

Challenges to Arbitrators – Decisions by the SCC Board during 2008 – 2010

By Niklas Lindström*

I. Introduction

Under the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the “*SCC*”) as well as under the Rules for Expedited Arbitrations of the Arbitration Institute of the Stockholm Chamber of Commerce (the “*SCC Rules*”), every arbitrator must be impartial and independent. If circumstances that give rise to justifiable doubts as to an arbitrator’s impartiality or independence exist in a specific case, a party may challenge the arbitrator. Each year the secretariat of the Arbitration Institute of the Stockholm Chamber of Commerce (the “*Secretariat*”) receives various challenges to arbitrators.

When a challenge is presented, the Board of Directors of the Arbitration Institute of the Stockholm Chamber of Commerce (the “*SCC Board*”) decides whether the challenged arbitrator should be considered impartial and independent. The decision is based on applicable law as well as the SCC’s rules and praxis. The SCC also takes into account the IBA Guidelines on Conflicts of Interest in International Arbitration (the “*IBA Guidelines*”). The SCC Board makes its decision on the basis of the Secretariat’s preparation and proposal.

This article reviews SCC Board decisions regarding challenges to arbitrators during 2008-2010.¹ The article is divided into four main sections, of which the first two briefly overview the relevant legislation and rules, the third puts forward the relevant SCC statistics and the fourth includes a presentation of cases in which the SCC Board has made a decision on a challenge to an arbitrator.

II. The Swedish Arbitration Act

The Swedish Arbitration Act (SFS 1999:116, the “*SAA*”) applies to arbitral proceedings that take place in Sweden.² Stockholm is the most frequent seat for arbitration proceedings under the SCC Rules, and the SAA is in many cases of relevance to the proceedings.³

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¹ For an overview of SCC Board decisions regarding challenges to arbitrators during previous years, see Marie Öhrström, Decisions by the SCC Institute regarding Challenge of Arbitrators, Stockholm Arbitration Report 2002:1, p 35-57; Annette Magnusson & Hanna Larsson, Recent Practice of the Arbitration Institute of the Stockholm Chamber of Commerce: Prima Facie Decisions on Jurisdiction and Challenges of Arbitrators, Stockholm Arbitration Report 2004:2, p. 47-84; and Helena Jung, SCC Practice: Challenges to Arbitrators, SCC Board Decisions 2005-2007, Stockholm International Arbitration Review 2008:1, p. 1-18.

² SAA, Section 46.

According to the SAA, the parties may choose their arbitrators freely. However, each arbitrator chosen by the parties must possess full legal capacity in regard to actions and property.⁴ Furthermore, the arbitrator must be impartial. The requirement of impartiality concerns a chairman or sole arbitrator as well as party-appointed arbitrators. If any circumstance exists which may diminish confidence in the arbitrator's impartiality, the arbitrator will be discharged at the request of a party.⁵

It may be noted that the SAA requires an arbitrator to be “*impartial*”, whereas the UNCITRAL Model Law on International Commercial Arbitration requires an arbitrator to be “*impartial and independent*”.⁶ The SAA does not contain a word equivalent to “*independent*”. However, according to the Swedish legislator, the reference to the word “*independent*” in the Model Law does not have a meaning of its own. If circumstances exist which may diminish confidence in the arbitrator’s independence, the same circumstance will also diminish confidence in the arbitrator’s impartiality. Hence, according to the legislator, a reference to the word “*independent*” is not needed in the SAA.⁷

Assessment of an arbitrator’s impartiality under the SAA must result from an objective point of view. If circumstances exist which from a reasonable third person’s view give rise to justifiable doubts as to the arbitrator’s impartiality, the arbitrator must be discharged. It is not of relevance that the arbitrator may *de facto* be impartial.

Section 8 of the SAA sets out a non-exhaustive list of circumstances that will always be considered as diminishing confidence in the arbitrator’s impartiality. These are:

1. where the arbitrator or a person closely associated to him is a party, or otherwise may expect notable benefit or detriment as a result of the outcome of the dispute;
2. where the arbitrator or a person closely associated to him is the director of a company or any other association which is a party, or otherwise represents a party or any other person who may expect notable benefit or detriment as a result of the outcome of the dispute;
3. where the arbitrator has taken a position in the dispute, as an expert or otherwise, or has assisted a party in the preparation or conduct of his case in the dispute; or

³ The Swedish Supreme Court recently clarified the effect of the seat of arbitration under Swedish law in its decision rendered on 12 November 2010 in Case No. Ö 2301-09 between RosinvestCo UK Ltd and the Russian Federation. The Supreme Court stated that where the parties have agreed that the proceedings are to take place in Sweden, it is irrelevant if the parties or the arbitrators have decided to hold hearings in other countries, if the arbitrators are not from Sweden, if their duties have been carried out in another country, or if the dispute concerns a contract which otherwise has no connection to Sweden.

⁴ SAA, Section 7.

⁵ SAA, Section 8.

⁶ UNCITRAL Model Law on International Commercial Arbitration, Article 13: “An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence, or if he does not possess qualifications agreed by the parties.”

⁷ See Government Bill 1998/99:35, p. 82.

4. where the arbitrator has received or demanded compensation in violation of section 39, second paragraph.⁸

As stated, the list is non-exhaustive and serves merely as a list of examples of circumstances under which an arbitrator is not impartial. Hence, an arbitrator may well be considered partial under other circumstances than those listed in the SAA.

According to the SAA, a challenge to an arbitrator must be presented within fifteen days commencing on the date on which the party became aware both of the appointment of the arbitrator and of the existence of the circumstance which may diminish confidence in the arbitrator's impartiality. The challenge must be adjudicated by the arbitrators themselves.⁹

The parties may also agree that an arbitration institution will conclusively determine challenges. When the SCC Rules are applied, all challenges are decided upon by the SCC Board. Decisions by the SCC Board are final.

It may be noted that Swedish courts have recently referred to the IBA Guidelines in their assessment of the impartiality of an arbitrator under the SAA. The Swedish Supreme Court recently decided a challenge against a Swedish arbitration award where the challenging party asserted that one of the arbitrators lacked impartiality due to repeat appointments. The Svea Court of Appeal as first instance decided to dismiss the challenge¹⁰, a decision which was later upheld on appeal by the Supreme Court¹¹. Both judgments refer to some degree to the IBA Guidelines.

The Svea Court of Appeal stated in its reasons that the IBA Guidelines, as well as other domestic and international arbitration rules, “*serve as important guidelines for counsel and arbitrators and also have some relevance as background material when the Court of Appeal now is trying the case applying the provisions of the Arbitration Act.*”

One of the arbitrators in the case had been appointed as arbitrator twice within the last three years by counsel of a certain law firm. The Svea Court of Appeal referred to section 3.3.7 of the IBA Guidelines and stated that “*since the IBA Guidelines provides that an arbitrator during the given period has to have been appointed more than three times, i.e. at least four times, by the same counsel or law firm to be considered not impartial, B.N. cannot with reference to these rules be considered prevented from serving as an arbitrator in the arbitration between Korsnäs and Fortum*”.

Finally, the Court of Appeal stated that “*based on an overall assessment, there have objectively been no circumstances that may have diminished confidence in B.N.'s impartiality.*”

⁸ Section 39, second paragraph, of the SAA states: “*An agreement regarding compensation to the arbitrators that is not entered into with the parties jointly is void.*”

⁹ According to Section 10 of the SAA a party who is dissatisfied with the arbitrators' decision denying a motion or dismissing a motion on the grounds that the motion was not timely filed may apply to the District Court for an order that the arbitrator be removed from his post.

¹⁰ Svea Court of Appeal, Case T 10321-06, rendered on 10 December 2008.

¹¹ Swedish Supreme Court judgment in Case No. T 156-09, rendered on 9 June 2010.

III. The SCC Rules

On 1 January 2010 new versions of the SCC Arbitration Rules and the SCC Rules for Expedited Arbitrations entered into force. However, no amendments were made to the rules regarding requirements of an arbitrator's impartiality and independence or regarding challenges to arbitrators.

The SCC has no pre-established list of arbitrators from which arbitrators must be selected. Under the SCC Rules, the parties may appoint any person of any nationality or profession as arbitrator. However, the arbitrator must be impartial and independent.

A person who accepts an appointment as arbitrator must disclose any circumstances which may give rise to justifiable doubts as to their impartiality or independence. In this respect, the SCC provides each arbitrator with a standardized Confirmation of Acceptance form. By filling in and signing the form the arbitrator confirms that they are impartial and independent in the arbitration in question. Furthermore, the arbitrator must either confirm that they are not aware of any circumstance that may give rise to justifiable doubts as to their impartiality or independence or alternatively must disclose such circumstances. An arbitrator must also disclose any circumstances that arise during the course of the arbitration proceedings and which may give rise to justifiable doubts as to the arbitrator's impartiality or independence.

In addition to the confirmation of independence, the arbitrator must also confirm availability stating that the arbitrator, throughout the anticipated duration of the case, can and will dispose the time necessary in order for the case to be settled in the most expeditious and practical manner possible.

The Secretariat provides all parties with a copy of the arbitrators' Confirmation of Acceptance. If the arbitrator does not have anything to disclose, the Confirmation of Acceptance is sent out when the Secretariat refers the case to the arbitral tribunal. If the arbitrator has disclosed any circumstance, the Confirmation of Acceptance is sent out to each party and arbitrator immediately.

In situations where the Confirmation of Acceptance contains a disclosure it is up to the parties to assess its significance and to challenge the arbitrator. Even though the SCC's objective is that arbitrators who do not have anything to disclose are appointed, the SCC does not act *ex officio* in situations where a disclosure has been made. The SCC does not take measures with regard to the disclosure unless the arbitrator is challenged by a party. The parties are free to appoint their arbitrators without the involvement of the SCC.

Under the SCC Rules a party may challenge an arbitrator by submitting a written statement to the Secretariat. The submission must set forth the reasons for the challenge. It is important to note that in the same way as under the SAA, the challenge must be submitted within 15 days as from the date when the circumstances giving rise to the challenge became known to the party. Failure to submit a challenge within the deadline is considered a waiver of the right to challenge.

When the Secretariat receives a challenge to an arbitrator, the Secretariat provides the other party and the arbitrators with the opportunity to comment on the challenge. Normally, the Secretariat asks to receive such comments within seven days.

After receiving the comments or after the time set for submitting comments has passed, the SCC Board decides upon the challenge.

When necessary, the Secretariat may give the parties the opportunity to submit further statements before the matter is presented to the SCC Board.

If the SCC Board decides to sustain a challenge to an arbitrator, the Board releases the arbitrator from the appointment. The procedure for appointing a replacing arbitrator depends on who originally appointed the arbitrator released from their appointment. If the arbitrator being replaced was party appointed, that party must as a general rule appoint the new arbitrator. In other situations, the new arbitrator is appointed by the SCC Board.

IV. Statistics

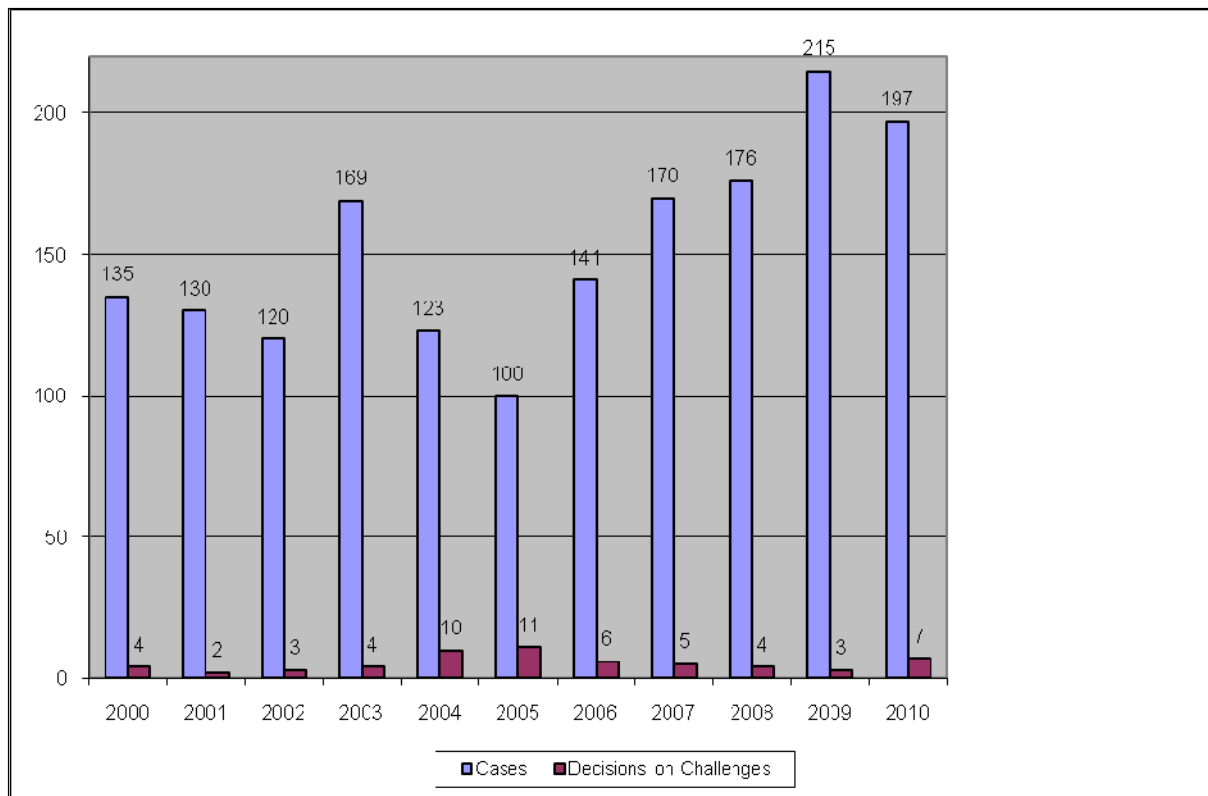
During 2008 – 2010 a total of 588 arbitral proceedings were initiated at the SCC. The number of arbitral proceedings initiated at the SCC has increased during recent years and 2008-2010 are, in fact, the three busiest years at the SCC so far.

During 2008-2010 the Board made 14 decisions on challenges to arbitrators. This number reflects the number of decisions made during those years without taking into consideration during which year the arbitration in question was initiated. Challenges were presented under the SCC Arbitration Rules (9 challenges), the SCC Rules for Expedited Arbitrations (2 challenges) and the UNCITRAL Arbitration Rules (3 challenges).

The number of proceedings initiated and SCC Board decisions on challenges to arbitrators in 2008 – 2010 is illustrated in the table below.

Year	Number of proceedings initiated	Number of SCC Board decisions on challenges
2008	176	4
2009	215	3
2010	197	7

SCC Board decisions on challenges in relation to the total number of arbitrations are further illustrated in the chart below.



When discussing the number of decisions it is important to note that only challenges that give rise to an actual decision by the SCC Board are included.

It happens that an arbitrator resigns voluntarily when challenged, e.g. because the arbitrator feels that they do not want to remain on the arbitral tribunal if they do not enjoy the confidence of all parties. Furthermore, according to the SCC Rules an arbitrator must resign if the other party agrees to the challenge presented by one of the parties (this provision was included in the SCC Rules of 2007). The types of situations mentioned do not give rise to a decision by the SCC Board and hence are not reflected in the statistics.

V. Recent decisions by the SCC Board

V.1 Challenges presented in 2008 - 2010

Naturally, challenges to arbitrators are presented on various grounds. A common reason for doubts as to an arbitrator's impartiality and independence is the arbitrator's or the arbitrator's law firm's previous relationship with one of the parties or counsel representing the parties.

Other grounds for challenges during 2008 – 2010 include the son of one of the arbitrators joining the law firm acting as counsel for one of the parties (the challenge was sustained); an alleged *quid pro quo* relationship between a party's counsel, who was listed as an arbitrator by an arbitration institution, and the arbitrator who was the chairman of the same arbitration institution (the challenge was dismissed); a challenge based on alleged breach of confidentiality and undisclosed use of law clerks (the challenge was dismissed) and a challenge in a mat-

ter where a personal friend of an arbitrator had participated as arbitrator in another tribunal which had already decided upon the same matters as would be decided upon by the tribunal in which the challenged arbitrator participated (the challenge was dismissed).

In one case the date for rendering the final award had been set to only a few days after the arbitral tribunal was to decide on its jurisdiction. A challenge was presented on the ground that the only award possible within the time frame was that the SCC lacks jurisdiction. By asking for an extension of only two weeks it appeared to the claimant as though the arbitrator had already concluded, before having taken part in the parties' pleadings on the jurisdiction issue, that the SCC lacks jurisdiction (the challenge was dismissed).

In the following, some challenges are presented in more detail. Presentation of cases includes a summary of the submissions presented by the parties and arbitrators, but no reasons. The SCC does not provide reasons for its decisions.

V.2 Challenges Dismissed by the SCC Board

CASE 1: SCC Arbitration V (137/2008)

Challenge by the respondent to the chair and the arbitrator appointed by the claimants.

Nationality of the parties:

Claimants: Sweden

Respondent: Sweden

Seat of arbitration:

Gothenburg, Sweden

Nationality of the arbitrators:

Chair: Sweden

Arbitrator appointed by the claimants: Sweden

Arbitrator appointed by the respondent: Sweden

Nationality of counsel:

For claimants: Sweden

For respondent: Sweden

Applicable rules:

SCC Arbitration Rules

Language:

Swedish

Background:

The parties had entered into a share purchase agreement. The claimants initiated arbitration proceedings claiming that the respondent was obligated to pay the remaining part of the purchase price.

Challenge to the Chair and the Arbitrator Appointed by the Claimants:

One day before the scheduled main hearing the arbitrator appointed by the claimants informed the parties that he had an ongoing business relationship with the firm at which a witness called by the claimants was working as consultant. Even though the arbitrator did not normally have any contact with the witness, he had been in contact with him in connection with a few of his assignments. Finally, the arbitrator stated that the circumstance mentioned did not disqualify him as arbitrator but the parties should nevertheless be aware of it.

Additionally, the chair of the arbitral tribunal informed the parties that he had worked together with the witness in certain matters where the witness had acted as expert.

The respondent challenged the chair and the arbitrator appointed by the claimants. The respondent stated that the pending dispute concerned, e.g., the manner in which the consultant called as witness had handled certain valuation questions. According to the respondent, the confidence placed in the testimony of the consultant could be decisive in the matter. The close relationship between, on the one hand the consultant and the claimants and, on the other hand, between the consultant and two of the arbitrators, were circumstances that could disturb the confidence placed in the arbitrators.

The respondent submitted that even the fact that the arbitrators had considered it necessary to disclose their relationships with the witness should be construed as the arbitrators finding that the fact might be of relevance from an impartiality point of view.

Statement by the Claimants:

The claimants opposed the challenge and submitted that contacts between the arbitrators and the witness were not of such magnitude or character as to influence the impartiality of the arbitrators.

Statement by the Chair:

The chair submitted that over several years he had represented different parties in matters concerning liability of consultants. In connection with these matters, the chair had been in contact with the witness on four different occasions. In those cases the witness had acted as an expert for both the party represented by the chair as well as for opposing parties. The chair noted that the witness was frequently contacted as an expert by professional firms in general, as well as by their opposing parties.

Statement by the Arbitrator Appointed by the Claimants:

The arbitrator appointed by the claimants submitted that he frequently advises the firm where the witness was working, on its internal matters. In these internal matters the arbitrator had on a few occasions been in contact with the witness but he had never worked with him for a mutual client.

Decision by the SCC Board:

The SCC Board did not find any ground for disqualifying either of the arbitrators. The challenges were dismissed.

CASE 2: SCC Arbitration V (001/2010)

Challenge to the chair.

Nationality of the parties:

Claimants: Sweden

Respondent: Sweden

Seat of arbitration:

Stockholm, Sweden

Nationality of the arbitrators:

Chair: Sweden

Arbitrator appointed by the claimants: Sweden

Arbitrator appointed by the respondent: Sweden

Nationality of counsel:

For claimants: Sweden

For respondent: Sweden

Applicable rules:

SCC Arbitration Rules

Language:

Swedish

Background:

The dispute concerned payment of an arranger's fee in connection with purchase of real estate.

The arbitral tribunal consisted of three arbitrators. The SCC Board had appointed the chair with the claimant and respondent each appointing one co-arbitrator.

Challenge to the Chair:

The claimants challenged the chair. The challenge was based on circumstances revealed in a letter sent to the claimants' counsel by the arbitrator appointed by the claimants.

In his letter the arbitrator appointed by the claimants stated that he had acted as counsel in an arbitration in which the chair's spouse had acted as opposing counsel. During those proceedings, the chair's spouse had, in the opinion of the arbitrator, acted in a manner which caused strong conflict between counsel.

The arbitrator appointed by the claimants had strongly criticized the chair's spouse during these previous proceedings and it was the arbitrator's understanding that the chair's spouse was strongly averse to the arbitrator.

Even though the antagonism between the arbitrator appointed by the claimants and the chair's spouse could not burden the chair, the arbitrator appointed by the claimants stated he had reason to believe that the chair had been influenced by the views of the spouse.

Finally, the claimants' counsel pointed out that he had also criticized the chair's spouse in another matter and it was possible that the chair was aware of this criticism.

Statement by the Respondent:

The respondent opposed the challenge. According to the respondent, there were no such circumstances as would give rise to justifiable doubts as to the chair's impartiality or independence.

Statement by the Challenged Arbitrator:

The chair was not aware of professional contacts between the spouse and the arbitrator appointed by the claimants or the claimants' counsel, and the chair could therefore not comment on those circumstances.

Decision by the SCC Board:

The SCC Board did not find any ground for disqualifying the arbitrator. The challenge was dismissed.

CASE 3: Arbitration U (045/2008)

Challenge by the claimant to the arbitrator appointed by the respondents.

Nationality of the parties:

Claimant: the United States of America

Respondents: the Russian Federation

Seat of arbitration:

Stockholm, Sweden

Nationality of the arbitrators:

Chair: Switzerland

Arbitrator appointed by the claimant: Sweden

Arbitrator appointed by the respondents: Russia

Nationality of counsel:

For claimant: Russia, Canada, Sweden

For respondents: Russia

Applicable rules:

UNCITRAL Arbitration Rules

Language:

English

Background:

The Parties had entered into a joint venture agreement regarding a large development in Russia. The claimant claimed damages for various breaches of the agreement.

The arbitration was conducted under the UNCITRAL Arbitration rules and the SCC acted as appointing authority.

Challenge to the Arbitrator Appointed by the Respondents:

The claimant challenged the arbitrator appointed by the respondents in a letter to the respondents. Following the challenge, the respondents informed the claimant that they were unwilling to withdraw their arbitrator. Against this background the claimant decided to exercise its right to have the SCC as the appointing authority to determine whether to uphold the claimant's challenge.

In its challenge the claimant pointed out that under Article 10 of the UNCITRAL Arbitration Rules "*any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence*".

The claimant did not question the integrity of the challenged arbitrator. However, according to the claimant the arbitrator had been a long-time academic and legal advisor to two high officials of the Russian government who were closely aligned with the respondents' interests in the arbitration proceedings. It was clear, according to the claimant, that the arbitrator had worked with the officials in an official capacity and knew them on a very personal level.

One of the respondents in the dispute was the administrative body of a Russian city. Hence, it was clear that high officials of the Russian government had an interest in the dispute.

Moreover, the persons mentioned had been officials of the city during the relevant period of the matters in dispute. According to the claimant, the officials and their closest associates were intimately involved in the transactions that were to be at issue in the arbitration and it was likely that these persons would have to testify in the arbitration. This would put the arbitrator in an "*impossible situation*".

Statement by the Respondents:

One of the respondents commented on the challenge.

Firstly, the respondent pointed out that according to Article 24(1) of the UNCITRAL Arbitration Rules "*each party shall have the burden of proving the facts relied on to support his claim*". According to the respondent, the claimant had not provided satisfactory evidence in relation to the circumstances referred to, wherefore the challenge should be dismissed.

Secondly, the challenge was without ground even if the circumstances referred to were correct. According to the respondent, neither of the officials mentioned had any legally significant connection with the respondents. Nor did they have any interests in relation to the subject matter of the dispute.

Statement by the Challenged Arbitrator:

The challenged arbitrator did not submit any comments on the challenge.

Statement by the Claimant:

In its statement the claimant argued that neither the respondent nor the challenged arbitrator himself had disputed any of the facts presented by the claimant. Hence, the facts remained undisputed. According to the claimant, both the respondent and the arbitrator had conceded by their silence that the arbitrator was a friend and former colleague of the officials mentioned, and that these two officials and their closest associates were intimately involved in the transactions that were to be at issue in the arbitration. Hence, the arbitrator should be released from his appointment.

Decision by the SCC Board:

The SCC Board did not find any ground for disqualifying the arbitrator. The challenge was dismissed.

V.3 Challenges Sustained by the SCC Board

CASE 4: Arbitration U (207/2009)

Challenge by the claimant to the arbitrator appointed by the respondents.

Nationality of the parties:

Claimant: the United States of America

Respondents: the Russian Federation

Seat of arbitration:

Stockholm, Sweden

Nationality of the arbitrators:

Chair: Switzerland

Arbitrator appointed by the claimant: Sweden

Arbitrator appointed by the respondents: Russia

Nationality of counsel:

For claimant: Russia, Canada, Sweden

For respondents: Russia, Sweden

Applicable rules:

UNCITRAL Arbitration Rules

Language:
English

Background:

The factual background to the dispute is the same as in CASE 3 (U 045/2008) above.

Challenge to the Arbitrator Appointed by the Respondents:

The claimant challenged the arbitrator appointed by the respondents. The claimant based its challenge on the following.

Firstly, the arbitrator had been elected as a member of the board of directors of a large corporation in which a majority of the controlling interest was held by a party closely connected to the respondents. According to the claimant, it was evident that a member of the board of directors of that company could not be impartial and independent in arbitral proceedings where parties closely related to the biggest owner of the company were respondents, and the interests of the owner were closely related to the interests of the respondents.

Secondly, the arbitrator had served as an advisor on legal matters to one of the respondents and its agencies in 1993, 1994, 1999 and 2005. He also served as a member of a city advisory body on issues relevant for one of the respondents. The claimant pointed out that, according to the IBA Guidelines, providing services in the past to one of the parties may give rise to justifiable doubts as to the impartiality of an arbitrator.

Thirdly, the claimant referred to a newspaper article, according to which a partner of the arbitrator's law firm had been the official legal advisor to four successive heads of one of the respondents.

The claimant explained that the official legal advisor provides direct legal advice concerning the most important legal matters. Hence, it was a virtual certainty that the arbitrator's partner – who occupied the position as legal adviser when the contract in dispute was negotiated, and during the first four years when it was in effect – had provided important legal advice concerning the contract. According to the claimant, the arbitrator's partner had thus provided direct legal advice to one of the parties to the pending arbitration concerning the subject matter of the arbitration.

Fourthly, the arbitrator's law firm had received material benefits from one of the respondents. In particular the firm had been granted the right to use an apartment designated for living quarters as its office, which ensured the firm access to low cost office space.

The claimant finally pointed out that in court proceedings the arbitrator had withdrawn from sitting as a judge in a case against a party closely connected to the respondents. In that case, the arbitrator's impartiality was questioned on the same grounds as presented above.

According to the claimant, the arbitrator had in the pending arbitration proceedings failed to properly disclose these conflicts of interest.

Statement by two of the Respondents:

The respondents objected to the challenge.

Firstly, according to the respondents, there was no relevant connection between the owner of the majority of the shares in the company in which the arbitrator was a member of the Board of Directors, and the respondents.

Secondly, the respondents did not contest the arbitrator's involvement in a number of expert panels. However, they argued that these activities were of a purely expert and scientific nature and were performed on a *pro bono* basis. The expert activities were not related to the present arbitration.

Thirdly, the respondents confirmed that the arbitrator's partner had, as claimed, indeed been employed as a legal assistant to one of the respondents. The employment had, however, ended more than ten years ago. Furthermore, the partner's position did not imply any controlling, supervisory or management functions and, in any case, the partner had not been involved in the project that was the subject matter of the arbitration. The respondent referred to the IBA Guidelines and stated that similar facts as in this case could not be found either on the red list or the orange list of the guidelines.

Fourthly, the respondents agreed with the claimant that the arbitrator's law firm had been allowed by order of one of the respondents to use an apartment designated for living quarters as office space. However, according to the respondents, neither the arbitrator nor his law firm had received any monetary or material benefits from the change of the apartment's status. Furthermore, the change was not of an exceptional or privileged nature.

Fifthly, the respondents also agreed that the arbitrator had withdrawn from sitting as judge in the court proceedings referred to by the claimant. In the case mentioned, none of the respondents in the pending arbitration proceedings had been a party. The arbitrator had withdrawn voluntarily.

Statement by the Challenged Arbitrator:

The arbitrator did not comment on the challenge. On an earlier occasion he had stated that, in his opinion, there were no circumstances which could affect his impartiality in the pending arbitral proceedings.

Decision by the SCC Board:

The challenge was sustained. The arbitrator was released from his appointment.

CASE 5: SCC Arbitration V (018/2009)

Challenge by the respondents to the arbitrator appointed by the claimant.

Nationality of the parties:

Claimant: Sweden

Respondents: Sweden

Seat of arbitration:
Stockholm, Sweden

Nationality of the arbitrators:
Chair: Sweden
Arbitrator appointed by the claimant: Sweden
Arbitrator appointed by the respondents: Sweden

Nationality of counsel:
For claimant: Sweden
For respondents: Sweden

Applicable rules:
SCC Arbitration Rules

Language:
Swedish

Background:

The claimant filed a request for arbitration seeking damages based on an allegation that the respondents had not placed all daily income in a bank account in accordance with an agreement between the parties.

Challenge to the Arbitrator Appointed by the Claimant:

The respondents challenged the arbitrator appointed by the claimant. The challenge was based on two separate grounds.

Firstly, according to the respondents, the claimant had appointed the same person as arbitrator on several occasions. Hence, the arbitrator could not be considered impartial.

Secondly, the arbitrator had previously been the chairman of a branch organisation and was currently a member of the branch organisation's ethical board. Two companies controlled by the claimant were members of the organization.

Statement by the Challenged Arbitrator:

In his statement the challenged arbitrator firstly stated that he could not, with reference to the confidentiality rule in Article 46 of the SCC Rules, disclose whether the claimant had previously appointed him as arbitrator, as alleged by the respondents.

Secondly, the arbitrator stated that the branch organisation is an organisation for the branch in general, not only for parties representing certain positions. The board of directors as well as the ethical board consists of representatives of different positions in the branch. The arbitrator's engagement in the branch organisation should merely be regarded as positive and as promoting the making of an objective and independent award.

The claimant did not submit any statement in the matter.

Decision by the SCC Board:

The SCC Board decided to sustain the challenge. The arbitrator was released from his appointment.

CASE 6: SCC Arbitration V (068/2010)

Challenge by the respondent to the arbitrator appointed by the claimant.

Nationality of the parties:

Claimant: Sweden

Respondent: Netherlands Antilles

Seat of arbitration:

Stockholm, Sweden

Nationality of the arbitrators:

Chair: France

Arbitrator appointed by the claimant: Sweden

Arbitrator appointed by the respondent: Sweden

Nationality of counsel:

For claimant: Sweden

For respondent: Sweden

Applicable rules:

SCC Arbitration Rules

Language:

English

Background:

The parties had entered into a software licence agreement under which the claimant granted the respondent a licence to use certain software developed by the claimant. After the respondent had alleged that the claimant had breached the agreement between the parties, the claimant filed a request for arbitration claiming a declaratory judgement that the claimant had not committed any breaches of contract entitling the respondent to damages.

Challenge to the Arbitrator Appointed by the Claimant:

In his confirmation of acceptance the arbitrator appointed by the claimant disclosed that his firm had had four matters involving the claimant, two for and two against. According to the arbitrator, all matters were unrelated to the current dispute.

The respondent raised a preliminary challenge to the arbitrator. The respondent requested the arbitrator to provide further information on the character, subject-matter and duration of the matters referred to by the arbitrator in his confirmation of acceptance.

Statement by the Arbitrator Appointed by the Claimant:

In his answer to the preliminary challenge the arbitrator corrected the information provided in his confirmation of acceptance by stating that there had, in fact, been three matters with the claimant as a client. He explained the three matters as follows:

- The first matter was a potential patent dispute handled by another office of the firm in 2006. The matter was settled. The office had spent some 5 hours on the matter.
- The second matter concerned a trademark infringement and was handled by another office of the firm in 2006 and 2007. The case was settled. Some 90 hours of work was spent on the project.
- The third matter concerned a potential patent infringement and was handled by another office of the firm in 2004 and 2005. The office spent about 80 hours on the matter.

The arbitrator referred to the IBA Guidelines orange list, section 3.1.4, according to which the timeframe for a potential conflict is three years. The arbitrator's firm had represented the claimant up to April 2007, when the last bill to the claimant was sent, and the appointment as arbitrator was accepted in April 2010.

With respect to the two matters adverse to the claimant, the arbitrator firstly stated that another office of the firm had represented a third party in a potential corporate transaction with the claimant. The final bill was issued in February 2005.

Secondly, the arbitrator stated that his firm had represented an entity in a corporate transaction with, among others, the claimant across the table. The arbitrator was personally involved in the matter. The final bill was issued in May 2008. According to the arbitrator, the matter fell within rule 3.1.2 on the Orange list of the IBA Guidelines, which reads "*the arbitrator has within the past three years served as counsel against one of the parties or an affiliate of one of the parties in an unrelated matter*".

Upon a request from the respondent to provide additional information on the character and subject-matter of the corporate transaction, the arbitrator stated that the advice given by his law firm in the transaction mentioned concerned Swedish rules and regulations in connection with tender offers in Sweden. His law firm had represented the claimant's shareholder in connection with a tender offer for shares in the claimant.

Statement by the Respondent:

The respondent referred to the new information provided by the arbitrator regarding the corporate transaction. According to the respondent, the client of the arbitrator's law firm was one of the founders of, and at that time the largest shareholder in, the claimant. Thus, it had become clear that the claimant, which was under significant influence of its principal shareholder (as phrased in the claimant's annual report), had not been across the table but in fact had been the very subject of the transaction in which the arbitrator had been involved.

Furthermore, the arbitrator's client and a second company had acquired a jointly owned third company for the sole purpose of tendering all outstanding shares in the claimant. The arbitrator was the responsible partner for the matter at his law firm. The arbitrator's client's joint bidder was represented in the joint tender offer by the same law firm, which was now the counsel of the claimant and that had appointed the arbitrator.

With reference to the above, the respondent concluded that the arbitrator had personally advised the claimant's largest shareholder in respect of its joint tender offer for the shares in the claimant during the period when events relevant in the arbitration occurred.

Based on the information provided by the arbitrator and the circumstances accounted for above, the respondent found that there were justifiable doubts as to the arbitrator's impartiality and independence to be an arbitrator in a case involving the claimant. Hence, the respondent maintained its challenge to the arbitrator.

Statement by the Claimant:

The claimant opposed the challenge.

According to the claimant, the circumstances referred to by the respondent did not give rise to justifiable doubts as to the arbitrator's impartiality and independence to serve as an arbitrator in the present proceedings.

The claimant referred to rule 3.1.2 on the orange list of the IBA Guidelines. According to the claimant, the current situation fell within that rule.

The claimant pointed out that situations enumerated in the orange list are situations which may give rise to doubts as to an arbitrator's impartiality and as such should be disclosed by the arbitrator. However, such disclosure does not automatically result in disqualification of the arbitrator. For the arbitrator to be disqualified there must - from an objective point of view and considering the facts of the respective case - be a justifiable doubt as to the arbitrator's independence and impartiality. From that point of view, no justifiable doubt existed.

The claimant reasoned its standpoint by stating that, firstly, the arbitrator had acted as counsel against the claimant, not against the respondent. Secondly, the advice offered by the arbitrator was solely advice on an ownership level and as such unrelated to the business operations of the claimant and unrelated to any of the matters in dispute. The arbitrator had only represented the interests of one of the owners of the claimant and had not at any time represented the interests of the claimant.

Statement by the Respondent:

In its final statement the respondent, among others, pointed out that according to General Standard 2(c) of the IBA Guidelines, doubts are justifiable if a reasonable and informed third party would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case in reaching a decision.

According to the respondent there were justifiable doubts as to the arbitrator's impartiality and independence (i) because of his representation of the claimant's shareholder with regard to the claimant, (ii) because he was - with reference to his professional confidentiality - pre-

vented from making a complete disclosure of relevant facts and, (iii) because of the manner in which he had made his disclosures.

Decision by the SCC Board:

The challenge was sustained. The arbitrator was released from his appointment.

CASE 7: SCC Arbitration V (058/2008)

Challenge by the claimant to the arbitrator appointed by the respondent.

Nationality of the parties:

Claimant: Sweden

Respondent: Sweden

Seat of arbitration:

Stockholm, Sweden

Nationality of the arbitrators:

Chair: Sweden

Arbitrator appointed by the claimant: Sweden

Arbitrator appointed by the respondent: Sweden

Nationality of counsel:

For claimant: Sweden

For respondent: Sweden

Applicable rules:

SCC Arbitration Rules

Language:

Swedish

Background:

The parties had concluded a delivery agreement. The claimant filed a request for arbitration seeking damages based on an alleged breach of contract by the respondent.

Challenge to the Arbitrator Appointed by the Respondent:

The claimant challenged the arbitrator appointed by the respondent. The challenge was based on the fact that the claimant's counsel acted as counsel for two other claimants in pending District Court proceedings in which the challenged arbitrator was personally the respondent.

Statement by the Challenged Arbitrator:

The challenged arbitrator opposed the challenge.

The arbitrator confirmed the information provided by the claimant regarding the pending District Court proceedings. The District Court had, however, recently partly rejected the claims.

The challenged arbitrator pointed out that the arbitration proceedings did not concern the interest at stake in the court proceedings.

The respondent did not submit any statement in the matter.

Decision by the SCC Board:

The challenge was sustained. The arbitrator was released from his appointment.

VI. Final Comments

Clearly, the grounds for presenting challenges vary from case to case. Each challenge must be assessed on its specific merits. Where some challenges are well founded and justifiable, others may be presented mainly for tactical reasons.

The requirement of an arbitrator's impartiality and independence is a fundamental principle. The impartiality and independence of arbitrators is also of great importance for the general confidence placed in arbitration. On the other hand, a decision to release an arbitrator from their appointment may delay the proceedings and increase the costs, as well as being regarded as a limitation of a party's right to choose an arbitrator freely. Hence, decisions made by the SCC Board on challenges to arbitrators must be, and are, considered carefully.

Based on the statistics presented in section IV it can be concluded that the number of challenges in cases administered by the SCC does not seem to correspond with the number of arbitral proceedings initiated. In 2009 there were 215 new arbitral proceedings initiated, but only three challenges. On the other hand, the number of challenges more than doubled in 2010, even though the number of arbitral proceedings initiated decreased somewhat from 2009.

Keeping in mind that the annual number of challenges during the last ten years has ranged between two and eleven and that the yearly ratio between challenges and arbitral proceedings initiated also varies widely, it is difficult to draw any general conclusions from the number of challenges or to foresee how many challenges will be presented in SCC cases during upcoming years. However, it is virtually certain that the SCC Board will also be required to make various decisions regarding challenges to arbitrators in the years to come.