

# Summary Procedure Decisions at the SCC Arbitration Institute 2017–2022

December 2023

Jake Lowther, Yi Ting Sam<sup>1</sup>

<sup>1</sup> Jake is a dual-qualified (Australia & Sweden) lawyer and legal counsel at the SCC Arbitration Institute. Yi Ting is a Singapore-qualified lawyer who was a legal intern at the SCC Arbitration Institute (April–August 2023).

# Table of Contents

- 1. Introduction** **3**
  
- 2. The SCC Rules on Summary Procedure** **4**
  
- 3. Summary Procedure Decisions rendered in 2017–2022** **6**
  - 3.1. Requests for Summary Procedure granted 6
    - 3.1.1. Case 1 6
    - 3.1.2. Case 2 7
  - 3.2. Requests for Summary Procedure dismissed 8
    - 3.2.1. Case 3 8
    - 3.2.2. Case 4 9
    - 3.2.3. Case 5 10
    - 3.2.4. Case 6 12
    - 3.2.5. Case 7 13
    - 3.2.6. Case 8 14
    - 3.2.7. Case 9 16
  
- 4. Summary** **17**

# 1. Introduction

The SCC Arbitration Institute (“SCC”) was among the first arbitration institutions in the world to provide for summary procedure in its arbitration rules. This mechanism enables parties to seek a decision on discrete issues of fact or law at a preliminary stage of the proceedings, without necessarily taking all the procedural steps that would usually apply in the arbitration.

Summary procedure is a case management tool designed to strengthen the Arbitral Tribunal’s mandate to resolve confined issues, ensure procedural economy, and discourage any manifestly inadmissible or even abusive claims by parties to SCC arbitrations. Summary procedure should not be confused with expedited procedure. Indeed, summary procedure is available under both the SCC Arbitration Rules and the SCC Expedited Arbitration Rules (together, the “SCC Rules”).<sup>1</sup> Under the SCC Rules, summary procedure is available to both the claimant and the respondent. Thus, not only may issues be determined under this mechanism based on an objection of jurisdiction or admissibility by the respondent, but either party may identify issues on the merits which could be appropriate to be heard and determined in this manner.<sup>2</sup>

From 2017 (when the summary procedure mechanism was first introduced) to 2022, the SCC has seen a total of nine applications for summary procedure, of which seven were contested. Eight of the nine applications for summary procedure were requested in cases governed by the SCC Arbitration Rules, and the remaining application was governed by the SCC Expedited Arbitration Rules. This practice note will summarise the summary procedure decisions rendered by Arbitral Tribunals from 2017 to 2022 and provide some key takeaways.

The practice note is structured as follows.

**Section 2** analyses the summary procedure mechanism under the SCC Rules.

**Section 3** summarises the decisions on summary procedure rendered by Arbitral Tribunals from 2017 to 2022. The section first summarises the two decisions wherein the requests for summary procedure were granted by the Arbitral Tribunal. In both these cases, the parties agreed to adopt a summary procedure. Next, the section summarises the decisions wherein the requests for summary procedure were dismissed by the Arbitral Tribunal.

**Section 4** summarises some conclusions that can be drawn from the cases set out in Section 3.

---

<sup>1</sup> Ragnwaldh, J., et al., *A Guide to the SCC Arbitration Rules* (Wolters Kluwer, 2020), p. 125; Nilsson, B.G.H., Andersson, B.R., Chapter 1: Fundamental Principles of International Arbitration in Sweden, in Magnusson, A., et al., *International Arbitration in Sweden, A Practitioner’s Guide* (2nd Edition, Wolters Kluwer, 2021) at para. 98.

<sup>2</sup> Ragnwaldh, J., et al., *A Guide to the SCC Arbitration Rules* (Wolters Kluwer, 2020), p. 125.

## 2. The SCC Rules on Summary Procedure

Since 2017, the summary procedure mechanism has been governed by Article 39 of the SCC Arbitration Rules and Article 40 of the SCC Expedited Arbitration Rules, both of which are substantively similar. Minor linguistic amendments to the summary procedure rules were introduced in the 2023 revision of the SCC Rules. For the purposes of this practice note, reference to Article 39 of the SCC Arbitration Rules also includes the corresponding reference to Article 40 of the SCC Expedited Arbitration Rules.

Under the SCC Rules, the term summary procedure does not exclusively refer to the summary procedure / summary judgment mechanism as used in certain common-law jurisdictions. Although the summary procedure mechanism can certainly be used in such a manner, its scope of application is broader and provides for considerable flexibility and discretion. It gives the parties and the Arbitral Tribunal the opportunity to adopt a procedure suitable for the specific requirements of each case.<sup>3</sup>

Pursuant to Article 39(1) of the SCC Arbitration Rules 2023, a party may request that the Arbitral Tribunal decide one or more issues of fact or law by way of summary procedure, without necessarily taking every procedural step that might otherwise be adopted in the arbitration. The summary procedure should be tailored to the need to resolve the specific issues at hand. Examples of procedural steps which may be disregarded or adapted include: the length, number and focus of written submissions, the need (if any) of oral testimony and document production, and the need for a hearing and if so, in what form.<sup>4</sup>

Article 39(2) confirms that requests for summary procedure may be made in respect to jurisdiction, admissibility, or the merits of the case. It also provides examples of the assertions that a request for summary procedure may include, such as

(i) an allegation of fact or law material to the outcome of the case is *manifestly unsustainable*;

(ii) even if the facts alleged by the other party are assumed to be true, no award could be rendered in favour of that party under the applicable law; or

---

<sup>3</sup>Ragnwaldh, J., et al., *A Guide to the SCC Arbitration Rules* (Wolters Kluwer, 2020), p. 125.

<sup>4</sup>Ragnwaldh, J., et al., *A Guide to the SCC Arbitration Rules* (Wolters Kluwer, 2020), p. 125.

(iii) any issue of fact or law material to the outcome of the case is, for any other reason, suitable to determination by way of summary procedure.

These examples are not exhaustive. Instead, they provide guidance as to the issues that may be appropriate to determine in a summary procedure.<sup>5</sup>

Article 39(3) provides that the request shall specify the grounds relied on and the form of summary procedure proposed and demonstrate that such procedure is efficient and appropriate having regard to all the circumstances of the case.

Pursuant to Article 39(4), the Arbitral Tribunal shall, after providing the other party an opportunity to submit comments, issue an order on the summary procedure request, either dismissing the request or fixing the summary procedure in the form it deems appropriate.

Article 39(5) provides that in determining whether to grant a request for summary procedure, the Arbitral Tribunal shall have regard to all relevant circumstances, including the extent to which the summary procedure contributes to a more efficient and expeditious resolution of the dispute.

Finally, according to Article 39(6), if the request for summary procedure is granted, the Arbitral Tribunal shall decide the issues under consideration in an efficient and expeditious manner having regard to the circumstances of the case, while giving each party an equal and reasonable opportunity to present its case. Article 39(6) does not prevent a hearing from being held as part of the summary procedure. The need for a hearing needs to be assessed and decided on a case-by-case basis taking into account all relevant circumstances, including the need to conduct the summary procedure as efficiently and expeditiously as possible, any request for a hearing by a party, and whether the applicable law or rules confer the parties with a right to a hearing.<sup>6</sup> In this regard, it should be noted that Article 32(1) of the SCC Arbitration Rules provides that “[a] hearing shall be held if requested by a party, *or* if the Arbitral Tribunal deems it appropriate” (emphasis added), whereas Article 33(1) of the SCC Expedited Arbitration Rules provides that “[a] hearing shall be held only at the request of a party *and* if the Arbitrator considers the reasons for the request to be compelling” (emphasis added).

---

<sup>5</sup> Ragnwaldh, J., et al., *A Guide to the SCC Arbitration Rules* (Wolters Kluwer, 2020), p. 126.

<sup>6</sup> Ragnwaldh, J., et al., *A Guide to the SCC Arbitration Rules* (Wolters Kluwer, 2020), p. 127; Löf, K., et al., Chapter 9: The Proceedings, in Magnusson, A., et al., *International Arbitration in Sweden, A Practitioner's Guide* (2nd Edition, Wolters Kluwer, 2021) at para. 127.

# 3. Summary Procedure Decisions rendered in 2017–2022

## 3.1. Requests for Summary Procedure granted

### 3.1.1. Case 1

#### **Background**

The dispute under the SCC Arbitration Rules concerned a shareholders' agreement and in particular, the claimant's assertion that the respondent was liable to pay a share of a contractual penalty. The parties were also parties to a parallel litigation concerning similar issues in the United States.

#### **Issues sought to be decided by summary procedure**

The claimant sought for the following issues to be decided by summary procedure: (i) whether the respondent's procedural objections could be considered by the Arbitral Tribunal at all, given that they had already been decided by a court in the United States, and (ii) whether the respondent waived its right to arbitration.

#### **Procedure**

After the statement of defence was filed, the claimant sought for the two issues mentioned above to be decided by summary procedure. The respondent consented to this at a case management conference, noting that the issues were purely legal and that there was no need for oral evidence or submissions. Specifically, the respondent noted that in respect of the second issue of waiver, it should be undisputed which procedural actions the parties have taken in the parallel court proceedings. Shortly after the case management conference, the Arbitral Tribunal granted the claimant's request for summary procedure.

#### **Analysis and decision by the Arbitral Tribunal**

The Arbitral Tribunal held that the claimant had satisfied the prerequisites for an order granting summary procedure under Article 39 by submitting a proposal for summary procedure and the grounds for the same. Further, the Arbitral Tribunal was of the view that the summary procedure was appropriate given the parties' agreement on the procedure and its advantages and disadvantages.

### **3.1.2. Case 2**

#### **Background**

The dispute under the SCC Expedited Arbitration Rules centred on the claimant's debt claim arising from the respondent's failure to repay a debt as required by a repayment agreement. The respondent raised several defences, including the defence of set-off based on two distribution agreements.

#### **Issues sought to be decided by summary procedure**

The claimant requested that the Arbitral Tribunal determine, by summary procedure, whether it had jurisdiction to deal with the respondent's set-off defences arising from two distribution agreements, and whether one aspect of the respondent's set-off defence was statute-barred.

#### **Procedure**

After the respondent filed its answer to the request for arbitration, the claimant proposed that the two issues mentioned above be determined by way of summary procedure. The respondent consented to this at a case management conference, agreeing that it would be an efficient way forward to resolve certain issues as preliminary issues as suggested by the claimant. Following the parties' agreement, the Arbitral Tribunal issued a procedural order adopting the summary procedure as agreed between the parties.

#### **Analysis and decision by the Arbitral Tribunal**

As both parties agreed to the use of summary procedure, the Arbitral Tribunal did not consider it necessary to consider in detail whether the claimant had complied with the requirements of Article 40(3) of the SCC Expedited Rules. In the Arbitral Tribunal's opinion, it was sufficient that both parties considered it appropriate to use the summary procedure in the circumstances. Accordingly, the Arbitral Tribunal issued an order fixing the summary procedure pursuant to Article 40(4) of the SCC Expedited Rules.

## **3.2. Requests for Summary Procedure dismissed**

### **3.2.1. Case 3**

#### **Background**

The dispute under the SCC Arbitration Rules concerned a subscription and shareholders' agreement, under which the claimant had the right to redeem the shares registered in the respondent's name if the respondent ceased to be employed or engaged by the claimant's group of companies. In particular, the dispute focused on what constituted the correct interpretation of two specific terms under the contract which related to the termination of the respondent's employment.

#### **Issues sought to be decided by summary procedure**

The claimant requested that the Arbitral Tribunal confirm, by way of summary procedure, that the two specific contractual requirements for the share redemption (as mentioned above) were satisfied. The claimant also listed the additional relief that it intended to seek depending on the outcome of the Arbitral Tribunal's decision.

#### **Procedure**

The claimant's request for summary procedure was set out in its request for arbitration. The respondent objected to summary procedure in its answer to the request for arbitration.

Prior to the filing of its statement of claim, the claimant submitted a separate request for summary procedure. Shortly thereafter, the respondent submitted its response, and the Arbitral Tribunal issued its decision.

#### **Analysis and decision by the Arbitral Tribunal**

In respect to the timing of the claimant's request, the Arbitral Tribunal held that the appropriate time to deal with a request for determination by way of summary procedure is after at least the statement of claim and the statement of defence have been submitted. In the Arbitral Tribunal's view, before that point in time, the many aspects that need to be taken into account when deciding on summary procedure are not yet known to the Arbitral Tribunal. The Arbitral Tribunal further noted that, as a matter of procedure, the claimant was not bound by its indications that it intended to seek future relief, and such issues were not yet relief sought and subject to the arbitration.

Additionally, the Arbitral Tribunal held that a prerequisite for determining an issue by way of summary procedure is that the issues must be suitable for summary procedure. The suitability of an issue is decided in view of

the advantages and disadvantages with such a procedure for the case at hand, as they appear at the time when the request is made. It is not sufficient that the proceedings as a whole would benefit one way or the other if an issue were decided by way of a summary procedure.

Applying this reasoning, the Arbitral Tribunal held that the reliefs sought by the claimant were not suitable for determination by way of summary procedure. In the Arbitral Tribunal's view, the assessments that it had to make in order to decide on the relief sought included assessments which had to be made, and are the core of, most arbitrations. These included the interpretation of contractual terms, the potential application of legal principles as well as the assessment of facts which a party may argue are relevant. According to the Arbitral Tribunal, such issues are typically not suited for determination by way of summary procedure against the other party's will.

Accordingly, the claimant's request for summary procedure was denied.

### **3.2.2. Case 4**

#### **Background**

This dispute was administered under the SCC Arbitration Rules. The parties were shareholders of a joint venture company which was established pursuant to a joint venture agreement. The claimants alleged that the respondent, in material breach of the joint venture agreement, had failed to fulfil its contractual obligation to provide capital contributions.

#### **Issues sought to be decided by summary procedure**

The respondent sought for ten issues to be decided by summary procedure. In summary, these issues related to the claimants' locus standi, the arbitrability of the claims, contractual interpretation of the joint venture agreement, time-bar, waiver, illegality, and the alleged losses claimed by the claimants.

#### **Procedure**

After the claimants filed their statement of claim, the respondent filed a request for information which the claimants responded to by way of letter. On the same day that the respondent filed its statement of defence, the respondent also submitted an application for further and better particulars of the statement of claim, and in the alternative, that the issues mentioned above be decided by way of summary procedure.

#### **Analysis and decision by the Arbitral Tribunal**

After dismissing the respondent's application for particulars, the Arbitral Tribunal considered the respondent's alternative arguments for summary procedure.

As a starting point, the Arbitral Tribunal noted that Article 39 of the SCC Arbitration Rules affords arbitral tribunals with a wide discretion to allow suitable issues to be determined by way of summary procedure. In assessing whether to apply the summary procedure, an arbitral tribunal should take into account the non-exhaustive list of the type of assertions that the request might contain under Article 39(2) of the SCC Arbitration Rules, as well as the requirements under Articles 39(3)-(6).

Turning to the facts, the Arbitral Tribunal first placed weight on the fact that the respondent had given very little explanation to support its assertion that the allegations of fact and/or law in the claimants' statement of claim were "*manifestly unsustainable*".

In addition, the Arbitral Tribunal found that the ten questions which were sought to be decided by way of summary procedure were not simple issues that could be determined by the Arbitral Tribunal in a summary manner on the basis of documents only. In the Arbitral Tribunal's view, those questions (to the extent relevant) needed to be fully explored through further written and oral submissions, as well as factual and expert witness testimony at the merits hearing.

Further, the Arbitral Tribunal observed that even if some of the questions raised by the respondent could, in principle, lend themselves to summary procedure without the need for full argument, it was not appropriate or practicable to adopt a summary procedure given the advanced stage of the proceedings (where a condensed procedural timetable had already been established). Given this procedural impracticability, the Arbitral Tribunal was of the view that the respondent had not demonstrated that the summary procedure was appropriate or would contribute to a more efficient and expeditious resolution of the dispute, as required under Articles 39(3) and (5) of the SCC Arbitration Rules.

For the reasons above, the respondent's request for summary procedure was dismissed.

### **3.2.3. Case 5**

#### **Background**

The dispute under the SCC Arbitration Rules concerned a financial penalty imposed on the investor claimant's subsidiary by the respondent state. In particular, the claimant argued that the respondent had breached its investment treaty obligations regarding the promotion, protection, and treatment of the claimant's investment in the respondent state.

### **Issues sought to be decided by summary procedure**

The respondent requested that the Arbitral Tribunal decide, by way of summary procedure, its jurisdictional objection that Article 26 of the Energy Charter Treaty (“ECT”) does not apply to intra-EU investment arbitration (as in the case at hand) and that EU law prevails in case of a conflict with the ECT.

### **Procedure**

In the respondent’s answer to the claimant’s request for arbitration, the respondent requested the bifurcation of the arbitration due to its jurisdictional objections. Thereafter, the respondent submitted a separate request for summary procedure. At that point in time, the statement of claim and statement of defence had not been filed. Subsequently, the Arbitral Tribunal issued its decision.

### **Analysis and decision by the Arbitral Tribunal**

The Arbitral Tribunal first held that an arbitral tribunal enjoys considerable discretion in deciding whether to grant a request for summary procedure under Article 39 of the SCC Arbitration Rules.

The Arbitral Tribunal then noted that the respondent fulfilled the formal requirements under the first half of Article 39(3) of the SCC Arbitration Rules by specifying the grounds relied on and including a proposed procedural calendar for the summary procedure. Further, the Arbitral Tribunal noted that the respondent’s request related to an issue of jurisdiction, which is listed under Article 39(2) of the SCC Arbitration Rules as one of the issues which a request for summary procedure may concern.

However, the Arbitral Tribunal was not convinced that granting the request would contribute to a more efficient and expeditious resolution of the dispute, as mandated by Article 39(5) of the SCC Arbitration Rules.

Firstly, the Arbitral Tribunal considered that the dispute could be resolved efficiently and expeditiously without summary procedure. The claimant had indicated that it did not consider expert reports, extensive witness testimony or a long hearing to be necessary and estimated that the proceedings would be concluded within a year. The Arbitral Tribunal accepted that this was feasible based on the claimant’s summary of claims in the request for arbitration.

Secondly, the Arbitral Tribunal was of the view that the summary procedure could significantly increase the length of proceedings, if unsuccessful. In this regard, the respondent’s proposed summary procedure was at least three months long, and both parties had raised the possibility that annulment proceedings be initiated against any interim decision on jurisdiction.

Thirdly, based on a preliminary review of the record, it was not obvious to the Arbitral Tribunal that there were compelling reasons to assume that the respondent would succeed with its jurisdictional objection.

In view of the above, the respondent's request for summary procedure was dismissed. On the related issue of bifurcation, the Arbitral Tribunal reserved its decision pending the filing of the statement of claim.

### **3.2.4. Case 6**

#### **Background**

The claimants were two affiliated companies which were in the chemical supply business. The dispute under the SCC Arbitration Rules arose after a portion of the first claimant's business was acquired by one of the respondents. In the arbitration proceedings, the claimants brought claims against three affiliated companies and two individuals, alleging that all five respondents were involved in a research project which misappropriated the claimants' trade secrets and infringed the claimants' patents.

#### **Issues sought to be decided by summary procedure**

The request for summary procedure was made by the fifth respondent, who was an employee of the first claimant that had been transferred to one of the respondent companies in the acquisition process. The fifth respondent requested that all the claims against him be heard separately from the claims against the other respondents, by way of summary procedure.

#### **Procedure**

The fifth respondent's request for summary procedure was set out in his statement of defence. The claimants objected to this in their statement of reply.

Following the parties' unsuccessful attempt to agree on terms for a withdrawal of the claims against the fifth respondent, the fifth respondent submitted a reiterated request to the Arbitral Tribunal for summary procedure. Shortly thereafter, the Arbitral Tribunal issued its decision.

#### **Analysis and decision by the Arbitral Tribunal**

In coming to its decision, the Arbitral Tribunal noted that pursuant to Article 39(5) of the SCC Arbitration Rules, an arbitral tribunal shall have regard to all relevant circumstances when deciding whether to grant a request for summary procedure, including the extent to which the summary procedure contributes to a more efficient and expeditious resolution of the dispute.

On the facts, the Arbitral Tribunal noted that the procedural timetable for the arbitration (as agreed between the parties and decided by the Arbitral Tribunal in an earlier procedural order) was already extremely tight and that a parallel summary procedure would require additional work from both sides that would burden the proceedings at the late stage of the arbitration. Accordingly, a separate procedure for the claims against the fifth respondent would not satisfy the requirements under Article 39 of the SCC Arbitration Rules. Therefore, the fifth respondent's request for summary procedure was denied.

### **3.2.5. Case 7**

#### **Background**

This was an investment dispute administered under the SCC Arbitration Rules. The investor claimant argued that the respondent state had taken a series of measures to diminish the value of the claimant's investment, in breach of the respondent state's contractual and treaty obligations.

#### **Issues sought to be decided by summary procedure**

The respondent asked the Arbitral Tribunal to consider various objections relating to jurisdiction, admissibility, and merits by way of summary procedure. The objections related to *inter alia* allegations concerning the seat, piercing of the corporate veil, abuse of process, the existence of an investment, and illegality.

#### **Procedure**

In response to the claimant's statement of claim, the respondent submitted its request for summary procedure. In the alternative, the respondent sought for the proceedings to be bifurcated on the same basis.

#### **Analysis and decision by the Arbitral Tribunal**

The Arbitral Tribunal held the view that the summary procedure mechanism is meant to be used in very limited situations, such as where issues can be resolved without evidentiary investigation – essentially, on the basis of facts as pleaded (Article 39(2)(ii)) – or where a proposition of fact or law is so “*manifestly unsustainable*” (i.e., obviously defective on its face) that little procedure is required at all to address it (Article 39(2)(i)). While the SCC Arbitration Rules contain a further catch-all authorization – that an arbitral tribunal may use a summary procedure to resolve any other issue that “*is, for any other reason, suitable to determination by way of summary procedure*” (Article 39(2)(iii)) – this discretion is to be exercised within the framework of the inherent meaning of a “*summary procedure*”, namely a procedure that is abbreviated in one form or another.

According to the Arbitral Tribunal, the SCC Arbitration Rules refer to this as a procedure that is implemented “*without necessarily undertaking every procedural step that might otherwise be adopted for the arbitration*” (Article 39(1)).

In the Arbitral Tribunal’s view, many of the respondent’s objections required some degree of evidentiary inquiry to allow them to be addressed. The Arbitral Tribunal assessed that some of that inquiry was likely to be substantial, such as the respondent’s various allegations regarding fraud or other forms of illegality in connection with the investment. As for the other objections where the evidentiary inquiry appears more discrete, the Arbitral Tribunal assessed that the same types of procedural steps used for the arbitration were likely to be necessary (i.e., written submissions by the parties, accompanied by documentary evidence or witness/expert statements to the extent appropriate, the possibility of requests for disclosure of additional documents, and an oral hearing to examine that evidence and pose questions to counsel).

In these circumstances, the Arbitral Tribunal considered the summary procedure mechanism to be inappropriate for resolving the type of objections raised by the respondent. Instead, the Arbitral Tribunal found it more appropriate to evaluate the request through the traditional rubric of bifurcation, which offers the possibility for Arbitral Tribunals to accelerate determination of particular issues, while still providing the customary procedural steps. Accordingly, the respondent’s request for summary procedure was denied.

### **3.2.6. Case 8**

#### **Background**

This case was heard under the SCC Arbitration Rules. It formed part of a long-standing dispute between the parties regarding a supply contract which had been the subject of a previous arbitration between the parties. In the case at hand, the claimant sought for the Arbitral Tribunal to order the respondent to pay certain contractual penalties to the claimant.

#### **Issues sought to be decided by summary procedure**

The respondent sought for the following issues to be decided by summary procedure: the claimant’s alleged lack of legal standing, the claimant’s alleged failure to negotiate the claim before commencing arbitration, the applicability of the doctrine of *res judicata*, and whether the claimant was precluded from pursuing its claims due to late notice, passivity, and or subsequent behaviour.

### **Procedure**

In accordance with directions given by the Arbitral Tribunal at a case management conference, the respondent applied to the Arbitral Tribunal seeking for the issues mentioned above to be decided by way of summary procedure. The Arbitral Tribunal then issued its decision. At that juncture, the statement of claim and statement of defence had not yet been filed.

### **Analysis and decision by the Arbitral Tribunal**

Regarding the claimant's alleged lack of standing, the parties agreed that this defence turned solely on the interpretation of certain documents, in particular, a settlement agreement which had yet to be disclosed in the proceedings. The Arbitral Tribunal accepted that this matter was suited for determination by way of summary procedure. However, the Arbitral Tribunal did not think that it would be efficient or expeditious to order summary proceeding at that point in time. Instead, the Arbitral Tribunal stated that the most efficient and expeditious way of dealing with the issue would be for the claimant to provide a copy of the settlement agreement to the respondent so that the respondent could consider the claimant's position. Accordingly, the Arbitral Tribunal made no order on this part of the respondent's application pending the production of the settlement agreement.

As for the remaining issues, the Arbitral Tribunal declined to decide these issues by way of summary procedure for the reasons below.

Regarding the claimant's alleged failure to negotiate, the Arbitral Tribunal considered that the factual enquiry into the course of the negotiations between the parties was likely to prove to be complex and involve issues that might also need to be dealt with in considering the merits as a whole. As such, the Arbitral Tribunal did not consider that taking this as a summary issue would contribute to a more efficient and expeditious resolution of the dispute, particularly as, even if the respondent were successful, it would only determine part of the dispute.

Regarding the allegations that the claimant was precluded from pursuing its claims, the Arbitral Tribunal held that view that the consideration of all these matters in a summary procedure, rather than at the merits hearing, would not contribute to the expedition or efficiency of these proceedings. On the issue of *res judicata*, the Arbitral Tribunal held that this required an analysis of the final award in the previous arbitration proceedings and further submissions. In the Arbitral Tribunal's view, the clear intertwining effect of the final award in the previous proceedings and the merits of the present case made it unsuitable for decision by summary procedure.

In a similar vein, the Arbitral Tribunal found that the respondent's arguments regarding notice and the claimant's behaviour required detailed analysis as to what was said by whom to who and when. According to the Arbitral Tribunal, this was almost certain to involve factual witness evidence and was likely to result in duplication of witness testimony in the event the respondent was unsuccessful in the summary procedure, as well as a significant expenditure of time and costs. In addition, there was a significant difference between the parties as to the law on these issues, which would involve detailed consideration of the applicable law.

In conclusion, the Arbitral Tribunal made no order on the part of the respondent's application regarding the claimant's alleged lack of standing, and dismissed the rest of the respondent's application.

### **3.2.7. Case 9**

#### **Background**

The dispute under the SCC Arbitration Rules concerned two supply contracts and a novation agreement. According to the claimant, the respondent had acted in breach of its various contractual obligations.

#### **Issues sought to be decided by summary procedure**

The respondent requested that the issue of jurisdiction be decided by way of summary procedure. Specifically, whether the claimant's allegation that there was a valid arbitration agreement was "*manifestly unsustainable*".

#### **Procedure**

After the claimant filed its statement of claim, the respondent filed a request for summary procedure. The claimant objected to this by way of letter. Thereafter, the Arbitral Tribunal issued its decision.

#### **Analysis and decision by the Arbitral Tribunal**

The Arbitral Tribunal noted that Article 39(2) of the SCC Arbitration Rules includes a non-exhaustive list of situations where an arbitral tribunal may determine an allegation of fact or law by way of a summary procedure. One such situation is where the allegation at issue is considered to be "*manifestly unsustainable*". In the Arbitral Tribunal's view, it follows from that wording that the threshold for adopting a summary procedure is high.

Having considered the parties' submissions, the complexity of the jurisdictional issue, the extent of the arguments and evidence already adduced, the Arbitral Tribunal concluded that it was not appropriate to grant a summary procedure in this case. The respondent's request was therefore denied.

## 4. Summary

The SCC summary procedure mechanism thus enables parties to seek a decision on discrete issues of fact or law at a preliminary stage of the proceedings, without necessarily taking all the procedural steps that would usually apply in the arbitration. However, to grant a request for summary procedure, the Arbitral Tribunal must be satisfied it would contribute to a more efficient and expeditious resolution of the dispute.

Based on the SCC's jurisprudence from 2017 to 2022, it can be concluded that the mechanism has primarily been requested in cases under the SCC Arbitration Rules. Moreover, while Article 39 of the SCC Arbitration Rules gives the Arbitral Tribunal a wide discretion to grant requests for summary procedure, the standard applied is high. This is reflected in the wording of Article 39, e.g., "*manifestly unsustainable*", which establishes a very high threshold for granting such a request. However, in line with the principle of party autonomy, the Arbitral Tribunal will give effect to the parties' agreement. This is demonstrated in the two cases summarised in Section 3.1. above wherein the requests for summary procedure were granted in light of the parties' agreement.

The jurisprudence also demonstrates that both claimants and respondents have sought to use the summary procedure mechanism from 2017 to 2022. Of the nine applications for summary procedure in the relevant time period, three applications were made by claimants and six applications were made by respondents.

In determining whether to grant a request for summary procedure, there are two main questions which arbitral tribunals have considered:

(a) **(suitability)** the suitability of the issue for summary procedure (see Article 39(2)); and

(b) **(a more efficient and expeditious resolution)** the extent to which the summary procedure contributes to a more efficient and expeditious resolution of the dispute (see Article 39(5)).

In respect to the question of suitability, arbitral tribunals typically consider (i) the timing of the request for summary procedure, and (ii) the extent of evidentiary investigation required to determine the issue.

In respect of the question of a more efficient and expeditious resolution, Arbitral Tribunals typically consider the effect of the summary procedure mechanism on the existing procedural timetable (if any), and whether the determination of the issue would dispose of the case.

It can thus be concluded that the summary procedure mechanism pursuant to Article 39 of the SCC Arbitration Rules is an effective procedural tool in the parties' armoury, which is in line with the SCC's longstanding and firm commitment to efficiency and expeditiousness in arbitration.