

East Meets West in Stockholm

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Introduction

International arbitration has a long history. Originating from the charters of trade towns and the customs of merchant guilds, it developed as a natural response to the needs of trade for fair and fast resolution of disputes. In the history of nations there are also many examples where international arbitration – due to its autonomy and informal character – was the only means of peaceful dispute settlement in both trade and politics.¹

This is the lens through which development of East-West arbitration in Stockholm is best observed and understood. It could be said to be the result of historical and political events which shook Europe and Russia throughout the 20th century.

In this chapter we will explore the background to the development of East-West arbitration in Stockholm, analyze the increase in the volume of cases, and give some examples of salient features of this group of cases in the caseload of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

But first we will briefly outline trade relations between Russia and Sweden during the past century as foreseen through international agreements supporting the use of international arbitration.

1. Russian – Swedish trade relations

Following the 1917 Revolution, the young Soviet state sought to co-operate with its neighbors without giving up its ideology and political independence. Sweden attracted the particular attention of the Bolshevik leaders, as it had not participated in the First World War, and, on top of that, was known for its relatively strong leftist movement.²

¹ In this context, see Ulf Franke and others (eds), *Arbitrating for Peace: how arbitration made a difference* (Wolters Kluwer 2016).

² *Шушкин В.А. Становление советско-скандинавских экономических отношений (1917—1923 гг.) // Исторические связи Скандинавии и России IX-XX вв.: сб. статей / ред. Носов Н.Е., Шаскольский И.П. — Ленинград: Наука, 1970.*

In April 1918, a Swedish trade delegation visited Soviet Russia to explore the possibilities of trade in goods. The mission was successful, resulting in the first commercial contracts for the Soviet state, which received agricultural machines in exchange for tin, copper and mineral oils. By 1920 contracts with Swedish companies constituted 27% of all foreign trade turnover in Russia¹.

a. The Trade Agreement between the Union of Soviet Socialist Republics and Sweden of 15 March 1924

In 1924, despite political controversies with the Bolsheviks over pre-war debts and nationalized assets, the Swedish government signed a Trade Agreement with Soviet Russia.² The parties agreed on the basic principles of mutual trade, allowing merchants and corporations to conclude contracts on the territory of the respective state. Each party undertook to provide a non-discriminatory regime to each other's nationals, organizations and corporations and agreed not to nationalize assets without adequate compensation.

This very first Trade Agreement between the Soviet Union and Sweden did not mention arbitration. Instead, the Agreement provided for resolution of disputes between Soviet and Swedish parties “in accordance with the principles of international law in proper courts of the respective court of either country unless otherwise decided by the contents of the contract or by special agreement.”³

b. The 1940 Agreement on Exchange of Goods and Payments between Sweden and the USSR, dated 7 September 1940

In 1940 the Soviet Union and Sweden signed a second treaty: the Agreement on Exchange of Goods and Payments, regulating the procedure for payments for goods purchased from the respective party.

The 1940 Agreement established the right of the parties to refer disputes arising from Soviet-Swedish trade to arbitration. Swedish and Soviet parties could arbitrate on terms as prescribed in the Agreement.

The Agreement included provisions governing formation of the tribunal and conduct of the hearing.⁴ The Stockholm Chamber of Commerce and the All-Soviet Chambers of Commerce

¹ Шишкин В.А. Становление советско-скандинавских экономических отношений (1917—1923 гг.) // Исторические связи Скандинавии и России IX-XX вв.: сб. статей / ред. Носов Н.Е., Шаскольский И.П. — Ленинград: Наука, 1970. С. 169.

² Шишкин В.А. Становление советско-скандинавских экономических отношений (1917—1923 гг.) // Исторические связи Скандинавии и России IX-XX вв.: сб. статей / ред. Носов Н.Е., Шаскольский И.П. — Ленинград: Наука, 1970. С. 197.

³ Article 3 of the 1924 Trade Agreement between the USSR and Sweden.

⁴ Article 14 (3 – 10) of the 1940 Agreement on Exchange of Goods and Payments.

acted as appointing authorities on behalf of Swedish and Soviet respondents respectively, should they fail to appoint an arbitrator.

The co-arbitrators were tasked with appointing the chairman of the tribunal. If no agreement on the chairman could be reached, the chair was appointed by a draw procedure from a list of arbitrators of neutral nationality, adopted by the Swedish Ministry of Trade and the Soviet Trade Representation in Stockholm. The list consisted of five individuals, and had to be reviewed every year.¹



The draw procedure in an arbitration between a Swedish and a Soviet party in the Stockholm Chamber of Commerce (SCC) in 1980. From left to right: Torbjörn Spector (SCC legal counsel), Bittan Andersson (SCC assistant), Ulf Franke (SCC Secretary General), Prof. Sergei N. Lebedev.

It is not clear when the first case under the 1940 Agreement was filed. The procedure contained in the 1940 Agreement envisaged *ad hoc* arbitration seated either in Sweden or in the USSR, depending on the claimant's nationality. It is therefore difficult to conduct an overall assessment of cases filed. Beginning in the early 1990s, however, the SCC was retained to provide secretarial services and hearing facilities in several cases under the Agreement. As a result, some of the awards rendered in Stockholm under the 1940 Agreement have been preserved in the SCC archives. The substantive matters in these awards primarily

¹ Article 14(7), (8) of the 1940 Agreement on Exchange of Goods and Payments. Between the years 1982 – 1997, the list of confirmed chairpersons included Lars Nordskov Nielsen, Johannes Andenaes, Christian Dominicé, Carsten Smith, Hermod Lannung, Robert Bruner, Björn Haug, Werner Melis, Allan Philip and Ivan Szasz.

originate from claims brought by Swedish companies under contracts for delivery of services and goods concluded with Soviet foreign trade organizations.

The 1940 Agreement enabled trade between Sweden and the Soviet Union through exchange of goods. This was of great importance for the Soviet Union, which at the time was experiencing a shortage of hard currency. As a consequence of trade relations created by the 1940 Agreement, Sweden and the USSR concluded a second agreement in 1946. According to the 1946 Trade and Credit Agreement, the USSR obtained a loan of 1 billion SEK to purchase Swedish machinery and goods. At the time, this was seen “as a way of creating a spirit of co-operation between East and West even after the War.”¹

c. The 1977 Optional Clause Agreement

The 1940 Agreement was, to the best of the authors’ knowledge, the first international treaty to vest the SCC with the power of appointing authority. Decades later, the same power was granted under the 1977 Optional Arbitration Clause for use in US-USSR trade relations – recommended by the American Arbitration Association (AAA) and the Soviet Chamber of Commerce and Industry – in contracts between American and Soviet organizations. 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.

The Optional Clause Agreement was reportedly inspired by a call at the 1975 Conference on Security and Co-operation² to recommend, where appropriate, to organizations, enterprises and firms in their countries, “*to include arbitration clauses in commercial contracts and industrial co-operation contracts, [...] and permit arbitration in a third country, taking into account existing intergovernmental and other agreements in this field.*”³

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,⁴ in a speech in 1976 before the American Bar Association, where he spoke on the issue of “Sweden as a place for

¹ Sweden’s chief negotiator, G. Sohlman, quoted in G. Häglöf, *Fredens Vägar*, Stockholm, 1973 and from <https://books.google.se/books?id=Ka1CedhiZHUC&pg=PA227&dq=credit+agreement+between+USSR+and+Sweden+1946+Myrdal&hl=sv&sa=X&ved=0ahUKewixvK3M1drhAhWhw4sKHZA2AcYQ6AEIOjAC#v=onepage&q=credit%20agreement%20between%20USSR%20and%20Sweden%201946%20Myrdal&f=false>

² 1 August 1975 Summit of Heads of State or Government in Helsinki under the auspices of the Organization for Security and Co-operation in Europe.

³ *Лебедев С.Н.* Факультативная арбитражная оговорка для советско-американских контрактов // Материалы секции права / ТПП СССР. — М., 1978. — Вып. 30. С. 6—17; Final Act of the Conference on Security and Co-operation in Europe (Helsinki, 1975), p.22

⁴ Judge Howard Holtzmann was a well-known arbitration expert, 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).

East-West arbitration”.¹ In his remarks, Judge Holtzmann noted that “[t]he 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”.²



12 January 1977, signing of the US – USSR Optional Clause Agreement. Front row, from left to right Prof. S.N. Lebedev (USSR Chamber of Commerce and Industry), Sven Swarting (President of the Stockholm Chamber of Commerce), Robert Coulson (President of the American Arbitration Association).

The Optional Clause Agreement shaped a new approach to arbitration for Soviet parties by locating the venue of the proceedings in a neutral third country. The arrangement was also unique because it provided for non-institutionalized arbitration, supported by an independent appointing authority. In contrast, trade agreements concluded up until then by the USSR after the Second World War most often referred to resolution of disputes by a permanent arbitral body in the country of the respondent.³

The 1940 Trade Agreement and the 1977 Optional Arbitration Clause and the many contracts concluded on the basis of these instruments formed the tradition of Soviet parties choosing Stockholm as the dispute resolution forum in Swedish-Soviet and US-Soviet contracts. The

¹ The speech has never been published but Judge Holtzmann presented Ulf Franke, SCC Secretary General at the time, with a personal copy from which citations in this text originate.

² Judge Holtzmann 1976 speech, footnote above.

³ *Ginsburgs G., Simons B.W. The Soviet Union and International Cooperation in Legal Matters // Martinus Nijhoff Publishers, 1988, p. 32.*

political context seems to have been of significant importance for the conclusion of the US-USSR Optional Clause Agreement, to which those involved at the time have testified.¹

In the years that followed, the tradition of using Swedish arbitration in commercial agreements concluded between the USSR and Western parties gained momentum. As pointed out by a Russian arbitration lawyer; “*Experience gained by Soviet lawyers in the course of arbitrations in Stockholm certainly in subsequent years influenced their choice in favour of Stockholm as the preferred venue and the SCC Rules as the preferred procedure.*”²

The preference for SCC arbitration also made its way into bilateral investment treaties concluded by the Soviet Union (and later the Russian Federation).³

Swedish arbitration specialist Gillis Wetter commented on the development in the following way; “*A pattern that seems to have gained widespread acceptance and use in a large number of contracts made over the past decade has been the creation of ad hoc arbitration in a third country. Sweden in such clauses has been a favored location.*”⁴

2. The first wave of East-West disputes in Stockholm

In the Soviet Union, foreign trade was centralized and monopolized by the state. Export and import consisted primarily of supplies of raw materials, agricultural goods and equipment.⁵

In 1980, the aggregate share of trade operations with Western countries constituted less than 34% of the total foreign trade turnover of the USSR, and disputes with Western parties appeared rarely.⁶ Between 1978 – 1981 the Soviet Foreign Trade Arbitration Commission reported four arbitral awards rendered in disputes with parties from non-Socialist countries.⁷

¹ cf interviews with Gerald Aksen, Sergei Lebedev, Alexander Komarov and Richard Naimark in the film ‘The Quiet Triumph’ (2017) <<https://vimeo.com/205567614>> accessed 21 March 2019.

² Vladimir Khvalei, ‘Enforcement of SCC Arbitral Awards in CIS Countries: Reflections on Arbitration History’ in Kaj Hobér and others (eds.), *Between East and West: Essays in Honour of Ulf Franke*, Juris Publishing (2010), p. 269.

³ See Section 4 below.

⁴ *Wetter J.G. East Meets West in Sweden // SvJT, 1978.* <<https://svjt.se/svjt/1979/44https://books.google.se/43>> (last visited — 14 April 2019).

⁵ Внешнеэкономические связи СССР: официальная статистика за 1980 г. <http://istmat.info/files/uploads/17071/narhoz_ssr_1980_vneshtorg.pdf> (последнее посещение — 14 апреля 2019 г.).

⁶ Внешнеэкономические связи СССР: официальная статистика за 1980 г. С. 539 <http://istmat.info/files/uploads/17071/narhoz_ssr_1980_vneshtorg.pdf> (последнее посещение — 14 апреля 2019 г.).

⁷ Арбитражная практика. Часть IX: Практика Внешнеторговой арбитражной комиссии 1979 – 1981 гг. / Подгот. В.А. Кабатовым. — М., 1984. С. 76—80.

The figures in Stockholm for the same period reflect the same trend, with three East – West arbitrations reported between 1975 – 1977.¹ From SCC statistics we learn that Soviet parties participated in five SCC arbitrations in the decade 1980 – 1990.

One of the very first cases under the 1977 Optional Clause Agreement from this era is a dispute which came to develop into a high-profile case in the public domain between the Soviet Union and the United States, relating to the construction of the Embassy of the United States in Moscow. The dispute was finally settled in 1992, but serves as an interesting example of the role played by East-West arbitration in Stockholm. Professor Kaj Hobér notes that the “*handling of the dispute illustrates the role that arbitration can play also during such a politically tense period as the Cold War*”, and also an illustration of “*the central role played by the SCC – placed as it is between East and West – in facilitating the resolution of disputes between parties from these geographical areas.*”²

In the wake of political developments in the early 1990s, international trade relations increased as the former republics of the Soviet Union – now in their capacity of new independent states – began to move towards a market economy. As pointed out by Professor Alexander Komarov regarding this era; “*One of the immediate results of abandoning a centralized economic system was the rapid growth of the number of private enterprises involved in business activity including cross-border transactions.*”³

In parallel with this development, East-West cases in Stockholm began to increase.

Between 1992 and 1995, the SCC saw between 40 and 50 new Russian cases every year, which represented more than half of the yearly SCC caseload at the time. This increase of claims against Russian companies and organizations often had its origin in events affected by the dissolution of the Soviet Union.

In the SCC archives are some cases related to the 1991 - 1992 crisis of non-payments in the Soviet Union. Often disputes concerned defaulted payments and admitted debts, which occurred because of the disintegration of the Soviet Union, depreciation of the currency and bankruptcies of state financial institutions that followed.⁴ Many of these cases did not in the end result in arbitral awards, but were settled, or withdrawn for other reasons. However, although a minority of cases from this period resulted in an award on the merits,⁵ the first wave of Russian disputes fueled the development of international arbitration both in Sweden and in Russia. This opened the way for exchange of expertise among Swedish and Russian

¹ *Wetter J.G.* East Meets West in Sweden // SvJT. 1978. <<https://svjt.se/svjt/1979/44https://books.google.se/43>> (last visited — 14 April 2019).

² 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) 121-138.

³ Alexander S. Komarov, ‘Remarks on the Development of International Commercial Arbitration in Modern Russia’ in Kaj Hobér and others (eds.), *Between East and West: Essays in Honour of Ulf Franke*, Juris Publishing (2010), p. 297.

⁴ Ковнир В.Н. История экономики России: учеб. пособие. — 2-е изд. — М.: Логос, 2011. 472 с.

⁵ The SCC archives contain 38 final awards on the merits involving Russian parties from this period.

arbitration experts, sharing of experience and building of important relationships for the development of international arbitration at a global level, including recognition of Stockholm as a venue for East-West disputes.

3. East-West cases in Stockholm in the 21st century

From the beginning of the 1990s, the inflow of Russian cases to the SCC settled at 10 – 15 arbitrations every year. Statistical analysis of the SCC's Russian cases filed between 2000 and 2019 demonstrates a variety of cases which include both high-profile disputes and minor low-value disputes. The scale of disputed values ranged from 5000 EUR to approximately 45 bln EUR.

The majority of East-West cases filed at the SCC during this time concern delivery of goods, machinery and commodities. Recent trends specific to Russian cases are the many claims relating to contracts for gas, oil and other energy-related disputes. As of April 2019, the SCC has seen more than twenty gas pricing disputes involving Russian interests, cases characterized by very high values and long-term contracts.

Political tensions and economic turbulence following the Russia – Ukraine crisis of 2014 resulted in a considerable inflow of cases filed both by and against Russian parties. As a consequence, in 2014 – 2016 the SCC saw the number of Russia-related cases doubled.

From the outset of the crisis it has been important for the SCC to underscore that the complexity of the situation, and later EU sanctions, does not affect the parties' possibilities to arbitrate their disputes in Sweden as a neutral venue.¹

As the size and diversity of nationalities represented in the SCC caseload has grown substantially in later years, SCC governing structures have come to include changes to reflect this development. Since 2006, the SCC Board therefore hosts both Swedish and international arbitration experts. Professor Alexander S. Komarov was among the first group of international experts to be appointed to the SCC Board following this amendment to SCC practice, a capacity in which he has made substantial contributions to the development of East-West arbitration.²

4. SCC investment disputes involving Russian interests

¹ Д. Биичи, Д. ван Харсолт-ван Хоф, Аннетт Магнуссон, «Потенциальное влияние санкций ЕС на международные споры, администрируемые европейскими арбитражными институтами», Legal Insight | № 5 (41) | 2015, https://sccinstitute.com/media/80976/legal_insight_05_2015_sanction.pdf

² Professor Komarov was a member of the SCC Board between 2006 – 2011. Members of the SCC Board are appointed by the Board of Directors of the Stockholm Chamber of Commerce.

The Russian Government adopted the first Model Investment Protection Treaty in 1992.¹ The treaty included three dispute resolution options at the investor's choice; a court or "arbitrazh court" in the recipient state, arbitration at the SCC or *ad hoc* arbitration under the 1976 UNCITRAL Arbitration Rules². Using the model treaty, many of the treaties which followed – also referred to as first generation Russian BITs – include a reference to the SCC.³

The choice of the SCC in the first generation BITs could be said to reflect the tradition of third-country arbitration, which likely developed in response to geopolitical tensions at the time between the USSR and Western countries. By the time of the dissolution of the Soviet Union, the SCC had emerged as an established international arbitral institution, not only for Russian parties but at a wider international level. And in the bilateral investment treaties concluded between CIS countries or former Soviet republics in general, the SCC was referred to in many of the Russian instruments.

In the years that followed, a considerable number of treaty-based investor-state claims have been filed at the SCC, including under these instruments.

As of 31 December 2018, a total of 106 investor-state cases had been filed with the SCC since the very first case in 1993. The majority of these have been heard under the SCC Rules.⁴ In 21 of the cases, investors were of Russian nationality. On the respondent side, post-Soviet states have appeared in 49 investor-state arbitrations at the SCC up until 2018.

According to the most recent annual report from UNCTAD on investor-state arbitration cases, these numbers make the SCC Rules the third most commonly used arbitration rules in investor-state arbitration cases filed to date throughout the world,⁵ a reflection partially of 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.⁶ 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.⁷

CIS-related investor-state claims at the SCC follow the general pattern of investor-state claims experienced at the SCC as far as the protections invoked by claimants are concerned.

¹ Постановление Правительства РФ №395 от 11 июня 1992 «О заключении соглашений между Правительством Российской Федерации и правительствами иностранных государств о поощрении и взаимной защите капиталовложений».
<http://pravo.gov.ru/proxy/ips/?docbody=&prevDoc=102071479&backlink=1&&nd=102016739> (last visited on 19 April 2019)

² Id., art. 6

³ At the moment of writing, 27 first generation Russian BITs are effective, corresponding to more than 40% of all Russian BITs currently in force.

⁴ 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.

⁵ cf UNCTAD Investment Policy Hub <<https://investmentpolicyhub.unctad.org>> accessed 16 March 2019.

⁶ Cf. 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.

⁷ cf Energy Charter Treaty (signed 17 December 1994, entered into force 16 April 1998) art 26.

However, a few distinctive features of CIS-related investment cases can be observed, for example, which of the state agencies involved would represent the respondent. Settlements are very rare, constituting less than 2% of the whole CIS-related caseload ¹.

Conclusion

The transformation of commercial and political relations between East and West in recent decades has only increased the interest of international business in fair dispute resolution in neutral venues. Coupled with the historical perception of Sweden as a neutral and friendly neighbour, it has formed the modern trend for including the SCC in Russian commercial contracts and investment treaties irrespective of the geographic location of the parties.

Stockholm is proud of its heritage in East-West dispute resolution, and will continue to work towards meeting the needs and expectations of parties in East-West contexts in the future as well.

¹ As of April 2019, only 1 CIS-related case has been withdrawn due to settlement. The number of settlements is somewhat higher in non-CIS arbitrations, with 2 cases terminated by claimants following negotiation with the respondent state.