

Forward!  
Вперёд!  
Framåt!

Essays in Honour of Prof Dr Kaj Hobér

*Editors*

Eric Bylander  
Anna Jonsson Cornell  
Jakob Ragnwaldh

© The Authors and Iustus Förlag AB, Uppsala, Sweden 2019

Edition 1:1

ISBN 978-91-7737-076-5

Production: eddy.se ab, Visby, Sweden 2019

Cover: John Persson

Photo: Mikael Wallerstedt

Address of the Publisher: Box 1994, 751 49 Uppsala, Sweden

Phone: 018-65 03 30

Website: [www.iustus.se](http://www.iustus.se), e-mail: [kundtjanst@iustus.se](mailto:kundtjanst@iustus.se)

Printed by Dimograf, Poland 2019

# Contents

Tabula Gratulatoria	5
Editors' Preface	7
Foreword	9
Charles N Brower and Daae Kim <i>Kaj Hobér and Stockholm. Ensuring that East and West Ever Shall Meet</i>	15
C Mark Baker and Cara Dowling <i>Resolving Climate-related Disputes. The Role of International Arbitration</i>	29
W E Butler <i>Catherine the Great, William Blackstone, and Comparative Law</i>	43
Iain Cameron <i>Russian Constitutional Law and Judgments of the European Court of Human Rights</i>	57
Mattias Dahlberg <i>Russian Tax Treaty Relations. The Examples of Sweden and Cyprus</i>	69

## Contents

Joel Dahlquist Cullborg <i>Challenges of Treaty-Based Arbitral Awards in Swedish Courts</i>	83
Rudolf Dolzer <i>International Law and English Law. Res Judicata and the Henderson Doctrine</i>	101
Nils Eliasson <i>Some Reflections on Hong Kong from an Investment Treaty Perspective</i>	111
Ulf Franke and Annette Magnusson <i>The Emergence of an International Arbitral Institution for the 21<sup>st</sup> century</i>	127
Anna Jonsson Cornell <i>Revisiting Old Ideas in the Quest for New Ones</i>	143
Neil Kaplan <i>The Perfect Chair</i>	155
Herbert Küpper <i>Economics in the Hungarian Constitution</i>	163
Julian D M Lew <i>Determining Relevancy of Facts in International Arbitration</i>	179
Otto Luchterhandt <i>Historical Experience and the Lessons of Armenian Statehood. Taking a Detached View</i>	193
Kristoffer Löf <i>A Story of Corruption. A Case Study of How Bribery Affects the Validity of Performed Commercial Contracts</i>	201
Katlijn Malfliet <i>Ruxit. A Turning of the Plot in Europe-Russia Relations</i>	217
Christoph Schreuer <i>The Active Investor</i>	237

## Contents

Patrik Schöldström	
<i>Massive Evidence in Arbitration. A Case with     Food for Thought</i>	253
Patricia Shaughnessy	
<i>The Renaissance Arbitrator. The Multi-Tasking Model</i>	263
Daniel Stattin	
<i>Some Comments on Directors' Duties and     Cross Border Activities</i>	275
Eva Storskrubb	
<i>Navigating EU Law and the Law of Arbitration.     From the Horizon of Commercial Arbitration in Sweden</i>	285
Howard S Sussman	
<i>Kaj Hobér and Clinical Teaching</i>	309
John M Townsend	
<i>The Empty Chair. Arbitration with a Non-participating Party</i>	313
V V Veeder	
<i>A Swedish-British Story. The "Charente" on State Immunity</i>	323
Maria Berg Andersson	
<i>Bibliography of the Writings of Kaj Hobér. 1978–2019</i>	349
Presentation of Contributors	361

Ulf Franke and Annette Magnusson

# The Emergence of an International Arbitral Institution for the 21<sup>st</sup> century

## Introduction

In 2017 the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) celebrated its 100<sup>th</sup> anniversary. The history of the SCC during its first century serves well to illustrate why arbitration matters on a global scale, and the increasing importance attributed to the role of international arbitral institutions during this period.

In this chapter we will explore the importance of international arbitral institutions through the lens of developments in Sweden.<sup>1</sup> How did the role of the SCC emerge, and what specifically in Swedish legal culture supported this development? And how has the global landscape of international arbitration changed since the SCC took on its first, and, at that time, rare international cases? These are some of the questions which will be addressed in this text, which will end with some thoughts on how the practice of institutional arbitration could be expected to develop in the coming years in light of global trends.

<sup>1</sup> By an “international arbitral institution” we mean an arbitral institution that wholly or partly administers international arbitration cases.

As an introduction we will explore the underlying value of a strong arbitral institution not only for dispute resolution, but for society at large.

## **1. Why do we need arbitral institutions?**

Rule of law matters for economic development. Reliable and enforceable rules are intrinsically connected with investors' willingness to put their money on the line, be it a new local venture or a completely new market. Legal certainty, or lack thereof, affects the price of capital. And international arbitration represents an important part of this bigger picture.

At the SCC, what started as an initiative to meet local needs for dispute resolution in the grain industry has grown into a global operation addressing the supply of energy at European level,<sup>2</sup> just to mention one example. This reflects the SCC's move from the local to the international level. During this time, international arbitration in general has aligned with and supported an exponential increase in international trade during a period characterized by tremendous growth of the global economy.<sup>3</sup>

International trade also encourages peaceful and stable relations among nations. A 2015 study from Stanford University examining the metrics of economics and war since 1870 concludes that "in the absence of international trade, no network of alliances is peaceful and stable."<sup>4</sup> Trade, legal norms and peace simply go hand-in-hand.

It should therefore not come as a surprise that so many successful arbitral institutions originate from chambers of commerce. Fostering strong economies for healthy and peaceful societies are part of the DNA of chambers of commerce, and the foundation upon which many of them are built. Perhaps this is best described by the ethos of the International Chamber of Commerce, which states that the purpose of the organization is "enabling business to secure peace, prosperity and opportunity for all."<sup>5</sup>

The role as a trusted third party is also quite unique for chambers of commerce. At the Stockholm Chamber of Commerce, dispute resolution is one

<sup>2</sup> For a practical example, see Johan Sidklev, 'RosUkrEnerg versus Naftogaz of Ukraine' in Ulf Franke and others (eds), *Arbitrating for Peace: how arbitration made a difference* (Wolters Kluwer 2016) 211–22.

<sup>3</sup> World Bank, 'World Development Indicators' <<http://datatopics.worldbank.org/world-development-indicators/>> accessed 21 March 2019.

<sup>4</sup> Matthew O Jackson and Stephen Nei, 'Networks of Military Alliances, Wars, and International Trade' (2014) 46 FEEM Working Paper <<https://ssrn.com/abstract=2441869>> accessed 15 March 2019.

<sup>5</sup> International Chamber of Commerce, 'About ICC' <<https://iccwbo.org/about-us/>> accessed 12 March 2019.

of many services offered in this capacity. Other services include the issuance of trade documents<sup>6</sup> and source code escrow services.<sup>7</sup> At the same time, on a global level, the International Chamber of Commerce has contributed with common rules for efficient trade and investment through, for example, INCOTERMS<sup>8</sup> and other similar initiatives.

These are but a few examples of the special position held by chambers of commerce in society.

The unique role of chambers of commerce in parallel with the importance of enforceable rules for business thus explains why chambers of commerce in so many different jurisdictions have successfully set up arbitral institutions. Stockholm follows this pattern, but at the same time represents somewhat of an outlier thanks to the relative size of its operations and case-load, its unique role in East-West relations and the developments this has led to, for example in investor-state arbitration and energy disputes.

## **2. Arbitral Institutions in a Global Perspective**

International commercial arbitration has enjoyed tremendous growth in the past several decades, a fact reflected in the statistics of arbitral institutions across the globe. In a 2008 study from Queen Mary University, the total number of cases from eleven international arbitral institutions was reported to be 1139 cases in 1992.<sup>9</sup> By the end of 2017, the total number from the same institutions had more than quadrupled, now adding up to more than 5 500 cases.<sup>10</sup>

The increasing use of international arbitration in general and institutional arbitration in particular is also reflected in the strong increase of training programmes, higher education and conferences addressing this truly global area of legal practice. An observation by Professor Eric B Bergsten, founder of the Willem C Vis International Commercial Arbitration Moot in Vienna, provides an interesting illustration where he notes that “as recently as

<sup>6</sup> Stockholm Chamber of Commerce, ‘Trade documents’ <<https://english.chamber.se/trade-documents/index.htm>> accessed 18 March 2019.

<sup>7</sup> Stockholm Chamber of Commerce, ‘Escrow Services’ <<https://english.chamber.se/escrow-services.htm>> accessed 18 March 2019.

<sup>8</sup> International Chamber of Commerce, ‘Incoterms rules’ <<https://iccwbo.org/resources-for-business/incoterms-rules/>> accessed 18 March 2019.

<sup>9</sup> Loukas A Mistelis, ‘Part I: International Commercial Arbitration, Chapter 19: Arbitral Seats – Choices and Competition’, in Stefan Michael Kroll, Loukas A Mistelis, et al (eds), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer Law International 2011) pp 363–379.

<sup>10</sup> Research by the SCC.

25 years ago, in 1984, it would have been hard to find any law faculty offering courses in international commercial arbitration, which did not even have the status of a niche subject to be taught.”<sup>11</sup>

Today, clearly, the landscape has shifted. In Sweden alone, two master programmes have been firmly established: International Commercial Arbitration Law (ICAL) at Stockholm University, spearheaded by Associated Professor Patricia Shaughnessy,<sup>12</sup> and Investment Treaty Arbitration at Uppsala University under the leadership of Professor Kaj Hobér.

It is worth noting that even if recent years have seen a strong growth of arbitral institutions, many of the arbitral institutions most commonly referred to today<sup>13</sup> have a very long history. This includes for example the London Court of International Arbitration (LCIA), established in 1892, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), recently celebrating its 100<sup>th</sup> anniversary in 2017, and the ICC Court of International Arbitration (ICC), from 1923. Across the Atlantic, the American Arbitration Association (AAA) was established in 1926. In later years, new institutions have successfully been founded in new areas of the world also associated with strong economic growth. Examples include Singapore International Arbitration Centre (SIAC) and the Hong Kong International Arbitration Centre (HKIAC).

The arbitral institutions listed above include primarily institutions handling commercial disputes, but arbitral institutions at global level also include intergovernmental organizations. Among the best-known are the International Centre for Settlement of Investment Disputes (ICSID), under the auspices of the World Bank, and the Permanent Court of Arbitration (PCA) in the Hague, founded as a result of the Paris Peace Conference in 1899. Both institutions administer primarily investor-state disputes; however, the PCA also has a strong docket with interstate disputes.

The inherent value of being regarded as a strong venue for international disputes has not been left unnoticed by policy makers across the world.

<sup>11</sup> Eric E Bergsten, ‘Teaching International Arbitration in Law Faculties’ in Kaj Hobér and others (eds), *Between East and West: Essays in Honour of Ulf Franke* (Juris Publishing 2010) 35.

<sup>12</sup> In 2018, Patricia Shaughnessy was awarded the *Boosting the Capital Prize* for her ground-breaking work in establishing the Master’s Program for International Commercial Arbitration Law 15 years earlier, see Stockholm Chamber of Commerce, ‘News’ (2 May 2018) <[www.chamber.se/nyheter/boosting-the-capital-vinnarna-gor-stockholm.htm](http://www.chamber.se/nyheter/boosting-the-capital-vinnarna-gor-stockholm.htm)> accessed 18 March 2019.

<sup>13</sup> For a recent report on the evolution of seats and institutions, see White & Case and School of International Arbitration at Queen Mary University of London, ‘International Arbitration Survey: The Evolution of International Arbitration’ (2018) <[www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-\(2\).PDF](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF)> accessed 12 March 2019.

Referring disputes to a certain jurisdiction communicates trust, a sought after asset on a global market. Add to this the direct and indirect financial contributions to cities preferred by the international dispute resolution community in its capacity as a service or visiting industry<sup>14</sup>, and the growth of arbitral institutions across the world in both numbers and size is even better understood.

The relevance attributed to the importance of being able to attract international disputes can also be illustrated by the multitude of recent initiatives to establish international courts in several European countries, but also in Singapore and China. Brexit appears to have added force to this trend, where new courts have been announced in the Netherlands,<sup>15</sup> Belgium,<sup>16</sup> Ireland<sup>17</sup> and France,<sup>18</sup> ready to take on the role traditionally held by English courts. International disputes are simply seen as “a boost for the economy as a whole”.<sup>19</sup>

### 3. The Stockholm Story

Sweden has a strong track record in international arbitration, where the success of the Arbitration Institute of the Stockholm Chamber of Commerce is very much part of the story.

What does it take to become a successful international arbitral institution? We will approach this issue by studying how the SCC developed from a local dispute resolver to an international arbitral institution, and highlighting issues that we believe to have been of particular importance for this development. We use the SCC as an illustrative example, both because the

<sup>14</sup> A 2017 study from the Stockholm Chamber of Commerce revealed that the total economic impact of international disputes in Sweden represents SEK 9 billion, see Stockholm Chamber of Commerce, ‘Tvister Säljer Sverige 2017’ (2018) <<http://www.chamber.se/rapporter/tvister-saljer-sverige.htm>> accessed 18 March 2019.

<sup>15</sup> The Netherlands Commercial Court, ‘Blenheim’s guide to commercial litigation in the Netherlands’ <<https://netherlands-commercial-court.com/>> accessed 18 March 2019.

<sup>16</sup> Michael Cross, ‘Brussels latest to announce English-language business court’ *The Law Society Gazette* (London, 30 October 2017) <[www.lawgazette.co.uk/practice/brussels-latest-to-announce-english-language-business-court/5063460.article](http://www.lawgazette.co.uk/practice/brussels-latest-to-announce-english-language-business-court/5063460.article)> accessed 18 March 2019.

<sup>17</sup> Arthur Beesley and Barney Thompson, ‘Ireland joins race to be EU’s Post-Brexit legal hub’ *Financial Times* (London, 12 January 2018) <[www.ft.com/content/4b6768ba-f6e5-11e7-88f7-5465a6ce1a00](http://www.ft.com/content/4b6768ba-f6e5-11e7-88f7-5465a6ce1a00)> accessed 18 March 2019.

<sup>18</sup> Iona Tudor-Knoll, ‘Specialised Chambers for International Commercial Disputes: Paris in the spotlight’ (*Kluwer Arbitration Blog*, 14 February 2018) <<http://arbitrationblog.kluwerarbitration.com/2018/02/14/specialised-chambers-international-commercial-disputes-paris-spotlight/>> accessed 18 March 2019.

<sup>19</sup> Cross (*supra* n 16).

SCC is the institution we know best, but also because Kaj Hobér has been very much part of this development.<sup>20</sup>

We will, however, begin with a more general overview of arbitration in Sweden. The reasons are twofold. First, the position of an arbitral institution much depends on the arbitration laws and practices in the country where the institution is situated. Second, most SCC arbitrations take place in Sweden, which means that the arbitration laws and practices in Sweden have to be taken into account.

When parties consider SCC arbitration, the starting point is therefore often arbitration laws and practices in Sweden. Is the legislation up-to-date and suited to international arbitration? Are the courts reliable and competent? Is Sweden a party to the relevant international conventions on arbitration, in particular, the 1958 New York Convention? These are some of the questions which ought to be considered before deciding on the seat of arbitration, be it Sweden or elsewhere.

#### 4. A Pro-Arbitration Legal Environment

Sweden has a long history of recognizing arbitration as a means of resolving disputes. Statutory provisions concerning arbitration appear as early as the middle of the 14<sup>th</sup> century<sup>21</sup> in provincial codes from that time, while the issue of enforcement of arbitration awards is addressed in Swedish legislation starting in the 17<sup>th</sup> century. In 1887, the first comprehensive Swedish Arbitration Act was adopted. It is noteworthy that two principles which are now deemed to constitute fundamental features of modern arbitration were codified as early as in the 1887 Act. First, it was laid down that a valid arbitration agreement is a bar to court proceedings. Secondly, arbitration was considered final and binding, unless the parties had made a reservation in this respect.<sup>22</sup>

The firmly rooted tradition of favouring arbitration in Swedish commercial life has even led one commentator to remark that “Swedish business

<sup>20</sup> Professor Kaj Hobér has contributed to the development of arbitration in Sweden in many different capacities. He was previously a member of the SCC Board until 2009, and re-joined the SCC Board as Chairman in 2016. He was a member of the SCC committees that drafted the 1999 and 2007 SCC rules, as well as a member of the Government committees that drafted the 1999 and the 2019 Acts.

<sup>21</sup> *Arbitration in Sweden* (2nd edn, Jure 1984) 3.

<sup>22</sup> Kaj Hobér, *International Commercial Arbitration in Sweden* (Oxford University Press 2011) 3. See also Bo G H Nilsson and Björn Rundblom Andersson, ‘Fundamental Principles of International Arbitration in Sweden’ in Franke Ulf and others (eds), *International Arbitration in Sweden – A Practitioner’s Guide* (Wolters Kluwer 2013) 1–23.

contracts so routinely include arbitration clauses that one suspects that a party putting forward a draft in which that clause was missing would be looked at with something akin to suspicion.”<sup>23</sup>

Recognition of arbitration as a natural part of the dispute resolution system was also an important reason why Sweden adhered to the major enforcement conventions adopted in the 20<sup>th</sup> century: first the 1927 Geneva Convention and later the 1958 New York Convention, the latter without any of the reservations open to the contracting parties.<sup>24</sup>

New Arbitration Acts were adopted in Sweden in 1929,<sup>25</sup> 1999<sup>26</sup> and 2019.<sup>27</sup> However, it is safe to say that none of these revisions introduced any dramatic changes. In essence they did not deviate from the firm acceptance in Swedish legal life of arbitration as an efficient out of court procedure to finally decide disputes. With each revision, however, new developments in the field were duly reflected so as to safeguard that Swedish arbitration would continue to meet modern international standards, and expectations on efficiency.

The 1929 law provided an excellent basis for forthcoming legislation, which – it is interesting to note – worked well for 70 years, in particular during a dynamic period for Sweden’s recognition as a venue for international cases. The 1929 Act was carefully scrutinized in the early 1970s, as part of the preparations for the US-USSR Optional Clause Agreement concluded in 1977.<sup>28</sup> Before concluding the agreement, an extensive joint US-USSR study on arbitration in Sweden was conducted by the parties to the forthcoming Agreement. The result was reported by the chief negotiator on the US side, Judge Howard M Holtzmann,<sup>29</sup> in a speech in 1976 before the American

<sup>23</sup> Jan Paulsson, ‘An Introduction from an Outside Perspective – Reflections on International Arbitration with a Particular Focus on Sweden’ in Franke Ulf and others (eds), *International Arbitration in Sweden – A Practitioner’s Guide* (Wolters Kluwer 2013).

<sup>24</sup> United Nations, ‘United Nations Treaty Collection’ <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXII-1&chapter=22&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en)> accessed 18 March 2019.

<sup>25</sup> NJA II 1929 no 1 *Ny lagstiftning om skiljemän*. Govt Bill 1929:226.

<sup>26</sup> Govt Bill 1998/99:35.

<sup>27</sup> Govt Bill 2017/18:257.

<sup>28</sup> See below in section 6.

<sup>29</sup> Judge Howard Holtzmann was one of the greatest arbitration experts of his time, and for almost half a century greatly contributed to the development of international commercial arbitration. Among the many positions he held during his career was President of the American Arbitration Association, Member of the Iran-US Claims Tribunal and Vice Chairman of the International Council for Commercial Arbitration (ICCA).

Bar Association, where he spoke on the issue of “Sweden as a place for East-West arbitration”.<sup>30</sup>

Judge Holtzmann began his remarks by stating that “the US-USSR joint study confirmed that Sweden had the basic characteristics desirable in a country chosen as the locale to conduct international commercial arbitration proceedings” and went on to list the following characteristics as being of particular importance:

- There is conveniently available written material on Swedish arbitration law and practice, including reliable translations of all relevant statutes.
- The Swedish Arbitration Act permits flexibility for parties to choose whatever procedure they consider best suited to their particular case.
- Swedish law permits parties to agree that the law of another country shall govern the substance of a dispute arbitrated in Sweden.
- Swedish law does not unduly limit the issues which can be submitted to arbitration.
- Swedish law does not require arbitrators to be Swedish.
- The Swedish courts do not unduly intrude in arbitration. The grounds for appeal are reasonably limited and courts do not exercise hindering control over arbitration proceedings.
- Sweden is a party to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958 New York Convention).<sup>31</sup>

The 1999 Act which followed was geared towards further modernizing Swedish arbitration, and the content of the 1929 Act. The 1985 UNCITRAL Model Law on International Commercial Arbitration had been adopted and represented an important development. Moreover, the Swedish legislator made it very clear that the principles laid down in the Model Law should be reflected and respected in the new Act. Although in the end Sweden did not formally adopt the UNCITRAL Model Law, it thus nevertheless served as an important guideline for the Act, and no provisions in the Act deviate from, let alone contradict, the approach taken by the Model Law.<sup>32</sup>

<sup>30</sup> The speech has never been published but the author presented Ulf Franke with a personal copy.

<sup>31</sup> *Supra* note 32.

<sup>32</sup> Kaj Hobér, *International Commercial Arbitration in Sweden* (Oxford University Press 2011) 4.

On 1 March 2019, further revisions of the Swedish Arbitration Act entered into force, introducing changes deemed valuable in light of developments and experience since 1999. Issues targeted include new rules regarding jurisdictional objections, multi-party disputes,<sup>33</sup> including clarifying the appointment of the arbitral tribunal,<sup>34</sup> provisions on consolidation,<sup>35</sup> and determining the applicable substantive law.<sup>36</sup>

The revisions reflect the continued influence of the UNCITRAL Model Law. Indeed, an overarching theme has been modernization and efficiency. A clear ambition has also been to maintain and develop the attractiveness of Sweden as a seat for international disputes. One example is the possibility now introduced to hear oral evidence in English in a challenge proceeding without interpretation to Swedish.<sup>37</sup>

Another clear goal has been to increase efficiency in arbitration. In line with this objective the time-limit for bringing a challenge against an arbitral award has been now reduced to two months.

The upgrades contained in the revised Act are important, but are not expected to “dramatically change the landscape of Swedish arbitration.”<sup>38</sup> As pointed out by one commentator and a member of the expert committee mandated to investigate and propose the upgrade of the Act: the revisions are designed to “interface with the modern rules and practice of international arbitration.”<sup>39</sup> As before, the Act and Swedish arbitration place great emphasis on the principle of party autonomy.<sup>40</sup>

## **5. The Early Years of the SCC**

In spite of the long history of arbitration in Sweden, the SCC experienced a fairly slow start in 1917. Wars and anxiety in Europe negatively affected both national and international business and trade for many years. The demand for commercial arbitration was limited. For many years the SCC’s

<sup>33</sup> Govt Bill 2017/18:257 *ibid* 30.

<sup>34</sup> *Ibid* 30.

<sup>35</sup> *Ibid* 34.

<sup>36</sup> *Ibid* 37.

<sup>37</sup> *Ibid* 57.

<sup>38</sup> Patricia Shaughnessy, ‘Sweden Adopts Revisions to Modernize its Arbitration Act’ (*Kluwer Arbitration Blog*, 1 December 2018) <<http://arbitrationblog.kluwerarbitration.com/2018/12/01/sweden-adopts-revisions-to-modernize-its-arbitration-act/>> accessed 14 March 2019.

<sup>39</sup> *Ibid*.

<sup>40</sup> Govt Bill 1998/99:35 42. See also Bo G H Nilsson and Björn Rundblom Andersson, ‘Fundamental Principles of International Arbitration in Sweden’ in Franke Ulf and others (eds), *International Arbitration in Sweden – A Practitioner’s Guide* (Wolters Kluwer 2013) 6.

activities were mainly confined to assisting in deciding very local business disputes.

It was not until the 1960's that the SCC's activities expanded outside the Stockholm area, and the late 1970's when the SCC handled its first international cases. A similar pattern can be found among other international arbitral institutions – international activities were distinctly limited up to the 1970's; indeed, it was in fact not until the 1980's and particularly the 1990's, that international arbitration really took off.<sup>41</sup>

## 6. East Meets West in Stockholm

As alluded to above, 1977 marks the shift for the SCC from a domestic arbitral institution to a truly international arbitration centre. After negotiations between the USA and the USSR, in practice exercised by the leading arbitral organizations in the two countries, i.e. the American Arbitration Association and the USSR Chamber of Commerce and Industry, the parties concluded the so-called *US-USSR Optional Clause Agreement for use in contracts in USA-USSR Trade 1977*.<sup>42</sup> The Agreement provided for arbitration between parties from the two countries to take place in Stockholm, Sweden under the 1976 UNCITRAL Arbitration Rules with the SCC as the appointing authority and administrative agency.<sup>43</sup>

The agreement was recognized worldwide and Sweden in general and the SCC in particular became almost overnight internationally renowned as an international arbitration forum.

As mentioned above, the Agreement was preceded by an intricately detailed study<sup>44</sup> into arbitration in Sweden, carried out 1973–1976 by a joint US-USSR Committee,<sup>45</sup> with the assistance of a group of Swedish arbitration experts. The information produced in this context was so comprehensive that it became the basis for the book *Arbitration in Sweden*, which the SCC published in 1977.

The general background to the Agreement was growing international trade, and in particular the growing trade between the USA and the USSR.

<sup>41</sup> Mistelis (*supra* note 11).

<sup>42</sup> The full text of the Agreement is reproduced as Appendix 5 in *Arbitration in Sweden* (2nd edn, Jure 1984).

<sup>43</sup> An account of an early application of the Optional Arbitration Clause is available in Kaj Hobér, 'Arbitrating in Stockholm during the Cold War' in Ulf Franke and others (eds), *Arbitrating for Peace: how arbitration made a difference* (Wolters Kluwer 2016) 121–38.

<sup>44</sup> See section 4 above.

<sup>45</sup> It was said that this was the first joint US-USSR committee during the cold war.

What was needed was suitable means, and a suitable place, for settling disputes. The parties agreed relatively early on the use of arbitration as the dispute settlement method, while it took longer to agree on the place. Other countries were also discussed. But eventually they decided on Stockholm, Sweden.

China followed with interest the US-USSR initiative, so that by 1975 a delegation of Chinese arbitration experts was sent to Sweden. The Chinese delegation had prepared a large number of questions on Swedish arbitration law and practice, which were later answered by the Swedish expert group. Following these contacts arbitration in Sweden under the SCC Rules became the preferred venue for Chinese corporations.<sup>46</sup>

East-West arbitration at the SCC thus traditionally includes parties from the former Soviet Union, Eastern Europe and China, on the one hand, and parties from Western Europe and the United States, on the other.

## **7. A Change of Scenery**

Beginning in the 1970's, development as an international institution began to increase at the SCC. As the international caseload started to grow, it was clear that the SCC was now the established preferred venue for East-West arbitration. In fact, in the mid-1990s, the majority of all cases filed at the SCC were between East-West parties. Fast forward to 2019, and the SCC case load has become even more diverse. In recent years parties in SCC cases have steadily represented somewhere between 35 and 40 different countries.<sup>47</sup>

As the nationalities of the parties to SCC cases have come to mirror SCC's development as a truly international institution, the governing structures of the SCC have followed suit. Beginning in 2006, the SCC Board includes both Swedish and international arbitration experts. The SCC Secretariat has also moved towards increased diversity among the nationalities and legal backgrounds of its staff members to meet the demands of international practice.

Another area with a substantial global SCC footprint is investor-state arbitration. As of 31 December 2018, a total of 106 investor-state cases had been filed with the SCC. The majority of these have been heard under the

<sup>46</sup> Michael J Moser, 'Ulf Franke, Stockholm Arbitration, and the Bridge to China' in Kaj Hobér and others (eds), *Between East and West: Essays in Honour of Ulf Franke* (Juris Publishing 2010) 343.

<sup>47</sup> Statistics on SCC cases are available at the SCC website <<https://sccinstitute.com/statistics/>>.

SCC Rules.<sup>48</sup> According to the most recent annual report on investor-state arbitration cases from UNCTAD, this makes the SCC Rules the third most commonly used arbitration rules in investor-state arbitration cases filed to date throughout the world.<sup>49</sup>

This development is partially explained by the fact that the SCC or Sweden has been included as a venue for investor-state arbitration in at least 120 bilateral investment treaties globally.<sup>50</sup> In addition, the SCC is one of three options for investor-state arbitration under the Energy Charter Treaty, together with ICSID and the UNCITRAL Arbitration Rules.<sup>51</sup>

Rapid developments in the number and diversity of cases at the SCC since the early 1970's have required continuous development of the SCC Rules and SCC practice. Previous versions of the SCC Rules date from 1976, 1988, 1999, and 2007. The most recent version of the SCC Rules dates from 2017.

The basic character of an SCC arbitration has not altered under the 2017 SCC Rules. However, the new rules include for example a number of key changes relating to multi-party and multi-contract disputes. The 2017 SCC Rules also introduced a new tool of summary procedure for efficiency,<sup>52</sup> and addresses for the first time the role of the administrative secretary in an SCC proceeding.<sup>53</sup> A number of articles are available on the new SCC 2017 Rules,<sup>54</sup> and a comprehensive commentary on the 2017 SCC Rules is due to be published shortly.

To meet increasing demands for efficiency but also for procedures geared towards disputes of smaller value and less complexity, the SCC introduced its first Rules for Expedited Arbitration as early as 1995. In expedited proceedings, the dispute is heard by a sole arbitrator, and the parties are allowed a limited number of submissions and shorter time frames than in a typical arbitration. The Expedited Rules have been well received, and in recent years around one-fourth of the total SCC caseload has typically been

<sup>48</sup> Stockholm Chamber of Commerce, 'SCC Statistics 2017' <<https://sccinstitute.com/statistics/>> accessed 19 March 2019.

<sup>49</sup> Cf UNCTAD Investment Policy Hub <<https://investmentpolicyhub.unctad.org>> accessed 16 March 2019.

<sup>50</sup> For a comprehensive report on investment arbitration at the SCC, see Celeste E Salinas Quero, 'Investor-state disputes at the SCC' (SCC, February 2017) <<https://sccinstitute.com/about-the-scc/digital-library/articles/>> accessed 19 March 2019.

<sup>51</sup> Cf Energy Charter Treaty (signed 17 December 1994, entered into force 16 April 1998) art 26.

<sup>52</sup> SCC Rules art 39.

<sup>53</sup> SCC Rules art 24.

<sup>54</sup> For an overview of the 2017 SCC Rules, see Celeste E Salinas Quero, '2017 SCC Rules – Key Changes' (SCC, December 2016) <<https://sccinstitute.com/about-the-scc/digital-library/articles/>> accessed 19 March 2019.

disputes under the Expedited Rules. Originally intended primarily for the domestic market, in recent years the Expedited Rules increasingly appear in international cases, too, and the trend of the increasing attractiveness of the Expedited Rules appears to be gaining momentum. The 2017 revision of the Expedited Rules included changes geared towards further enhancing the efficiency of the procedure.<sup>55</sup> The measure appears to have been successful, as reflected in statistics where the average times for rendering awards in expedited cases have been reduced.<sup>56</sup>

The introduction of the SCC Emergency Arbitrator Rules in 2010 represents another milestone for the SCC and its international development. The Emergency Arbitrator Rules allow a party in need of prompt interim relief to obtain a decision from an emergency arbitrator if no tribunal has yet been constituted.<sup>57</sup> Although available in both domestic and international cases, the expectation was always that this would be a tool of interest primarily in international cases, an expectation which has turned out to match the practical experience of the procedure since its introduction.<sup>58</sup> A total of 34 Emergency Arbitrator cases had been filed at the SCC up until 2018.

As with any international arbitral institution, the SCC case load is highly diverse in terms of substantive matters. If one trend could be observed since the rise of international cases at the SCC, it is that diversity has also increased in this area. Whereas sale of goods and general delivery contracts used to dominate, an overview of dispute agreements now demonstrates a wider case load. However, in terms of substance the SCC has also become a preferred venue for energy disputes, both in commercial and investment arbitration cases. Energy disputes include primarily supply disputes in the oil and gas industries, for example disputes involving the sale and purchase of equipment for processing or transport of oil and gas, and price review disputes. Gas related disputes make up the bulk of these cases.<sup>59</sup>

<sup>55</sup> For an overview, see Anja Håvedal-Ipp, 'Expedited Arbitration at the SCC: One Year with the 2017 Rules' (*Kluwer Arbitration Blog*, 2 April 2018) <<http://arbitrationblog.kluwerarbitration.com/2018/04/02/expedited-arbitration-scc-one-year-2017-rules-2/>> accessed 14 March 2019.

<sup>56</sup> Statistics on the average time for rendering an award in SCC cases is available on the SCC website <<https://sccinstitute.com/statistics/>>.

<sup>57</sup> SCC Rules App II.

<sup>58</sup> Practice Notes describing SCC Emergency Arbitrator decisions authored by Johan Lundstedt (decisions rendered 2010–2013), Lotta Knapp (decisions rendered 2014) and Anja Håvedal Ipp (decisions rendered 2015–2016) available on the SCC website <<https://sccinstitute.com/about-the-scc/digital-library/articles/>>.

<sup>59</sup> For additional reporting on SCC gas disputes, see Annette Magnusson, 'The SCC Experience of Gas Disputes: Perspectives from a Leading Arbitration Centre' (SCC, June 2012)

Diversity in arbitrator appointments is another area where the SCC has continued to evolve. The number of nationalities represented among SCC arbitrators is continuing to grow, and the SCC is now regularly reporting on gender diversity in arbitrator appointments as part of its annual statistical report. Reporting on gender diversity in international arbitration is by now a feature of best practice among institutions, attributable by many to the launch of the Equal Representation in Arbitration Pledge in 2016.<sup>60</sup> The SCC was one of the very first institutions to sign the ERA Pledge, and the SCC commitment in this respect is also included in the SCC Board's Policy for the Appointment of Arbitrators.<sup>61</sup>

## 8. An Institution for the 21<sup>st</sup> Century

A number of factors were relevant for the development of Sweden and the SCC as a strong venue for international dispute resolution.

The mutual respect between the actors of the two parallel systems for finally deciding commercial disputes – litigation and arbitration – rests on a solid foundation and has been decisive in creating the arbitration-friendly climate today connected with Sweden as the *lex locus arbitri*. The strong support enjoyed by arbitration in Sweden for centuries by policymakers, courts and business has been decisive. It also paved the way for modern legislation as early as 1929.

Geography and foreign policy have also been part of the picture explaining Sweden's success. The political context seems to have been of significant importance for the conclusion of the US-USSR Optional Clause Agreement, as those involved at the time have testified to,<sup>62</sup> as were the examples of Swedish arbitrators and mediators in the international political arena. The best-known Swedish international arbitrator and judge during the 20<sup>th</sup> century was Gunnar Lagergren (1912–2008), who not only chaired several high-profile international cases in a long career but also served as the very

---

<<https://sccinstitute.com/about-the-scc/digital-library/articles/>> accessed 19 March 2019. A new edition of the report is forthcoming (2019).

<sup>60</sup> The Pledge seeks to increase, on an equal opportunity basis, the number of women appointed as arbitrators in order to achieve fair representation as soon practically possible, with the ultimate goal of full parity. <<http://www.arbitrationpledge.com/about-the-pledge>> accessed 20 March 2019.

<sup>61</sup> The policy is available on the SCC website <<https://sccinstitute.com/media/220131/scc-policy-appointment-of-arbitrators-2017.pdf>> accessed 20 March 2019.

<sup>62</sup> Cf interviews with Gerald Aksent, Sergei Lebedev, Alexander Komarov and Richard Naimark in the film 'The Quiet Triumph' (2017) <<https://vimeo.com/205567614>> accessed 21 March 2019.

first president of the Iran-United States Claims Tribunal.<sup>63</sup> However, Gunnar Lagergren was not the only Swedish judge in the international arena. Other examples include Hjalmar Hammarskjöld (chairing a number of state-to-state cases, including between France and Germany in a dispute relating to Casablanca in 1909), Östen Undén (chairing a number of state-to-state cases, including between Bulgaria and Greece in 1933), and Emil Sandström (chairing for example the United Nations Special Committee on Palestine in 1947).<sup>64</sup>

If the factors above influenced the development of the SCC during its first 100 years, what will be decisive for the future?

Arbitral institutions today are operating in a world where globalization and digitalization influence business at an exponential rate. This will also influence expectations on international arbitration and its ability to deliver efficiency, predictability and indeed cyber security. Much of this is already being experienced by institutions, and reflected by initiatives to meet new demands.

At the SCC, 2019 will see the introduction of a digital platform for all cases once these are referred to the arbitral tribunal. This is but one step along the road of digitalization that the SCC entered several years ago with the introduction of digital case management at the SCC Secretariat and SCC Board Meetings. Going forward, demands for cybersecurity by parties, counsel, tribunals and anyone involved in international disputes are only expected to increase, as well as expectations on transparency. This is a challenging equation which all institutions are facing, but which must be mastered in order to deliver on the promise of arbitration.

Climate change and how international arbitration could contribute is another issue which is gaining momentum, not least after the signing of the Paris Agreement in 2015. A growing awareness of the importance of reaching global targets has seen constructive collaboration between institutions.<sup>65</sup> In this context, the ICC, PCA and SCC have successfully co-organized successful projects together with the International Bar Association,

<sup>63</sup> A biography of Gunnar Lagergren was published as part of the SCC Centennial celebrations, see Anders Johnson, *Skiljedomens ädla konst: Gunnar Lagergren – internationell domare för handel, fred och mänskliga rättigheter* (Ekerlids 2017).

<sup>64</sup> For an overview of Swedish judges appearing in international disputes 1890–1990, see Anders Johnson, *Skiljedomens ädla konst: Gunnar Lagergren – internationell domare för handel, fred och mänskliga rättigheter* (Ekerlids 2017) 143 ff.

<sup>65</sup> ‘Bridging the Climate Change Policy Gap: The Role of International Law and Arbitration’ (Joint IBA, ICC, PCA & SCC conference, Stockholm, November 2016) <<https://sccinstitute.com/about-the-scc/digital-library/articles/>> accessed 15 March 2019.

including official side-events at the annual negotiations under the United Nations Framework Convention on Climate Change (UNFCCC).

The Stockholm Treaty Lab represents another part of this development. This was initiated by the SCC in 2017 as a competition where participants were challenged to draft an enforceable international treaty with strong potential to encourage investment in climate change mitigation and adaptation.<sup>66</sup> The competition was carried out in collaboration with crowd sourcing platform HeroX, and attracted 300 participants from 25 countries. In the end 20 treaties were submitted, the majority of which have since been published.<sup>67</sup>

International arbitration has been part of global ambitions for centuries. We firmly believe that it can also become an important feature of the roadmap for the future. In this picture, arbitral institutions will continue to have an important role to play.

<sup>66</sup> To find out more, including reading the submissions in the competition, visit <<http://stockholm-treatylab.org/>>.

<sup>67</sup> 36 J Int Arb 1.