THE 2007 ARBITRATION RULES OF THE
ARBITRATION INSTITUTE OF THE
STOCKHOLM CHAMBER OF COMMERCE

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The Arbitration Institute of the Stockholm Chamber of Commerce (SCC Institute) has adopted new rules, which came into effect on January 1, 2007 (2007 SCC Rules). While the 2007 SCC Rules do not substantially deviate from the former rules and do not introduce any novel or unusual provisions, there are some significant changes, a number of which will be discussed in this article.

1. Revision of the SCC Rules

The 2007 SCC Rules were drafted by a committee of Swedish arbitration specialists who were given the mandate to review the existing SCC Rules and to suggest revisions. The committee began its work in early 2006 and in the fall it distributed its draft of the 2007 SCC Rules for public comment both domestically and internationally. A public hearing was held on the rules and many written comments and suggestions were received and reviewed. The committee further revised the proposed rules in response to these comments and submitted the proposed rules to the Board of the Arbitration Institute for approval in late October, 2006. Following the Board’s approval, the rules were presented to the Board of the Stockholm Chamber of Commerce, which approved the 2007 SCC Rules on November 13, 2006. The 2007 SCC Rules will be applied to all cases filed after January 1, 2007.

The work to review and revise the rules was not a response to any particular dissatisfaction with the previous rules, which date from 1999 (1999 SCC Rules). The 1999 SCC Rules had provided an effective and flexible system for conducting both domestic and international arbitrations in Sweden. However, the English version of the old Rules contained some linguistic imperfections stemming from the fact that they were a translation from the Swedish version, which was the original drafting language. More
importantly, a review and revision of the rules was justified to ensure that
the SCC Rules reflected modern international best practices, did not include
any unnecessary parochial provisions, adopted generally recognised and
accepted procedures and terminology, and provided a modern and flexible
approach well-suited to conducting a wide-range of arbitral proceedings.

The SCC Institute administers a large number of cases which vary
considerably in nature, complexity, size, and often involving diverse
nationalities of parties, arbitrators, and legal representatives. About half of
the cases are international and increasingly these include complex
investment cases and cases with states as parties.\(^5\) The SCC Institute uses
one set of rules for both its domestic and international cases and
consequently, the SCC Rules need to provide a system that can be
efficiently applied by a range of users in the varied cases it administers.\(^6\)

When revising the SCC Rules, the committee considered the existing
UNCITRAL Rules as well as the rules of leading arbitration institutions.
Already before the work on the revision of the SCC Rules, UNCITRAL
had begun preliminary discussions on reviewing and possibly revising the
UNCITRAL Rules of Arbitration.\(^7\) Near the conclusion of the SCC revision
work, a report on the revision of the UNCITRAL Rules was prepared by
Jan Paulsson and Georgios Petrochilos which suggested numerous
revisions.\(^8\) Although this was not part of the work of UNCITRAL, the
paper was posted on the UNCITRAL website in the fall of 2006, when

\(^5\) In 2006, the SCC caseload included 141 new cases, 74 were international, involving parties

\(^6\) The Swedish Arbitration Act also applies to both international and domestic cases,
although there are some special provisions that only apply to international cases.
1998/99:JuU12. (hereinafter referred to as the "SAA").

\(^7\) See for example, UNCITRAL Report on the Working Group on Arbitration and Conciliation
on the work of its forty-fourth session (New York, 23 – 27 January, 2006) page 20, paragraph 90. Available on the UNCITRAL website at: http://daccessdds.un.org/doc/UNDOC/GEN/V06/515/13/PDF/V0651513.pdf?OpenElement (last visited January 13, 2007). See also, the most recent Secretariat Notes prepared in connection with the most recent working group meeting on February 5 – 9, 2007, which were posted on December 6, 2006 and can be accessed at: http://daccessdds.un.org/doc/UNDOC/LTD/V06/590/44/PDF/V0659044.pdf?OpenElement (last visited February 5, 2007).

\(^8\) Jan Paulsson and Georgios Petrochilos, Revision of the UNCITRAL Arbitration Rules, posted
on the UNCITRAL website on September 6, 2006 and prepared for the information of the
Secretariat. The report was presented at a conference held in Vienna, on 6 and 7 April 2006,
in cooperation with the International Arbitral Centre of the Austrian Federal Economic
visited on January 13, 2007)
most of the work on the revision of the SCC Rules was already completed. It was decided that the revision of the SCC Rules should not await any revision of the UNCITRAL Rules, a process which is in an early stage and that could likely take considerable time.

2. **Organisation and Procedures of the Institute**

One of the aims of the revision of the rules was to improve the transparency of the decision-making procedures and clarify the organisation of the SCC Institute. Although some users may find that this is not a particularly significant matter, other users occasionally inquired about the internal procedures and organisation of the Institute. The 2007 SCC Rules now specify whether certain measures or decisions are taken by the Secretariat or the Board. Thus, while the internal procedures of the Institute remain unchanged, transparency has increased.

The 2007 SCC Rules also clarify the general role of the Institute to increase user awareness and to improve the preciseness of the language used to describe the functions of the Institute. For example, the 1999 SCC Rules provided that the objectives of the Secretariat were, among other things, “to assist in the settlement of domestic and international disputes”.9 This terminology may have given some users the misimpression that the Secretariat actually assisted in settling or resolving cases, which has never been the case but was only a linguistic expression. The 2007 SCC Rules now clearly indicate the role of the Secretariat by providing that the SCC Institute “is a body providing administrative services in relation to the settlement of disputes”.10 The rules also specifically provide that “the SCC Institute does not itself decide disputes” and that its function is “to administer domestic and international disputes”.11

The provision requiring the Institute to maintain the confidentiality of the arbitration and to deal with the arbitration in an impartial, practical and expeditious manner is retained, but has been moved to the Appendix because it deals with the procedures of the Institute rather than the initiation of arbitral proceedings.12 In the 1999 SCC Rules, this article was contained in the provisions relating to the initiation of proceedings.13 The provision regarding the limitation of liability for the Institute and arbitrators remains essentially unchanged and is now contained in Article 48.

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12 2007 SCC Rules, Appendix I, Article 9.
13 1999 SCC Rules, Article 9.
In 2006, the Board of the SCC Institute was enlarged to include six international members and the 2007 SCC Rules reflect this change. The Board may now consist of a chairperson, up to three members may be vice-chairpersons, and a maximum of twelve additional members having both Swedish and non-Swedish nationality. Decisions which the Board may delegate to the Secretariat are also clarified in the 2007 SCC Rules.

3. Appointment of Arbitrators

The 2007 Rules have not substantially deviated from the 1999 Rules as regards the composition of the arbitral tribunal and continue to give considerable importance to the concept of party autonomy and the right to appoint an arbitrator. However, there are a few changes which are not merely linguistic or organisational. These changes will probably not significantly affect most cases and primarily reinforce the right of the parties to appoint the arbitrators. The new Rules specifically provide that the parties are free to agree upon the number of and the procedure for appointing arbitrators. Consequently, the parties are free to agree on an appointment procedure other than the procedure provided for in the rules. Of course any agreed-upon procedure would have to comport with notions of due process. The rules relating to the composition of the tribunal are now contained in two articles: Article 12 providing for the default number of arbitrators and Article 13 containing the principles for the appointment of arbitrators.

3.1 Number of Arbitrators

During the revision work there were discussions about whether the default number of arbitrators should be a single arbitrator or three arbitrators. The committee considered the solutions of other rules. The ICC, the Swiss Rules of Arbitration, the AAA, and the LCIA Rules all provide that in the absence of party agreement there shall be a sole arbitrator unless the circumstances warrant the appointment of three arbitrators.
The UNCITRAL Rules provide that if the parties have not agreed on a sole arbitrator, there shall be three arbitrators. This is consistent with UNCITRAL Model Law approach, which provides for three arbitrators unless the parties have agreed otherwise. The Paulsson-Petrochilos report noted that in small cases it might be desirable to have the option to allow a sole arbitrator when the parties have been unable to agree on the number of arbitrators. There is a risk that a respondent could unjustifiably escalate the costs of the arbitration by refusing to agree to a sole arbitrator and thus hope to obstruct the arbitration by deterring the claimant from proceeding. They suggest that an appointing authority should be empowered to make the determination of the number of arbitrators should the parties fail to agree.

In its discussions, the committee was aware that there are increasing concerns about the cost of arbitration. However, it also was cognizant that the fees of the arbitrators are generally estimated to comprise a relatively minor expense in arbitration. The committee was also mindful of the fact that increasingly the SCC Institute administers large and complex cases often involving substantial investments and states as parties. In such cases a default preference for three arbitrators may enhance reliance upon the arbitral process. Additionally, the majority of the comments submitted on the draft rules favoured a default rule of three arbitrators.

The committee decided to retain the default rule of the 1999 SCC Rules and thus the 2007 SCC Rules provide that absent party agreement there shall be three arbitrators, unless the Board determines that there should be a sole arbitrator, taking into consideration the complexity of the case, the

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19 ICC Rules of Arbitration, Article 8.2; The Swiss Rules of Arbitration, Article 6.2; AAA Commercial Arbitration Rule, Article R-15; and LCIA Rules of Arbitration, Article 5.4.

20 UNCITRAL Rules, Article 5. The Paulsson-Petrochilos report noted that in small cases it might be desirable to have the option to allow a sole arbitrator when the parties have been unable to agree on the number of arbitrators. They note that there is a risk that a respondent could unjustifiably escalate the costs of the arbitration by refusing to agree to a sole arbitrator and thus hope to obstruct the arbitration by deterring the claimant from proceeding. Thus, they suggest that an appointing authority should be empowered to make the determination of the number of arbitrators should the parties fail to agree, thus leaving the default number of arbitrators entirely up to the appointing authority. Paulsson-Petrochilos report, supra. at footnote 8, paragraph 65, pages 35 – 36.

21 UNCITRAL Model Law, Article 10.

22 Paulsson-Petrochilos report, supra. at footnote 8, paragraph 65, pages 35 – 36.

23 Id.


25 Id.
amount in dispute and other circumstances. Consequently, the number of arbitrators is subject to the determination of the SCC Institute unless the parties have agreed otherwise and have in fact appointed the arbitrators according to their agreement within the stipulated time.\(^{26}\) In practice the SCC Rules take essentially the same position as other institutional rules by focusing on the particular circumstances of the case in deciding the default number of arbitrators.\(^{27}\) It should be noted that the 2007 SCC Rules introduced a new provision which requires the request for arbitration to include comments on the number of arbitrators.\(^{28}\) This was introduced to promote efficiency by requiring the parties to address this issue at the outset of the arbitration. The information is needed at an early stage of the case because the Board will need to make a decision regarding the number of arbitrators if the parties have not agreed.

The 2007 Rules, like the 1999 Rules do not regulate the appointment of a secretary for the arbitral tribunal. This issue was discussed in the committee and it was recognised that it is not uncommon for a secretary to be appointed in large, complex arbitrations. However, it was generally agreed that this was a matter for the parties and the arbitrators to determine in the context of each case. It can be noted that this issue is addressed in the Arbitrators’ Guidelines published by the SCC Institute.\(^{29}\)

### 3.2 The Procedure for Appointment

Article 12 of the 2007 Rules expressly provides that parties are free to agree upon the procedure for appointing arbitrators. This does not introduce a new principle but confirms the existing practice. In the experience of the SCC Institute, it is not uncommon for parties to agree upon specific appointment procedures. Appointment procedures agreed upon by the parties are always respected by the Institute to the extent practically possible.

In order to prevent delay or obstruction, if the parties have not appointed the arbitrators within the prescribed time limit, either as stipulated by the parties in their arbitration agreement or as decided by the Institute, the Board may appoint the arbitrator(s) pursuant to Article 13.1. Again, this addition to the rules does not introduce any change in the SCC procedure but promotes clarity and transparency by codifying existing practice.


\(^{27}\) ICC Rules, Article 8; LCIA Rules, Article 5.4.

\(^{28}\) 2007 SCC Rules, Article 2 (v).

Often when the parties have agreed to a sole arbitrator they many times will try to agree to the appointment or to a procedure for making the appointment. Under the 1999 SCC Rules, when the parties had agreed to a sole arbitrator, unless the parties agreed otherwise the Board would appoint the arbitrator. 30  Under the 2007 SCC Rules, the parties have thirty days to jointly appoint the sole arbitrator and if they fail to do so, the Board will then make the appointment. The purpose for this change is to ensure the parties are given the opportunity to make their own appointment. However, this opportunity is limited to thirty days in order to prevent a recalcitrant party from obstructing and delaying the proceedings and to ensure a speedy resolution to the dispute. 31

According to the SCC old Rules and prior practice, the SCC Board appoints the chairperson of the tribunal unless the parties agree otherwise. This practice is continued under the new Rules. 32  The committee discussed changing this practice to providing that the party-appointed arbitrators should appoint the chairperson; a practice which is followed by some institutions and which arguably promotes party autonomy. However, this method of appointing the chairperson can also lead to delays. The committee decided to maintain the existing practice. Thus, each party shall each appoint an equal number of arbitrators, and the Board shall appoint the chairperson, unless the parties have agreed otherwise. 33

Parties are also able to entrust the appointing procedure to the SCC Institute, both when the proceedings are conducted pursuant to the SCC Rules or by making the SCC Institute an appointing authority when arbitrating pursuant to the UNCITRAL Rules or other procedures. 34  As was the case with the previous rules, when the SCC Board appoints arbitrator(s) either because it has been designated the appointing authority or through the default of one or more of the parties to make an appointment, the Board shall consider the nature and circumstances of the dispute, the seat and language of the arbitration, and the nationality of the parties. 35  Consistent with the 1999 SCC Rules and prior practice, in a case where the parties have different nationalities, the Board will appoint a sole

30 1999 SCC Rules, Article 16 (5).
31 2007 SCC Rules, Article 13 (2).
32 2007 SCC Rules, Article 13 (3).
33 Consistent with international practice, with SCC arbitrations it is extremely unusual that the parties would agree to appoint other than one or three arbitrators. See Paulsson-Petrochilos Report, supra at footnote 8, paragraph 63, page 35 where it is noted that in less than 1% of all cases the tribunal is not a one or three arbitrators tribunal.
34 It is not unusual for the SCC Institute to be named the appointing authority in arbitration pursuant to the UNCITRAL Rules.
35 2007 SCC Rules, Article 13 (6).
arbitrator or the chairperson with a different nationality than the parties, unless the parties have agreed otherwise or unless otherwise deemed appropriate by the Board. The committee discussed and rejected introducing a formal list of arbitrators, choosing instead to maximise party autonomy.

The SCC caseload reflects the global trend towards increasingly complex transactions involving multiple parties. In light of this, after some discussions the committee decided to slightly revise the rules relating to the appointment procedure in multi-party situations. The 1999 SCC Rules provided that the multiple claimants and multiple respondents should appoint an equal number of arbitrators for each side and if they failed to do so, the SCC Institute would make the appointment for that side. However, the old rule also provided that if the circumstances warranted, the Institute could appoint the entire tribunal, unless otherwise agreed by the parties. The 2007 SCC Rules provide that if either the multiple claimants or respondents fail to appoint the arbitrator(s), the SCC Board shall appoint the entire arbitral tribunal. This provision ensures that the appointment procedure complies with any requirements of due process which may give each party an equal right to appoint an arbitrator, as was enunciated in the well-known Dutco case. It is also in line with the practice of most institutions, ensures efficiency, and respects the agreement of the parties.

4. Challenge of Arbitrators

Articles 14 and 15 of the 2007 SCC Rules contain the provisions relating to the impartiality and independence of arbitrators and the challenge of arbitrators. Changes include greater specificity regarding the requirements of the disclosure obligations in Article 14 and a new ground for challenge in Article 15.

36 1999 SCC Rules, Article 16 (3).
37 Id.
4.1 Grounds for Challenge and the Arbitrators’ Duty of Disclosure

Since 2000, the SCC Institute has requested arbitrators who have been appointed in SCC arbitrations to complete a written form in which they confirm their impartiality and independence, as well disclose any circumstance which may give rise to justifiable doubts as to their impartiality or independence. This practice has now been incorporated into the rules.

Completing the form is not a preliminary step in the process of appointing an arbitrator. A party first appoints an arbitrator and informs the SCC Institute of the appointment. Only after this notification, the Institute requests the appointed arbitrator to complete and return the form. This order of events also applies when the Institute appoints the arbitrator. The Board decides upon the appointment of the prospective arbitrator and if the arbitrator accepts the appointment, the Secretariat will request the arbitrator to complete and return the form. The order of first appointing the arbitrator and then having the arbitrator confirm his or her impartiality and independence only after the actual appointment has been made reflects the principle under the SCC Rules that parties are very independent in the appointment process. Unlike some institutional procedures, there is no requirement that party-appointed arbitrators be approved or confirmed by the SCC Institute, nor do parties have to select their arbitrators from a list maintained by the SCC Institute. Needless to say, all arbitrators must meet the requirement of impartiality and independence set out in Article 14 (1).

In summary, it can be noted that the 2007 SCC Rules have complemented the provisions on challenge and disclosure by incorporating an existing practice at the SCC Institute. In substance the requirements for the qualification of arbitrators has not changed by the 2007 SCC Rules. Consequently, previous practice relating to various issues, for example decisions on challenge of arbitrators, may continue to serve as guidance under the new rules.

39 On the appointment of arbitrators by the SCC Institute, see Magnusson, supra. at footnote 26.

40 See e.g., ICC Rules of Arbitration, Article 9.

4.2 The Challenge Procedure

The time period for bringing a challenge to an arbitrator continues to be 15 days under the 2007 SCC Rules. The parties and arbitrators shall be given an opportunity to comment upon any challenge made to an arbitrator. After giving the parties and the arbitrators this opportunity, the SCC Board will decide whether to sustain the challenge. As a general rule, the Board does not state reasons for its decision\(^{42}\) and the decision is final.\(^{43}\)

Article 15 of the 2007 SCC Rules contains a new provision, which makes it possible to challenge an arbitrator during arbitral proceedings on the grounds that the arbitrator lacks the agreed-upon qualifications. This ground for challenge is also included in the UNCITRAL Model Law.\(^{44}\) The addition is the result of practical experience. Proposals to this effect were included in the written comments already during the preparatory work of the 1999 SCC Rules. Arbitrators have been challenged because of an alleged lack of the agreed-upon qualifications under the 1999 SCC Rules, although this was not specifically regulated in the rules.\(^{45}\)

Article 15 (4) of the 2007 SCC Rules in practice gives the parties the power to jointly decide to remove an arbitrator, as this provision states that when a party agrees to a challenge made by the other party, the challenged arbitrator shall resign.\(^{46}\) From a practical perspective, maybe it may have been more effective in this situation if the Institute had been given the power to immediately remove the arbitrator, rather than having to wait for him or her to resign. In theory an arbitrator obliged to resign under Article 15(4) could delay the proceedings simply by doing nothing, perhaps out of sheer spite. In practice, however, it is probably safe to assume that Article 15 (4) will be applied very rarely. When the situation does arise the Board

\(^{42}\) For an example of an exception to this rule, see SCC case 61/2004, reported in Stockholm Arb. Rep. 2004:2, page 82.

\(^{43}\) In Sweden, this means that a court will dismiss a motion to appeal a decision following a challenge under the SCC Rules. Cf. Swedish Arbitration Act, section 11, and Svea Court of Appeal, case ÖA 4247-04, reported in Stockholm Arb. Rep. 2004:2, p. 329. It is however important to note that under Swedish law, decisions by the SCC Institute following a challenge are final only in matters referred to in Section 8 of the Swedish Arbitration Act. This means that a decision by the SCC Institute following a challenge due to lack of agreed qualifications of an arbitrator is not final under Swedish law, i.e. this ground may, notwithstanding a decision by the SCC Board, serve as a ground for a challenge of the arbitral award pursuant to Section 34 of the Swedish Arbitration Act.


\(^{45}\) SCC case 66/2004, reported by Magnusson & Larsson, supra at footnote 41, page 62.

\(^{46}\) LCIA Rules, Article 10.1, AAA Rules, Article 8(3).
should be able to request the challenged arbitrator to resign within a designated period of time. If the arbitrator fails to do, the Board could remove the arbitrator in accordance with Article 16.

It may seem obvious that a party should not be able to challenge an arbitrator for a reason that was known to the party at the time it made the appointment. Nonetheless, for the sake of clarity a provision to this effect has now also been included in the Rules. 47 A related issue that may not be as clear is how to determine what circumstances a party ought to have been aware of when appointing its arbitrator. The SCC Rules do not define the standard of knowledge nor the extent to which parties are required to investigate the specific background or ties of potential arbitrators. This is essentially a fact-based determination made on a case-by-case basis.48

5. Challenges to Jurisdiction

The provisions regarding challenges to jurisdiction are contained in Articles 5, 9, and 10. The time period for a challenge on jurisdiction is specified in Article 5. Articles 9 and 10 more clearly describe the procedures for handling challenges to jurisdiction than did the corresponding provisions of the 1999 SCC Rules. 49

5.1 Time-limit for Challenges

Under the 1999 SCC Rules, occasionally uncertainty arose as to whether a party who failed to object to the jurisdiction of the SCC Institute in its first reply in accordance with Article 10 was prevented from later raising this objection before the arbitral tribunal. 50 This uncertainty in part stemmed from the actual wording of the relevant article of the 1999 SCC Rules, which simply stated that “if the respondent wishes to raise any objection concerning the validity of the applicability of the arbitration agreement, such objection shall be made in the Reply together with the grounds therefore.”51 To remove any doubts, the corresponding provision in the 2007 SCC Rules has been expanded and now expressly provides that the failure to raise any objections on jurisdiction in the first reply before the

47 Compare with LCIA Rules, Article 10.3.
48 A case touching upon this issue is presently (February 2007) pending before the Swedish Supreme Court; case T 2448-06; Anders Jilkén ./. Ericsson AB.
49 1999 SCC Rules, Articles 5, 13 and 7.
50 In SCC case 112/2000 a jurisdictional challenge was filed as late as during the main hearing. The arbitral tribunal dismissed the challenge. However, in its dismissal the arbitral tribunal referred specifically to Article 10 (2) of the SCC 1999 Rules.
51 1999 SCC Rules, Article 10 (2) (emphasis added).
Institute does not preclude the respondent from subsequently raising such objections at any time up to and including the submission of the statement of defence.

The new wording is not expected to bring about any dramatic change from how this issue in practice had been dealt with under the SCC Rules. On the contrary, it probably reflects the current practice as applied by most arbitral tribunals. In a case decided already under the 1988 version of the SCC Rules, the arbitral tribunal ruled that “it is generally considered that failure to raise a plea of non-competence in the answer to the request for arbitration as provided in Article 11 of the Rules does not forfeit the right to contest jurisdiction; the rule is more in the character of a recommendation.” The tribunal defined the statement of defence as the crucial point at which the respondent at the latest must raise its jurisdictional objections in order not to lose this right.

According to Article 5 (1) (iii) of the 2007 SCC Rules, in its answer to the request for arbitration, the respondent may make a preliminary statement of any counter-claims or set-offs. The Secretariat shall send the answer to the claimant and the claimant shall be given an opportunity to submit comments on the answer. The 2007 SCC Rules do not clearly indicate whether the claimant has a corresponding time period within which to object to the jurisdiction of the arbitrators, extending to the respondent’s claims, counter-claims or set-offs, but the provisions of Article 5 (1) (i) should be applied by analogy. Thus, the claimant should be able to make such jurisdictional objections up until it has submitted its statement of defence to the respondent’s claims, counter-claims, or set-offs.

5.2 Decision on Jurisdiction by the SCC Institute

A jurisdictional challenge made during the initial exchange of pleadings is subject to a prima facie jurisdictional decision by the SCC Board. In the 2007 SCC Rules this procedural step is expressly described in Article 9. Again, it is not a novelty in substance, but the added provision serves to clarify the decision-making process in SCC cases.

According to the provisions of Article 9, the SCC Board shall decide on its jurisdiction only “if necessary”. If the arbitration agreement is clear and the respondent has made no jurisdictional objections, the Board will probably find no reason to make a jurisdictional decision. Correspondingly,

52 1988 SCC Rules, Article 11: “If the respondent desires to raise any objection concerning the validity or applicability of the arbitration agreement, such objections shall be made in the reply together with a statement of the grounds thereof” (emphasis added).

53 SCC case 20/1999.

54 2007 SCC Rules, Article 5 (2).
the Board will be prompted make such decisions when the respondent, in
its answer pursuant to Article 5, has made an express challenge to the
existence of the arbitration agreement, its validity, or its applicability.

There may be situations in which the Board finds it justified to raise the
issue of jurisdiction *ex officio*. For example, when the claimant submits a
request for arbitration pursuant to an alleged arbitration clause that clearly
does not refer to the SCC Institute and the respondent submits its answer
under Article 5 without commenting on the arbitration agreement. In such
cases, the Board is likely to raise the issue on its own motion.55 This would
also be the case should the claimant’s request for arbitration be based upon
an arbitration agreement which doubtfully refers to the SCC Institute and
the respondent remains silent. 56

5.3 Dismissal for Lack of Jurisdiction

Under Article 10, the Board shall dismiss a case, in whole or in part, if
the SCC Institute manifestly lacks jurisdiction over the dispute. The English
wording of this provision has varied over the years. In the 1988 version of
the SCC Rules, the corresponding article provided that the case should be
dismissed “if it is *obvious* that the Institute lacks competence over the
dispute”,57 and in the 1999 SCC Rules “if it is *clear* that the SCC Institute
lacks jurisdiction over the dispute”.58 However, the change in terminology is
merely linguistic expression and should not be given any substantive
meaning. Thus, the threshold for *prima facie* decisions on jurisdiction made
by the SCC Board is and has been the same throughout all of these versions
of the Rules.59

The provisions on dismissal contained in Article 10 provide that the
Board may dismiss a case “in whole or in part”, which is an additional
provision in the article on dismissal in the 2007 SCC Rules. This addition
refers primarily to section (ii) of the Article which affirms a principle that
was already applicable under the 1999 SCC Rules. This principle provide
that if a party does not make a required payment for the advance on costs,
the case will be dismissed, either wholly or in part, to the extent attributable
to the missing payment. 60 However, a case may also be partially dismissed

55 Given the wording of Article 10, the likelihood of a dismissal should, however, in such
situation be very small.
56 See for example SCC case 121/1998 and SCC case 90/1999, reported in Stockholm Arb
57 1988 SCC Rules, Article 10 (emphasis added).
58 1999 SCC Rules, Article 7 (emphasis added).
59 Also clearly demonstrated by the fact that the Swedish term used (“*uppenbart*”) has
remained unchanged throughout the various revisions of the rules.
60 1999 SCC Rules Article 14 (3).
for lack of jurisdiction. One of the most probable examples is when a claimant relies on a number of contracts in its request for arbitration, but not all of the arbitration clauses contained in the various contracts refer to the SCC Institute. For example, in a case under the 1999 SCC Rules, a claim was partially dismissed, when the claim in the request for arbitration was based on two contracts and one contract contained an arbitration clause that clearly referred any dispute to ad hoc arbitration under the Swedish Arbitration Act. Because the respondent objected to the jurisdiction of the SCC Institute on this ground, the claimant's claim request for arbitration was dismissed to the extent it related to the contract with the ad hoc clause.

6. Consolidation

In Article 11, a new rule on consolidation is introduced in the SCC Rules. Many of the submission received by the committee included comments on the issue of consolidation, the majority of which were positive to the addition. The committee noted the trend for institutional rules to deal with this increasingly common issue and sought to find an approach which would comport with international best practices and to promote efficiency in arbitral proceedings. The committee chose to take a relatively conservative approach rather than introducing potentially extensive consolidation possibilities.

6.1. Background

Absent any specific rule, the principle of party-autonomy limits the situations in which consolidation of arbitral proceedings may take place to those cases where all of the parties involved agree to consolidate. As the number of disputes involving several underlying contracts has increased, so has the potential for parallel proceedings and multi-party, multi-claim disputes arising out of related events. In response to this development, provisions on consolidation have been deemed useful and included in many institutional rules.

Pursuant to Article 11, if a request for arbitration is filed concerning a legal relationship in respect of which arbitration between the same parties is already pending under the SCC Rules, the Board may, at the request of a party, decide to include the claims contained in the request for arbitration in


62 See e.g., ICC Arbitration Rules, Article 4(6); LCIA Rules Article 22.1.
the pending proceedings. Before deciding on consolidation, the Board shall consult the parties and the arbitral tribunal.63

It should be emphasised that Article 11 cannot be used to increase the number of parties in an on-going arbitration or to consolidate disputes where different claimants are arbitrating against the same respondent, as it only allows consolidation where several disputes arise between the same parties.

6.2 Consolidation vs. Amendment

The prerequisites for consolidation in Article 11 are in effect closely related to the rule on amendments in Article 25.

According to Article 25, a party may amend or supplement its claim, counterclaim, defence or set-off at any time prior to the close of the proceedings, if the arbitral tribunal does not consider the amendment inappropriate with regard to the delay in making it, the prejudice to the other party, or any other circumstances, and if the amended or supplemented claim is comprised by the arbitration agreement. A party wishing to file a new claim against a party with which it is already involved in on-going proceeding thus has a choice, either to file an amendment in the on-going arbitration, or file a new request for arbitration. A party may decide to file a new request for arbitration for a number of reasons. For example, because (i) the party simply wants the separate claim to be decided in a separate proceeding, or (ii) the first proceeding has progressed too far to make it likely that the arbitral tribunal would allow an amendment under Article 25, or (iii) the new claim is not covered by the same arbitration agreement as in the first proceeding, thus out-ruling an application of Article 25.

It is not likely that the SCC Board will decide to consolidate cases where one party or the arbitrators strongly opposes the consolidation, or where the proceedings have progressed so far that an amendment under Article 25 is inappropriate. Consequently, it is the third situation mentioned above where Article 11 most probably will play a role; namely where a claim between two parties already engaged in arbitration under the SCC Rules arises out of the same legal relationship but not same arbitration agreement, thus involving separate but connected agreements.

Article 11 does not provide any definition of the prerequisite “legal relationship”, leaving it to future practitioners to develop a definition as requests for consolidation are argued and decided. Nor does it give any

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63 This provision is comparable to the revisions to the UNCITRAL Rules suggested in the Paulsson-Petrochilos report where it is suggested that the arbitral tribunal, after consulting with the parties, could consolidate two or more claims involving the same and no other parties, when the claims which are subject to separate arbitral proceedings arise out of common facts. Paulsson-Petrochilos Report, supra, at footnote 8, paragraph 131, page 69.
guidance as to the standards to be applied by the SCC Board when taking a decision pursuant to Article 11. The Board is however required to consult the parties and the arbitral tribunal before reaching its decision. When the proposed rules were distributed for public comment, the Institute requested that particular attention be paid to this provision. There were two alternatives: one for using the term “legal relationship” and the other for the term “contractual relationship”. The former term was considered a better choice by most of the people commenting on the proposed rules.

The practical implication of Article 11 remains to be seen. Perhaps it will not differ from the actual examples of ad hoc consolidation already found in the SCC practice, consolidations taking place simply because parties involved agreed to it. As touched upon above, it can reasonably be expected that the Board’s decisions under Article 11 will be greatly influenced by practical considerations. For example, if the existing proceedings have significantly progressed then a consolidation is not very likely. Similarly, if a party strongly objects to the consolidation, an order for consolidation is also unlikely: Consolidating cases where the parties have strongly differing opinions about whether the cases would benefit from consolidation will not increase the efficiency of the proceedings, which, in the end, must be said to be one of the driving forces behind the provision in the first place.

However, the mere existence of this provision in the rules might contribute to voluntary agreements to consolidate. It is possible that as part of the rules, the issue may become less controversial, as opposed to having one of the parties propose consolidation. Even if only in a few cases Article 11 can turn a blank “no” into a serious consideration of the request for consolidation, this in itself may be an important result of the new article, albeit fairly intangible.

The rules do not address how the amount in dispute and the advance on costs shall be calculated in the event of a decision to consolidate cases. This needs to be decided on a case-by-case basis.

7. The Proceedings before the Arbitral Tribunal

The procedures under the 2007 SCC Rules remain flexible and subject to the agreements of the parties, with an emphasis on impartiality, practicality, and efficiency while ensuring the due process rights of the parties. While the provisions on the conduct of the proceedings have not significantly changed in substance, the user familiar with the SCC Rules will notice that the provisions in this section have been restructured to improve clarity, better reflect actual practices, and to improve linguistic expression.

64 Compare with, SAA, Section 21 and 2007 SCC Rules, Appendix I, Article 9.
A few significant revisions should be noted. In Article 23, a provision requiring the arbitral tribunal to establish a provisional timetable for the conduct of the arbitration has been added. The designation of the seat of arbitration has been given a separate article in Article 20. In Article 21, provisions on language have been expanded from the 1999 SCC Rules. Article 24 and 26 deals with written submissions and evidence. A few changes may be noted in Article 27 on hearings. A new provision on confidentiality is found in Article 46. Article 32 introduces a new rule on decisions on interim measures in the form of an award.

7.1 Provisional Timetable

Under Article 23, the arbitral tribunal shall promptly consult with the parties to establish a provisional timetable for the conduct of the arbitration. This timetable should be sent to the parties and to the SCC Secretariat. The newly added provision reflects international best practice and a similar provision is contained in other institutional rules.65

In the original draft of the rules, the proposed rule provided that any subsequent amendments to the timetable should be sent to the Secretariat. After considering the comments to the draft rules, the committee decided to delete the requirement to notify the Secretariat of subsequent amendments. This was to allow the arbitrators and parties some flexibility in making adjustments to the timetable. Thus, the arbitrators may make procedural orders or decide to deviate from the original preliminary timetable without having to formally notify the Secretariat. The timetable should help to ensure efficiency in the conduct of the proceedings. Generally, those who provided comments to the 2007 SCC Rules positively received the introduction of the provisional timetable.

7.2 Seat of Arbitration

Designating the seat of the arbitration has great significance and has been given a separate article in Article 20 of the 2007 SCC Rules, unlike in the 1999 SCC Rules where it was part of the general provision dealing with the procedures of the arbitral tribunal66 and was also referred to in two other articles.67

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65 See e.g., ICC Rules, Article 18.4. The Paulsson-Petrochilos Report suggests that the UNCITRAL Rules be revised to include such a timetable. Paulsson-Petrochilos supra. at footnote 8, paragraph 124, page 67.

66 1999 SCC Rules, Article 20 (4).

67 1999 SCC Rules, Articles 13 (iii) and 32 (1).
It is well established internationally that the “seat of arbitration” is a technical-legal determination and not merely geographic location. During the drafting of the new Rules, specific attention was given to consistently using the term “seat of arbitration” to refer to the technical-legal concept of the seat rather than to a place where hearings or deliberations or other proceedings may take place. This is also reflected by the addition in Article 20(2), which states that if any hearing, meeting, or deliberation is held elsewhere than the seat of arbitration, the arbitration shall be deemed to have taken place at the seat of arbitration. This corresponds to internationally accepted practice. An express clarification was partially motivated by a highly criticised decision of the Svea Court of Appeal in 2005.

The designation of the seat of arbitration produces significant practical and legal effects. The place of the arbitration will determine the lex arbitri, which can substantially affect a number of important issues that may arise before, during, and after arbitral proceedings. It is probably safe to assume that absent any agreement or opinion to the contrary, when deciding on the seat of arbitration pursuant to Article 20, the SCC Board will designate a Swedish seat of arbitration. In the experience of the SCC Institute, parties referring disputes to the Institute do so in the expectation that Swedish law will govern the proceedings and the award. However, there is nothing in the rules preventing the Board from designating a seat of

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68 A. Redfern & M. Hunter, Law and Practice of International Commercial Arbitration, page 100 (4th ed. 2004): “(T)he place of arbitration is not merely a matter of geography. It is the territorial link between the arbitration itself and the law of the place in which that arbitration is situation.” Accord, SOU 1994:81, page 275. “The place for the proceedings has thus mostly a legal-technical character.”

69 There was some discussion in the committee about whether to use the term “juridical seat” or “legal seat” to make this concept especially clear. The committee decided not to use these latter terms since most institutional rules use the term “seat of arbitration” and it was considered desirable to not deviate in any way from usual international practice. However, the Paulsson-Petrochilos Report suggests using the term “juridical seat”. Paulsson-Petrochilos supra. at footnote 8, at paragraph 152, page 81.

70 This Svea Court of Appeal case created some concern about the designation of the seat of arbitration in Sweden when the arbitration has no apparent connection to Sweden, cf. Titan v. Alcatel, Svea Court of Appeal, Stockholm, Case T 1038-05 (2005). The importance and value of this case as precedent should not be exaggerated. There should be a sufficient connection to Sweden if the parties or the arbitrators have designated Sweden as the seat of arbitration and an arbitration conducted under the SCC Rules is connected to Sweden regardless of where hearings are held. See, Decision by the Svea Court of Appeal in Sweden rendered in 2005 in case No. T 1038-05, observations by Patricia Shaughnessy and Christer Söderlund, Stockholm Int’l Arb. Rev., 2005:2, page 299.


72 In Sweden for example, Section 46 of the Swedish Arbitration Act provides: “This Act shall apply to arbitral proceedings which take place in Sweden notwithstanding that the dispute has an international connection.”
7.3 Language

Article 21 provides that the parties may agree upon the language or languages to be used in the proceedings and this choice is not limited to having been expressed in the arbitration agreement. If the parties have not agreed upon the language, the arbitral tribunal shall make this determination with regard to all relevant circumstances and after having given the parties an opportunity to submit comments. Under the 1999 SCC Rules, the arbitral tribunal should respect any designation of the language which the parties made in the arbitration agreement, but failing such a designation, the arbitral tribunal should make such the choice after consultation with the parties. In practice, this ostensibly expanded right to chose the language is not introducing more party rights than previously existed. The 2007 SCC Rules reflect the established practice where the arbitral tribunal made such a choice in the absence of party agreement after consultation with the parties.

A new provision has been added to Article 21(2), which provides that the arbitral tribunal may order that any documents submitted in language(s) other than the designated language(s) of the proceedings must be accompanied by a translation into the language(s) of the proceedings. The committee intentionally used the term “may” in this provision, thus investing the arbitrators with discretion in determining whether a translation is necessary. The committee also avoided requiring that any translation be “certified” leaving such issues to the tribunal to determine under the circumstances of the case.

In practice, arbitral tribunals can exercise a fairly large amount of flexibility when it comes to language of the arbitration. Thus, documents may be admitted and hearings conducted in one or more languages which are different from the language of the arbitration. This could be justified, for example, when it promoted the efficiency of the proceedings. Decisions to this effect are usually set out in procedural orders at the beginning of the arbitration.

7.4 Written Submissions

When referring to the written submissions and the exchange of written pleadings, the new Rules use the terminology “written submissions” rather than the terminology used by the old Rules, which was “Statement of Claim and Defense”. However, Article 24 includes only one significant change to

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73 1999 SCC Rules, Article 23.
the content of the rule. The previous rule provided that the parties’ respective submissions should include “a preliminary statement of the evidence on which (the party) intends to rely”.\(^\text{75}\) In the 2007 SCC Rules the usual and best practice of actually submitting copies of documents relied upon in the statement of claim and the statement of defence is followed.\(^\text{76}\) This does not mean that copies of all of the eventual documentary evidence must be submitted in the initial submissions of the claim and defence. However, the parties should submit copies of those documents that underlie their claims, counterclaims, defences and set-offs.\(^\text{77}\) This requirement does however not preclude the parties from later submitting additional supporting documents. Furthermore, the arbitral tribunal may direct the parties to submit additional documents. A party may also request the tribunal to make such an order.\(^\text{78}\)

Although the parties’ submissions should contain information about the specific relief sought and the material circumstances upon which it is based – and correspondingly statements admitting or denying the relief sought, any objections to the arbitration agreement, the material circumstances relied upon, and any counterclaim or set-off and the grounds supporting such – there is no requirement that all of the details of the evidence need to be presented in these submissions.\(^\text{79}\) Should the arbitral tribunal find that the submissions are insufficient, it should request the party or parties to make further submissions to remedy the deficiencies.\(^\text{80}\) Details that should be contained in the submissions may vary according to the circumstances of the case and the legal traditions of the parties, their legal representatives and the arbitrators. The role of the rules is to provide sufficient flexibility to allow the arbitral tribunal to adapt the procedures to the particular needs of

\(^\text{75}\) 1999 SCC Rules, Article 21 (1)(iii) and 21 (2) (iv).

\(^\text{76}\) 2007 SCC Rules, Article 24 (1) (iii) and 24 (2) (v).

\(^\text{77}\) This approach can be compared to the UNCITRAL Rules approach where the parties are not required to attach copies of such documents but “may annex to his statement . . . all documents he deems relevant or may add a reference to the documents or other evidence.” UNCITRAL Rules, Article 18 (2). See also, UNCITRAL Rules, Article 19 (4) which references this provision as regards the Statement of Defence. The Paulsson-Petrochilos Report suggests revising these provisions to require that supporting documents and other evidentiary evidence accompany the submissions. Paulsson-Petrochilos Report, supra. at footnote 8, paragraph 170, page 90.

\(^\text{78}\) 2007 SCC Rules, Article 24 (3).

\(^\text{79}\) See Lars Heuman, supra. at footnote 18 , page 322 – 323. “There is no requirement that the statement of claim contain particulars as to the evidence upon which the claimant intends to rely” (emphasis in the original). However, it should be noted that in the cited context, Professor Heuman is not referring to practice under the SCC Rules but rather general principles of Swedish arbitration.

\(^\text{80}\) Id. at 326.
the case, ensuring an impartial, practical, and efficient proceeding, while allowing each party an equal and reasonable opportunity to present its case.

It should also be borne in mind that a party may be able to amend its claims, counterclaims, defences or set-offs pursuant to Article 25. The amendment provision has not been revised in content, but reflects some linguistic revision to ensure that it may be applied not only to claims and defences, but also to counterclaims and set-offs.

7.5 Evidence

Evidentiary issues are dealt with in three separate rules, a general rule on evidence, a rule on witnesses, and a rule on experts appointed by the tribunal. The new provisions regarding evidence reflect linguistic improvements more than actual changes to any procedures, intended to clarify that the rules emphasise flexibility, efficiency, fairness and party-autonomy. Furthermore, the rules should reflect their intended applicability to a wide range of types of cases and to both domestic and international cases.

Article 26 uses the language found in most institutional rules and in the UNCITRAL Arbitration Rules that the arbitral tribunal may determine the admissibility, relevance, materiality and weight of the evidence. The right of the arbitrators to specifically decide on admissibility reflects an international standard which international users are quite familiar with. It may appear unfamiliar for some Swedish users, as Swedish procedural law adopts an approach where nearly all evidence may be admissible and objections focus on probative value. However, the committee believed it was desirable that the SCC Rules conform to international expectations and standards. The expression of the arbitrators’ discretion in the new evidence article is not expected to result in practice or procedures which significantly differ from the practice under former rules. Under the 1999 SCC Rules, the tribunal was entitled to refuse to accept submitted evidence if it considered it irrelevant, non-essential or if proof could be established by more convenient or less expensive means.

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82 2007 SCC Rules, Article 28.
83 2007 SCC Rules, Article 29.
84 See also, IBA Rules of Evidence, Article 9 (1).
85 1999 SCC Rules, Article 26 (2). See also, SAA, Section 25, paragraph 2 which allows the arbitrators to refuse to admit evidence when it is manifestly irrelevant or where such refusal is justified with regard to when it was offered. See, Patricia Shaughnessy, *Dealing with Privileges in Arbitration*, Scandinavian Studies in Law, Vol 51 (2007).
Article 26 provides that “the Arbitral Tribunal may require a party to identify the documentary evidence it intends to rely upon and to specify the circumstances intended to be proved by such evidence.” This should be considered in light of the rules relating to the written submissions. There were some discussions in the committee about the extent to which the parties should be required to identify evidence and its intended probative purpose. The Swedish approach to evidence requires a party to identify “evidentiary themes” which the proffered evidence will support. While the Swedish procedural practices are not applicable in arbitration, many if not most Swedish lawyers find this approach useful also in arbitration, and tend to apply it in domestic arbitration practice. Lawyers from other legal traditions may however be unfamiliar with this approach and the intention is not to import this practice into SCC arbitration. Rather, the 2007 SCC Rules seek to strike a balance between requiring the parties to identify the nature and purpose of their evidence and allowing sufficient flexibility to ensure that the rules can be used by a range of users and applied in a variety of cases. The arbitral tribunal is invested with some discretion in this regard by the choice of the terminology; the arbitral tribunal “may” require the identification of the evidence and the specification of its purpose. Any agreements of the parties in this regard should be observed, unless in conflict with mandatory provisions of law.

Unlike the 1999 SCC Rules, the 2007 SCC Rules clearly provide in Article 26 (3) that the arbitral tribunal may, at the request of a party, order a party to produce any evidence or documents that may be relevant to the outcome of the case. Interestingly, the SCC Rule requires that a party request the tribunal to act, in other words the arbitral tribunal cannot act on its own motion (sua sponte). This position is contrary to the UNCITRAL Rules, the LCIA Rules, the AAA Rules, the Swiss Rules, the IBA Rules and other institutional rules. The limitation on the arbitral tribunal’s power was pointed out to the committee but a majority of the committee members preferred the adopted wording, which may prevent arbitrators from acting overly inquisitorial and empowers parties to control the presentation of

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86 Lars Heuman, supra. at footnote 18, pages 380 – 382.
87 Lars Heuman, supra. at footnote 18, pages 289 – 291.
88 UNCITRAL Rules, Article 24 (2). The existing rule does not specifically note that the tribunal may act on its own motion but merely notes that the tribunal may make such orders. The Paulsson-Petrochilos revisions suggest making it explicit that the tribunal to act on its own accord to make such orders. Paulsson-Petrochilos Report, supra. at footnote 8, paragraph 192, page 101.
89 LCIA Arbitration Rules, Article 22.1 (e).
90 AAA International Arbitration Rules, Article 19 (3).
91 Swiss Rules of International Arbitration, Article 24 (3).
92 IBA Rules, Article 3.9.
their cases. Thus, under Article 26, unless the parties have agreed otherwise, the arbitral tribunal may order the production of documents or evidence only if so requested by a party.

7.6 Hearings

A new provision has been added in Article 27, which reflects current practice rather than changing it. According to this new provision, unless agreed otherwise by the parties, the hearing shall be held in private. This should not be confused with the provision on confidentiality, which is contained in Article 46 (discussed below). In Article 27(2) a provision which is fairly common in other institutional rules has been added. This provision makes it explicit that the arbitral tribunal shall provide the parties with reasonable notice of the hearing which also reflects and codifies existing best practices.

The 1999 SCC Rules contained a provision concerning to which extent a previously held hearing would have to be repeated should an arbitrator be replaced.\textsuperscript{93} Because this actually deals with issues relating to the replacement of arbitrators, this matter has now been dealt with in Article 17 of the 2007 SCC Rules.

7.7 Witnesses

A new provision is contained in Article 28 that deals with two important issues: the identification of witnesses and their testimony, and the extent to which written statements may be used. The provision expressly applies to both witnesses and party-appointed expert witnesses. Article 28 provides that in advance of the hearing, the arbitral tribunal may request the parties to identify all witnesses and specify the circumstances intended to be proved.

The 1999 SCC Rules did not regulate the issue of written witness statements. Written witness statements can be useful in preparing for a hearing and help to expedite proceedings. But such statements are also criticised, as they are often prepared by a party’s legal representative. Additionally, often parties want to have the right to confront and cross-examine witnesses, as a live examination of the witness may shed light on the credibility of the witness. The new rules provide that signed written witnesses statements may be submitted, but it further states that unless the parties have agreed otherwise, any witness or expert whose testimony will be relied upon by a party must attend a hearing for examination.

\textsuperscript{93} 1999 SCC Rules, Article 25 (2).
7.8 Experts

A new provision on experts appointed by the arbitral tribunal has been added in Article 29, in contrast to the 1999 SCC Rules, which made no distinction between party-appointed and tribunal-appointed experts. The structural and linguistic changes do not signify a difference in existing practice but instead reflect the current practice. The tribunal may appoint an expert after consultation with the parties. In practice in most cases the parties will appoint their own experts and a tribunal should only appoint an expert without party agreement in exceptional cases.

The appointment of an expert may involve significant costs and requires that the expert be given directions in order to carry out its assignment. The arbitrators need to ensure that they both appear and act impartially and directing the expert can pose challenges. Consequently, it is preferable if the parties participate in setting out the directions or the guidelines for the expert and approve the costs of the expert. Article 29 requires that tribunal-appointed experts be given specific issues to report on, which should be set out in writing. When the tribunal has received a report from a tribunal-appointed expert, the report shall be given to the parties in order that they may have an opportunity to comment upon it. Furthermore, upon the request of a party, the party shall be given an opportunity to examine the tribunal-appointed expert at a hearing. Although this provision is not as detailed as the IBA Rules on tribunal-appointed experts, it generally complies with the principles embodied in the IBA Rules.

7.9 Default

The article relating to default has been given a new title and is more extensive in the 2007 SCC Rules than in the 1999 SCC Rules, but does not make any significant change to existing practice. Article 30 sets out three different types of default: (1) failure to submit a statement of claim, (2) failure to submit a statement of defence, failure to appear at a hearing, and otherwise failing to avail itself of the opportunity to present its case, and (3) failure without good cause to comply with the rules or procedural orders of the arbitral tribunal. In the first case, the tribunal shall dismiss the case unless there is a pending counterclaim. In the second case, the arbitral tribunal may
proceed with the arbitration and make an award.\textsuperscript{100} In the third case, the arbitral tribunal may draw such inferences as it considers appropriate.

\textbf{7.10 Confidentiality}

Confidentiality was the subject of considerable discussion in the revision work. The revision committee presented two alternative provisions for comment when it circulated the draft rules both internationally and to the Swedish arbitration community. The short version provided:

\textit{Unless agreed otherwise by the parties, the SCC Institute and the Arbitral Tribunal shall maintain the confidentiality of the arbitration and the award.}

The long version provided:

\textit{Unless otherwise agreed by the parties, the SCC Institute, the Arbitral Tribunal and the parties shall maintain the confidentiality of the arbitration, the award and any documentary or other evidence not within the public domain – except where disclosure is required to comply with a legal requirement or to protect a legal right or to enforce or challenge an award.}

To impose an obligation of confidentiality not only on the Institute and the arbitrators but also on the parties was opposed by many commentators to the draft rules, in which both versions above were presented. Precedents on the issue from other arbitral institutions vary, as does national law. In Sweden, the Supreme Court ruled in 2000 that absent a specific agreement to that effect, parties in arbitration are not subject to an obligation of confidentiality.\textsuperscript{101}

The revision committee decided to use the short version, thus creating a limited obligation of confidentiality and not imposing an obligation of confidentiality on the parties. The more extensive obligation of confidentiality would be difficult to apply. Obligations of confidentiality imposed upon parties often conflict with legitimate obligations for disclosure and it would be difficult to regulate the potential exceptions to a confidentiality obligation imposed on parties. Issues of confidentiality are particularly problematic in arbitrations involving states as parties.\textsuperscript{102}

Increasingly, in investment arbitration public interest groups make requests are made for \textit{amicus curiae} briefs or other access to the arbitral process.\textsuperscript{103}

\textsuperscript{100} 2007 SCC Rules, Article 30 (2).


\textsuperscript{102} \textit{See e.g.,} Esso Australia Resources Ltd. and Others v. Plowman (Minister for Energy and Minerals) and Others (1995) 128 ALR 391

\textsuperscript{103} \textit{See e.g.,} Methanex Corporation v. United States of America, Decision of the Tribunal on
The committee and the majority of people commenting on the proposed rules found it preferable that the parties reach an agreement on any confidentiality that they find suitable rather than imposing an obligation through the rules. However, it was also recognised that parties may be unlikely to be able to reach such an agreement after a dispute has arisen and arbitration has been initiated. The committee was also aware that while confidentiality is an important aspect of arbitration, its importance to the parties may be exaggerated\textsuperscript{104} and in any case is sacrificed when courts may be involved in the arbitral process.\textsuperscript{105}

Confidentiality of the award is specifically mentioned in Article 46, which is an addition to the provision on confidentiality. The addition has been included for reasons of clarity and does not represent an actual change in practice. Confidentiality should also be distinguished from the privacy afforded to hearings. Article 27 (3) ensures that hearings will be held in private, unless otherwise agreed by the parties.

7.11 Interim Measures

Interim measures have been the subject of considerable international discussion and the article relating to interim measures in the UNCITRAL Model Law was recently amended.\textsuperscript{106} The aim of Article 32 is to bring the 2007 SCC Rules into line with the corresponding UNCITRAL Model law provision and international practice, and to improve clarity and flexibility.

The 1999 rule provided that the arbitral tribunal could “order specific performance . . . for the purpose of securing the claim.”\textsuperscript{107} The revised rule is broader, allowing the arbitral tribunal to “grant any interim measures it deems appropriate” at the request of a party.\textsuperscript{108} The committee discussed the alternative of including a list of possible measures but rejected such a “laundry list” in favour of promoting flexibility and allowing the parties and

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\textsuperscript{104} Mistelis, supra, at footnote 24, pages 541-542.


\textsuperscript{107} 1999 SCC Rules, Article 31(1).

\textsuperscript{108} 2007 SCC Rules, Article 31 (1).
arbitrators to seek appropriate solutions. The committee chose not to regulate the standards which should be applied to determining whether such relief is justified, thus investing the arbitrators with considerable discretion. Prior practice in this regard continues to be relevant. The arbitral tribunal may require the party seeking the interim measure to post appropriate security. The committee was unanimous in not including any provision which would allow for a party to seek *ex parte* orders.

For the purpose of supporting the enforceability of a decision on interim measures, Article 32(3), has been revised to allow the arbitral tribunal to issue the interim measures in the form of either an order or an award. This change corresponds to a general development; provisions on interim measures in the form of an award are included in a number of international arbitration rules. There are discussions internationally about the enforceability of awards granting interim measures but this is not an issue which can be decided in the rules. Parties remain free to seek interim measures from national courts if they so chose.

### 7.12 Waiver

As regards waivers, no changes have been made other than a renumbering and renaming of the provision to conform to international practice. The old rule was entitled “Failure to Object to Procedural Irregularities”, which conformed to the terminology used in the Swedish Arbitration Act. The new Article 31 is entitled “Waiver” and contains the same provisions as the 1999 SCC Rules. According to the former rule, a party will be deemed to have waived a possible right to object if during an arbitration the party failed to object without delay to any failure to comply with the arbitration agreement, the SCC Rules or any other rules applicable to the proceedings.

Article 31 avoids the problem of expressing whether a waiver requires actual or constructive knowledge, or in other words whether a waiver will occur only when a party actually knew or if it is sufficient that it should have known of the opportunity to object. The rule does not directly refer to the standard of knowledge, instead it refers to the party who “fails to object without delay to any failure . . . will be deemed to have waived.” Some rules

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110 2007 SCC Rules, Article 32(2).

111 ICC Rules Article 23(1), UNCITRAL Rules Article 26(2), WIPO Rules Article 46 (c).

112 2007 SCC Rules, Article 32 (4).

113 1999 SCC Rules, Article 29.

114 SAA Section 34 (6).
such the UNCITRAL, LCIA and WIPO use language referring to a party’s knowledge: “a party who knows . . . and yet proceeds”. The ICC Rules use language similar to the SCC Rule: “a party who proceeds . . . without raising its objection to the failure to comply . . . will be deemed to have waived . . . ” Paulsson and Petrochilos recommend that the UNCITRAL Rule be revised to follow the lead “of the ICC Rule which imputes knowledge to the party who proceeds notwithstanding the failure”. Like the ICC rule, the SCC Rule implies that a party will be deemed to waive the right to object whether that party had actual or constructive knowledge.

The new SCC rules do not specifically refer to any failure to comply with the directions of the arbitral tribunal. However, the 2007 SCC Rules includes language referring to failure to comply with “any other rules applicable to the proceedings.” This general reference should be interpreted to include any relevant directions of the arbitral tribunal. The LCIA Rules inspired Paulsson and Petrochilos to recommend adding language that the waiver is “irrevocable”. This additional term is not included in the SCC Rules and should not be necessary since by its nature a waiver is irrevocable.

7.13 Close of the Proceedings

The 2007 SCC Rules have introduced a new provision entitled “Close of Proceedings” which does not have an equivalent in the 1999 SCC Rules. Article 34 does not introduce any new procedures or practices but reflects current practice both internationally and in SCC arbitration. The provision is intended assist the arbitrators in conducting the arbitration in an expeditious and effective manner. Article 34 provides that the arbitral tribunal should declare the proceedings closed when it is satisfied that the parties have had a reasonable opportunity to present their cases. The article also provides that in exceptional case the tribunal may reopen the

115 UNCITRAL Rules, Article 30.
116 LCIA Rules, Article 32.1.
117 WIPO Rules, Article 58.
118 ICC Rules, Article 33.
119 Paulsson-Petrochilos report, supra. at footnote 8, paragraphs 229 - 231, pages 130 - 31. They suggest that UNCITRAL Rule, Article 30 be revised by adding “or ought to know”.
120 2007 SCC Rules, Article 31. See also Paulsson-Petrochilos report, supra. at footnote 8, paragraphs 229 - 231, page 123. Paulsson and Petrochilos also recommend that the UNCITRAL Rule be amended to specifically include waivers of objections to any failure to comply with the directions of the arbitral tribunal.
121 Paulsson-Petrochilos report, supra. at footnote 8, paragraph 230, page 130.
122 2007 SCC Rules, Article 34.
proceedings on its own motion or at the request of a party if the final award has not yet been made. This rule is similar to the corresponding UNCITRAL Rule\textsuperscript{123} and rules of other institutions.

8. The Award

A number of revisions have been made to the provisions relating to the award, all of which are intended to reflect international best practices. To a large extent these changes codify and clarify existing practice and thus may not have a significant affect in practice. The new heading of this section of the SCC Rules, “Awards and Decisions” reflects the fact that the arbitrators may make orders in forms other than an award. The committee purposefully avoided using various terms to label an award such as “interim award” or “partial award”, instead trying to consistently use the term “award”, which by its nature should be a final and binding decision of the arbitral tribunal.

The provisions relating to the Award include the following: Article 35 on awards and decisions, Article 36 on making of awards, Article 37 on the time limits for the final award, Article 38 on separate awards, Article 39 on termination of the proceedings by settlement or other grounds, Article 40 on the effect of the award, Article 41 on the correction and interpretation of the award, and Article 42 on an additional award. These articles will not be fully reviewed here; rather only the notable revisions will be mentioned. The most significant change is the provision relating to a separate award for advancing the payment of costs on behalf of a non-paying party. This provision is discussed separately below.

The former provisions on voting are now incorporated into Article 35 which not only applies to the awards but to all decisions of the tribunal. Article 35 follows the practice established by the 1999 SCC Rules by requiring a majority of arbitrators, when the tribunal consists of more than one arbitrator, and failing a majority decision the chairperson will have the decisive vote. This reflects modern practice\textsuperscript{124} and avoids problems which can arise when there is not a majority.\textsuperscript{125} Also consistent with the old Rule and international practice, this Article allows the tribunal to decide that the chairperson may alone make procedural rulings.\textsuperscript{126}

\textsuperscript{123} UNCITRAL Rules, Article 29.
\textsuperscript{124} See e.g., Paulsson-Petrochilos report, supra at footnote 8, page 9.
\textsuperscript{126} 2007 SCC Rules, Article 35(2).
Users familiar with the 1999 SCC Rules will notice that the new article on the making of the award, Article 36, incorporates a number of changes. One of the most obvious differences is that it no longer provides that arbitrators may attach dissenting opinions to the award. The lack of a specific provision for dissenting opinions does not imply that they may not be made. The committee found that dissenting opinions are clearly allowed and that it is not necessary to provide for them in the rules. Such a provision is not usually found in institutional rules and might even be thought to encourage dissents. The pre-existing practice continues and arbitrators are free to issue dissenting opinions.

The time for making the final award, which is set out in Article 37 continues to be six months but can be extended by the Board. Additional language was added to the rule that the extension should be requested by the arbitral tribunal. However, the Board may extend the time even when not requested by the tribunal when it is “otherwise deemed necessary.”

The language of the rule for separate awards has been simplified. This was intended to allow for greater clarity and increased flexibility, particularly in complex cases and to reflect international practices. The rule relating to settlement and other means of terminating the proceedings, Article 39, provides for an award to be issued when the case is terminated for any reason and not only for settlement.

Article 40 which deals with the effect of an award introduce a new obligation upon the parties. Not only does it provide that the award is final and binding upon the parties, but it also provides that by agreeing to the SCC Rules the parties have undertaken to carry out any award without delay. This obligation reflects a trend in international arbitration.

Under the 1999 SCC Rules there was no stated time period within which an award could be corrected. In the 2007 SCC Rules it is stated that any request for a correction or interpretation of an award must be made within 30 days of having received the award. If the arbitral tribunal finds it justified, it may make the requested correction or interpretation within 30 days of receiving the request. Unlike the 1999 SCC Rules, Article 41

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127 For SCC practice regarding the extension of time for rendering the award, see Magnusson, supra, at footnote 26.
128 2007 SCC Rules, Article 38.
129 The 1999 SCC Rules provided for 30 days to make requests for interpretation (Article 37(3)) or requests to address issues which were allegedly not decided but should have been (Article 37(2)).
130 2007 SCC Rules, Article 41 (1).
provides that any correction or interpretation of the award shall be in writing and subject to the provisions of Article 36.\textsuperscript{131}

Additional awards are dealt with in a separate article, Article 42. A party has 30 days from the receipt of the award to make a request for an additional award on claims presented in the arbitration but not dealt with in the award. The new provision has expanded the time in which the arbitral tribunal may make an additional award to 60 days from the time when the receipt of the request for the additional award was received. When deemed necessary, the SCC Board may extend this time by an additional 60 days.\textsuperscript{132}

9. Separate Award for Payment of the Advance on Costs

It is not unusual that a respondent who either objects to the jurisdiction of the SCC Institute, or for some other reason does not want to participate in the arbitral proceedings, refuses to pay its part of the advance on costs of the arbitration, as required pursuant to Articles 43 and 45. In such situations, the Secretariat shall give the claimant the opportunity to pay the other party’s share of the payment within a specified time. If the claimant wants the arbitration to proceed it does not have any alternative but to make this payment on behalf of the respondent. Payment in full of the advance on costs is a prerequisite for transferring the file to the arbitrators.\textsuperscript{133}

Relying on a new provision in Article 45, the claimant may now in such situations request the arbitral tribunal to make a separate award and order the respondent to reimburse the claimant the amount it has paid on the respondent’s behalf.\textsuperscript{134}

In a case from 2000, the Swedish Supreme Court considered the issue of whether a party could obtain a separate award for reimbursement of an advance on costs paid on behalf of a defaulting party.\textsuperscript{135} The Court ruled that such a separate award could not be obtained, absent a specific agreement as between the parties that allowed for such an award. In the case before the Supreme Court, parties had agreed upon \textit{ad hoc} arbitration under the Swedish

\textsuperscript{131} 2007 SCC Rules, Article 41(3).
\textsuperscript{132} 2007 SCC Rules, Article 42.
\textsuperscript{133} 2007 SCC Rules, Article 18. An available option for the claimant under Swedish law is to terminate the arbitral proceeding and initiate court proceedings, as failure to provide the requested advance on costs forfeits the respondent’s right to rely on the arbitration agreement as a bar to court proceedings. Swedish Arbitration Act, Section 5.
\textsuperscript{134} The situation may also be the reversed, i.e. the respondent has paid the advance on cost on behalf of the claimant. This of course is very uncommon, but it does happen, particularly in cases involving counter-claims.
Arbitration Act. Under Swedish law, the provision relating to the parties’ payment of the advance on costs states that the arbitrators may request security for the compensation due to them, and that where a party fails to provide its share of the requested security within the period of time determined by the arbitrators, the other party may provide the entire security. This could not, according to the Court, be interpreted as an agreement giving the parties the right to request a separate award on costs.

The Supreme Court appears to have justified its decision in part by noting that to allow a right of redress during on-going arbitral proceedings could create legal complications of a technical-practical nature. It goes beyond the aim of this article to discuss the Court’s decision in depth, however it can be noted that the Court’s reasoning in this regard does not prevent parties from exercising their freedom of contract and thus they may enter into an agreement allowing for such a right of redress.

Unlike the Swedish Arbitration Act, the SCC Rules have long had a specific provision that the parties shall each pay half of the advance on the costs of the arbitration. Some commentators have stated that this would be sufficient to create the necessary agreement between the parties which would entitle a party the right to seek redress for payments made on behalf of the defaulting party during the on-going proceedings. A recent decision in a case at the SCC Institute would suggest that it might not have been sufficient. In this case the claimant paid the entire amount of the advance on costs when the respondent refused to pay its part. The claimant relied upon Article 14 (2) in the 1999 SCC Rules, which provided that each party shall contribute half of the advance on costs. The claimant requested the arbitral tribunal to issue a separate award in which the respondent would be ordered to reimburse the claimant for the amount the claimant paid on behalf of the respondent. The arbitral tribunal rejected the request finding that Article 14 (2) of the 1999 SCC Rules could not be interpreted as an agreement between the parties entitling a party to obtain a separate award for the amounts paid on behalf of the non-paying party. In summary, the arbitral tribunal found that the circumstances presented in the SCC institutional arbitration did not significantly differ from the circumstances in the Supreme Court case.

Article 45 (4) now makes it clear that by choosing the SCC Rules parties have in effect made an agreement to allow for the right of redress through a

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136 The arbitration had been conducted under the 1929 Swedish Arbitration Act. This had however no relevance for the outcome of the case.

137 SAA, Section 38.

138 See, Lars Heuman, Tystnadsplikt och underlåtenhet att ställa säkerhet i skiljetvist, Juridiskt Tidskrift No 3, 2000/01, page 683.

separate award for the payment of an advance on costs made on the other party’s behalf, during on-going arbitral proceedings. This provision does however not create an absolute right for a party to obtain such award; the decision to allow it is always within the discretion of the arbitral tribunal.

From an international perspective, it is not unusual to include a provision in arbitral rules that relate to the right of redress for paying the opposing party’s share of the advance on costs. In commentary to the ICC Rules’ corresponding provision,[^140] which does not regulate the issue of a separate award for such advanced payments, it has been stated:

“[t]he most obvious option for the party seeking to reverse the consequences of its opponent’s failure to pay its share of the advance on costs is for it to pay on behalf of the defaulting party and then to seek an interim award for immediate reimbursement of the sums which the party has been required to advance because of its adversary’s default.”[^141]

There are also examples of separate awards being issued for such payments on advance on costs in arbitrations conducted pursuant to the ICC Rules.[^142]

10. Summary

The revision of the SCC Rules does not introduce any controversial or unusual provisions and conforms to international best practices. It has not been aimed at changing existing practice but to improve clarity and linguistic expression. The 2007 SCC Rules have also been reorganised to some extent to increase transparency and ease of use.

The primary changes in the 2007 SCC Rules which do introduce some significant features include the following: some revisions to the appointment of arbitrators which ensure that the parties have an opportunity to appoint the arbitrator when they have chosen to have a sole arbitrator; the possibility for the SCC Board to consolidate proceedings involving the same parties concerning the same legal relationship; the rules on evidence are internationalised both linguistically and to some extent in content; interim relief may be made in the form of an order or an award; and the arbitral tribunal may make a separate award on advanced costs of arbitration.

[^140]: ICC Rules, Article 30(3).
[^142]: ASA Bulletin No.1, 2001 (March), page 285.