

## **ARBITRATORS' INDEPENDENCE AND IMPARTIALITY: A REVIEW OF SCC BOARD DECISIONS ON CHALLENGES TO ARBITRATORS (2010-2012)**

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*Felipe Mutis Tellez\**

### **1. Introduction**

It is a well-known principle of arbitration that arbitrators must be and remain independent and impartial from the parties, their counsel and the subject matter of the dispute. Among others, Article 14(1) of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the “SCC Rules”) expressly provides that arbitrators “*must be impartial and independent*”.

In the context of international arbitration, independence is concerned with questions arising out of the relationship between an arbitrator and one of the parties, whether financial or otherwise. This is considered to be an objective test, mainly because it has nothing to do with an arbitrator’s state of mind<sup>1</sup>. By contrast, the concept of impartiality is connected with actual or apparent bias of an arbitrator, either in favour of one of the parties or in relation to the issues in dispute. Impartiality is thus a subjective and more abstract concept than independence that primarily involves a state of mind<sup>2</sup>.

The arbitrators’ duty to be and remain impartial and independent has several legal consequences, out of which it is important to highlight the parties’ right to challenge any arbitrator if “*circumstances exist which give to justifiable doubts as to the arbitrator’s independence or impartiality*”, as Article 15(1) of the SCC Rules establishes. If a challenge is successful the arbitrator will be removed and subsequently replaced, all of which will be done according to the rules governing the arbitration proceedings<sup>3</sup>.

Under this “*justifiable doubts*” formula, analysis is directed to the existence of risks or possibilities of partiality, rather than requiring a certainty or probability of partiality. Therefore, it is not necessary for a party challenging an arbitrator to demonstrate that the individual lacks independence or impartiality; it is instead sufficient to show that there is enough doubt as to that arbitrator’s independence or impartiality<sup>4</sup>.

The Arbitration Institute of the Stockholm Chamber of Commerce (the “SCC”), founded in 1917, is not only the most important arbitration institution in Sweden, but is also one of the

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\* LL.B. (honors), Pontificia Universidad Javeriana (Colombia); LL.M. in International Dispute Resolution and Management, Centre for Energy, Petroleum and Mineral Law and Policy, University of Dundee (United Kingdom). Former Intern at the Arbitration Institute of the Stockholm Chamber of Commerce. Contact: [mutiste@hotmail.com](mailto:mutiste@hotmail.com). The opinions and views expressed in this article are those of the author, and do not reflect in any way those of the Arbitration Institute of the Stockholm Chamber of Commerce.

<sup>1</sup> Blackaby, N., and Partasides, C., with Redfern, A., and Hunter, M., Redfern and Hunter on International Arbitration (5<sup>th</sup> Ed) (Oxford, United Kingdom; Oxford University Press, 2009), p. 267.

<sup>2</sup> *Ibid.*, 477. However, Article 11(1) of the 2012 version of the ICC Rules expressly includes impartiality as a ground for challenging arbitrators. In any case, it is worth noting that impartiality could clearly be included in the “*or otherwise*” language of the 1998 version of the ICC Rules.

<sup>3</sup> See, for instance, Articles 16 and 17 of the SCC Rules.

<sup>4</sup> Born, G., International Commercial Arbitration (The Netherlands, Kluwer Law International, 2009), pp. 1474-1475.

leading institutions at the international level<sup>5</sup>. The SCC is composed of a Secretariat and a Board. While the former provides a trained staff for administration of cases, the latter has the authority to take all relevant decisions for the proceedings, including all challenges against arbitrators<sup>6</sup>.

Between January 2010 and November 2012 the SCC had several cases in which a party challenged one or more arbitrators. The variety of circumstances giving rise to arbitrator challenges, the legal arguments advanced by the parties in order to support their positions and the implications of the decisions taken by the SCC Board provide evidence that this subject deserves further analysis and study.

The purpose of this article is to review the decisions taken by the SCC Board from January 2010 to November 2012 when deciding challenges to arbitrators. In order to do so, part two of the paper will discuss SCC practice on challenges to arbitrators. This discussion is complemented by a brief commentary on the applicability of the 2004 International Bar Association Guidelines on Conflict of Interest in International Arbitration (the “IBA Guidelines”) to cases administered by the SCC. Part three conducts a case study that examines nine (9) cases in which the SCC Board had to decide a challenge to an arbitrator. Finally, this article concludes in part four by arguing that the SCC has developed some firm and consistent practices on challenges to arbitrators.

## **2. SCC Practice on Challenge to Arbitrators**

### **2.1. SCC Rules and Practice**

The SCC has no pre-established list from which arbitrators must be selected. Therefore, under the SCC Rules the parties may appoint any person of any nationality or profession as arbitrator, provided that the latter is and remains “*impartial and independent*”<sup>7</sup>.

Pursuant to the SCC Rules, an arbitrator must disclose any circumstances which may give rise to justifiable doubts as to his/her impartiality or independence<sup>8</sup>. For that purpose, the SCC provides each arbitrator with a standardized Confirmation of Acceptance form. By filling in and signing this form the arbitrator confirms his/her independence and impartiality. Additionally, the arbitrator must corroborate his/her availability throughout the anticipated duration of the case, by stating that he/she can and will dispose the time necessary for the expeditious and practical resolution of the case<sup>9</sup>. It is worth noting that this duty to disclose is an on-going one that remains with the arbitrator throughout the course of the proceedings.

The Secretariat provides all parties with a copy of the arbitrators’ Confirmation of Acceptance. If the arbitrator does not have any circumstance to disclose, the Confirmation of Acceptance is sent out when the Secretariat refers the case to the arbitral tribunal<sup>10</sup>. However,

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<sup>5</sup> Hobér, K., International Commercial Arbitration in Sweden (Oxford, United Kingdom; Oxford University Press, 2011), p. 9.

<sup>6</sup> See Articles 15 and 16 of the SCC Rules.

<sup>7</sup> Articles 13 and 14 of the SCC Rules.

<sup>8</sup> Article 14(2) of the SCC Rules.

<sup>9</sup> Lindström, N., *Challenges to Arbitrators – Decisions by the SCC Board during 2008-2010* (at [http://www.skiljedomsforeningen.se/\\$2/file/challenges-to-arbitrators-decisions-by-the-scc-board-during-20081.pdf](http://www.skiljedomsforeningen.se/$2/file/challenges-to-arbitrators-decisions-by-the-scc-board-during-20081.pdf)) (last visited on November 21, 2012), p. 2.

<sup>10</sup> Pursuant to Article 18 of the SCC Rules.

if the arbitrator has disclosed any circumstance, the Confirmation of Acceptance is immediately sent out to each party and to the other arbitrators<sup>11</sup>.

An arbitrator's disclosure may not produce any consequence at all: on the one hand, because the SCC does not act *ex officio* in situations where a disclosure has been made; on the other, because the parties may consider that the circumstances disclosed by the arbitrator do not compromise his/her independence or impartiality, so no challenge would be filed. Put differently, it is up to the parties to assess the significance of the circumstances disclosed by the arbitrators and file a challenge whenever they conclude that there are justifiable doubts as to arbitrator independence or impartiality<sup>12</sup>. Additionally, a party may challenge an arbitrator based on the latter's lack of qualifications agreed upon by the parties<sup>13</sup>.

The SCC Rules establish a special procedure for dealing with challenges to arbitrators<sup>14</sup>. A party wishing to do so has to submit a written statement to the Secretariat within fifteen (15) days as from the date when the circumstances giving rise to the challenge became known to that party. Failure to submit a challenge within this deadline is considered a waiver of the right to challenge<sup>15</sup>. In order to prevent unnecessary obstruction of the proceedings, the SCC Rules provide that a party can only challenge an arbitrator whom it has appointed or in whose appointment it has participated for reasons of which it becomes aware after the appointment was made<sup>16</sup>.

Pursuant to Article 15(3) of the SCC Rules, the Secretariat notifies the parties and the arbitrators of the challenge and gives them an opportunity to submit comments thereon. Normally, the Secretariat asks to receive comments within seven (7) days. In any case, the Secretariat may give the parties the opportunity to submit further statements before the matter is presented to the SCC Board<sup>17</sup>. If the other party agrees to the challenge, the arbitrator must resign, whereas in all other cases the SCC Board makes the decision on the challenge<sup>18</sup>.

After receiving comments or after the time set for submitting comments has passed, the SCC Board decides upon the challenge. The decision is taken on the basis of the written submissions, so no hearings are held by the SCC at this stage<sup>19</sup>. As a general rule, the SCC Board does not state reasons for its decision and the decision is final<sup>20</sup>. The fact that the SCC

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<sup>11</sup> Lindström, *op cit.* note 9, p. 2.

<sup>12</sup> Lindström, *op cit.* note 9, p. 4.

<sup>13</sup> Article 15(1) of the SCC Rules. It is worth mentioning that this ground for challenge is also included in Article 12 of the UNCITRAL Model Law. See Magnusson, A., and Shaughnessy, P., *The 2007 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce*, 3 *Stockholm International Arbitration Review* 33 (2006), p. 43.

<sup>14</sup> Hobér, *op cit.* note 5, p. 169.

<sup>15</sup> Articles 15(1) and 15(2) of the SCC Rules.

<sup>16</sup> Article 15(1) of the SCC Rules. See Hobér, *op cit.* note 5, p. 170.

<sup>17</sup> Lindström, *op cit.* note 9, p. 4-5.

<sup>18</sup> Article 15(4) of the SCC Rules.

<sup>19</sup> Hobér, *op cit.* note 5, p. 170.

<sup>20</sup> In Sweden, this means that a court will dismiss a motion to appeal a decision following a challenge under the SCC Rules. However, it is important to note that, under Swedish law, decisions by the SCC Board following a challenge are final only in matters referred to in Section 8 of the Swedish Arbitration Act. This means that a decision by the SCC Board following a challenge due to lack of agreed qualifications of an arbitrator is not final under Swedish law, i.e. this ground may, notwithstanding a decision by the SCC Board, serve as a ground for challenge of the arbitral award pursuant to Article 34 of the Swedish Arbitration Act. See Magnusson and Shaughnessy, *op cit.* note 13, p. 43.

Board does not state reasons for its decisions means, in practice, that the parties and the arbitrators, including the challenged arbitrator(s), would only be notified of the decision and not of the reasons or arguments in which the decision is supported<sup>21</sup>. Moreover, for reasons of confidentiality decisions adopted by the SCC Board, including those on challenge to arbitrators, are not published or available to the public<sup>22</sup>

Not without reason has this ‘lack’ of reasoning of the SCC Board’s decisions been subject to criticism<sup>23</sup>. Nevertheless, each decision taken by the SCC Board is preceded by a thorough analysis of the case and its circumstances in light of the SCC Rules and practice, Swedish law and cases (when applicable) and the IBA Guidelines. More often than not SCC Board decisions on challenges to arbitrators involve complex discussions and debates among its members which, among others, guarantee that the outcome decision is taken after all arguments and positions have been duly considered and weighed.

If the SCC Board decides to sustain a challenge to an arbitrator, the latter is released from appointment and it would be necessary to replace that arbitrator. According to Article 17 of the SCC Rules, if the arbitrator being replaced was appointed by a party, that party should appoint the new arbitrator, unless otherwise deemed appropriate by the SCC Board. In all other cases, the new arbitrator will be appointed by the SCC Board.

## 2.2. Applicability of the IBA Guidelines to SCC practice

SCC practice has evidenced how the IBA Guidelines have gained general acceptance as a non-binding set of principles with which most parties and arbitrators seek to comply. Indeed, on the one hand, the IBA Guidelines are relied upon heavily by parties challenging arbitrators and those defending such challenges before the SCC. On the other hand, it is fair to assume that the SCC Board usually bears in mind the IBA Guidelines when deciding on challenges to arbitrators<sup>24</sup>.

Even though the IBA Guidelines have not been applied *strictu sensu*, they have provided useful guidance for the SCC Board when dealing with difficult and complex questions relating to the impartiality and independence of arbitrators. It would therefore seem reasonable to assume that the IBA Guidelines will continue to play an important role in SCC practice on challenges to arbitrators<sup>25</sup>.

Whilst the IBA Guidelines are clearly taken into account by the SCC Board when deciding challenges to arbitrators, they are by no means exclusive, especially since not all challenges received by the SCC concern circumstances contemplated by the Guidelines, as will be seen below. In any case, as the chair of the IBA Taskforce on the Guidelines observed, they are a “*useful compendium of the views of international practitioners and internationally accepted*”

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<sup>21</sup> In this regard, it is noteworthy that since 2006 the LCIA decided to publish challenge decisions in a suitable edited form. Additionally, under the ICSID Rules decisions on challenges to arbitrators are reasoned and usually publicly available. See Blackaby and Partasides, with Redfern and Hunter, *op cit.* note 1, pp. 279-280.

<sup>22</sup> According to Article 46 of the SCC Rules.

<sup>23</sup> Hobér, *op cit.* note 5, 171. Also see Madsen, F., Commercial Arbitration in Sweden (Oxford, United Kingdom; Oxford University Press, 2007), p. 133.

<sup>24</sup> Blackaby and Partasides, with Redfern and Hunter, *op cit.* note 1, pp. 271-272.

<sup>25</sup> Hobér, *op cit.* note 5, p. 165.

*practices*” and “*the first port of call for many international practitioners’ in dealing with arbitrator challenges*”<sup>26</sup>.

### **3. SCC CASE STUDIES (2010 – 2012)**

This part of the paper will analyse nine (9) cases in which, during the 2010-2012 period, an arbitrator was challenged before the SCC. The purpose is not only to review the decisions taken by the SCC Board, but also to examine the arguments presented by the parties, both the objecting and the opposing one, and, where possible, by the challenged arbitrator and by his/her co-arbitrators.

#### **3.1. Challenges Dismissed by the SCC Board**

##### **3.1.1. *Arbitration U 115/2010***

#### **Nationality of the Parties**

Claimants: United States

Respondent: Russia

#### **Seat of Arbitration**

Stockholm

#### **Nationality of the Arbitrators**

Chairperson: Switzerland

Arbitrator appointed by Claimant: Sweden

Arbitrator Appointed by Respondent: Russia

#### **Nationality of Counsel**

Claimants: Canada / Russia / United Kingdom

Respondent: Sweden / Russia

#### **Applicable Rules**

UNCITRAL Arbitration Rules

#### **Language**

English

#### **Background**

Claimant commenced arbitration pursuant to the UNCITRAL Arbitration Rules seeking damages for various alleged breaches of a joint venture agreement entered between the Parties.

#### **Challenge by Claimant to the Arbitrator Appointed by Respondents**

Claimant challenged the arbitrator appointed by Respondent based on his close personal relationship with Respondents’ counsel, with whom the arbitrator had written several legal books and articles. Moreover, they were professors at the same University. According to Claimant, in one of their joint works the arbitrator and Respondents’ counsel adopted a

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<sup>26</sup> Blackaby and Partasides, with Redfern and Hunter, *op cit.* note 1, p. 272.

position concerning one of the Respondents, which was prejudicial for the Claimant in this dispute.

Moreover, Claimant asserted that the arbitrator is a state official in the country in which Respondents are incorporated, and that he actually receives financial support from one of the Respondents. In addition, Claimant accused the arbitrator of failing to disclose all these circumstances.

### **Respondents' Reply**

Respondents denied the existence of personal or joint financial relationships between the arbitrator and its counsel, as they explained that academic publications are not subject to disclosure and are listed on the IBA Guidelines Green List. Furthermore, according to Respondents the quotations from the book made by Claimant were taken out of context and represent the authors' retelling of a court decision.

On the other hand, Respondents explained that the arbitrator's employer is the central state, which was not a party to this dispute, that the circumstances supposedly not disclosed by the arbitrator were not subject to disclosure, and that the non-disclosure in itself is not a ground for disqualification.

### **Arbitrator's reply to the challenge**

The arbitrator did not submit any comment on the challenge.

### **Decision by the SCC Board**

The SCC Board decided to dismiss the challenge.

## **3.2. Challenges Sustained by the SCC Board**

### **3.2.1. *Arbitration V 068/2010***

#### **Nationality of the Parties**

Claimant: Sweden

Respondent: Netherlands Antilles

#### **Seat of Arbitration**

Stockholm

#### **Nationality of the Arbitrators**

Chairperson: United States

Arbitrator appointed by Claimant: Sweden

Arbitrator Appointed by Respondent: Sweden

#### **Nationality of Counsel**

Claimants: Sweden

Respondent: Sweden

#### **Applicable Rules**

SCC Rules

**Language**

English

**Background**

Claimant granted Respondent a licence to use certain software developed by the former for operation of the latter's business. Afterwards, Respondent claimed that, in order to approach clients, a competitor was illegally using user data belonging to Respondent. Respondent also argued that the competitor operated under an agreement entered into with a sister company of Claimant. Respondent further asserted that Claimant knew about the competitor's alleged use of illegal data. Claimant rejected the allegations and no further action was taken.

Later, the original license agreement was replaced with a new one, with similar terms but with certain differences, particularly regarding choice of law and dispute settlement provisions. Respondent's old allegations against Claimant restarted and the former threatened to initiate court proceedings against the latter due to breach of the licence agreement, unless a certain amount of money was paid. In view of this background, Claimant initiated SCC arbitration seeking a declaration that it had not breached the licence agreement.

**Challenge by Respondent to the Arbitrator Appointed by Claimant**

Respondent challenged the arbitrator appointed by Claimant based on the fact that, in the arbitrator's Confirmation of Acceptance, he disclosed that his law firm has had two (2) matters for and two (2) matters against Claimant. Additionally, Respondent asserted that the arbitrator had been personally involved with the claimant concerning a corporate transaction which took place no more than three (3) years ago, thus falling within the circumstance outlined in paragraph 3.1.2 of the IBA Guidelines Orange List.

**Claimant's Reply**

Claimant did not make any comments or submissions concerning this challenge.

**Arbitrator's reply to the challenge**

The arbitrator explained that the four (4) matters that his law firm had for and against Claimant were concluded more than three (3) years prior to his nomination as arbitrator, thus not covered by the requirements of paragraph 3.1.4 of the IBA Guidelines Orange List. Regarding the corporate transaction, the arbitrator explained that his law firm acted in a complex transaction concerning rules and regulations in connection with tender offers.

**Decision by the SCC Board**

The SCC Board sustained the challenge. The arbitrator was consequently released from appointment.

**3.2.2.           *Arbitration V 190/2010*****Nationality of the Parties**

Claimant: Belarus

Respondent: Poland

**Seat of Arbitration**

Stockholm

**Nationality of the Arbitrators**

Chairperson: Sweden  
Arbitrator appointed by Claimant: Russia  
Arbitrator Appointed by Respondent: Poland

**Nationality of Counsel**

Claimants: Belarus  
Respondent: Poland

**Applicable Rules**

SCC Rules

**Language**

English

**Background**

Respondent and a third party entered into a contract for delivery of certain equipment to Claimant. Claimant was mentioned in the contract as a lease holder. Since the purchase was financed by a third party, that third party and Claimant entered into a leasing agreement concerning the equipment.

Claimant commenced SCC arbitration arguing that it acquired ownership to the equipment and that it had the rights under the delivery contract as if it were a party to that agreement. Claimant further asserted that the delivered equipment was faulty and requested damages and costs under the delivery contract.

**Challenge by Claimant to the Arbitrator Appointed by Respondent**

Claimant challenged the arbitrator appointed by Respondent alleging that the arbitrator owns a company that negotiated the delivery of similar equipment as with Claimant. The arbitrator's company's offer was turned down by Claimant in favour of Respondent's offer. After Respondent's failure to repair the faulty equipment, Claimant turned to the arbitrator's company and to the arbitrator personally for a proposal for elimination of the defects, although the arbitrator's offer was rejected again. Claimant considered that the arbitrator's involvement in the subject of the dispute and awareness of commercial and technical details of the relationship between the parties undermined his independence and impartiality.

**Respondent's Reply**

Respondent objected to the challenge arguing that the market for this kind of equipment is narrow and the companies and their directors recognised each other on a commercial basis.

**Arbitrator's reply to the challenge**

Although the arbitrator did not deny that his company was involved in the bidding process, he explained that his company did not made any offer concerning the reparation works. Accordingly, his impartiality and independence were confirmed.

**Decision by the SCC Board**

The SCC Board sustained the challenge. The arbitrator was consequently released from appointment.



### **3.2.3.***Arbitration V 124/2011*

#### **Nationality of the Parties**

Claimant: Sweden

Respondent: Sweden

#### **Seat of Arbitration**

Stockholm

#### **Nationality of the Arbitrators**

Chairperson: Sweden

Arbitrator appointed by the Claimant: Sweden

Arbitrator appointed by the Respondent: Sweden

#### **Nationality of Counsel**

Claimant: Sweden

Respondent: Sweden

#### **Applicable Rules**

SCC Rules

#### **Language**

Swedish

#### **Background**

The Parties entered into an agreement by means of which Claimant would lease some equipment to Respondent. Claimant commenced SCC arbitration arguing that Respondent's facilities had several defects which, in turn, caused damage to Claimant's equipment.

#### **Challenge by Respondent to the Arbitrator Appointed by Claimant**

Respondent challenged the arbitrator appointed by Claimant based on the fact that, in her Confirmation of Acceptance, the arbitrator stated that her law firm had/ had had matters for and against Respondent and one of its subsidiary companies. Although the arbitrator explained that these matters were not handled/had not been handled by her but by other persons at the law firm, Respondent explained that it is typically assumed that confidence in an arbitrator's impartiality is diminished if the law firm with which the arbitrator is working has matters for or against one of the parties in the dispute.

#### **Claimant's Reply**

Claimant submitted that it relied upon the arbitrator's judgement that there was no conflict of interest.

#### **Arbitrator's reply to the challenge**

The arbitrator acknowledged that indeed it is typically assumed that the confidence of an arbitrator's impartiality is diminished if the law firm in which the arbitrator is working has matters for or against one of the parties in the dispute. However the circumstance that her law firm had acted both for and against Respondent and a subsidiary shows a balance relative to Respondent's corporate group. The arbitrator also emphasized that the case law referred to by Respondent was appealed and therefore was not final.

**Decision by the SCC Board**

The SCC Board sustained the challenge. The arbitrator was consequently released from appointment.

**3.2.4.        *Arbitration V 170/2011*****Nationality of the Parties**

Claimant: Sweden

Respondent: Great Britain

**Seat of Arbitration**

Stockholm

**Nationality of the Arbitrators**

Chairperson: Sweden

Arbitrator appointed by the Claimant: Sweden

Arbitrator appointed by the Respondent: Sweden

**Nationality of Counsel**

Claimant: Sweden

Respondent: Sweden

**Applicable Rules**

SCC Rules

**Language**

English

**Background**

Claimant entered into a supply agreement with a third party for production of certain products. The third party assigned all its rights and obligations under the supply agreement to Respondent. Afterwards, Respondent terminated the supply agreement, questioned the exclusive nature of Claimant's right to manufacture the products and contracted another manufacturer. Claimant then commenced SCC arbitration seeking damages for breach of the exclusivity clause.

**Challenge by Respondent to the Arbitrator Appointed by Claimant**

Respondent challenged the arbitrator appointed by Claimant based on the fact that, as disclosed by the arbitrator in his Confirmation of Acceptance, his law firm had advised both Claimant and its major shareholder in several matters. According to Respondent, these circumstances call the arbitrator's independence and impartiality into question objectively speaking, and so he should be released from appointment.

**Claimant's Reply**

Claimant submitted that national courts have only considered justifiable doubts as to the independence and impartiality of an arbitrator to exist where a law firm has a significant commercial relationship with any of the parties. In Claimant's opinion, the issues complained about had been of very limited scope and commercially irrelevant to the arbitrator's law firm. No obligation of loyalty or interest between Claimant and the law firm had arisen from the issues complained about. Claimant emphasised that neither the law firm nor Claimant had

considered the arbitrator barred from accepting instructions from opposing parties to Claimant for ethical reasons.

Claimant noted, lastly, that if a lawyer is to be considered disqualified as soon as the law firm where he or she practices has had any instructions from one of the parties, in principle all lawyers at law firms would be barred from acting as arbitrators whenever a big company is party to the dispute. For that purpose, Claimant relied on the IBA Guidelines Orange List.

#### **Arbitrator's reply to the challenge**

The arbitrator did not submit any comment on the challenge.

#### **Decision by the SCC Board**

The SCC Board sustained the challenge. The arbitrator was consequently released from appointment.

### **3.2.5.           *Arbitration V 174/2011***

#### **Nationality of the Parties**

Claimant: Belgium

Respondent: Sweden

#### **Seat of Arbitration**

Stockholm

#### **Nationality of the Arbitrators**

Chairperson: Danish

Arbitrator appointed by the Claimant: Sweden

Arbitrator appointed by the Respondent: Sweden

#### **Nationality of Counsel**

Claimant: Sweden

Respondent: Sweden

#### **Applicable Rules**

SCC Rules

#### **Language**

English

#### **Background**

The Parties entered into a settlement agreement regarding a worldwide exclusive license agreement, which, among others, provided for cooperation between them. According to Claimant, Respondent was in breach of the agreement because it failed to share the relevant income with Claimant, and because, in breach of the exclusivity provisions, it entered into an agreement with a third party. Claimant commenced SCC arbitration seeking damages.

#### **Challenge by Claimant to the Arbitrator Appointed by Respondent**

Claimant challenged the arbitrator appointed by Respondent based on the circumstance, disclosed by the arbitrator in his Confirmation of Acceptance, that the latter's law firm had recently represented Respondent in a dispute with a close connection to this one. According to

Claimant, this circumstance not only gave rise to justifiable doubts as to the arbitrator's independence and impartiality, but it also created a conflict of interest for any lawyer in the arbitrator's law firm to act as arbitrator where Respondent or a closely connected party is involved.

### **Respondent's Reply**

Respondent did not submit any comment on the challenge.

### **Arbitrator's reply to the challenge**

The arbitrator explained that the matter disclosed by him had finalized more than six (6) months ago and that during the past thirty six (36) months his law firm had not handled any other assignments with any relation to any entity in Respondent's company group.

### **Decision by the SCC Board**

The SCC Board sustained the challenge. The arbitrator was consequently released from appointment.

### **3.2.6.           *Arbitration V 177/2011***

#### **Nationality of the Parties**

Claimant: Sweden

Respondent: Sweden

#### **Seat of Arbitration**

Stockholm

#### **Nationality of the Arbitrators**

Chairperson: Sweden

Arbitrator appointed by the Claimant: Sweden

Arbitrator appointed by the Respondent: Sweden

#### **Nationality of Counsel**

Claimant: Sweden

Respondent: Sweden

#### **Applicable Rules**

SCC Rules

#### **Language**

Swedish

#### **Background**

The Parties entered into a construction agreement by means of which Claimant undertook to perform some works for Respondent. According to Claimant, Respondent changed the construction documents on several occasions. This led to a delay in the works causing Claimant lost time and money since it had not been able to perform the work it had planned from the beginning. Claimant commenced SCC arbitration seeking damages and compensation.

**Challenge by Respondent to the Arbitrator Appointed by Claimant**

Respondent challenged the arbitrator appointed by Claimant based on two circumstances. First, that the arbitrator was acting as counsel in another matter where the law firm representing Respondent was acting as counsel for the counter-party. Second, that until a few months before the filing of this Request for Arbitration the arbitrator had acted as counsel for Claimant in a dispute before national courts. According to Respondent, these circumstances, which were disclosed by the arbitrator in his Confirmation of Acceptance, diminished confidence in his independence and impartiality as arbitrator in this case.

**Claimant's Reply**

Claimant opposed the challenge arguing that the circumstances did not imply that the arbitrator was not independent or impartial, in that the first circumstance was not contemplated in any of the lists of the IBA Guidelines.

**Arbitrator's reply to the challenge**

The arbitrator did not submit any comment on the challenge.

**Decision by the SCC Board**

The SCC Board sustained the challenge. The arbitrator was consequently released from appointment.

**3.2.7.            *Arbitration V 081/2012*****Nationality of the Parties**

Claimant: Sweden

Respondent: Sweden

**Seat of Arbitration**

Stockholm

**Nationality of the Arbitrators**

Chairperson: Sweden

Arbitrator appointed by Claimant: Sweden

Arbitrator Appointed by Respondent: Sweden

**Nationality of Counsel**

Claimants: Sweden

Respondent: Sweden

**Applicable Rules**

SCC Rules

**Language**

Swedish

**Background**

Claimant purchased from Respondent a property in order to perform some construction on it. After the construction works had begun, soil contamination in the property was discovered. Claimant thus initiated SCC arbitration seeking compensation for damages.

### **Challenge by Respondent to the Arbitrator Appointed by Claimant**

Respondent challenged the arbitrator appointed by Claimant based on the fact that the arbitrator's law firm had previous engagements with Claimant within the three (3) year period established in paragraph 3.1.4 of the IBA Guidelines Orange List. Moreover, for Respondent the nature and areas covered in those previous engagements gave reasons to suppose that the arbitrator's law firm may have advised Claimant on how to handle this dispute. Additionally, Respondent asserted that the arbitrator's law firm was advising Claimant in a matter which had many similarities to the subject matter of this dispute. Finally, Respondent accused the arbitrator of failing to disclose all circumstances which gave rise to justifiable doubts as to his independence and impartiality.

### **Claimant's Reply**

Claimant explained that the arbitrator had not been personally involved in the matters handled by his law firm for Claimant. Claimant also asserted that the matters handled by the law firm were not significant for Claimant from a commercial perspective and that they did not generate considerable income for the law firm. According to Claimant the three matters handled by the arbitrator's law firm for Claimant were all concluded and unrelated to this dispute. Additionally, Claimant affirmed that the IBA Guidelines are only general guidelines and in some cases a three (3) year period is too long. In any case, for Claimant those matters would fall under paragraph 4.2.1 of the IBA Guidelines Green list, which do not raise doubts as to the impartiality of an arbitrator.

Regarding the current advice provided by the arbitrator's law firm to Claimant, the latter established that it was true that that law firm was advising it on some issues concerning contract interpretation. This situation could fall under paragraph 3.4.1 of the IBA Guidelines Orange List, but in this case there was no objective information – from the perspective of a third party – raising justifiable doubts as to the arbitrator's impartiality and independence. Finally, Claimant explained that the arbitrator's law firm had not accepted any commission to manage a dispute where subject-matter was similar to that in this case, and that the arbitrator had fulfilled his duty of disclosure.

### **Arbitrator's reply to the challenge**

The arbitrator stated that he had not been personally involved in the matters handled by his law firm for Claimant, and that none of the allegations raised by Respondent against him could demonstrate that he lacked the independence or impartiality required for acting as arbitrator in this case.

### **Decision by the SCC Board**

The SCC Board sustained the challenge. The arbitrator was consequently released from appointment.

### **3.2.8.           *Arbitration V 078/2012***

#### **Nationality of the Parties**

Claimant: Poland

Respondent: Denmark

#### **Seat of Arbitration**

Stockholm

**Nationality of the Arbitrators**

Chairperson: To be appointed

Arbitrator appointed by Claimant: Denmark

Arbitrator Appointed by Respondent: Denmark

**Nationality of Counsel**

Claimants: Denmark

Respondent: Denmark

**Applicable Rules**

SCC Rules

**Language**

To be determined by the Arbitral Tribunal.

**Background**

The Parties entered into an agreement by means of which Claimant provided Respondent with trained staff for performance of the latter's services. Claimant initiated SCC arbitration seeking payment of a total of ten (10) allegedly unpaid invoices.

**Challenge by Respondent to the Arbitrator Appointed by Respondent**

In its Confirmation of Acceptance, the arbitrator appointed by Respondent disclosed that he had previously been hired by Respondent on a day to day basis to provide services from 2008 to 2012. Based on this circumstance, Claimant challenged the arbitrator appointed by Respondent. According to Claimant, an arbitrator with a connection such as that between the challenged arbitrator and Respondent was not impartial and was unsuitable to act as arbitrator. Claimant further explained that Respondent's Managing Director and the arbitrator were long-time friends and/or professional colleagues.

**Respondent's Reply**

Respondent's reply was limited to asserting that the appointment of the arbitrator in this proceeding did not violate the arbitration rules.

**Arbitrator's reply to the challenge**

The arbitrator did not submit any comments on the challenge.

**Decision by the SCC Board**

The SCC Board sustained the challenge. The arbitrator was consequently released from appointment.

**4. Conclusion**

The cases and Board decisions reviewed in this article provide evidence that it is possible to identify some firm SCC practices on challenges to arbitrators. Indeed, there is a consistent SCC practice of sustaining challenges based on the arbitrator's and/or his/her law firm's previous or current professional involvement with one of the parties. Influenced by the IBA Guidelines, the SCC Board has repeatedly considered that previous professional engagements of the arbitrator or his/her law firm with a party does give rise to justifiable doubts as to the arbitrator's independence and impartiality.

This practice has been criticized as being too “*strict*”, particularly because it is said that the SCC Board sustains all challenges based on the arbitrator’s or his/her law firm’s previous contacts with one of the parties within the past three years “*even when no actual bias has been shown*”<sup>27</sup>. Nevertheless, the author is of the opinion that the SCC Board makes its best endeavours to ensure that, in such cases, an arbitrator would only be released from appointment when the SCC Board is satisfied that a reasonable and informed third party would reach the conclusion that there is a likelihood that that arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his/her decision<sup>28</sup>. The SCC Board decisions analysed in this paper constitute a clear example thereof.

Additionally, these case studies provide evidence that the SCC Board is not easily persuaded to sustain a challenge based on the existence of a previous relationship between the arbitrator and the attorney(s) for one of the parties. Instead, such a challenge would only succeed when it is sufficiently demonstrated that the relationship between the arbitrator and counsel does in fact jeopardize the former’s ability to be and remain independent and impartial<sup>29</sup>.

On the other hand, the cases and decision reviewed in this paper demonstrate that during the last two (2) years challenges to arbitrators were not used to obstruct arbitral proceedings. This conclusion is supported not only by the fact that the majority of the cases analysed here were sustained, but also from the arguments advanced by the challenging parties. Following and encouraging this practice would contribute enormously to the development of international arbitration.

Finally, it is worth noting that not all the circumstances invoked by the challenging parties are contemplated within the different lists of the IBA Guidelines. Although the Guidelines are the first to recognize that its lists are by no means exhaustive, the IBA could take note of those circumstances, especially now that the Conflict of Interest Subcommittee has begun an interesting process of review of the Guidelines.

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<sup>27</sup> Hobér, *op cit.* note 5, p. 171.

<sup>28</sup> General Standard 2(c) of the IBA Guidelines on Conflicts of Interest in International Arbitration.

<sup>29</sup> See the decision in Arbitration V 047/2012 referred to above.