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Summary Procedure in the SCC Arbitration Rules of 2017: Shifting the Paradigm of Preliminary Objections in International Arbitration

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The new arbitration rules of the Arbitration Institute of the Stockholm Chamber of Commerce ("**SCC Rules**" or "**Rules**") entered into force on 1 January 2017. These Rules introduced a new procedure in Article 39 that is, in fact, uncommon to most of the renowned arbitration rules, including the ICC Rules of Arbitration (2012), the LCIA Arbitration Rules (2014), the ICSID Arbitration Rules (2006), and the UNCITRAL Arbitration Rules (2010). The said article in the pertinent part reads as follows:

> Article 39 Summary procedure
> (1) A party may request that the Arbitral Tribunal decide one or more issues of fact or law by way of summary procedure, without necessarily undertaking every procedural step that might otherwise be adopted for the arbitration.
> (2) A request for summary procedure may concern issues of jurisdiction, admissibility or the merits. It may include, for example, an assertion that:
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> (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
> (iii) …

Article 39 empowers SCC tribunals, at the request of either party, to rule on certain issues of *fact* or *law* in a summary procedure. As its name suggests, a review under the summary procedure will not involve a thorough assessment of the facts surrounding the case. It will rather provide parties with an opportunity to *isolate* certain matters of *fact* or *law*, and bring them separately to the attention of arbitral tribunals at any time throughout the proceedings, and even obtain an early judgment confined to these particular matters.

Furthermore, such a request for summary procedure under Article 39 does not necessarily have to take the form of accustomed preliminary objections such as jurisdictional and/or admissibility objections, but parties may even seek for a decision on a matter pertaining to the merits of the case.

The possibility of obtaining a decision on a particular issue relating to the merits could perhaps be deemed as the most distinctive feature of the summary procedure. This is especially so because of the fact that parties to arbitration are already able to seek a decision on the matters of jurisdiction and admissibility by way of preliminary objections without a need for a summary procedure; however, a conclusive resolution on a merits-related issue, broadly speaking, has not so far been possible before a final award is rendered.

While it is true that it is too early to foresee how parties will make use of Article 39, and arbitral tribunals react to requests thereunder, the benefits of such provision for arbitral proceedings in general, seem to be evident.

First, and for obvious reasons, the summary procedure will **ensure procedural economy** by allowing a party against whom an unsustainable, meritless, or even abusive claim is brought an opportunity to terminate the proceedings at an early stage. This possibility is clear from Article 39 (2) as it expressly illustrates two instances where such a request for summary procedure might be made (see above, Article 39 (2) (i) and (ii)).

These two grounds for a request for summary procedure are, in essence, not novel to international tribunals. The wording adopted in Article 39 (2) (i) and (ii) is similar to the manner in which the International Court of Justice described the general form of admissibility objections on several occasions, most famously in the Oil Platforms Case. (See, Oil Platforms [Iran v USA]). The same description has also been followed by some of investment tribunals. From this perspective, Article 39 of the SCC Rules might partly be viewed as a codification of the practice of international tribunals. This being said, such a codification was indeed crucial and needed. Namely, there is no description with respect to the extent and form of admissibility objections either in the Statute and the Rules of the Court (1978) or in arbitration rules. That leads to inconsistent applications, especially among investment tribunals, as it will be discussed below.

In line with the first benefit, which serves the procedural economy, the SCC summary procedure may also put an end to the ongoing debate around the distinction between jurisdiction and admissibility. To be more precise, it might be argued that the summary procedure contained in the SCC Rules may render the implications of this distinction irrelevant. Arbitral practice has, so far, shown that, in bifurcated proceedings, arbitral tribunals are often inclined to reject to rule on admissibility objections and certain types of jurisdictional objections (most commonly objections to jurisdiction *ratione materiae*) raised by parties due to two main reasons. First, there is only limited evidence before the tribunal at this stage to rule on such complex objections. Second, a ruling on preliminary objections of this kind highly carries the risk of interfering with the merits, or prejudging them. Accordingly, numerous merits-related issues remain non-adjudicated at the jurisdictional stage, and they are forwarded to the merits phase without any conclusive determination by tribunals on points of *fact* or *law*. Consequently, the party previously raising such objections has to bring the same matters before the tribunal again at the merits stage, and other party naturally responds to these objections. This not only entails a waste of the time spent by the parties when raising and responding to the voluminous objections of this kind, but also the time spent by tribunals when reviewing these preliminary objections. Moreover, it also obliges arbitral tribunals to give a ruling at the merits stage on the issues which do not, in fact, fundamentally belong to the merits.

In an ideal bifurcated proceeding, tribunals are expected to discuss only the core substantive claims underlying the dispute at the merits stage, e.g., whether there is a violation of the relevant

contract/treaty or not. Inadmissible claims, or any other claim which is not legally feasible to a determination on its merits, should be eliminated at the jurisdictional stage. It, therefore, seems that Article 39 of the SCC Rules will be an effective tool which will ensure more efficient and expeditious functioning of the merits stage by enabling parties to request arbitral tribunals to conclusively resolve the matters which are important to maintain the integrity of the merits at an early stage.

Another benefit of Article 39 is the **strengthening of the mandate of arbitral tribunals to conduct the proceedings**. As stated above, the lack of an explicit legal ground prevented some tribunals to rule on admissibility objections. These tribunals were of the opinion that they cannot rule on the admissibility of claims, as applicable rules do not accord them any power to do so. Also, regarding treaty arbitration, Methanex case is a clear example where the tribunal had categorically rejected to rule on admissibility objections by arguing that the applicable rules do not confer on the tribunal any power to rule on the admissibility of the claims. Some other tribunals did not expressly reject giving a ruling, but they simply disregarded such objections, and decided to join them to merits – again, primarily due to the risk of trespassing to the merits with lack of full evidence. One may argue that arbitral tribunals may freely decide on merits-related issues for this is already inherent to the tribunals' general power to conduct the proceedings. Nevertheless, Article 39 of the SCC Rules provides an effective legal ground for tribunals to rule on such preliminary objections without any fear of intervention in the merits or acting *ultra petita* in the form of a summary procedure, subject to the parties' request. Arbitral tribunals will have diminished discretion to disregard such preliminary objections given that, under the clear language of Article 39 (1), the lack of full evidence or trespassing into the merits will no longer be an easy excuse to make. After all, Article 39 will also pave the way for an established case law.

In bifurcated proceedings, a ruling on the admissibility of claims in conjunction with rulings on the objections to subject-matter jurisdiction might be a very effective procedural tool for tribunals to make a *prima facie* review of the case, sort out the core claims to be heard at the merits stage, and hereby exclude inadmissible and sometimes abusive claims at the very early stage of the proceedings. Put differently, they may enable arbitral tribunals to narrow down the scope of the claims to be ruled on at the merits stage, and this may facilitate resolving disputes in a prompt and efficient manner. However, due to the practical concerns hitherto discussed, preliminary objections did not always serve well to prepare a case for a trial on merits. It is likely (and expected) that future arbitral proceedings to be conducted under the auspices of the SCC Institute will make a paradigm shift.

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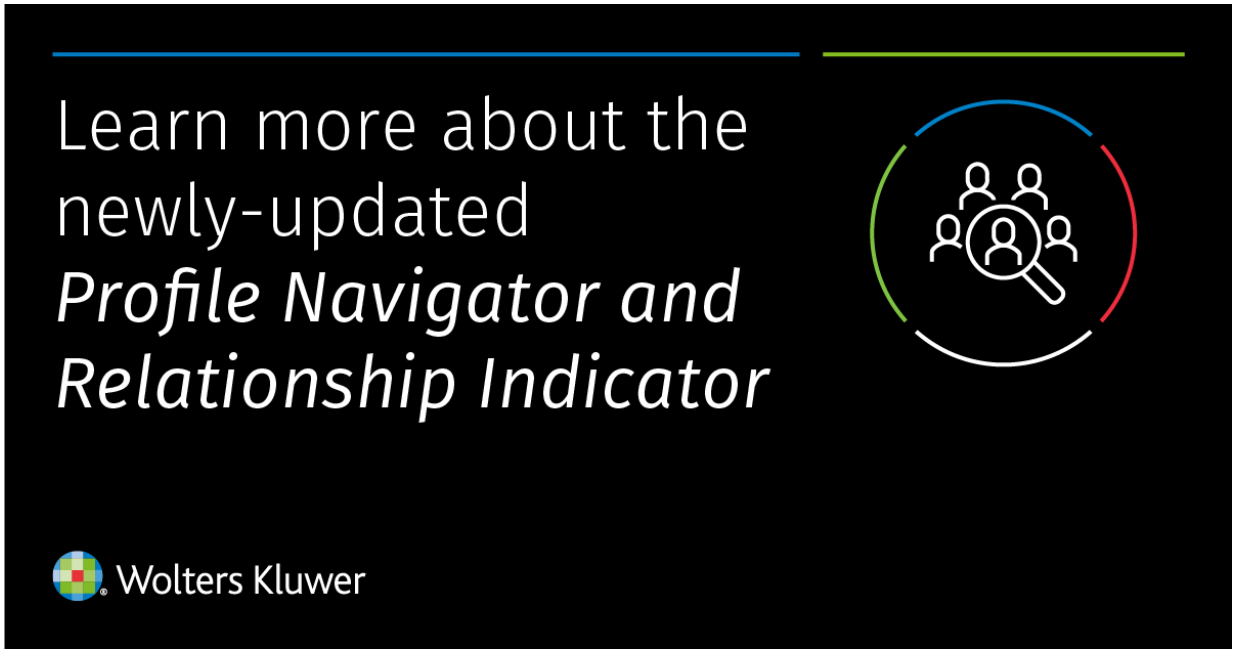

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