SCC Arbitration Institute

SCC Policy

Deciding the seat in intra-eu investment arbitrations adminstered under the SCC Rules

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Background

The SCC Arbitration Institute ("SCC") in Stockholm, Sweden, provides parties with a neutral forum and an impartial process for the reliable, efficient, and expeditious resolution of disputes worldwide and remains one of the world's top fora for the administration of investment treaty arbitrations between investors and host states. Since the Cold War, the SCC has played an important role in the administration of "East-West" commercial and investment treaty disputes.

Sweden has since 1995 been a member state of the European Union ("EU"). EU law thus forms an important part of the Swedish legal order. In recent years, the Court of Justice of the European Union ("CJEU") has ruled that EU law precludes so-called "intra-EU" investment arbitration,[1] invalidating the dispute resolution mechanisms contained in various international investment treaties between member states of the EU, most of which entered into force prior to at least one of the contracting parties acceding as a member state of the EU. In 2020, 23 EU member states, not including Sweden, signed an agreement for the termination of all intra-EU bilateral investment treaties.[2]

However, many of these international investment treaties remain in force and investors from EU jurisdictions have continued to request investment arbitration against EU host states, mostly administered and or seated outside of the EU legal order.

Moreover, the EU has in its enlargement policy designated several countries as candidates or potential candidates for EU membership.[3] Upon accession, any of such candidate countries' international investment treaties signed with EU member states would be affected by the rulings of the CJEU.

In light of the above background, this SCC policy on deciding the seat in intra-EU investment arbitrations administered under the SCC Rules ("Policy") clarifies the role of the seat of arbitration, the applicable SCC Rules and practice, and the Board's position in deciding on the seat of arbitration pursuant to Article 25 (1) of the SCC Arbitration Rules ("SCC Rules") in the investment treaty arbitration context.

[1] See, e.g., CJEU Case C-284/16 Slowakische Republik v Achmea BV; Case C-741/19 République de Moldavie v Komstroy LLC.
[2] Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, SN/4656/2019/INIT, OJ L 169, 29.5.2020.
[3] European Commission, EU enlargement <https://commission.europa.eu/strategy-and-policy/policies/eu-enlargement_en>.

The seat of arbitration

The seat of arbitration is a legal fiction. It does not refer to the physical location or venue of the arbitration, but rather the legal place of arbitration. Its designation is important because the seat determines which court(s) has jurisdiction to try actions concerning, e.g., the challenge to and appointment of an arbitrator, the setting aside of an arbitral award, or the Arbitral Tribunal's jurisdiction.[4] For this reason, the designated seat should be a city or judicial district, and not a country.

The arbitration proceedings are thus conducted within the legal framework of the seat.[5] However, the designation of the seat of arbitration does not prevent, e.g., an oral hearing, from taking place in another location, or even virtually.[6]

The application of the law of the seat of arbitration to the proceedings can thus have a particularly significant effect where such law is affected by a potentially restrictive legal order, such as in the case of investment treaty arbitration and EU law, as well as the law of the member states of the EU, including Sweden,[7] of which EU law forms a part.

The SCC Rules and practice

Pursuant to Article 2 (2) of the SCC Rules, the SCC has an obligation *"to act in the spirit of the SCC Rules and make every reasonable effort to ensure that any award is legally enforceable."*

According to Article 25 (1) of the SCC Rules, *"[u]nless agreed upon by the parties, the Board shall decide the seat of arbitration."* In general, and particularly in commercial cases, the parties will have agreed on the seat of arbitration in their arbitration agreement.[8] However, where there is no agreement, or the agreement is unclear, the SCC will provide the parties the opportunity to agree on the seat of arbitration, if they have not addressed the question in the request for arbitration or answer thereto.

[4] K. Löf et al, International Arbitration in Sweden: A Practitioner's Guide (Second Edition) (2021), footnote 189, p. 326.
[5] J. Ragnwaldh et al, A Guide to the SCC Arbitration Rules (2017), p. 81.
[6] J. Ragnwaldh et al, A Guide to the SCC Arbitration Rules (2017), p. 82.
[7] Importantly, Sweden maintains its reputation as providing a neutral and arbitration friendly legal environment. See, e.g., R. Oldenstam et al, Mannheimer Swartling's Concise Guide to Arbitration in Sweden, (Second Edition) (2019), p. 19.
[8] K. Löf et al, International Arbitration in Sweden: A Practitioner's Guide (Second Edition) (2021), p. 246.

Where the parties cannot agree, the Board will decide the seat of arbitration. In making its decision, the Board considers *"all relevant circumstances, such as the nationality of the parties, practical aspects, cost-effectiveness and the legitimate expectations of the parties when drafting the arbitration agreement".*[9]

In the SCC's practice, the parties' choice to refer disputes to the SCC has often given rise to the conclusion that the parties expected the dispute to be seated in Stockholm and thus to be governed by the Swedish Arbitration Act, in the absence of any relevant circumstances mandating that another seat be designated.[10]

Policy on deciding the seat in intra-EU investment arbitrations administered under the SCC Rules

Given the above, as well as the important role of the seat of arbitration to the proceedings, and the role and practice of the Board under the SCC Rules, the SCC considers it important to clarify its practice in respect to intra-EU investment treaty arbitration and the Board's decisions on the seat of arbitration in the absence of an agreement of the parties.

Mindful of the SCC's obligation to make every effort to ensure an arbitral award rendered under the SCC Rules is legally enforceable, and that awards in intra-EU investment treaty arbitrations seated in the EU will in general not be enforceable within the EU, in the absence of an agreement of the parties on the seat, the SCC's policy in investment treaty arbitrations is as follows.

In investment treaty arbitrations between parties based in the EU, and/or a state that is a candidate or potential candidate for EU membership, the Board will not decide that Stockholm, or any other city, or any other judicial district within the EU, or within a state that is a candidate or potential candidate for EU membership, shall be the seat of arbitration.

[9] J. Ragnwaldh et al, A Guide to the SCC Arbitration Rules (2017), p. 81.
[10] J. Ragnwaldh et al, A Guide to the SCC Arbitration Rules (2017), p. 81.

In such cases, the Board will decide on a seat located outside the EU and those states listed as candidates or potential candidates for EU membership.

Further information

For enquiries or further information, please contact the SCC Secretariat by email at: arbitration@sccarbitrationinstitute.com.