

SCC Practice Note

Mediation Proceedings 2003-2017

December 2017



SAMUEL CAREY



ARBITRATION INSTITUTE
OF THE STOCKHOLM CHAMBER OF COMMERCE

SCC Practice: Mediation

Samuel Carey*



1. Introduction

Mediation offers a speedy and cost-efficient dispute resolution method for parties who wish to resolve their disputes amicably. Over the past decade, mediation has gained popularity among commercial parties.¹ It is considered both a supplement and an alternative to arbitration. While arbitration resembles court litigation, mediation is a facilitative process where parties reach an amicable settlement with the assistance of a mediator.

Mediation is an informal, confidential, and flexible dispute resolution method where a neutral third person helps the parties reach a voluntary resolution of their dispute. Mediation is business friendly and allows the parties to resolve their dispute without sacrificing their business relationship. Parties often continue to cooperate after the closure of a successful SCC mediation procedure.

Another great advantage of mediation is the flexible nature of the method. The parties are in charge of the procedure. The mediator is an independent intermediary who assists the parties in reaching a mutually satisfactory settlement of the dispute. The mediation is controlled by the parties, and the parties can at any point during the process choose to end the mediation and commence an arbitration or litigation process.

The Stockholm Chamber of Commerce established a Mediation Institute in 1999. In 2014, the Mediation Institute merged with the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), making the administrative process for mediations more efficient and streamlined. The SCC Mediation Rules, which had originally entered into force in 1999, were revised at the time of the 2014 institutional merger (*see sections 2.1–2.2*).

This practice note will provide a survey of SCC mediation from 1999 to date. First, the 1999 Mediation Rules and the 2014 amendments will be outlined. Second, the article will discuss some of the primary procedural issues to be considered by parties, counsel and mediators when undertaking mediation under the SCC Mediation Rules. Finally, an analysis of all mediation cases administered by the SCC from 2003 to 2017 will be presented.

2. Mediation and Consent

Like arbitration, mediation is a consent-based process. The threshold for consent, however, is higher when it comes to mediation than arbitration. In arbitration, consent is deemed sufficient if the parties have agreed to an arbitration clause in their contract. In mediation, the parties must expressly consent to engaging in the process once the dispute has arisen.

Under the Swedish Arbitration Act, a court may not assert jurisdiction over claims covered by an arbitration agreement.² The same does *not* apply to an agreement to mediate; under Swedish law, such an agreement is not an impediment to litigation

* Legal Intern at the Arbitration Institute of the Stockholm Chamber of Commerce.

¹ Henry J. Brown and Arthur L. Marriot, *ADR Principles and Practice*, second edition (Sweet & Maxwell: London, 1999), p. 127.

² See, Section 4(1), Swedish Arbitration Act 1999.

or arbitration.³ This principle is also incorporated in Article 2 of the 2014 SCC Mediation rules, which states that, “[u]nless the parties have agreed otherwise, an agreement to mediate pursuant to these Rules does not constitute a bar to court proceedings or a bar to initiate arbitration.”⁴

In other words, even if the parties have included a mediation clause in their contract, the mediation cannot proceed without express agreement of all the parties to participate.⁵ If a respondent party does not accept the request for mediation, the request will be dismissed.⁶

2.1. The 1999 Mediation Rules

The majority of the mediation cases administered by the SCC to date were administered under the 1999 SCC Mediation Rules. Those rules provided that the mediator could be appointed jointly by the parties, or by decision of the SCC Board.⁷ The mediation was to be concluded within two months from the date of referral of the dispute to the mediator.⁸ Notably, the Rules allowed the parties to agree that the mediator be appointed as arbitrator for the purpose of turning their settlement agreement into a consent award, enforceable under the New York Convention.⁹

2.2. The 2014 Mediation Rules

The 1999 Mediation Rules were revised in 2014, when the Mediation Institute was brought under the umbrella of the SCC Arbitration Institute. The most important revision was the removal of the two-month time limit on all mediations. The 2014 Rules provide no defined time period under which a mediation must be completed. Another significant revision was the provision in the 2014 Rules that the SCC will ask the parties whether or not they would like to appoint the mediator jointly, or if they prefer that the SCC to make the appointment. The parties’ comments in this regard also frequently include requests regarding the mediator’s background and qualifications.

Importantly, the 2014 Rules maintained the provision that the parties may choose to “upgrade” the mediator into an arbitrator, thus allowing the terms of a settlement agreement to be included in an enforceable consent award.¹⁰

2.3. SCC Mediation Procedure

The initiation of mediation under the SCC Mediation Rules is similar to that of arbitration. According to Article 4, mediation pursuant to the rules is deemed to have commenced from the date that one party submits a request for mediation.¹¹ The SCC’s Secretariat will then forward this request to the respondent party, just as under the Arbitration Rules. The defining difference is that unlike arbitration,

³ See, Lag om medling i vissa privaträttsliga tvister (2011:860). See also, Government proposition 2010/11:128, Section 7.4. Cf. Article 2, SCC Mediation Rules 2014.

⁴ Article 2, SCC Mediation Rules 2014.

⁵ Article 4(3), SCC Mediation Rules 2014. Cf. Article 9(3) and Article 10(4), SCC Arbitration Rules 2017 (the ‘SCC Rules 2017’).

⁶ Article 4(3), SCC Mediation Rules 2014. See e.g., SCC Mediation 2013/156; SCC Mediation 2013/146; SCC Mediation 2012/049; SCC Mediation 2011/152; SCC Mediation 2011/113; SCC Mediation 2011/095; SCC Mediation 2008/107.

⁷ Article 6, SCC Mediation Rules 1999. Cf. Article 17, SCC Arbitration Rules 2017.

⁸ Article 11(1), SCC Mediation Rules 1999.

⁹ Article IV, United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958 (the ‘New York Convention’).

¹⁰ Article 14, SCC Mediation Rules 2014.

¹¹ Article 4, SCC Mediation Rules 2014. Compare, Article 2 and Article 3, ICC Mediation Rules 2014

the opposing party may reject the request to mediate.¹² Along with the request for mediation, the party requesting the mediation is asked to pay the registration fee in accordance with the Schedule of Costs found in Appendix II of the Rules.¹³

According to Article 10, on acceptance of the mediation, the SCC will set the Advance on Costs based on the estimated amount of the Mediation Costs.¹⁴ The parties are expected, unless agreed otherwise, to contribute equally to the Advance on Costs.¹⁵ If one or both parties fail to pay its share of the Advance on Costs, the dispute may not proceed “either wholly or partly to such an extent as is attributable to the missing payment.”¹⁶

The parties may agree to jointly appoint a mediator, otherwise the mediator will be appointed by the SCC.¹⁷ In instances where the parties have agreed to jointly appoint a mediator, the SCC shall appoint the chosen mediator.¹⁸ Where the SCC appoints a mediator, the SCC will solicit the opinions of the parties before appointment.¹⁹ In cases where multiple mediators are to be appointed, the parties shall appoint an equal number of mediators, with the SCC appointing one mediator to act as Chairperson.²⁰

The mediator must be “impartial and independent”²¹ and must disclose any circumstances that are “likely give rise to justifiable doubts as to his/her impartiality or independence.”²² The mediator may also be removed after appointed to the dispute, where the mediator is “unable to perform his/her duties or fails to perform his/her functions.”²³ In such instances, the SCC will solicit the views of the parties,²⁴ and appoint a new mediator pursuant to Article 6 of the Rules.

After the payment of the Advance on Costs and the appointment of the mediator, the SCC shall refer the mediation dispute to the mediator.²⁵ After the referral of the dispute, the mediator must act diligently to insure against undue delay to the proceedings,²⁶ consult with the parties to establish a timetable for the mediation,²⁷ provide each party with sufficient time to present their case,²⁸ and unless otherwise agreed, consult privately with each party.²⁹

The mediation may be terminated where there has been a settlement between the parties, where the mediator decides that any further efforts to mediate are unlikely to lead to a resolution of the dispute, or a written request from one of the parties to the mediator requesting the termination of the mediation.³⁰ If the mediation is

¹² Article 4(3), SCC Mediation Rules 2014.

¹³ Article 5(1), SCC Mediation Rules 2014. *Cf.* Article 1(1), Appendix II, SCC Mediation Rules 2014.

¹⁴ Article 10(1), SCC Mediation Rules 2014. *Cf.* Article 15, SCC Mediation Rules 2014.

¹⁵ Article 10(2), SCC Mediation Rules 2014.

¹⁶ Article 10(5), SCC Mediation Rules 2014.

¹⁷ Article 6(1), SCC Mediation Rules 2014.

¹⁸ Article 6(2), SCC Mediation Rules 2014.

¹⁹ Article 6(1), SCC Mediation Rules 2014.

²⁰ Article 6(3), SCC Mediation Rules 2014.

²¹ Article 7(1), SCC Mediation Rules 2014.

²² Article 8(1), SCC Mediation Rules 2014.

²³ Article 9(1), SCC Mediation Rules 2014.

²⁴ Article 9(2), SCC Mediation Rules 2014.

²⁵ Article 11, SCC Mediation Rules 2014.

²⁶ Article 12(1), SCC Mediation Rules 2014.

²⁷ Article 12(2), SCC Mediation Rules 2014.

²⁸ Article 12(3), SCC Mediation Rules 2014.

²⁹ Article 12(4), SCC Mediation Rules 2014.

³⁰ Article 13, SCC Mediation Rules 2014.

terminated, the mediator is obligated to inform the SCC of such termination. Furthermore, if the mediation is terminated on the grounds of a settlement agreement, the parties may, subject to the consent of the mediator, request the mediator to act as an arbitrator and request him/her to confirm the settlement agreement in a consent award.³¹

3. Mediation into Arbitration

Article 14 of the 2014 Mediation Rules provide that, “[i]n case of settlement, the parties may, subject to the consent of the Mediator, agree to appoint the Mediator as an Arbitrator and request him/her to confirm the settlement agreement in an arbitral award.” The procedural hurdles that may arise from Article 14 are discussed below.

3.1. Turning a mediator into an arbitrator

Parties may wish to turn their mediation into an arbitration. There are two main reasons for this: first, the mediation may have failed to produce a settlement agreement, or contentious issues may remain between the parties. Second, the parties may wish to turn their settlement into a binding consent award.

According to Article 7(2) of the Rules, the mediator may not act as an arbitrator in any future arbitrations relating to the subject matter of the dispute, unless the parties have agreed otherwise.³² In other words, without the consent of both parties, the mediator is barred from acting as an arbitrator in disputes between the parties relating to the mediation.

The parties may choose to appoint their mediator as arbitrator because it may assist with the expediency and cost effectiveness of any unresolved issues remaining after the mediation. The mediator may have been selected based on relevant expertise, knowledge, and familiarity with the issues in dispute.³³

Mediators should take note of any potential issues of conflict or bias before accepting an appointment as arbitrator. A mediator may have expressed opinions on the positions of the parties during the mediation, which could lead a party to challenge the arbitrator’s impartiality or independence during the arbitration.³⁴

3.2. Turning a settlement agreement into a consent award

The Parties may wish to turn their settlement agreement into a consent award, which is an enforceable arbitral award. The practical purpose of rendering a consent award is that it ensures the enforceability of the settlement agreement under the New York Convention. According to the SCC Mediation Rules, parties may, subject to the consent of the mediator, appoint the mediator as an arbitrator for the purposes of recording the settlement agreement in an arbitral award.³⁵ The ability of an arbitrator to confirm a settlement agreement in the form of an arbitral award is confirmed in Article 45 of the SCC Arbitration Rules.³⁶

³¹ Article 14, SCC Mediation Rules 2014.

³² Article 7, SCC Mediation Rules 2014. *Cf.* Article 14, SCC Mediation Rules 2014. *Contra.* Article 12, UNCITRAL Model Law on Conciliation.

³³ Patricia Shaughnessy, ‘Turning mediation settlements into awards’, in Stefan Kröll, Andrea K. Bjorklund and Franco Ferrari (eds.) *Cambridge Compendium of International Commercial Arbitration and Investment Arbitration* (Cambridge: Cambridge University Press, forthcoming, 2018).

³⁴ Article 19(2), SCC Rules 2017.

³⁵ Article 14, SCC Mediation Rules 2014.

³⁶ Article 45(1), SCC Rules 2017. *See generally*, Howard M. Holtzmann, Joseph E. Neuhaus, et al. *A Guide to the 2006 Amendments to the UNCITRAL Model Law on*

4. Analysis of the Caseload

Since 2003, the SCC has administered 40 mediation cases, 34 under the 1999 Rules and 6 under the 2014 Rules. The following sections will provide a breakdown of relevant information for all closed (and one ongoing) mediation cases administered by the SCC under the 1999 and 2014 Rules.

4.1. Nationality of the Parties

There is an almost even split between Swedish and international users of the SCC's mediation services. Out of the 40 mediations administered by the SCC from 2003 to 2017, half involved two Swedish parties (20). During the same period, there were 14 mediations administered by the SCC that involved at least one international party.³⁷ Many of these international cases also involved at least one Swedish party. During this period, there has been six mediations between non-Swedish parties.

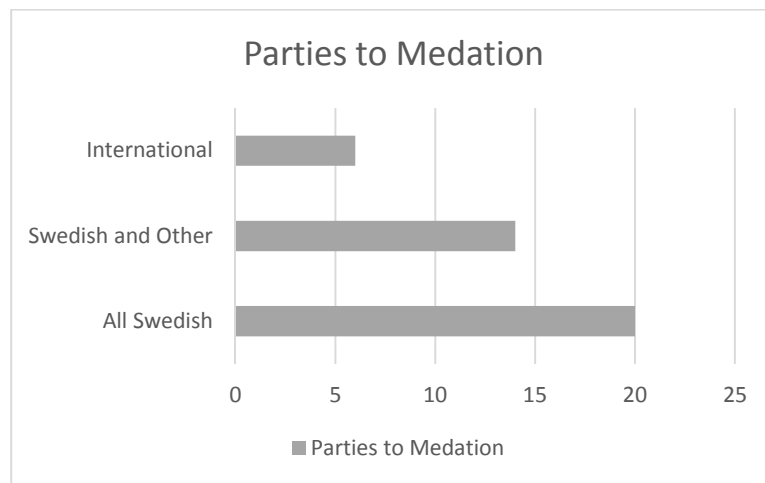


Figure 1: the above graph shows the distribution of parties to mediation into three categories: (1) International Parties, (2) Swedish and International Parties, and (3) both Swedish parties.

The overwhelming majority of parties to mediations administered by the SCC were Swedish. In addition to the Swedish parties there is a wide variety of nationalities who were involved in mediations administered by the SCC from 2003 to 2017.

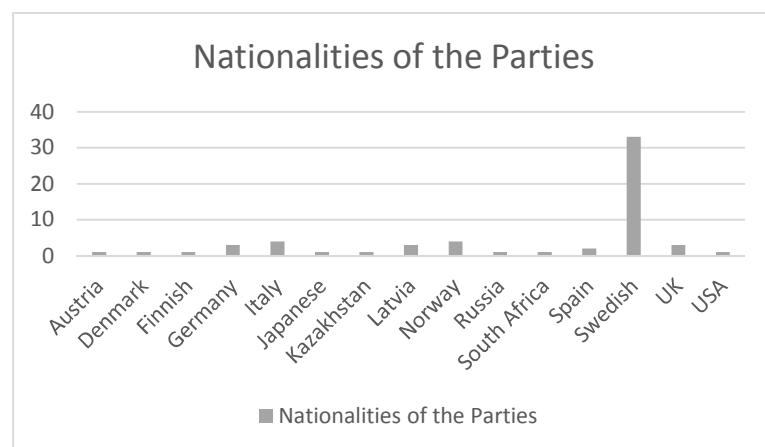


Figure 2: Distribution of Party nationalities in mediation cases from 2003 to 2017

International Commercial Arbitration: Legislative History and Commentary (Kluwer Law International, 2015), p. 30.

³⁷ SCC counts an international mediation as any mediation involving at least one foreign party.

4.2. Nationality of the Mediators

Mediators were appointed in 29 of the 40 mediation cases initiated. The remaining cases either settled before the appointment of a mediator, or one of the parties did not consent to the mediation. In cases where a mediator was appointed, the vast majority of mediators appointed were Swedish (27), one was from the UK, and one from the Netherlands.

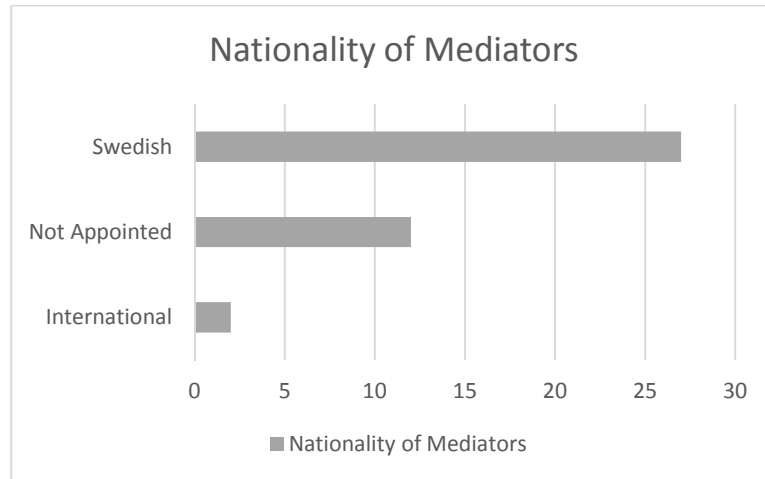
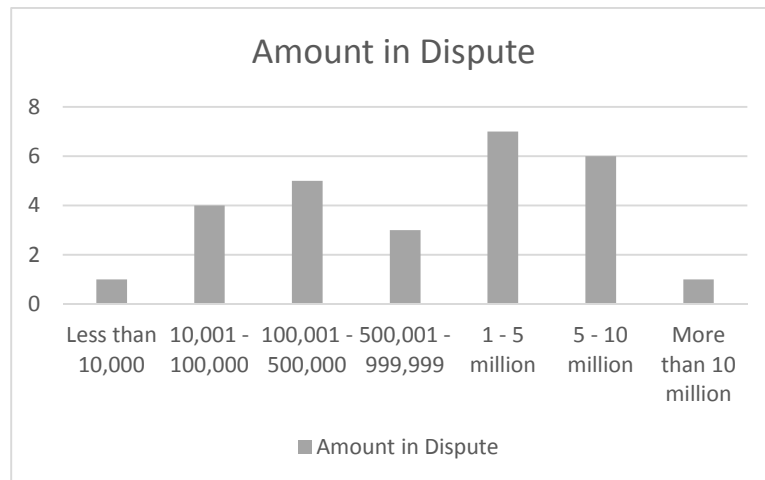


Figure 3: The distribution of nationalities in appointed mediators along with the number of mediations which did not appoint a mediator.

4.3. Amount in Dispute

The range of amounts in dispute in mediations administered by the SCC varied significantly. The amounts ranged from approximately EUR 4,000 to EUR 45 million.

A large portion of mediations administered by the SCC do not specify an amount in dispute. This may be because the SCC Mediation Rules do not require parties to provide a specific amount in dispute in their request for mediation. The requesting party are only required to provide (i) information about the parties and counsel, (ii) a summary of the dispute and (iii) a statement regarding the agreement to mediate.³⁸



³⁸ Article 4(2), SCC Mediation Rules 2014.

Figure 4: The amount in dispute (in Euros) in each mediation administered by the SCC from 2003 to 2017.

The largest portion of cases fell within the 1-5 million EUR range (7). This was closely followed by cases that fell within the 5-10 million EUR range (6). Though the figures do not necessarily provide a complete picture of the amounts in dispute in mediation cases administered by the SCC, they do show that mediation is not only for small-amount disputes.

4.4. Duration of the Mediation

As noted above (*see section 2.2*), the 2014 Mediation Rules does not include a time limit on the mediation process. The 1999 Rules required the mediation to be completed within two months of referral of the case to the mediator.³⁹ Of the 40 cases administered by the SCC to date, six were conducted under the 2014 Rules and 34 under the 1999 Rules. Despite the time limit in the 1999 Rules, most mediations lasted for longer than two months.

The numbers serve as an indication only, as information about duration is lacking in half of the mediations administered to date.

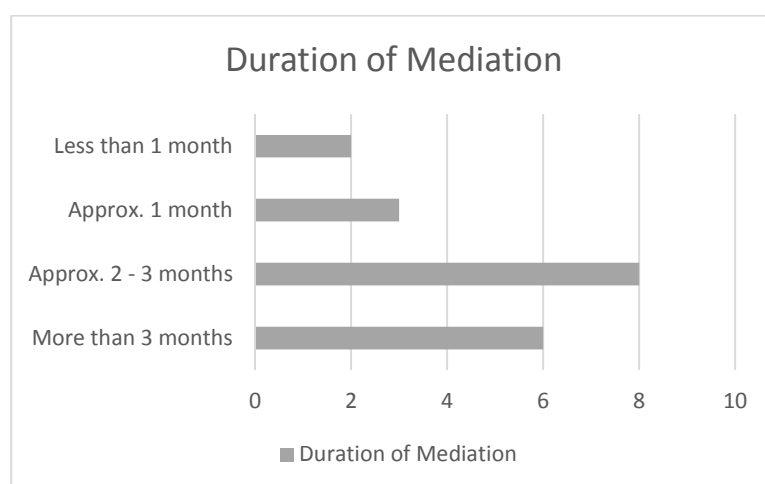


Figure 5: Distribution of duration of mediations from 2003 to 2017.

By comparison, the SCC Arbitration Rules stipulate that an award should be rendered within six months of referral of the dispute to the tribunal.⁴⁰

4.5. Reasons for Termination

Most mediations are terminated when the parties have reached a settlement agreement through their mediation proceedings. Only seven cases were terminated because further mediation efforts were unlikely to result in a settlement.

³⁹ Article 11(1), SCC Mediation Rules 1999.

⁴⁰ Article 43, SCC Rules 2017. *See*, Marie Öhrström 'Chapter XII: SCC Rules', in Rolf A. Schütze (ed.) *Institutional Arbitration: Article-by-Article Commentary* (Munich: C.H. Beck. 2013), p. 191.

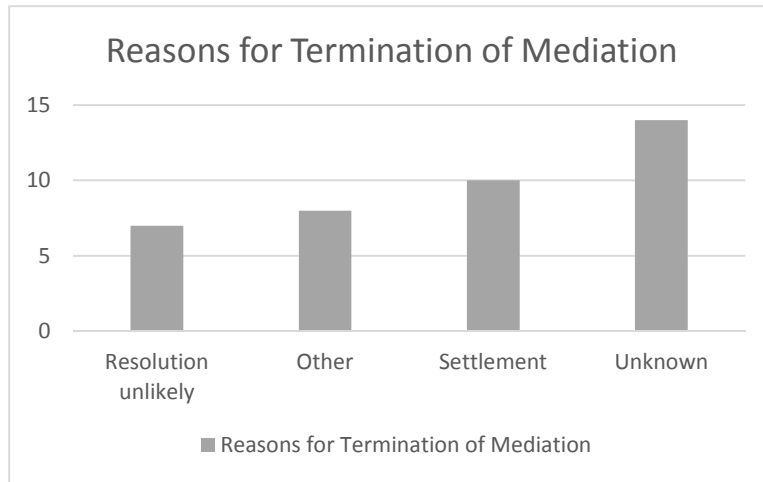


Figure 6: Distribution of reasons for terminating mediation.

The 14 cases which are labelled ‘Other’ were terminated for a variety of reasons, such as: failure of the parties to pay the Registration Fee,⁴¹ the respondent party’s refusal to participate in the mediation,⁴² withdrawal of the request to mediate, or settlement before the mediation was commenced.⁴³

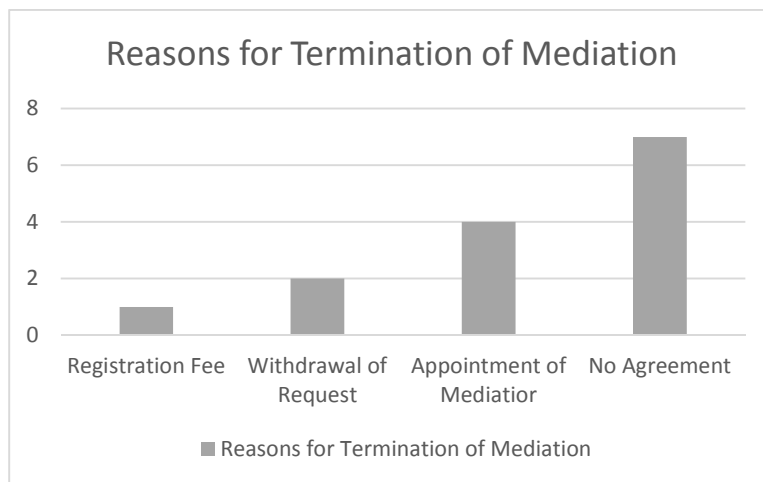


Figure 6: Distribution of reasons for termination of mediation other than settlement agreement or unlikelihood of settlement through mediation.

⁴¹ SCC Mediation 2009/012.

⁴² SCC Mediation 2013/156; SCC Mediation 2013/146; SCC Mediation 2012/049; SCC Mediation 2011/152; SCC Mediation 2011/113; SCC Mediation 2011/095; SCC Mediation 2008/107.

⁴³ SCC Mediation 2009/049; SCC Mediation 2013/168.

5. Conclusion

Mediation offers a speedy and cost-efficient dispute resolution method for parties who wish to resolve their disputes amicably. It is an informal, confidential, and flexible dispute resolution method that allows the parties to resolve their dispute while maintaining their business relationship.

Between 2003 and 2017, the SCC registered 40 mediation cases. The mediations administered during this period were almost evenly split between Swedish and international disputes. The majority of mediators appointed were Swedish.

The SCC mediation caseload to date shows that mediation is suitable in both low-value and high-value disputes. In 14 of the 40 mediations registered by the SCC since 2003, the stated amount in dispute has exceeded EUR 1 million.

In more than half of the registered mediations, the parties successfully reached a settlement. Most of these were settled due to the efforts of the mediator; some settled before a mediator was appointed. The latter scenario shows that a request for mediation itself can be an incentive for the parties to settle.