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International Arbitration: The Alternative of the Stockholm Chamber of Commerce

The growing acceptance of arbitration as a means of resolving important transnational commercial disputes has resulted in an increasing awareness of the importance of a number of large international arbitration centers, such as the Court of Arbitration of the International Chamber of Commerce, the American Arbitration Association, and the London Court of International Arbitration.¹ Although these institutions perhaps have attracted the lion's share of attention concerning international arbitration, there are also other arbitration centers that, despite their smaller size, play a valued role in this field.

One of these is the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Institute). 1988 marks the 350th anniversary of New Sweden, the first Swedish settlement in America, and that anniversary

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1. Arbitration in the largest arbitration centers is discussed in such highly-regarded works as W. CRAIG, W. PARK & J. PAULSSON, *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* (1985) [hereinafter ICC ARBITRATION]; M. MUSTILL & S. BOYD, *COMMERCIAL ARBITRATION* (1982); A. REDFERN & M. HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* (1986). A brief overview of International Chamber of Commerce (ICC) and American Arbitration Association (AAA) international arbitration and of arbitration in London is set forth in three articles included by the American Society of International Law in *CHOOSING A FORUM FOR INTERNATIONAL COMMERCIAL ARBITRATION*, 76TH ANNUAL MEETING (1982) [hereinafter AM. SOC'Y INT'L LAW PROCEEDINGS (1982)]. The three articles are Gaudet, *The International Chamber of Commerce Court of Arbitration*, in *id.* at 172; Hoellering, *Arbitration in the United States*, in *id.* at 175; and St. John Sutton, *Choosing a Forum for International Commercial Arbitration in London*, in *id.* at 178.

provides an appropriate opportunity to discuss this Swedish institution, whose activities should be of interest to a significant portion of the American legal and business community that is engaged in international transactions.

A brief article cannot summarize all the salient features of SCC Institute arbitration practice, but it is possible to focus here on some issues that ought to be considered by parties or their counsel when they draft an arbitration clause or prepare to embark on the arbitration of a claim. These issues include the appointment of arbitrators, submissions by parties, the procedure before the arbitrators, the language and governing law of the proceedings, time limits for decisions, the determination of applicable law, what awards may be subject to challenge, and the costs of arbitration.

I. Nature and Background of Swedish Arbitration

The SCC Institute is rooted in a legal and social tradition that has long considered arbitration to be an acceptable, and even a preferred, means of resolving disputes.² In fact, "in Sweden, . . . commercial disputes are settled by arbitration to an extent which surpasses that of many other countries."³ Sweden's first arbitration statute was enacted over one hundred years ago, in 1887, and there were antecedents in fourteenth century provincial legislation.⁴ The present statute, enacted in 1929 (Swedish Arbitration Act (or *Lag om skiljemän*)), has been updated by a few amendments, the most important of which were enacted in 1971 to implement the "New York Convention" (Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958).⁵

The international role of the SCC Institute, which was founded in 1917, was not fully anticipated by its founders, who believed that the institution

2. STOCKHOLM CHAMBER OF COMMERCE, *ARBITRATION IN SWEDEN* 3 (2d ed. 1984) [hereinafter *ARBITRATION IN SWEDEN*]. This work is an institutional work without a single author, although the preface states that final responsibility for the text was that of Hon. Birgitta Blom, Dr. J. Gillis Wetter, and Kaj Hober, and that the "overall responsibility for the drafting and editorial work" was that of Dr. Wetter and Mr. Hober. *Id.* at ii. It is valuable not only for its discussion of the legal principles but also for its Appendices, such as the text of the applicable Swedish Statutes in English translation and the US/USSR Optional Clause Agreement (1977), referred to below, as well as extensive bibliographies.

3. *ARBITRATION IN SWEDEN*, *supra* note 2, at 1. Of course, the SCC Institute is not the only forum that can benefit from the application of Swedish arbitration law. A relatively significant volume of Swedish arbitration is also conducted through the ICC and AAA, as well as through ad hoc arbitration.

4. *ARBITRATION IN SWEDEN*, *supra* note 2, at 3; Franke, *International Arbitration in Sweden*, 2 INT'L CONSTRUCTION L. REV. 159, 160 (1985) [hereinafter Franke, ICLR].

5. *ARBITRATION IN SWEDEN*, *supra* note 2, at 3, & app. 1 at 172-80; Franke, ICLR, *supra* note 4, at 160.

principally would serve Swedish domestic arbitration.⁶ For a number of years, the SCC Institute has been in a unique position with respect to trade disputes between Western businesses or nations and the trading activities of the Eastern countries.⁷ For example, under an arrangement known as the "US/USSR Optional Clause Agreement (1977)," which is set forth in letters dated December 29, 1976, between the American Arbitration Association and the U.S.S.R. Chamber of Commerce, the SCC Institute is designated the appointing authority and the Optional Clause is deemed "acceptable for inclusion in contracts" between U.S. legal or natural persons and U.S.S.R. foreign trade organizations.⁸ Moreover, the Chinese Government has also "expressed a strong preference to refer to the SCC Institute as an alternative to arbitration in China."⁹ The SCC Institute, whose potential in such arbitrations results in part from Sweden's neutrality as well as from its long history of legal sanction for arbitration, is also being increasingly used in non-East/West trade disputes.¹⁰ SCC arbitrations cover the usual range of subjects of international arbitration, such as sales contracts, construction projects, license agreements, and many other categories of commercial issues.¹¹ The international cases on the SCC Institute's docket typically are substantial and complex.¹² The SCC Institute often is chosen as an appointing authority under the UNCITRAL Rules.¹³

Technically part of the Stockholm Chamber of Commerce, the SCC Institute is autonomous within the Chamber, having its own Board, and its own Secretariat under the direction of a Secretary-General, who must be a lawyer.¹⁴ The SCC Institute has recently promulgated new Rules, effective January 1, 1988, which represent the most substantial revision in its rules since they were updated in 1976, and citations herein are to these new Rules.

6. Franke, *International Arbitration in Sweden*, printed in AM. SOC'Y INT'L LAW PROCEEDINGS (1982), *supra* note 1, at 167; Franke, ICLR, *supra* note 4, at 160.

7. *Id.*

8. ARBITRATION IN SWEDEN, *supra* note 2, app. 5 at 203; ICC ARBITRATION, *supra* note 1, at 65.

9. Bagner & Franke, *International Commercial Arbitration in Sweden*, LAW SOC'Y GAZETTE, Nov. 13, 1985, at 3276.

10. Franke, ICLR, *supra* note 4, at 160.

11. *Id.*

12. Franke, *Arbitration Institute of The Stockholm Chamber of Commerce*, 1983 Y.B. ARB. INST. STOCKHOLM CHAMBER OF COMMERCE 6.

13. *Id.* at 7.

14. Rules of the Arbitration Institute, Stockholm Chamber of Commerce, effective Jan. 1, 1988 [hereinafter SCC Rules], §§ 2, 4.

II. Appointment of Arbitrators

After the proceedings have been started with the filing of the parties' written submissions (a request for arbitration by the claimant and a reply by the respondent), and assuming that the SCC Institute has not dismissed the proceedings because of an obvious lack of jurisdiction or a failure to post security for costs,¹⁵ the appointment of arbitrators takes place. In SCC Institute arbitration, there are three arbitrators, unless the parties agree otherwise.¹⁶ If there is a sole arbitrator, he or she is appointed by the SCC Institute; if there is more than one, the parties appoint an equal number and the SCC Institute appoints one arbitrator, who is the chairman.¹⁷ The Institute will appoint all members of the panel if the parties agree.¹⁸ Parties who are interested in avoiding delay in the appointment phase of the proceedings may prefer the advantage that inheres when the Institute appoints the neutral arbitrator.

The Rules do not limit the nationality of an arbitrator but, although a party not unnaturally will often select an arbitrator of its own nationality, they require an arbitrator to disclose "any circumstances which might be deemed to diminish trust in his impartiality or independence."¹⁹ Any challenge to an arbitrator must be in writing and state the basis for the challenge.²⁰ Challenges are decided by the SCC Institute, which must discharge any arbitrator who is disqualified.²¹ In practice, most SCC Institute arbitrations "run very smoothly," and such problems as challenges to arbitrators, refusals by parties to participate in the proceedings, and objections to the validity or applicability of the arbitration agreement are infrequent.²²

III. The Proceedings

Although the parties may agree that their proceedings are to be conducted without oral hearings, such an agreement is not typical. ("An oral hearing shall, as a rule, be arranged."²³) Not surprisingly, many SCC Institute arbitration hearings take place in Stockholm, where the Institute has hearing rooms and other facilities to accommodate the parties and arbitrators.²⁴ In any event, the award should be rendered in Sweden if

15. *Id.* § 9-13.

16. *Id.* § 5.

17. *Id.*

18. *Id.*

19. *Id.* § 6.

20. *Id.* § 7.

21. *Id.* §§ 7, 8.

22. Letter from SCC Institute Secretary-General Ulf Franke to author (Nov. 2, 1987).

23. SCC Rules, *supra* note 14, § 20.

24. Franke, *supra* note 6, at 168.

the parties desire to insure that it will have the benefit of Swedish law.²⁵ The Rules provide that the "award shall be rendered at the place of arbitration."²⁶ The SCC Rules may be "inapplicable or unenforceable" to some extent "if the designated place of arbitration is outside Sweden."²⁷

The place of arbitration is of course a highly significant practical and psychological factor. Referring to some of the considerations that bear on the selection of the location of the proceedings, one author has noted:

From a purely practical point of view it is important that the place of arbitration is situated in a country and city to which there is easy transport from the country of residence of the parties and to which the parties and their lawyers have easy access. . . . Local facilities with respect to hotels, meeting rooms, mail and telex connections, . . . must be satisfactory. . . . It is very important that the parties are confident that their dispute is determined in an independent and neutral manner. The choice of the place of arbitration is important also in this respect. One of the reasons why parties to an international contract agree to arbitration is the wish to have a neutral decision.²⁸

Prior to the oral hearings, the parties must make written submissions entitled "Statement of Claim and Defense," which should include a preliminary statement of the evidence that the claimant and respondent respectively will desire to adduce.²⁹ In addition, the language of the proceedings obviously should be determined before oral hearings commence. The parties are given the power to agree on one or more languages, but if they do not, the arbitral tribunal makes that determination.³⁰

The law that will govern the arbitration can of course have a vital impact, and the SCC Institute's recommended arbitration clause reminds the parties to address this vital issue by including a sentence: "This contract shall be governed by the law of [insert jurisdiction]."³¹ (The recommended arbitration clause also includes blanks that remind parties to decide in their contracts the place of arbitration and language(s) of the proceedings, which issues are discussed above). Essentially, when the parties have not selected the governing law, the choice of law decision is made by the arbitrators. With respect to choice of law rules, Swedish rules are likely to be applied, at least in proceedings occurring in Sweden with a Swedish chairman.³²

25. Bagner & Franke, *supra* note 9, at 3277.

26. SCC Rules, *supra* note 14, § 28.

27. STOCKHOLM CHAMBER OF COMMERCE, ARBITRATION UNDER THE RULES OF THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE—AN INTRODUCTION § 5 (1988) [hereinafter HANDBOOK].

28. Philip, *Significance of the Place of Arbitration in International Arbitration*, 1985 Y. B. ARB. INST. STOCKHOLM CHAMBER OF COMMERCE 37.

29. SCC Rules, *supra* note 14, § 18.

30. *Id.* § 17.

31. *Id.* Recommended Governing Law Clause.

32. ARBITRATION IN SWEDEN, *supra* note 2, at 44–50; Wetter, *Choice of Law in Inter-*

Arbitrations before the SCC Institute are liberal concerning the appearance of counsel and matters of evidence. The parties may choose any person to assist them, whether or not a lawyer, and the Rules contain no limitation in that respect.³³ Absent an agreement to the contrary, an arbitrator may consider both written and oral evidence, and "there are very few, if any, restrictions upon the admissibility of evidence in Swedish arbitration proceedings."³⁴ Under the Rules, the tribunal may appoint an expert witness.³⁵

IV. The Award and Enforcement

The Rules require that the arbitrators make their award not later than one year after the case has been referred to them by the SCC Institute.³⁶ In practice, this time limit occasionally may prove to be too short, especially with regard to East-West disputes, but the same Rule authorizes the Institute to extend the period under appropriate circumstances and at the request of the arbitrators.

The award must be in writing and, as noted above, must be rendered at the place of arbitration.³⁷ It is valid even if not signed by all the arbitrators, as long as a majority signs it. In addition, an arbitrator may attach a dissenting opinion to the award.³⁸

The prospects for the enforceability of an SCC Institute award are favorable, in view of Sweden's status as a party not only to the New York Convention but also to the Geneva Convention of 1927 on the Execution of Foreign Arbitral Awards.³⁹ Under Section 21 of the Swedish Arbitration Act, awards can be challenged only under very limited circumstances. Challenges must be asserted in an action filed within sixty days of receipt of the award, and the court considering the challenge cannot substitute its own judgment for that of the arbitrators. The grounds for challenges, as set forth in the act, are that the arbitrators have gone beyond the matters submitted to them, have given their award after the agreed arbitration period, have decided a case that should not have been decided in Sweden, or were disqualified to serve, or that an irregularity of pro-

national Arbitration Proceedings in Sweden, 1984 Y.B. ARB. INST. STOCKHOLM CHAMBER OF COMMERCE 16-30 [hereinafter 1984 SCC Y.B.].

33. Franke, ICLR, *supra* note 4, at 163; HANDBOOK, *supra* note 27, § 4.

34. Franke, ICLR, *supra* note 4, at 163.

35. SCC Rules, *supra* note 14, § 22.

36. *Id.* § 26.

37. *Id.* § 28.

38. *Id.*

39. ARBITRATION IN SWEDEN, *supra* note 2, at 158-59; Franke, ICLR, *supra* note 4, at 164.

cedure probably influenced the decision.⁴⁰ An award cannot be voided at the instance of a party who, through acquiescence or otherwise, is deemed to have waived the challenge.⁴¹

Only in very rare circumstances will an award be void, as opposed to challengeable, but in such cases a party need not assert a challenge, although it has the option of obtaining a declaratory judgment that the award is void.⁴² Sections 1 and 20 of the Swedish Arbitration Act set forth the grounds upon which such a declaration could be made: (1) that there is no valid arbitration agreement; (2) that the award has not been reduced to writing and signed by the arbitrators; (3) that the decision is on a question that by law cannot be arbitrated (essentially this refers to the fact that the arbitration specified in the Act (section 1) is for civil matters, and thus criminal, forfeiture, and other noncivil matters are not within the scope of arbitration); or (4) that at the time the award was given the matter was the subject of pending court proceedings.⁴³

The matter of costs is expressly provided for by Rule 29 of the SCC Institute. The arbitrators decide the compensation due to the Institute and themselves. Although the parties are jointly and severally liable for those amounts, absent unusual circumstances the tribunal will order the losing party to pay them as well as the costs of the prevailing party. The Rules contain Regulations with respect to the compensation to the Institute, which need not be strictly followed if the circumstances call for a different result. The fees of the arbitrators are required to be reasonable and should be based on the time spent, the complexity of the case, and the amount in dispute.⁴⁴ The security for costs that is posted at the outset of a matter is intended to cover the anticipated compensation of the arbitrators and the Institute, but the amount posted for that purpose is not binding on the final determination of those amounts.⁴⁵

V. Summary

Arbitration is a well-established and preferred means of dispute resolution in Sweden, and that tradition gives support to the work of the SCC

40. Swedish Arbitration Act § 21 (reproduced in English translation in *ARBITRATION IN SWEDEN*, *supra* note 2, app. 1, at 178). See also *ARBITRATION IN SWEDEN*, *supra* note 2, at 148–56; ICC *ARBITRATION*, *supra* note 1, § 31.03; Westerling, *Void and Challengeable Awards in Swedish Arbitration Procedure*, 1984 SCC Y.B., *supra* note 32, at 45–47.

41. *Id.*

42. Franke, *supra* note 6, at 170.

43. Swedish Arbitration Act § 20 (reproduced in English translation in *ARBITRATION IN SWEDEN*, *supra* note 2, app. 1, at 177); *ARBITRATION IN SWEDEN*, *supra* note 2, at 144–47; ICC *ARBITRATION*, *supra* note 1, § 31.03; Westerling, *supra* note 40, at 45–47.

44. SCC Rules, *supra* note 14, § 30.

45. SCC Security for Costs Regulations Appended to SCC Rules.

Institute in the field of international arbitration as well as domestic arbitration. Sweden's neutrality has led to the SCC Institute being chosen as an acceptable appointing authority for East-West trade disputes, but the Institute has received increasing acceptance as an appropriate forum for international arbitration generally. The limited grounds for attacking awards, and the facilities and Rules of the SCC Institute, also enhance the acceptability of the Institute to contracting parties. Although it is not among the largest of the international arbitration forums, the SCC Institute has achieved a respected role in international arbitration, and parties who are about to enter into a contract that will contain an arbitration clause clearly can consider that Institute to be a disputes resolution forum that will act impartially and expeditiously, and that will have adequate institutional expertise and facilities to accommodate even complex arbitrations.