ICLG

The International Comparative Legal Guide to:

Investor-State Arbitration 2019

1st Edition

A practical cross-border insight into investor-state arbitration.

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Investor-State Arbitration Before The SCC Institute

Arbitration Institute of the Stockholm Chamber of Commerce (SCC)

James Hope

Introduction

The Arbitration Institute of the Stockholm Chamber of Commerce (the **SCC**) is well known in investment arbitration circles. Whilst of course ICSID and UNCITRAL account for many more Investor-State dispute settlement (**ISDS**) cases overall, the SCC comes a clear third in the list of ISDS institutions, having hosted 5% of all known ISDS cases filed from 1987 up to 31 July 2017.[1]

Sweden and the SCC are listed as a forum for disputes between investors and States in at least 120 Bilateral Investment Treaties (**BITs**), as well as in the Energy Charter Treaty (**ECT**). Of these 120 BITs, 61 agreements stipulate that the SCC Arbitration Rules shall apply to disputes arising out of the agreement. The remaining 60 BITs stipulate that the SCC shall act as Appointing Authority under the UNCITRAL Arbitration Rules or that Sweden shall be the legal seat of the dispute.

A detailed report of ISDS disputes before the SCC, "*Investor-state disputes at the SCC*" written by SCC legal counsel Celeste E. Salinas Quero in 2017, can be found on the SCC website.[2] In this short chapter, I propose to summarise some key points from that report, and to highlight some important recent changes to the SCC arbitration rules concerning ISDS cases.

The SCC Secretariat and The SCC Board

The SCC was founded in 1917. The institute, which is part of the Stockholm Chamber of Commerce, administers both international and domestic arbitration as well as mediation, and plays an active part in promoting dispute resolution both in Sweden and around the world.

The SCC is made up of an active Secretariat, presided over by the Secretary General Annette Magnusson, and a Board of 15 lawyers, presided over by the Chairperson: Kaj Hobér. The current Board includes lawyers from China, Finland, Germany, Italy, Russia, Sweden, the UK and the USA, and the Board members play an active part in the monthly meetings of the Board.

The Secretariat's primary task is to administer the SCC's caseload, and the legal counsel and administrators of the Secretariat are on-hand to provide assistance to the parties and to the arbitrators.

The Board takes decisions, when required, regarding *prima facie* jurisdiction, appointment of arbitrators in the absence of party appointment or agreement, the number of arbitrators, challenges to arbitrators, the seat of arbitration, the amount of advance on costs, and also consolidation and joinder.

ISDS Cases Before The SCC

A total of 92 ISDS cases were registered at the SCC between 1993 and 2016: 67 cases under the SCC Rules and 25 cases in which the SCC was requested to act as appointing authority under the UNCITRAL Rules. Eight more ISDS cases were registered with the SCC in 2017.

Energy disputes form a significant part of the SCC's overall caseload, and it is therefore not surprising to see that there have been several cases under the ECT, all of which have been administered under the SCC Rules.[3]

Most ISDS cases before the SCC between 1993 and 2016 involved investors and States from Europe and Central Asia (88% and 96%, respectively). Parties from other regions of the world have only rarely been involved in ISDS cases before the SCC.

Intra-EU disputes account for a significant number of these cases, 53% of cases registered between 2012 and 2016.

Arbitrators in ISDS Cases Before The SCC

Given the importance and value of ISDS cases, it is also not surprising that the majority of such cases before the SCC have been decided by three-member tribunals, with only 8% of such cases being decided by a sole arbitrator.[4]

Parties generally prefer to make their own appointments, if possible. Accordingly, the parties or the co-arbitrators made 70% of the appointments in ISDS cases before the SCC between 1993 and 2016. The remaining 30% of appointments were made by the SCC, with 92% of SCC appointments being appointments of the chairperson.

Between 1993 and 2016, the arbitrators appointed in SCC ISDS cases have been of 29 different nationalities. Sweden, the UK, Germany, the USA, France and Switzerland are the most frequently appointed nationalities, in that order, with the remainder coming mostly from other European and Central Asian countries.

It should be noted in this context that, while the majority of ISDS cases before the SCC are conducted in the English language, that is not always the case. In particular, some recent cases have taken place in Spanish.[5]

When making appointments, the SCC takes considerable care to appoint arbitrators who are suitable for the particular dispute at hand. The Board considers, *inter alia*, the nationality of the parties, the subject matter of the dispute, the languages involved, the arbitrators already appointed, the counsel involved in the case, and other relevant circumstances. The international members of the Board are often particularly active when it comes to making appointments in ISDS cases.

The Seat of Arbitration in ISDS Cases Before The SCC

Although parties in commercial arbitration cases generally stipulate the seat of arbitration in their arbitration agreement, in ISDS cases the seat is generally not specified in advance and it is therefore rather common that the parties disagree over this issue.

The SCC Board is frequently asked to determine the seat of arbitration in ISDS cases, and this issue is sometimes the subject of lengthy correspondence between the parties and the SCC. In determining the seat, the SCC Board again considers all relevant circumstances, bearing in mind that each case is different. In some cases, it can be a determining factor that the parties chose to arbitrate before the SCC, which can suggest a default position in favour of Stockholm as the seat of arbitration. In other cases, however, there may be reasons for choosing a seat other than Stockholm.

One particular factor in this regard is the impact of the *Achmea* case,[6] which has created considerable concern and uncertainty for parties involved in intra-EU ISDS disputes. Arguably, choice of a seat of arbitration within the EU allows parties to argue that the concerns expressed by the CJEU in *Achmea* should not apply, since there is then the possibility of a review of the arbitral award by a court of a Member State based on EU law, together with an opportunity to make a request for a preliminary ruling.[7] On the other hand, choice of a seat of arbitration outside the EU would enable the arbitration to proceed outside the scope of the CJEU's jurisdiction. The SCC continues to monitor developments carefully in light of the *Achmea* case.

Procedure in ISDS Cases Before The SCC

ISDS cases before the SCC take place pursuant to the SCC Arbitration Rules, where those rules have been chosen by the parties. Alternatively, if the SCC has been called upon to act as appointing authority under the UNCITRAL Rules or to administer cases under the UNCITRAL Rules, the SCC acts according to its established practices as set out in its UNCITRAL Procedures.[8]

Cases under the SCC Arbitration Rules proceed, in general terms, as follows:

- Cases are commenced by the Claimant submitting the Request for Arbitration to the SCC by email to arbitration@chamber.se.
- Upon receipt of the Request for Arbitration, the SCC sends the Request to the Respondent and sets a time period for submission of the Respondent's Answer.
- Following receipt of the Answer, and possible additional preliminary submissions, the case is then referred to the SCC Board in order for decisions to be taken on *prima facie* jurisdiction,[9] appointment of arbitrators in the absence of agreement, the choice of the seat of arbitration, the amount of the advance on costs, and other possible procedural issues.
- The case is referred to the arbitral tribunal once the advance on costs has been paid.
- The arbitral tribunal's first task is to establish the timetable for the arbitration, in conjunction with the parties. Although Article 43 of the 2017 SCC Rules provides that the final award should be made within six months of the referral of the case to the arbitral tribunal, in practice, the timetable is almost always considerably longer in ISDS cases.[10] In fact, the average duration of cases decided by three-member tribunals up to 1 January 2016 was 36 months, with a median duration of 32 months.[11]
- Thereafter, it is up to the arbitral tribunal to determine the procedure, subject to any agreement between the parties and the general principles of efficiency and due process.[12]
- Article 42(1) of the 2017 SCC Rules requires that the arbitral tribunal must state the reasons upon which its award is based, unless otherwise agreed by the parties. In practice, all SCC awards contain reasons, and in most cases the arbitral tribunal gives very detailed reasons for its award.
- The SCC does not provide for any scrutiny of awards. The arbitral tribunal issues its award to the parties once it is finalised, and the final award includes a decision regarding the costs of the arbitration.[13]

The Amounts in Dispute in ISDS Cases Before The SCC

In the course of 20 years, the SCC has seen a wide range of ISDS arbitrations, from small disputes brought by natural persons to large-scale arbitrations brought by multinational companies.

Whereas the average amount in dispute for the cases decided by sole arbitrator is only just over EUR 400,000, the average amount in dispute for the cases decided by a three-member tribunal is over EUR 340 million – although this figure is inflated by three cases-worth over EUR 1 billion.

Emergency Arbitration in ISDS Cases Before The SCC

One particular feature of the SCC Rules, which is not found in the ICSID or UNCITRAL Rules, is that claimants have an opportunity to seek emergency interim measures under the Emergency Arbitrator provisions in Appendix II to the SCC Rules. The purpose of such an emergency arbitration is to enable claimants to seek and obtain emergency interim relief before the arbitral tribunal has been constituted.

Emergency Arbitrations under Appendix II to the SCC Rules are designed to proceed under a very fast timetable. The application is made by email to the Secretariat[14] together with payment of the applicable costs,[15] whereupon the SCC Board seeks to appoint an emergency arbitrator within 24 hours of receipt of the application. The application is then referred to the emergency arbitrator as soon as possible, and the emergency arbitrator is asked to make a decision on the application for interim measures no later than five days thereafter.

The SCC has developed considerable experience of emergency arbitrations, having been 30 such cases between 2010 and 2017. The initial 24-hour deadline has been met in all but one case,[16] and the subsequent five-day deadline has been met in many cases, with the vast majority of emergency decisions having been issued within eight days.[17] It should be noted that, even though the timetable for such decisions is very short, most cases involve carefully reasoned written submissions by the parties, and fully reasoned decisions by the emergency arbitrator. It is also quite common for telephone hearings to be held between counsel and the emergency arbitrator.

The SCC has seen a number of Emergency Arbitrations in relation to ISDS cases in recent years. These include the following:[18]

- An ISDS case concerning the oil and gas industry, in which the investors sought to restrain the respondent State from taking measures to restrict the claimants' ability to sell gas. The request for interim measures was granted.[19]
- An ISDS case concerning a claim by an investor who owned shares in a bank that had been the subject of measures taken by decree of the national bank of the respondent State. The investor sought an emergency decision declaring that the decree at issue should be stayed or suspended pending final resolution of the dispute. The request for interim measures was denied.[20]

- An ISDS case concerning a claim by an investor who owned shares in a bank that had been the subject of measures taken by decree of the national bank of the respondent State. The investor sought an emergency decision declaring that the respondent should be ordered to refrain from enforcing or implementing the decree, and should refrain from interfering with the claimant's shareholding in the bank pending final resolution of the dispute. The request for interim measures was granted.[21]

It can be noted that, in all the above cases, the emergency arbitrator found that he or she had *prima facie* jurisdiction to award interim measures.

Appendix III to The 2017 SCC Rules

The SCC Rules are designed to apply to both commercial cases and ISDS cases. Nevertheless, the SCC recognises that there are some particular features of ISDS cases that call for particular regulation. Accordingly, the 2017 SCC Rules introduced a new Appendix III, which applies specifically to ISDS cases.[22]

The particular features of Appendix III can be summarised as follows:

- Article 1(2) of Appendix III provides the rules on joinder, multiple contracts and consolidation apply *mutatis mutandis* to ISDS cases. In practice, this gives the SCC Board some flexibility to adapt these rules for ISDS cases.
- Article 2 of Appendix III provides that, for ISDS cases, the default number of arbitrators shall be three. This is an exception to the general rule that, where the parties have not agreed upon the number of arbitrators, the SCC Board has discretion to choose the number of arbitrators.
- Article 3 of Appendix III sets out special rules which allow a third person[23] to apply to the arbitral tribunal for permission to make a written submission in the arbitration.
- Article 4 of Appendix III sets out special rules which allow a non-disputing treaty party to apply to the arbitral tribunal for permission to make a written submission in the arbitration.

Thus, Articles 3 and 4 of Appendix III recognise that there is often, although not always, a special need for transparency in ISDS cases.[24]

The Outcome of ISDS Cases Before The SCC

Of the 92 ISDS cases that were registered at the SCC between 1993 and 2016, most awards have been rendered in favour of respondent States:[25]

- 21% of the arbitral tribunals have declined jurisdiction;
- 37% of the arbitral tribunals denied all of the investor's claims;
- in 78% of cases where the investor's claims were denied in full, the respondent State was not found in breach, and in 22% the investor failed to prove any damages, despite the respondent State being found in breach; and
- the arbitral tribunals upheld the investor's claims in part or in full in 42% of cases.

Costs

When considering the costs of an arbitration, it is useful to distinguish between arbitration costs (*i.e.* the fees and costs of the arbitrators and of the SCC) and party costs (*i.e.* the fees and costs for legal representation and other costs incurred by each party).[26]

Party costs typically account for more than 80% of the overall costs of the arbitration.[27]

If so requested by one or more of the parties, the arbitral tribunal has the power to apportion both the arbitration costs and the party costs as between the parties in its final award.[28] The standard to be applied in both cases is that the arbitral tribunal shall have regard to "*the outcome of the case, each party's contribution to the efficiency and expeditiousness of the arbitration and any other relevant circumstances*".[29]

In practice, it appears that SCC tribunals tend to regard the outcome of the case as the primary factor to be taken into account. However, there are different views on what should be considered to be the outcome of the case. Some tribunals look at the success of a party in relation to the quantum of the claims awarded, while others define the outcome of the case on the basis of the relevance of the issues decided, and which party succeeded in a specific issue, and some tribunals combine both approaches.[30]

Stockholm Treaty Lab

The SCC seeks to be modern and forward-thinking in its approach to dispute resolution, and nowhere can this approach be seen more clearly than in the SCC's Stockholm Treaty Lab.

The Stockholm Treaty Lab[31] is a crowdsourcing platform through which the SCC invited teams from around the world to submit ideas for international law with the aim of promoting green investment and solving climate change problems.

In total, 43 teams registered to compete in this challenge, representing some 270 innovators from four continents, and more than 25 countries and 22 teams submitted entries.

The Stockholm Treaty Lab Jury announced its decision on 20 July 2018, and two teams were selected as winners:

- "the creative disrupters" who proposed a treaty on sustainable investment for climate change mitigation and adaptation; and
- "team innovate" who proposed a protocol for the encouragement, promotion, facilitation and protection of investments in climate change mitigation and adaptation.

The prize is broad exposure – including exposure at the United Nations in New York in September 2018 and in Davos in January 2019 – and an opportunity for the winners to engage in this important question on a global level.[32]

Conclusion

The SCC regards ISDS cases to be a key part of its work. The SCC will continue to work hard to promote ISDS cases, and to ensure that the cases before it are administered and run as well as possible.

At a time when others question or even threaten the existence of ISDS arbitration, such work is as important as ever.

Endnotes

1. UNCTAD IIA Issues Note, "*Special Update on Investor-State Dispute Settlement: Facts and Figures*", page 5: http://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf.
2. https://sccinstitute.com/about-the-scc/news/2017/new-report-on-investment-arbitration-at-the-scc/.
3. The SCC is one of the chosen fora for disputes between an investor and a Contracting Party under Article 26(4)(c) of the ECT.
4. Article 2(2) of Appendix III to the SCC Rules provides that the default rule for ISDS cases is three arbitrators, if the parties have not agreed otherwise. It can be expected that the

SCC Board will almost always decide that it is appropriate to have three arbitrators for ISDS cases, although the SCC Board does have discretion to appoint a sole arbitrator.

5. SCC cases are administered by the Secretariat in English, Russian or Swedish. The SCC Rules are available in Arabic, Chinese, English, German, Italian, Russian, Spanish and Swedish.
6. Case C-284/16 before the CJEU, *Slovak Republic v Achmea BV*.
7. Article 8 of the BIT in the *Achmea* case was considered by the CJEU to be particularly problematic, since it allowed the arbitral tribunal to choose a seat of arbitration outside the EU, and thus the CJEU was concerned that the arbitral tribunal might be able to interpret and apply EU law without the possibility of an effective review by a court of a Member State based on EU law, and without an opportunity to make a request for a preliminary ruling.
8. "*SCC Procedures for the Administration of Cases under the 2010 UNCITRAL Rules*" and "*SCC Procedures as Appointing Authority under the 2010 UNCITRAL Rules*", respectively.
9. In practice, the Board only dismisses cases on the basis of a lack of *prima facie* jurisdiction in the clearest of cases. All other cases are referred to the arbitral tribunal in order that the issue of jurisdiction can be thoroughly considered and determined.
10. Article 43 states that the Board may extend this time limit upon a reasoned request from the Arbitral Tribunal or if otherwise deemed necessary.
11. "*Investor-state disputes at the SCC*", page 5. The average duration for disputes decided by a sole arbitrator was 13 months, with a median duration of only 10 months; however, as the article makes clear, the discrepancy can be explained by particular circumstances in those cases.
12. Article 23(2) of the 2017 SCC Rules (entitled "*Conduct of the arbitration by the Arbitral Tribunal*") states: "*(1) The Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate, subject to these Rules and any agreement between the parties. (2) In all cases, the Arbitral Tribunal shall conduct the arbitration in an impartial, efficient and expeditious manner, giving each party an equal and reasonable opportunity to present its case*."
13. This is required by Article 49(5) of the 2017 SCC Rules.
14. It is important to note that there is a dedicated email address for applications for emergency arbitration, which is also monitored during out of office hours: emergencyarbitrator@chamber.se.
15. The costs of emergency proceedings are currently set at EUR 20,000 plus VAT, of which EUR 16,000 is the fee of the emergency arbitrator and EUR 4,000 is the application fee.
16. In the one case where the deadline was missed, the claimant failed to use the dedicated email address.
17. See generally the SCC Practice Note on Emergency Arbitrator Decisions Rendered 2015–2016: https://sccinstitute.com/media/194250/ea-practice-note-emergency-arbitrator-decisions-rendered-2015-2016.pdf.
18. See generally the SCC Practice Note on Emergency Arbitrator Decisions Rendered 2015–2016.
19. EA 2015/002.
20. EA 2016/082.
21. EA 2016/095.
22. Article 1(1) of Appendix III provides that it applies to cases under the Arbitration Rules based on a treaty providing for arbitration of disputes between an investor and a State.
23. A "*Third Person*" is defined as "[a]*ny person that is neither a disputing party nor a non-disputing treaty Party*".
24. See also the SCC Practice Note on the Mauritius Convention and UNCITRAL Rules on Transparency in SCC cases, 15 February 2016: https://sccinstitute.com/media/72819/scc-application-of-mauritius-convention-and-uncitral-rules-on-transparency.pdf.
25. "*Investor-state disputes at the SCC*", page 7.
26. The 2017 SCC Rules make this distinction, in Articles 49 and 50, respectively.
27. "*Investor-state disputes at the SCC*", page 7.
28. 2017 SCC Rules, Articles 49(6) and 50.
29. The reference to efficiency and expeditiousness is a new element, which was added by the 2017 SCC Rules.
30. "*Investor-state disputes at the SCC*", page 7.
31. http://stockholmtreatylab.org/.
32. In addition, the Stockholm Treaty Lab is also seeking to give wide exposure to the non-finalists in order that as many ideas as possible can reach a wider audience.

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James Hope is head of international arbitration at the Stockholm office of Vinge in Sweden. He also sits as a member of the Board of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

He is a dual-qualified Swedish Advokat and English Solicitor-Advocate, and is well placed to compare common law and civil law practices and procedures.

He has acted as counsel or arbitrator in more than 80 international arbitration cases, ranging from small cases worth around USD 100,000 to highly complex cases worth more than USD 50 billion. He has particular experience of energy disputes.

James has sat as arbitrator in international arbitrations under the ICC, SCC, Danish Institute of Arbitration, UNCITRAL and the Finnish Chamber of Commerce arbitration rules, in Stockholm, London, Paris, Copenhagen and Helsinki, under Swedish, English, Danish, Russian, Ukrainian and Finnish substantive laws, as well as under CISG. He is a Member of the ICSID international panel of arbitrators, the CIETAC panel of arbitrators and the Asian International Arbitration Centre (**AIAC**) panel of arbitrators. He is also a CEDR Accredited Mediator.

In addition to private practice, James is also a part-time supervisor and lecturer for the Master's Programme in International Commercial Arbitration Law at Stockholm University, and a guest lecturer at Edinburgh University and at Uppsala University. He is the author of a number of articles on dispute resolution issues, and is a frequent speaker at conferences.

James is fluent in English and Swedish.

ARBITRATION INSTITUTE
OF THE STOCKHOLM CHAMBER OF COMMERCE

The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) was established in 1917 and is part of the Stockholm Chamber of Commerce.

The SCC has developed into one of the world's leading forums for efficient dispute resolution for both Swedish and international parties.

The high number of international cases proves that the SCC is a preferred venue for dispute resolution among the international business community: every year parties from as many as 30–40 countries use the services of the SCC, and today, the SCC is the world's second largest institution for investment disputes worldwide.

The SCC was recognised in the 1970s as a neutral centre for the resolution of East-West trade disputes, and has since expanded its services in international commercial arbitration and emerged as one of the most important and frequently used arbitration institutions. In 2017, the SCC launched its new Arbitration Rules.

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