war.

The current slide towards a more protectionist attitude which we see in many countries today and the steps taken by some countries to curtail international trade indicates that the path ahead may be one of those temporary downwards slopes in international trade that we have seen in the past.

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As mentioned, the role of the SCC is not restricted to commercial arbitration but also includes facilitating the resolution of investor-state disputes.

However, international arbitration recently came under fire when ISDS became politics. A successful albeit misinformed movement against trade and investment agreements generally developed a public aversion towards international arbitration at large, with politicians calling international arbitration anti-democratic, that it is a threat to the environment and that it is private justice – as opposed to public justice – and which is something that one should shy away from.

Some states have withdrawn from the ICSID Convention and others are complaining about the arbitration mechanisms established in the BITs which were signed by them. This is the reality in which we find ourselves.

And it is clear that investment treaty making has reached a turning point. UNCTAD recently reported in its IIA Issues Note that international investment agreements reform is well under way across all regions. That, since 2012, over 150 countries have taken steps to formulate a new generation of sustainable development-oriented international investment agreements. They have reviewed their treaty networks and revised their treaty models and are also beginning to modernize the existing stock of old-generation treaties. An increasing number are issuing interpretations, replacing and consolidating their older agreements.

This is a welcome approach. Especially, as many of the critical voices were confusing the subject matter of the ISDS-disputes - and poorly drafted treaties - with the dispute resolution mechanism itself.

UNCTAD also noted that many States have been engaging in multilateral reform discussions, including with regard to ISDS.

One of these reform discussions will be further examined by the first panel here today and moderated by Judge Vajda. I look forward to this discussion.

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Another concern, or challenge if you will, is Third Party Funding, which originally sprung out of investment disputes but has grown considerably across the world to such an extent that it is now viewed as an accepted and relatively uncontroversial means for parties to allocate resources and minimize risks associated with pursuing arbitration claims.

In recent years, a consensus has emerged in the arbitration community that Third Party Funding, if undisclosed, may compromise the integrity of arbitral proceedings.

The existence of Third Party Funding triggers primarily three points of consideration:

1. First, the potential for conflicts of interest. Many arbitrators are involved with third party funders, either as board members or as consultants providing due diligence opinions at the funder's request. Undisclosed ties could affect the integrity of the arbitration and, when discovered, give rise to challenges and enforcement difficulties.
2. Second, a funded party is typically required to share confidential and privileged information with the funder. Funded parties must balance this disclosure of information against the risk of waiving privilege.
3. Third, a related issue involves the extent to which the specific terms of a third party funding arrangement should be subject to disclosure. The fact that a party is supported by an external funder may influence a tribunal's decisions regarding arbitration costs. The central questions are whether Third Party Funding should affect the recoverability of a party's legal costs, whether the funder could be ordered to pay the costs of a successful respondent, and whether Third Party Funding should impact a tribunal's decision on a security for costs application.

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Notwithstanding political challenges, we live in a fast paced world where globalization is more tangible than ever, where trade happens with incredible speed, through new technologies and in complex constellations.

This situation imposes new challenges of its own, demanding of the dispute resolution industry to be innovative and progressive, especially in commercial arbitration.

The demand for effective resolution to trade disputes in a cross-border context is high. Businesses want quick, time and cost-efficient resolutions to their disputes.

Just as it brings challenges, the development in technology also brings many opportunities for efficiency, both for trade at large and in the administration of trade disputes.

For instance, the World Economic Forum released a white paper this week assessing that distributed ledger technology such as blockchain could boost trade by more than $1 trillion in the next 10 years, by streamlining trade flows and supply chains, leaving the paper-trade-process behind us.[1]

So how must the SCC and also other institutions address these challenges and use the opportunities presented?

[1] https://www.weforum.org/agenda/2018/09/blockchain-set-to-increase-global-trade-by-1-trillion The findings come from *Trade Tech – A New Age for Trade and Supply Chain Finance* which looks at how Fourth Industrial Revolution technologies can beat the "paper monster" of legacy technologies by streamlining trade flows and supply chains.

IV. How the SCC addresses these challenges and opportunities

Regarding the political winds blowing across the world, it is the SCC's and other institutions duty to continue to champion international trade and international arbitration as an evident tool to promote trade, economic development and peace.

We are supportive of the work of other trade organisations and arbitration institutions to this effect.

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As far as investor-state dispute settlement goes, we are happy to discuss the benefits of international arbitration as a dispute resolution mechanism any chance we get and otherwise share our experience of investor-state disputes. Our experience tells us that most awards have been rendered in favour of respondent states and – contrary to public opinion - does not support the notion that multinational corporations are being awarded astronomical sums of compensation from States after said States have amended their environmental or health policies.

In fact, in February last year, the SCC published an updated report on its investment disputes stating that (of those cases that had resulted in an SCC award) 21% of Arbitral Tribunals had declined jurisdiction and 37% had denied all of the investor's claims. Leaving only 42% of the cases in which Arbitral Tribunals upheld the investor's claims – IN PART or in full.

Interestingly enough, the debate on ISDS produced an innovative measure by the SCC – the Stockholm Treaty Lab. Some of the most critical voices against ISDS came from the environmental movement, a movement which is calling out for green investments for which there is no existing stable and transparent legal framework that specifically incentivizes and protects green investments, including offering a neutral and reliable enforcement mechanism. To this effect, the SCC launched an innovative crowdfunding

competition last year – the Stockholm Treaty Prize. The jury of the Stockholm Treaty Prize commended two teams for their unique approaches to the challenge and these two teams' model treaties will be presented at an event alongside the 73rd session of the United Nations General Assembly next week. The two teams will also get the chance to present their ideas to policymakers in Davos during the Annual Meeting of the World Economic Forum next year.

Although we have no way of telling now the effect that this will have, we hope to have sparked ideas that can eventually lead to more green investments and the mitigation of the consequences of climate change.

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Regarding third party funding, disclosure obligations have been adopted by some arbitral institutions and incorporated in investment treaties such as the CETA and the EU-Singapore Investment Protection Agreement.

We at the SCC have recently appointed a task force group to further evaluate the concerns related to Third Party Funding. Work here is ongoing and we are excited by this development.

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When addressing the challenges posed by globalization, it requires a great deal of new ideas and innovation.

We need to be innovative in the services that we provide and in the ways we provide them. Using both technology and procedural tools to create smart and efficient ways of arbitrating disputes. I will give you a few examples of this.

Since 2013, the SCC has provided an all-electronic case management which has proven both time- and cost efficient. It shows both in our case load statistics and in our daily work.

Procedurally, the SCC has on numerous occasions introduced innovative tools in its Rules. The most prominent being the 2010 inclusion of the Emergency Arbitrator provisions. 8 years later, we can proudly say that we proved the sceptics wrong and that we have played a key role in shaping the future of international arbitration as this instrument has been truly embraced by international businesses and the arbitration community[2] and it has given rise to all major institutions adopting similar provisions.

Another novelty in arbitration is the SCC summary procedure which was introduced in the 2017 version of the SCC Rules. The summary procedure offers the possibility of determining an issue on the merits by way of summary procedure. It should not however be confused with the summary procedure as used in certain common-law jurisdictions but it is rather another tool in the toolbox to enhance the efficiency of the proceedings when appropriate. A request for a summary procedure may relate to issues of jurisdiction, admissibility or the merits.

However, it remains to be seen how this new tool will be embraced by our users – In fact, we had our very first decision by an arbitral tribunal to adopt a summary procedure for the dispute only last week. Very exciting!

Another procedural change with the 2017 Rules, was the change to frontload the Expedited Arbitration procedure by making the Request for Arbitration also constitute the Statement of Claim and the Answer the Statement of Defence. The change was introduced to allow for a better use of the arbitrator's and the parties' time. It gives the arbitrator a good insight into the scope of the dispute already at the point of referral, leaving more time for further submissions should they be needed and room to plan for a potential hearing. The change had an immediate effect and our users have adapted well to the new procedure, with 71 cases filed under the Expedited Rules last year.

[2] SCC to date: 32; ICC 2012 - 2017: 70

Our users do not only require efficient processing but they also need to have trust in the outcome. For this reason, it is crucial for institutions to provide both transparency and foreseeability. The SCC does this through a series of efforts. For instance through practice notes on matters related to our case load, such as investment arbitration and costs in arbitration and through the Swedish Arbitration Portal which provides free access to English translations of Swedish court decisions on arbitration issues, making Swedish case law more accessible to the international community. And since January of this year, the SCC also provides reasoned decisions on challenges to arbitrators.

V. Conclusion

In conclusion, although international trade and international arbitration are currently faced with some challenges, the situation offers the opportunity to bring new ideas to the table and be innovative.

It is unquestionable that international arbitration has a fantastic track record for enhancing trade and economic development in the world and has been an effective tool to end strained relationships between states and avoiding war. This should not be forgotten in the current state of affairs and it is the guiding force of advocates of international trade and international arbitration.

The role of international arbitration remains to be the “grease” for international trade and this is the SCC mission. We are here to help ensure the continued economic development and prosperity of peoples and countries across the world.

We will continue to be attentive to the needs of the users to provide time- and cost-efficient solutions to their disputes. We take upon ourselves a leading

position as innovator and an efficient processor, continuously looking to better our services and procedures to meet those challenging circumstances around us.

Thank you.