

# Mediation proceedings at the SCC Arbitration Institute 2017–2022

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# 1. Introduction

Mediation is a speedy and cost-efficient dispute resolution process under which a neutral third party (a Mediator) helps disputing parties to reach a consensual solution through a facilitated negotiation. In line with the consensual nature of mediation, parties are free to agree upon a mediation procedure that best suits their needs.

Unlike arbitration which is an adjudicative process similar to court litigation, mediation is a facilitative process which aims to assist parties in reaching an amicable settlement of their dispute. The Mediator's role is to facilitate the resolution of the dispute, and not to judge the merits of the case. With the aim of achieving a mutually satisfactory settlement of the dispute, the mediation process focuses on bringing parties together to resolve their dispute. This shift away from a fault-based determination helps to avoid win-lose scenarios commonly seen in an adjudicative process, and thus helps to preserve the relationship between the parties. Mediation also affords parties greater control over the outcome of their dispute, as they are able to negotiate settlement terms which satisfy their underlying interests.<sup>2</sup>

In Sweden, the Swedish Act on Mediation in Certain Civil Disputes (SFS 2011:860) was enacted in 2011 to implement the European Mediation Directive (2008/52/EC).<sup>3</sup> On an international level, there has been a growing interest in mediation in recent years, as reflected in the proliferation of international instruments, such as the United Nations Convention on International Settlement Agreements Resulting from Mediation 2020 (i.e., the Singapore Convention on Mediation), and the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation 2018.<sup>4</sup>

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<sup>2</sup> See Howard, A., *EU Cross-Border Commercial Mediation: Listening to Disputants - Changing the Frame; Framing the Changes*, *Global Trends in Dispute Resolution*, Volume 9 (Kluwer Law International 2021) at §1.02.

<sup>3</sup> Lindell, B.R., Chapter 31: Sweden, in Alexander, N., et al., *EU Mediation Law Handbook*, *Global Trends in Dispute Resolution*, Volume 7 (Kluwer Law International 2017) at p. 765.

<sup>4</sup> See Born, G., *International Commercial Arbitration* (3rd Edition, Kluwer Law International, Updated August 2022) at §1.02[B][9].

The SCC Arbitration Institute (“SCC”), part of the Stockholm Chamber of Commerce, offers mediation services alongside other types of dispute resolution services, such as arbitration. The SCC Mediation Rules were first introduced in 1999. In 2023, material changes were made to the SCC Mediation Rules (which had not been revised since 2014).

The practice note is structured as follows.

**Section 2** discusses mediation at the SCC. This section first sets out the history and caseload of the SCC and builds upon the observations made in SCC’s previous publication about mediation.<sup>5</sup> Next, this section provides a brief overview of the mediation procedure under the SCC Mediation Rules.

**Section 3** describes and analyses the revisions made to the SCC Mediation Rules 2023, with a focus on the key substantial changes.

**Section 4** sets out some concluding remarks.

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<sup>5</sup> Carey, S., SCC Practice Note Mediation Proceedings 2003–2017.

## 2. Mediation at the SCC

### 2.1. History and caseload

Mediation services have been offered by the Stockholm Chamber of Commerce since 1999 when the Mediation Institute was first established. In 2014, the Mediation Institute merged with the SCC to form a unified institutional body for both mediation and arbitration.<sup>6</sup> The SCC Mediation Rules, which originally entered into force in 1999, were revised at the time of the 2014 institutional merger. As mentioned above, material changes were made to the rules in 2023.

In terms of caseload, the SCC administered a total of 40 mediation cases between 2003 and 2017.<sup>7</sup> Since then, the SCC has seen 10 requests for mediation in the period from 2018 to 2022. Of these requests, the counterparty did not consent to mediation in the majority of cases, resulting in the mediation proceedings being dismissed. This reflects the consensual nature of mediation.

### 2.2. Overview of the SCC mediation procedure

Under the SCC Mediation Rules, mediation is initiated by way of a request for mediation submitted by one of the parties. This request is then forwarded to the recipient party by the SCC Secretariat. Along with the request for mediation, the requesting party is required to pay the registration fee within the stipulated time. For the mediation to proceed, the recipient party must agree to participate in the mediation.

The parties may agree to jointly appoint a Mediator, failing which the mediator will be appointed by the SCC. Similar to Arbitrators, a Mediator must be impartial and independent and is subject to a duty of disclosure.

Upon acceptance of the mediation, the SCC will set an advance on costs corresponding to the estimated amount of mediation costs. Unless otherwise agreed by the parties, each party is to pay half of this advance.

When the Mediator has been appointed and the advance on costs has been paid, the SCC Secretariat shall refer the dispute to the Mediator.

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<sup>6</sup>Lindell, B.R., Chapter 31: Sweden, in Alexander, N., et al., *EU Mediation Law Handbook, Global Trends in Dispute Resolution, Volume 7* (Kluwer Law International 2017) at p. 768.

<sup>7</sup>For more information on the SCC's caseload in this time period, see Carey, S., *SCC Practice Note Mediation Proceedings 2003–2017* at Section 4.

After this the Mediator must act diligently to insure against undue delay to the proceedings and consult with the parties to establish a timetable for the mediation.

In the scenario where the mediation results in a settlement, the parties often enter into a contractually binding settlement agreement. Parties may also, subject to the consent of the Mediator, agree to appoint the Mediator as an Arbitrator and request him or her to confirm the settlement agreement in an arbitral award. Doing so renders the settlement agreement enforceable as a consent award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (i.e., the New York Convention).

In the event that a settlement is not reached, the mediation may be terminated by a written request from a party, or by a declaration of the Mediator to the parties to the effect that further efforts of mediation are unlikely to lead to the resolution of the dispute.

# 3. 2023 revisions to the SCC Mediation Rules

In 2023, the SCC Mediation Rules were updated to the current practices of the SCC and to improve the clarity, coherency, and accessibility of the SCC Mediation Rules. Linguistic changes were also made for the purpose of accommodating the SCC's change of name from the Arbitration Institute of the Stockholm Chamber of Commerce to the SCC Arbitration Institute.

This section will describe and analyse the key substantive changes which were made to the SCC Mediation Rules. Unless otherwise stated, the references to the SCC Mediation Rules and SCC Arbitration Rules in this section refer to the 2023 versions of these rules.

## 3.1. Strengthening the confidentiality of mediation proceedings

Article 3 of the SCC Mediation Rules governs the confidentiality of the mediation. Pursuant to Article 3, the parties, the SCC and the Mediator shall not disclose the existence of the mediation or its outcome, or use any information learned in the context of the mediation, unless otherwise agreed by the parties. In addition to some linguistic amendments, Article 3 was supplemented in 2023 to clarify that this applies “whether in a subsequent arbitration or otherwise”.

The latest addition to this provision stresses the importance of confidentiality of the mediation proceedings, and guards against the misuse of the mediation procedure to obtain information for the purpose of improving one's position in subsequent arbitration proceedings.

## 3.2. Recognising the consensual nature of mediation proceedings

Article 4 of the SCC Mediation Rules governs requests for mediation. In 2023, linguistic amendments were introduced to Article 4(2) (which specifies what a request for mediation must contain) to improve uniformity across the rules maintained by the SCC (in particular, Article 6 of the SCC Arbitration Rules which relate to requests for arbitration).

More notably, a new Article 4(4) was introduced in the SCC Mediation Rules, which provides that “[i]f the other party or parties do not agree to participate in the mediation, the Secretariat shall dismiss the request for mediation. If some but not all of the other parties agree to the mediation, the mediation shall proceed between those parties and the requesting party or parties.”

This provision emphasises the consensual nature of mediation proceedings, while providing a mechanism for mediation to proceed amongst any remaining willing parties. This provision also reflects the SCC's practice where requests for mediation are dismissed when the counterparty refuses to consent to the mediation proceedings, regardless of whether the parties had previously agreed to mediate their disputes by way of a mediation clause in a contract.

In this regard, mediation can be distinguished from arbitration, where consent is deemed sufficient if an agreement to arbitrate between the parties exists (such as where parties have included a valid arbitration clause in their contract).<sup>8</sup> Under Swedish law for example, a court may not assert jurisdiction over claims covered by an arbitration agreement over the objection of the counterparty to the proceedings.<sup>9</sup> However, this does not apply to mediation agreements, which are not an impediment to litigation or arbitration. This is recognised at Article 2 of the SCC Mediation Rules which state that “[u]nless otherwise agreed by the parties an agreement to mediate pursuant to the Mediation Rules does not constitute a bar to court proceedings or a bar to initiate arbitration”.

That said, a party's breach of a mediation agreement might nonetheless attract adverse consequences, depending on the applicable law. For example, Swedish law permits the use of contractual penalties for parties not respecting a contractual obligation to mediate, even though such an obligation is not directly enforceable.<sup>10</sup> Additionally, in the scenario where parties' agreement to mediate form part of a larger dispute resolution clause (for example, as a prerequisite to arbitration in a multi-tier arbitration clause), the breach of an agreement to mediate might have an adverse effect on any future arbitration depending on the applicable law. Under Swedish law, it is uncertain what the consequences are of commencing an arbitration in disregard of any previous tiers (which are sufficiently clear and possible to determine objectively) and whether non-fulfilment of such tiers would give an arbitral tribunal the power to dismiss a request for arbitration.<sup>11</sup>

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<sup>8</sup> See Blackaby, N., et al, Redfern and Hunter on International Arbitration (7th Edition, Kluwer Law International & Oxford University Press 2023) at para. 2.01-2.04.

<sup>9</sup> See Section 4 of the Swedish Code of Statutes (SFS 1999:116), updated as per SFS 2018:1954.

<sup>10</sup> Lindell, B.R., Chapter 31: Sweden, in Alexander, N., et al., EU Mediation Law Handbook, Global Trends in Dispute Resolution, Volume 7 (Kluwer Law International 2017) at p. 770.

<sup>11</sup> Relden, A. & Frank, J., Chapter 4: The Arbitration Agreement in Magnusson, A., et al, International Arbitration in Sweden, A Practitioner's Guide (2nd Edition, Wolters Kluwer, 2021) at para. 7.

### **3.3. Greater transparency regarding the appointment of Mediators**

Article 6 of the SCC Mediation Rules sets out the procedure for appointing Mediators. Under this provision, a single Mediator shall be appointed unless parties otherwise agree. Further, the Mediator shall be appointed jointly by the parties or failing parties' agreement, by the SCC Board.

In 2023, Article 6(1) was revised to provide greater transparency on the considerations that the SCC Board would take into account when appointing Mediators. Under the revised rules, the SCC Board "shall take into consideration any proposals made by the parties, the nature and circumstances of the dispute, the applicable law, and the nationality and language of the parties". These considerations align with Article 17(7) of the SCC Arbitration Rules which apply to the appointment of Arbitrators.

In addition, various linguistic amendments were introduced to this provision to improve coherency and uniformity of the references to parties' agreement across the rules maintained by the SCC.

### **3.4. Safeguarding the impartiality and independence of Mediators**

Prior to the 2023 amendments, the role of the Mediator and the Mediator's duty to disclose were regulated by Articles 7 and 8 respectively. These articles have now been consolidated into a single Article 7, titled "Impartiality, independence, and availability". This is consistent with the structure of the SCC Arbitration Rules, in particular, Article 18 which governs the impartiality, independence and availability of Arbitrators.

Like its predecessor, the revised Article 7 of the SCC Mediation Rules mandates that every Mediator must be impartial and independent. The latest revisions to this provision establish a uniform procedure for disclosures by Mediators and Arbitrators under the SCC Mediation Rules and SCC Arbitration Rules respectively. For example, the standard for disclosure of Mediators is identically worded to that of Arbitrators, namely, "any circumstances that *may* give rise to justifiable doubts as to the prospective Mediator's impartiality or independence" (emphasis added), as opposed to "*likely to* give rise to justifiable doubts" (emphasis added) as stated in the 2014 version of the SCC Mediation Rules.

In addition, the amendments clarify the mode of the disclosure process with an aim to increase its robustness. The revised rules clarify that a Mediator shall submit “a signed statement of acceptance, availability, impartiality, and independence, disclosing any circumstances that may give rise to the Mediator’s impartiality or independence” to the Secretariat once the Mediator is appointed (see Article 7(3)). Article 7(4) emphasises that like an Arbitrator, a Mediator’s duty of disclosure is a continuing one.

While Article 7 of the SCC Mediation Rules now largely mirrors Article 18 of the SCC Arbitration Rules, Article 7(4) of the SCC Mediation Rules includes an additional line which provides that “[u]nless otherwise agreed by the parties, a Mediator may not act as arbitrator in any future arbitrations relating to the subject matter of the dispute”. This recognises that the dispute might not be amicably resolved by way of mediation and might require further adjudication in the form of subsequent arbitration proceedings. This provision was previously set out at Article 7(2) of the 2014 version of the SCC Mediation Rules and is designed to preserve the impartiality and independence of any future Arbitrators who might be required to adjudicate on the merits of the dispute.

### **3.5. Refining the mediation process**

Article 8 of the SCC Mediation Rules regulates the release of Mediators from their appointment. Previously, this provision only provided for the release of the Mediator where the Mediator: (a) was unable to perform his/her duties; or (b) failed to perform his/her functions. In 2023, the provision was revised to provide an additional ground for release of the Mediator, namely, where the Mediator is “no longer accepted by the parties”. This amendment reflects the consensual nature of mediation, and grants parties greater autonomy over the mediation process. In addition, the language of Article 8 was also revised to improve consistency in the terminologies used in the rules maintained by the SCC.

Article 11 of the SCC Mediation Rules relates to the conduct of the mediation by the Mediator. This provision mandates that a Mediator acts diligently to ensure that the mediation is conducted without undue delay, and that the Mediator shall consult with the parties to establish the procedure of the mediation. This provision is substantially similar to its predecessor (see Article 12 of the SCC Mediation Rules 2014), with a clarification that parties shall be given an “equal and reasonable opportunity to explain its position” as opposed to a “sufficient opportunity to present its case”. This wording is in line with Article 23(2) of the SCC Arbitration Rules which relate to the conduct of arbitrations.

### **3.6. Clarifying the fees and costs of mediation**

Various amendments relating to fees and costs were made in the latest revision to the SCC Mediation Rules. In particular, Article 5 was supplemented to clarify that the SCC Secretariat shall dismiss the request for mediation if the registration fee is not paid within the relevant time period.

The previous provisions on costs (i.e., Article 15 and 16) were also consolidated into a single Article 14, titled “Costs of the mediation”, which mirrors the structure of Article 49 of the SCC Arbitration Rules. These changes were introduced in order to promote uniformity across the rules administered by the SCC.

## 4. Summary

Mediation is one of the many avenues for dispute resolution offered by the SCC. Mediation is particularly well suited for disputes wherein parties seek to maintain their relationship, as the focus is on achieving an amicable settlement as opposed to an adjudication of the merits of the dispute.

As a whole, the 2023 revisions to the SCC Mediation Rules strengthen the mediation process administered by the SCC. Under the SCC Mediation Rules, parties are able to resolve their disputes in a fast, flexible, and confidential manner. This process allows parties to retain control over the outcome of their dispute via a settlement agreement, and parties may seek to have their settlement agreements confirmed in an arbitral award to maximise enforceability. Parties interested in the mediation process may adopt the model mediation clause under the SCC Mediation Rules available on the SCC website.