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Quick Answers on Appointment and Challenge of Arbitrators – Sweden

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Appointment

Number of Arbitrators

How many arbitrators may be appointed?

The parties are free to agree on the number of arbitrators. There are no restrictions as to how many arbitrators may be appointed. The number of arbitrators can be even or uneven (section 12 of the Swedish Arbitration Act (the 'Arbitration Act')).

In arbitrations conducted under the 2017 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the 'SCC Rules'), the parties are likewise free to agree on the number of arbitrators (Article 16 of the SCC Rules).

What happens if the parties have not agreed on the number of arbitrators?

Where the parties have not agreed on the number of arbitrators, the Arbitral Tribunal shall consist of three arbitrators (sections 12 and 13 of the Arbitration Act).

In arbitrations conducted under the SCC Rules, where the parties have not agreed on the number of arbitrators, the Board of the Arbitration Institute of the Stockholm Chamber of Commerce (the 'SCC Board') shall decide whether the Arbitral Tribunal shall consist of a sole arbitrator or three arbitrators. Such a decision shall take into account the complexity of the case, the amount in dispute and any other relevant circumstances (Article 16(2) of the SCC Rules).

Appointment Procedure

What is the procedure for appointing the arbitrator(s) in an arbitration seated in this jurisdiction?

The parties are free to agree on the manner in which the arbitrators are to be appointed (section 12 of the Arbitration Act). Where there is no such agreement the following applies:

– Each party shall appoint one arbitrator, and the arbitrators so appointed shall appoint the third arbitrator (sections 12 and 13 of the Arbitration Act).

– Where each party is required to appoint an arbitrator and one party has notified the opposing party of his choice of arbitrator in the request for arbitration (pursuant to section 19 of the Arbitration Act), the other party must, within thirty days of receipt of the notice, notify the first party in writing in respect of his choice of arbitrator. A party who has notified the other party of his choice of arbitrator in this manner, may not revoke the appointment without the consent of the other party (section 14 of the Arbitration Act).

In arbitrations conducted under the SCC Rules, the parties are free to agree on the procedure for appointment of the arbitrator(s) (Article 17(1) of the SCC Rules). Where the parties have not agreed on a procedure for the appointment of arbitrator(s), the following applies:

– Where the Arbitral Tribunal is to consist of a sole arbitrator, the parties shall be given ten days within which to jointly appoint the arbitrator. If the parties fail to make the appointment within this time period, the arbitrator shall be appointed by the SCC Board (Article 17(3) of the SCC Rules).

– Where the Arbitral Tribunal is to consist of more than one arbitrator, each party shall appoint an equal number of arbitrators and the Chairperson shall be appointed by the SCC Board (Article 17(4) of the SCC Rules).

– Where there are multiple Claimants or Respondents and the Arbitral Tribunal is to consist of more than one arbitrator, the multiple Claimants, jointly, and the multiple Respondents, jointly, shall appoint an equal number of arbitrators (Article 17(5) of the SCC Rules). If either side fails to make joint appointment of arbitrators, the SCC Board may appoint the entire Arbitral Tribunal (Article 17(5) of the SCC Rules).

What is the procedure for appointing the Chairman / Umpire?

Where the parties have not agreed on the procedure for appointment of the Chairperson, the two party-appointed arbitrators are to appoint a third arbitrator as the Chairperson (sections 13 and 20 of the Arbitration Act).

In arbitrations conducted under the SCC Rules, where the parties have not agreed on the procedure for appointment of the Chairperson, the Chairperson shall be appointed by the SCC Board (Article 17(4) of the SCC Rules).

What is the procedure where one party fails to appoint an arbitrator as it is required to do, or fails to do so within the relevant time-period?

Under the Arbitration Act, the Claimant must make its choice of arbitrator in the request for arbitration (section 19(3) of the Arbitration Act). If the Claimant fails to make his choice of arbitrator in the request for arbitration, the request is considered ineffective, unless the Respondent approves of the request.

If the Respondent fails to appoint an arbitrator within the stipulated time, the Claimant may apply to the District Court to make the appointment (section 14 of the Arbitration Act).

If the Respondent parties in a multi-party arbitration fail to jointly nominate an arbitrator, the District Court will appoint arbitrators on behalf of all parties upon the request of a respondent party. In such case, the District Court will release any arbitrator already appointed (section 14 of the Arbitration Act).

A party that fails to appoint an arbitrator in due time has forfeited its right to invoke the arbitration agreement as a bar to court proceedings (section 5(2) of the Arbitration Act).

Where an arbitrator is to be appointed by other arbitrators, but they fail to do so within thirty days from the date on which the last arbitrator was appointed, the District Court shall appoint the arbitrator at the request of a party. The same applies where an arbitrator is to be appointed jointly by the parties, but they fail to agree within thirty days, commencing on the date on which the question was raised through receipt by one party of notice from the opposing party (section 15 of the Arbitration Act).

In arbitrations conducted under the SCC Rules, where the parties have not agreed on a different procedure for appointment of the arbitrator(s), the following applies:

– Where the Arbitral Tribunal is to consist of a sole arbitrator, the parties shall be given ten days within which to jointly appoint the arbitrator. If the parties fail to make the appointment within this time period, the SCC Board shall appoint the arbitrator (Article 17(3) of the SCC Rules).

– Where the Arbitral Tribunal is to consist of more than one arbitrator, each party shall appoint an equal number of arbitrators and the Chairperson shall be appointed by the Board. Where a party fails to appoint arbitrator(s) within the stipulated time period, the Board shall make the appointment (Article 17(4) of the SCC Rules).

– In the case of multiple Claimants and Respondents and where the Arbitral Tribunal is to consist of more than one arbitrator and if either side fails to make joint appointment of arbitrators, the SCC Board may appoint the entire Arbitral Tribunal (Article 17(5) of the SCC Rules).

If the Claimant, pursuant to the agreement between the parties, is to make its choice of arbitrator in the request for arbitration (Article 6(vii) of the SCC Rules) but fails to do so, the Board may request further details. If it does not comply with such a request, the Board may dismiss the case (Article 10(2) of the SCC Rules).

Appointment and Confirmation of Arbitrators

Who can be an arbitrator?

Any person who possesses full legal capacity in respect of his actions and his property may act as an arbitrator (section 7 of the Arbitration Act). There are no further qualifications required, unless otherwise stipulated in the arbitration agreement.

There is no express provision in the SCC Rules addressing who can be an arbitrator.

What factors will be considered in confirming or appointing arbitrators in this jurisdiction?

Under the Arbitration Act, the parties may agree on the qualifications required from the arbitrator(s). In all cases, however, an arbitrator must possess full legal capacity with regards to his actions and his property (section 7 of the Arbitration Act). If an arbitral award is rendered by an Arbitral Tribunal composed of an arbitrator lacking such legal capacity, the award may be challenged under section 34(5) of the Arbitration Act.

If the District Court is to appoint an arbitrator, it will take into consideration the terms of any agreement between the parties as to the qualifications required of the arbitrator(s). If there is no such agreement, the District Court may choose any person as arbitrator who possesses full legal capacity with regard to his actions and his property (section 7 of the Arbitration Act).

In arbitrations conducted under the SCC Rules, where the parties are of different nationalities, the sole arbitrator or the Chairperson of the Tribunal shall be of a different nationality than the parties, unless the parties have agreed otherwise or unless otherwise deemed appropriate by the SCC Board (Article 17(6) of the SCC Rules).

When appointing arbitrators, the SCC Board shall consider the nature and the circumstances of the dispute, the applicable law, the seat and language of the arbitration and the nationality of the parties (Article 17(7) of the SCC Rules).

Who confirms or appoints arbitrators in this jurisdiction?

The District Court can appoint arbitrators if the parties fail to do so (sections 12 and 14-17 of the Arbitration Act).

In arbitrations conducted under the SCC Rules, the SCC Board can appoint arbitrators if the parties fail to do so (Articles 11(vi) and 17 of the SCC Rules).

Confirmation of arbitrators is not required by either the Arbitration Act or the SCC Rules.

Is there a set list of arbitrators from which arbitrators will be chosen?

There is no set list. In ad hoc arbitration, the parties may choose freely whom to appoint subject only to the requirement in section 7 of the Arbitration Act that such person must have full legal capacity as well as to any requirements agreed by the parties.

The Arbitration Institute of the Stockholm Chamber of Commerce (the 'SCC') does not have a set list of arbitrators. Thus, the SCC Board, which consists of sixteen experienced arbitration practitioners from a number of jurisdictions and with different backgrounds, is not limited in its choice to any list. The SCC Board appoints the most suitable arbitrator based on the characteristics of the case.

Are there restrictions on the nationality of an arbitrator?

There is no provision in the Arbitration Act addressing the nationality of arbitrators. Thus, in ad hoc arbitration, there is no provision precluding the appointment by the party-appointed arbitrators or a Chairperson of the same nationality as one of the parties.

In arbitrations conducted under the SCC Rules, where the parties are of different nationalities, the sole arbitrator or the Chairperson of the Tribunal shall be of a different nationality than the parties, unless the parties have agreed otherwise or unless otherwise deemed appropriate by the SCC Board (Article 17(6) of the SCC Rules).

Decision-making, Chairmen and Umpires

Are the parties free to agree what the functions of any Chairman to be appointed are to be?

Yes. The parties are free to agree what the functions of the Chairperson are to be in relation to the making of determinations in the arbitral proceedings. However, the arbitrators are not forced to comply with a party instruction which is unlawful or impossible to implement. Unless otherwise agreed by the parties, the opinion of the Chairperson shall prevail if no majority is attained (section 30 of the Arbitration Act). Furthermore, the parties may authorize the Chairperson to sign the award on his own (section 31 of the Arbitration Act). However, if the parties agree that the award is to be signed only by the administrative secretary or by a party-designated arbitrator, an award signed in such a manner will be invalid.

In arbitrations conducted under the SCC Rules, the parties are free to agree what the functions of the Chairperson are to be in relation to the making of determinations in the arbitral proceedings. When the Arbitral Tribunal consists of more than one arbitrator, the default rule is that any award or other decision of the Arbitral Tribunal shall be determined by the Chairperson if no majority is attained (Article 41(1) of the SCC Rules). The Arbitral Tribunal may decide that the Chairperson alone may make procedural rulings (Article 41(2) of the SCC Rules).

What is the position should the parties not agree what the functions of any Chairman to be appointed are?

The powers of an Arbitral Tribunal are those conferred upon it by the parties within the limits provided by the applicable law. In general terms, the arbitrators/Chairperson enjoy broad powers to determine the appropriate procedure, subject, however, to observing the requirements of due process, i.e., equality of treatment and opportunity to be heard. Duties of the arbitrators imposed by law include that the arbitrators shall handle the dispute in an impartial and speedy manner and that the award must be in writing.

Unless the parties have agreed otherwise, the opinion agreed upon by the majority of the arbitrators participating in the determination shall prevail, i.e., a majority award. However, if no majority is attained for any opinion, the opinion of the Chairperson shall prevail (section 30(2) of the Arbitration Act).

In arbitrations conducted under the SCC Rules, the parties are free to agree how the Arbitral Tribunal is to make decisions and awards.

– Where there is no agreement between the parties as to how the Arbitral Tribunal is to make decisions and awards, and when the Arbitral Tribunal consists of more than one arbitrator, any award or other decision of the Arbitral Tribunal shall be made by a

majority of the arbitrators or, failing a majority, by the Chairperson (Article 41(1) of the SCC Rules).

– The Arbitral Tribunal may decide that the Chairperson alone may make procedural rulings (Article 41(2) of the SCC Rules).

– Subject to the SCC Rules and any agreement between the parties, the Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate. In all cases, the Arbitral Tribunal shall conduct the arbitration in an impartial, practical and expeditious manner, giving each party an equal and reasonable opportunity to present its case (Article 23 of the SCC Rules).

Are the parties free to agree what the functions of any Umpire to be appointed are to be?

Umpires are not specifically mentioned in the Arbitration Act or in the SCC Rules. However, the parties are free to agree what the functions of the arbitrators are to be in relation to the making of determinations in the arbitral proceedings. This means that an arbitrator appointed may be granted the typical functions and powers of an Umpire. Also, in the case where the Arbitral Tribunal consists of two arbitrators and no Chairperson and the arbitrators cannot agree on a decision, the parties may be given the opportunity to appoint a Chairperson. Such a Chairperson then has the same function as an Umpire.

What is the position should the parties not agree what are the functions of any Umpire to be appointed?

Umpires are not specifically mentioned in the Arbitration Act or in the SCC Rules. However, the parties are free to agree what the functions of the arbitrators are to be in relation to the making of determinations in the arbitral proceedings. This means that an arbitrator appointed may be granted the typical functions and powers of an Umpire. Also, in the case where the Arbitral Tribunal consists of two arbitrators and no Chairperson and the arbitrators cannot agree on a decision, the parties may be given the opportunity to appoint a Chairperson. Such a Chairperson then has the same function as an Umpire.

What is the position if the parties agree that there should be two or more arbitrators with no Chairman or Umpire?

The parties are free to agree how the Arbitral Tribunal is to make decisions and awards. If the parties have not agreed otherwise, the opinion agreed upon by the majority of the arbitrators participating in the determination of the dispute shall be the opinion of the Arbitral Tribunal. If no majority is attained for any opinion, the opinion of the Chairperson shall prevail (section 30 of the Arbitration Act). Where there is no Chairperson, the arbitrators shall explain the situation to the parties and give them the opportunity to appoint a Chairperson. If the parties cannot agree in such case, the arbitration proceedings will be considered void.

In arbitrations conducted under the SCC Rules the parties are free to agree how the Arbitral Tribunal is to make decisions and awards. Where there is no agreement between the parties as to how the Arbitral Tribunal is to make decisions and awards, and when the Arbitral Tribunal consists of more than one arbitrator, any award or other decision of the Arbitral Tribunal shall be made by a majority of the arbitrators (Article 41(1) of the SCC Rules).

Expedited Formation

Is provision made for the expedited formation of the Arbitral Tribunal (and, if so, how)?

There is no provision in the Arbitration Act addressing the expedited formation of an Arbitral Tribunal.

Pursuant to the SCC Rules, the parties may agree, either in the arbitration agreement or once the dispute has arisen, to resolve a dispute in accordance with the SCC Rules for Expedited Arbitrations. An Arbitral Tribunal in an Expedited Arbitration always consists of a sole arbitrator (Article 17 of the SCC Rules for Expedited Arbitrations). Unless otherwise agreed between the parties, the parties shall be given ten days within which to jointly appoint the sole arbitrator. If the parties fail to make the appointment within this time period, the sole arbitrator shall be appointed by the SCC Board (Article 18 of the SCC Rules for Expedited Arbitrations).

Under Appendix II of the SCC Rules, a party may apply for the appointment of an Emergency Arbitrator in order to obtain an emergency decision on interim measures before the case is referred to an Arbitral Tribunal (Articles 1 and 2 of Appendix II of the SCC Rules). The SCC Board shall seek to appoint an Emergency Arbitrator within twenty-four hours of receipt of the application (Article 4 of Appendix II of the SCC Rules). Any emergency decision on interim measures shall be made within five days from the date upon which the application was referred to the Emergency Arbitrator. Extensions to that time limit may be granted (Article 8 of Appendix II of the SCC Rules). However, even when an extension is granted, experience shows that a decision is normally rendered within a

couple of days. The objective of the Emergency Arbitrator provisions is to provide a party with an urgent claim to secure interim relief before the proper Arbitral Tribunal has been constituted and without having to turn to a state court for interim measures. The mandate of the Emergency Arbitrator expires once an interim decision is rendered. Once appointed, the Arbitral Tribunal is not bound by the decision(s) and reason of the Emergency Arbitrator and may, thus, change or replace such decision(s) (Article 9 of Appendix II of the SCC Rules).

Multiple Parties

Is provision made for the appointment of the Arbitral Tribunal in multi-party arbitration (and, if so, how)?

Yes. The respondent parties in a multi-party arbitration are entitled to jointly propose a party-appointed arbitrator. However, if the respondent parties fail to reach an agreement to this end, the District Court will appoint arbitrators on behalf of all parties upon the request of a respondent party. In such case, the District Court will also release any arbitrator already appointed (section 14 of the Arbitration Act).

In arbitrations conducted under the SCC Rules, where there are multiple Claimants or Respondents and the Arbitral Tribunal is to consist of more than one arbitrator, the multiple Claimants, jointly, and the multiple Respondents, jointly, shall appoint an equal number of arbitrators (Article 17(5) of the SCC Rules). If the Arbitral Tribunal is to consist of one arbitrator, the sole arbitrator should be appointed jointly by the multiple Claimants and the multiple Respondents (Article 17(3) of the SCC Rules).

What happens if multiple Claimants / Respondents cannot agree on a joint nomination?

Should the respondent parties in a multi-party arbitration be unable to jointly propose a party-appointed arbitrator due to a lack of agreement between them, the competent District Court will appoint arbitrators on behalf of all parties upon the request of a respondent party. The District Court will also release any arbitrator already appointed (section 14 of the Arbitration Act).

In an arbitration conducted under the SCC Rules where the Parties have not agreed on a procedure for the appointment of arbitrators, the SCC Board shall appoint the entire Arbitral Tribunal if either the multiple Claimants or the multiple Respondents fails to make a joint appointment (Article 17(5) of the SCC Rules).

Revocation / Challenge / Resignation / Replacement

Duty of Disclosure

Is an arbitrator required to disclose any matters giving rise to justifiable doubts as to his impartiality?

Yes. Section 9 of the Arbitration Act stipulates that a person who is asked to accept an appointment as arbitrator shall immediately disclose all circumstances which, pursuant to sections 7 or 8 of the Act, may be deemed to prevent him/her from serving as arbitrator. An arbitrator shall inform the parties and the other arbitrators of such circumstances as soon as all arbitrators have been appointed and thereafter in the course of the arbitral proceedings as soon as he/she has learned of any new circumstances.

In arbitrations conducted under the SCC Rules, a person shall, before being appointed as arbitrator, disclose any circumstances that may give rise to justifiable doubts as to his/her impartiality or independence. Upon appointment as arbitrator, the person shall submit to the SCC Secretariat a signed statement of impartiality and independence disclosing any circumstances which may give rise to justifiable doubts as to that person's impartiality or independence. An arbitrator shall immediately inform the parties and the other arbitrators in writing where any such circumstances arise during the course of the arbitration (Article 18 of the SCC Rules).

Revocation of Authority

Can an arbitrator's authority be revoked, and in what circumstances?

A party who has notified the other party of his choice of arbitrator may not revoke the appointment without the consent of the other party (section 14 of the Arbitration Act).

There is no express provision in the SCC Rules addressing revocation of an arbitrator's authority. The parties are free to agree in what circumstances an arbitrator's authority may be revoked. Absent an agreement to the contrary, and if the place of arbitration is Sweden, the Arbitration Act applies.

Challenge

Can a party challenge / remove an arbitrator through the courts and, if so, in what circumstances?

Yes. A party may ask the District Court to remove an arbitrator if there exists any circumstance which may diminish confidence in the arbitrator's impartiality or independence (sections 8 and 10 of the Arbitration Act). Only a decision in which the District Court denies an application to remove an arbitrator can be appealed (section 44(3) of the Arbitration Act).

Moreover, section 8 of the Arbitration Act lists the following four situations in which a circumstance that may diminish confidence in the arbitrator's impartiality shall always be deemed to exist:

- the arbitrator, or a person closely associated with him/her, is a party, or otherwise may expect considerable benefit or detriment, as a result of the outcome of the dispute (section 8(1) of the Arbitration Act);
- the arbitrator, or a person closely associated with him/her, is the director of a company or any other association which is a party, or otherwise representing a party or any other person who may expect considerable benefit, or detriment, as a result of the outcome of the dispute (section 8(2) of the Arbitration Act);
- the arbitrator has taken a position in the dispute, as an expert or otherwise, or has assisted a party in the preparation or conduct of his case in the dispute (section 8(3) of the Arbitration Act); or
- the arbitrator has received or demanded compensation in violation of section 39(2) of the Arbitration Act (section 8(4) of the Arbitration Act).

In arbitrations conducted under the SCC Rules, a party may challenge any arbitrator if circumstances exist which give rise to justifiable doubts as to the arbitrator's impartiality or independence or if he/she does not possess qualifications agreed by the parties. A party may challenge an arbitrator whom it has appointed or in whose appointment it has participated, only for reasons of which it becomes aware after the appointment was made (Article 19(1)–(2) of the SCC Rules). If the other party agrees to the challenge, the arbitrator shall resign. In all other cases, the Board shall make the final decision on the challenge (Article 19(5) of the SCC Rules).

What is the procedure for challenging an arbitrator?

Pursuant to section 10 of the Arbitration Act, a party must present a challenge in relation to an arbitrator based on a circumstance set forth in section 8 of the Arbitration Act within fifteen days from the date on which the party became aware both of the appointment of the arbitrator and of the existence of the circumstance in question. The challenge shall first be determined by the arbitrators (including the arbitrator whose participation is challenged), unless the parties have decided that the challenge is to be determined by someone else, e.g., an arbitral institution. Section 11 of the Arbitration Act permits the parties to agree that an arbitration institution is to determine such issues conclusively. If the issues have been tried by the arbitrators, and the motion to disqualify an arbitrator is denied or dismissed because it was not filed within the stipulated time period, the challenging party may file an application to the District Court that the arbitrator be removed (section 10(3) of the Arbitration Act). Such an application must be submitted within 30 days from the date when the party received the arbitrators' decision. If the parties have agreed to have an arbitral institution determine these issues conclusively, this remedy is not available.

In an arbitration conducted under the SCC Rules, a challenge to an arbitrator shall, pursuant to Article 19(3) of the SCC Rules, be made within fifteen days from when the circumstances giving rise to the challenge became known to the party, by submitting a written statement to the SCC Secretariat setting forth the reasons for the challenge. The SCC Secretariat shall notify the parties and the arbitrators of the challenge and give them an opportunity to submit comments thereon (Article 19(4) of the SCC Rules).

When may a challenge to an arbitrator be made?

Pursuant to section 10 of the Arbitration Act, a party must present a challenge in relation to an arbitrator based on a circumstance set forth in section 8 of the Arbitration Act within fifteen days from the date on which the party became aware both of the appointment of the arbitrator and of the existence of the circumstance in question. If the issues have been tried by the arbitrators, and the motion to disqualify an arbitrator is denied, or is dismissed because it was not filed within the stipulated time period, the challenging party may file an application to the District Court that the arbitrator be removed. Such an application must be submitted within thirty days from the date when the party received the arbitrators' decision (section 10 of the Arbitration Act).

In an arbitration conducted under the SCC Rules, a challenge to an arbitrator shall, pursuant to Article 19(3) of the SCC Rules, be made within fifteen days from when the circumstances giving rise to the challenge became known to the party. Failure by a party to challenge an arbitrator within the stipulated time constitutes a waiver of the right to raise the challenge.

What is the test of impartiality?

Pursuant to section 8 of the Arbitration Act an arbitrator shall be impartial and

independent. At the request of a party, an arbitrator shall be discharged if there exist any circumstances which may diminish confidence in the arbitrator's impartiality. Such a circumstance shall always be deemed to exist:

- where the arbitrator, or a person closely associated with him/her, is a party, or otherwise may expect considerable benefit, or detriment, as a result of the outcome of the dispute (section 8(1) of the Arbitration Act);
- where the arbitrator, or a person closely associated with him/her, is the director of a company or any other association which is a party, or otherwise representing a party or any other person who may expect considerable benefit, or detriment, as a result of the outcome of the dispute (section 8(2) of the Arbitration Act);
- where the arbitrator has taken a position in the dispute, as an expert or otherwise, or has assisted a party in the preparation or conduct of his case in the dispute (section 8(3) of the Arbitration Act); or
- where the arbitrator has received or demanded compensation in violation of section 39(2) of the Arbitration Act (section 8(4) of the Arbitration Act).

The list in section 8 of the Arbitration Act is not exclusive. The situations listed are thus not meant to exclude other situations in which an arbitrator may fail to satisfy the requirement of impartiality.

The concept of independence is normally understood as referring to the relationship between the arbitrator and the party, while the concept of impartiality refers to whether the arbitrator actually behaves in a biased way or does not treat the parties on an equal basis.

Two decisions of the Supreme Court are also worth mentioning in this respect. *AJ v. Ericsson* (NJA 2007 s. 841) and *Korsnäs Aktiebolag v. AB Fortum Värme* (NJA 2010s. 317). In both cases, the Supreme Court made reference to the IBA Guidelines on Conflicts of Interest in International Arbitration.

SCC does not publish the SCC Board's decisions on the challenge of arbitrators. However, surveys made by the SCC Secretariat show that circumstances which have led to the removal of arbitrators include the following:

- The arbitrator, or his law firm, had within the past ten years served as counsel for one of the parties. For example, in a case where the Chairperson's law firm had previously acted as counsel for one of the parties, although the Chairperson had not been involved himself, the SCC Board upheld the challenge and removed the Chairperson.
- The arbitrator was retained as a legal expert by one of the parties in another arbitration.
- The arbitrator had been appointed on several occasions by the law firm representing one of the parties. In one case the arbitrator had, during the past two years, been appointed by a lawyer at the same firm, now representing one of the parties, in eight different arbitration proceedings, five of which had not yet been concluded.

In this context, it is also worth mentioning a decision from the Svea Court of Appeal (rendered in 2011) to set aside an award due to justifiable doubts as to the impartiality of one of the arbitrators. The award in question had been issued against KPMG. The arbitrator was a partner at a large Swedish law firm. In October 2010, lawyers at the same law firm and office as the arbitrator (although not the arbitrator himself) had been asked to represent a claimant against KPMG as the potential respondent. A first demand letter was sent to KPMG on 20 December 2010. The arbitration award in question was rendered on 22 December 2010 and KPMG was registered as a counterparty in the firm's client register on 23 December 2010. In its decision, the Svea Court of Appeal held that it was clear that the arbitrator knew about the question from the client in October 2010, but that it was not clear that he had been aware that the assignment had been taken on before the award was rendered. However, the assessment of whether an arbitrator is impartial or not is to be made on an objective basis. If the firm where an arbitrator is a partner takes on an assignment for or against one of the parties in the arbitration, this is normally seen as a circumstance which, viewed objectively, may give rise to justifiable doubts as to the arbitrator's impartiality. In such cases, the arbitrator shall be discharged or the award set aside.

Who decides on the challenge?

The challenge shall first be tried by the arbitrators, including the arbitrator whose participation is challenged, unless the parties have decided that it is to be determined by someone else, such as an arbitral institution. A party who is dissatisfied with a decision denying a request, or dismissing a request on the grounds that it was not timely filed, may file an application with the District Court that the arbitrator be discharged (section 10 of the Arbitration Act).

In arbitral proceedings conducted under the SCC Rules, the SCC Secretariat shall, after having received the written statement in which the challenge is made, notify the parties and the arbitrators of the challenge and give them an opportunity to submit comments thereon (Article 19(4) of the SCC Rules). If the other party agrees to the challenge, the

arbitrator shall resign, whereas in all other cases the SCC Board makes the final decision (Article 19(5) of the SCC Rules). The decision is taken on the basis of the written submissions. No hearings are held before the SCC Board.

Resignation

Can an arbitrator resign?

Yes (section 16 of the Arbitration Act). An arbitrator is, however, not entitled to resign without a valid reason. An arbitrator's undertaking means that he or she is to complete a task, namely that of resolving the dispute, together with the other arbitrators. An arbitrator cannot, however, be forced to complete his undertaking, such as by a subpoena. Since there is often great additional expenditure involved if an arbitrator resigns and the proceedings have to be repeated, the arbitrator must be able to provide good reasons for being entitled to resign. It is possible that the resigning arbitrator can become liable for damages incurred by the parties as a consequence of the resignation.

Pursuant to Article 20(1) of the SCC Rules, the SCC Board is to release an arbitrator from appointment if the SCC Board accepts the arbitrator's resignation or if a challenge against him/her is sustained. The SCC Board shall appoint a new arbitrator where an arbitrator has been released from his/her appointment pursuant to Article 20 of the SCC Rules. If the arbitrator being replaced was appointed by a party, that party shall appoint the new arbitrator, unless otherwise deemed appropriate by the SCC Board (Article 21(1) of the SCC Rules). Where the Arbitral Tribunal consists of three or more arbitrators, the SCC Board may, after the parties and the arbitrators have been given the opportunity to submit comments, decide that the remaining arbitrator shall proceed with the arbitration (Article 21(2) of the SCC Rules). Where an arbitrator has been replaced, the newly composed Arbitral Tribunal shall decide whether and to what extent the proceedings are to be repeated (Article 21(3) of the SCC Rules).

Replacement / Filling of Vacancy

By what process is a replacement arbitrator selected?

If an arbitrator resigns or is removed, a new arbitrator is to be appointed unless the parties have agreed otherwise. Under section 16 of the Arbitration Act, the form and method of appointment depend on whether the circumstance due to which the arbitrator cannot fulfil his duties arose before or after his appointment. In the former case, the District Court shall, upon a party's request, appoint the new arbitrator. If the previous arbitrator was appointed by a party, the District Court must appoint the person suggested by that party unless there are special reasons speaking against it. In the latter case, the party who originally was required to make the appointment shall appoint the new arbitrator (section 16 of the Arbitration Act). The period of time within which a new arbitrator shall be appointed is thirty days from the date on which the person who shall appoint the arbitrator became aware thereof.

Pursuant to Article 21(1) of the SCC Rules, the SCC Board shall appoint the new arbitrator where an arbitrator has been released from his/her appointment, or where an arbitrator has died. If the arbitrator to be replaced was appointed by a party, that party shall appoint the new arbitrator, unless otherwise deemed to be appropriate by the SCC Board.

To what extent can / will proceedings be repeated if a replacement arbitrator is appointed?

The Arbitration Act does not set out the extent to which proceedings must be repeated when an arbitrator is replaced. It is primarily up to the parties to decide on this issue (section 21 of the Arbitration Act). If the parties are not in agreement, however, the arbitrators, i.e., the newly composed Arbitral Tribunal, will make the decision.

In arbitral proceedings conducted under the SCC Rules, where the Arbitral Tribunal consists of three or more arbitrators, the SCC Board may decide that the remaining arbitrators shall proceed with the arbitration. In making its decision, the SCC Board shall take into account the stage of the arbitration and other relevant circumstances. Before making such decision, the parties and the arbitrators shall be given an opportunity to submit comments. Where an arbitrator has been replaced, the newly composed Arbitral Tribunal shall decide whether and to what extent the proceedings are to be repeated (Article 21(2)–(3) of the SCC Rules).

Refusing to Participate

What happens if a member of the Arbitral Tribunal refuses or fails to participate in proceedings?

If an arbitrator has delayed the proceedings, a party can request that the District Court shall discharge that arbitrator and appoint another. In addition, the parties can agree that such a request instead shall be conclusively determined by an arbitral institution (section 17 of the Arbitration Act). Moreover, if an arbitrator fails, without valid cause, to participate in the determination of an issue by the Arbitral Tribunal, such failure will not

prevent the other arbitrators from ruling on the matter (section 30(1) of the Arbitration Act). It is also sufficient that the award is signed by a majority of the arbitrators provided that the reason why all arbitrators have not signed the award is noted therein (section 31(1) of the Arbitration Act).

In arbitrations conducted under the SCC rules, the SCC Board shall release an arbitrator from appointment where the arbitrator fails to perform his/her functions in an adequate manner (Article 20(1)(iii) of the SCC Rules). If any arbitrator fails without valid cause to participate in the deliberations of the Arbitral Tribunal on an issue, such failure will not preclude a decision from being made by the other arbitrators (Article 42(5) of the SCC Rules). If an arbitrator fails to sign an award, the signature of the majority of the arbitrators, or failing that, of the Chairperson shall be sufficient, provided that the reason for the omission of the signature is stated in the award (Article 42(3) of the SCC Rules).

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