

The standard of Independence and Impartiality for arbitrators in International Arbitration

A comparative study between the standards of the SCC,
the ICC, the LCIA and the AAA

Master's thesis with internship
Procedural Law, 15 hp
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Spring semester 2008

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Summary

One of the most important issues for a prospective arbitrator is to determine whether he meets the standard of independence and impartiality as set forth by the arbitration institution overseeing the case. If there are potential conflicts of interest between him and any of the parties to the arbitration, then he must decide whether to decline the appointment or to make a disclosure to the parties.

This thesis compares the standards of independence and impartiality (1) in recent practices of the SCC and the ICC and (2) in the procedures of the SCC, the ICC, the LCIA and the AAA.

The standards of independence and impartiality of the SCC and the ICC appear to be similar in their recent practices. Presented in this work are 18 recent decisions regarding neutrality of arbitrators. While the SCC explicitly states that it strives to follow the IBA's guidelines on conflicts of interest, the ICC states that it does not, yet in practice the ICC's decisions seem to resonate with the IBA's guidelines. In situations where a lawyer from a law firm seeks appointment as an independent arbitrator, but the law firm has had previous ties with a party, however remote, the SCC and the ICC institutes require that the lawyer awaits three years from the last contact with the party. Such practice is recommended by the IBA's guidelines.

Procedurally, all four arbitral institutes require that the arbitrator disclose any circumstances which may question their independence. While the ICC, LCIA and the AAA may decide *ex officio* not to confirm an arbitrator even if none of the parties have raised a challenge against him, the SCC does not decide *ex officio*.

Table of Content

1.	Introduction.....	5
	1.1 Background.....	5
	1.2 Purpose, delimitation and method.....	5
	1.3 Disposition.....	6
2.	Independence and Impartiality.....	7
	2.1 The concepts of Independence and Impartiality.....	7
	2.2 The IBA's guidelines.....	7
3.	Challenges to arbitrators.....	9
	3.1 The procedure and the recent practice of the SCC.....	9
	3.1.1 The Swedish Arbitration Act.....	10
	3.1.2 Challenges under the SCC Rules.....	11
	3.1.3 Case studies.....	12
	3.1.3.1 Cases where the SCC rejected the challenge.....	12
	3.1.3.2 Cases where the SCC sustained the challenge.....	17
	3.1.3.3 Commentary.....	19
	3.2 The procedure and the recent practice of the ICC.....	20
	3.2.1 Challenges under the ICC Rules.....	21
	3.2.2 Case studies.....	23
	3.2.2.1 Cases where the ICC confirmed the arbitrator/ the ICC dismissed the challenge.....	23
	3.2.2.2 Cases where the ICC did not confirm the arbitrator/ the ICC sustained the challenge.....	25
	3.2.2.3 Commentary.....	26
	3.3 The procedure of the LCIA.....	27
	3.4 The procedure of the AAA.....	28
4.	Comparative analysis.....	31
	4.1 Do the procedure and the practice of the SCC differ from that of the other arbitration institutes?	31
	4.2 Consequences in international arbitration.....	32
5.	Source reference.....	34

1. Introduction

1.1 Background

As international law firms grow in size and international arbitration is becoming a more preferred means for resolving dispute, the issue of arbitrator's neutrality is becoming ever more important. The growth may expose a law firm with increasing conflict-of-interest issues since the likelihood of the law firm having had contact with the opposing party increases as the law firm grows. In order to circumvent such conflict of interest issues, larger law firms have been known to adopt drastic measures. There have been many situations where a partner in an international law firm leaves his firm to start a firm of his own in order to avoid conflict-of-interest issues which may prevent him from accepting an appointment as an arbitrator.¹ Recently, a procedural department of one of Stockholm's biggest law firms broke off from the firm to start its own firm in order to avoid situations where its lawyers may have to turn down assignments due to bias.² Are such precautions necessary means for avoiding conflict-of-interest issues?

This work takes a closer look at how the standards of independence and impartiality for arbitrators in international arbitration apply in determining an arbitrator's neutrality.

1.2 Purpose, delimitation and method

This thesis compares the standard of independence and impartiality reflected in the procedure of the Arbitration Institute of the Stockholm Chamber of Commerce (hereinafter "SCC") with the standards of the International Chamber of Commerce International Court of Arbitration (hereinafter "ICC"), the London Court of International Arbitration (LCIA) and the American Arbitration Association (AAA). The thesis also compares the recent practices of the SCC and the ICC. The recent practices of the LCIA and the AAA are not included since they have not published any decisions on this topic.

The scope of the thesis is limited to comparing the procedure and the practice of the ICC, the LCIA and the AAA to those of the SCC. The arbitration acts of jurisdictions other than Sweden will not be addressed.

¹ Lawson, p. 37.

² Dagens Juridik, 2008-01-16, [http://www.dagensjuridik.se/sv/Arkiv/Cederquistavhoppare-startar-
Nilsson--Co/](http://www.dagensjuridik.se/sv/Arkiv/Cederquistavhoppare-startar-Nilsson--Co/) (2008-05-28)

Conventional legal sources are used within the framework of this thesis. In instances where source references are missing, the author relies on the information garnered from her work experience as a legal counsel of the SCC.

1.3 Disposition

The thesis starts with a discussion of the concept of independence and impartiality and a description of the guidelines on conflicts of interest in international arbitration published by the International Bar Association (IBA) in 2004. Thereafter, the procedure and the recent practice of the SCC are offered, followed by the procedure and the recent practice of the ICC and the procedures of the LCIA and the AAA. This thesis compares the standards of independence and impartiality (1) in recent practices of the SCC and the ICC and (2) in the procedures of the SCC, the ICC, the LCIA and the AAA. Finally, thesis is concluded with a summary of the main points of interest in the comparison.

2. Independence and Impartiality

2.1 The concept of Independence and Impartiality

Numerous terms have been used to describe the neutrality of an international arbitrator. Most frequently the UN's Universal Declaration is quoted, saying that an arbitrator must be independent and impartial.³ Independence is traditionally defined as freedom from authorities. In international arbitration, however, the term is more frequently used to describe the arbitrator's lack of ties to any of the parties, counsels or co-arbitrators.⁴

In both civil- and common-law jurisdictions there is an accepted requirement that an arbitrator must be independent both towards the parties involved and the authorities and also *be perceived* as independent. It is no small matter that arbitrators must have the confidence of their prospective clients, the business community.⁵ Therefore, it is reasonable that an arbitrator must not only *be independent* but also in the eyes of a neutral third party *be perceived* as independent.

The term "impartial" usually describes an arbitrator's state of mind. To be impartial, an arbitrator should not be biased towards any of the parties or their counsel. As it may be difficult from the facts to conclude whether an arbitrator is impartial, it is often considered a demonstration of impartiality to be independent.⁶ Now a brief description of the IBA's guidelines will follow, giving one view on what may call into question an arbitrator's independence and impartiality.

2.2 The IBA's guidelines

The IBA recognised the growing number of problems caused by conflicts of interest in international arbitration. In an effort to minimize unnecessary disclosures and withdrawals by arbitrators they put together a group of experts from around the world to compose guidelines on conflicts of interest in international arbitration.⁷ The purpose of the guidelines was stated to be harmonisation of the standard of independence and impartiality in international arbitration.⁸

³ Lawson, p. 23.

⁴ Lawson, p. 39-40.

⁵ Lawson, p. 24-25.

⁶ See for example Swedish Govt. Bill 1998/99:35, p. 82.

⁷ Introduction to the IBA Guidelines on Conflicts of Interest in International Arbitration, p. 3-4.

⁸ Introduction to the IBA Guidelines on Conflicts of Interest in International Arbitration, p. 4.

The guidelines are constructed in two parts. The first part consists of general standards expressing the principles that should guide arbitrators, parties and arbitral institutions when deliberating over possible bias. The second part consists of a list of specific situations meant to give practical guidance.

The list is divided into three parts: a red list, an orange list and a green list. The red list describes situations in which an arbitrator should not accept appointment, or withdraw if already appointed. The guidelines deem certain situations described in the red list as non-waivable, such as when there is an identity between a party and the arbitrator, or the arbitrator has a significant financial interest in one of the parties or the outcome of the case. The orange list is a non-exhaustive enumeration of specific situations, which, in the eyes of the parties may give rise to justifiable doubts as to the arbitrator's impartiality or independence. According to the guidelines the arbitrator has a duty to disclose situations falling under the orange list. In situations on the orange list, the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made. The IBA general standard suggests a time limit of 30 days for parties to raise objections. Such situations include previous services for one of the parties within the past three years and relationships between an arbitrator and a co-arbitrator or counsel. The green list describes situations in which the guidelines do not recommend disclosure let alone withdrawal by the arbitrator. These situations include previously expressed legal opinions and previous services by the arbitrator's law firm against one party in an unrelated matter without the involvement of the arbitrator. Arguably the green list also includes situations described in the orange list such as previous services for one of the parties when more than three years have passed.⁹

Do the procedures and the practices of four of the major arbitration institutes reflect the standard set forth in the IBA's guidelines? The procedures and the recent practices of the SCC and the ICC as well as the procedures of the LCIA and the AAA are described below.

⁹ Lawson, p. 35.

3. Challenges to arbitrators

3.1 The procedure and the recent practice of the SCC

Under the Swedish Arbitration Act (SAA) and the Arbitration Rules of the SCC (hereinafter “SCC Rules”), an arbitrator must be impartial and independent.¹⁰ If the parties to the arbitration have grounds on which to question the independence and/or impartiality of appointed arbitrators, they may initiate a challenge to one or more arbitrators.

The grounds for a challenge vary from case to case. In the past three years at the SCC common grounds for challenging an arbitrator have concerned an arbitrator or his or her law firm having a previous contact with one of the parties to the arbitration. Other notable grounds have involved the following situations: a party not receiving a proper notice for appointing an arbitrator; an arbitrator giving his expert opinion in a previous case involving one of the parties; an arbitrator being involved in the decision on a challenge in another arbitration involving one of the parties.

Although the grounds for challenging an arbitrator are numerous, the actual number of challenges to arbitrators in comparison to the number of arbitrations has been low. From January 2005 through December 2007, there were 411 arbitral proceedings initiated at the SCC. In those proceedings, there were a total of 21 challenges to arbitrators. Ten of those challenges led to the removal of an arbitrator.¹¹

As the possible grounds for challenges to arbitrators, to most arbitral proceedings which are administered by the SCC, can be found in the SAA an account of the relevant section of the SAA will follow. Thereafter the challenge procedure under the SCC Rules is described and a presentation of seven of the recent cases from the SCC is offered. As the SCC promotes a homogenous international standard it follows the International Bar Association’s (IBA) guidelines on how to view conflicts of interest in international arbitration. A reference is made to the applicable section, if any, of the IBA’s guidelines, in relation to each of the described cases.

¹⁰ There is no term equivalent to the word “independence” in the SAA. But according to the legislative history, in those cases where a circumstance exists such that the independence of an arbitrator might justifiably be doubted, his impartiality can *also* be called into question. See Govt. Bill 1998/99:35, p. 82.

¹²The statistics do not include instances in which a challenged arbitrator chose to resign from a case. In such instances, the SCC does not render a decision on the challenge.

3.1.1 The Swedish Arbitration Act

The SAA is applicable to arbitrations that take place in Sweden. According to the SAA any person who possesses full legal capacity in regard to his actions and his property may act as an arbitrator.

The SAA further states that an arbitrator must be impartial. If a party so requests, an arbitrator shall be discharged if there exists any circumstance, which may diminish confidence in the arbitrator's impartiality. Such circumstances shall always be deemed to exist:

1. where the arbitrator or a person closely associated with him is a party, or otherwise may expect benefit or detriment worth attention, as a result of the outcome of the dispute;
2. where the arbitrator or a person closely associated with 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 benefit or detriment worth attention 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
4. where the arbitrator has received or demanded compensation in violation of section 39, second paragraph.

Section 39 of the SAA, second paragraph, states that an agreement regarding compensation to the arbitrators that is not entered into with the parties jointly is void.

It is important to note that the above quoted section is not exhaustive, but merely gives examples of when an arbitrator is disqualified. Thus, an arbitrator may be considered partial due to other circumstances than the ones enumerated in the SAA. The section does, however, serve as an important guideline as regards which situations may give rise to justifiable doubts to the arbitrator's impartiality.

The arbitrators shall decide on a challenge to one of the arbitrators, unless the parties have decided that another party shall make such decisions. A party, who is dissatisfied with the arbitrators' decision denying or dismissing a motion, may file an application with the District Court requesting that the arbitrator be removed. It is stated, however,

that the parties may decide that an arbitration institution shall finally determine a challenge. According to the SCC Rules, the SCC's decision on a challenge of an arbitrator is final.

3.1.2 Challenges under the SCC Rules

The SCC has no pre-established list from which arbitrators must be selected. The parties may appoint any person of any nationality and profession as an arbitrator, so long as he or she is impartial and independent. A person asked to accept an appointment as arbitrator must disclose any circumstance likely to give rise to justifiable doubts as to his or her impartiality and independence. If there are such circumstances, the arbitrator shall immediately, in a written statement, make the same disclosure to the parties and the other arbitrators.

In order to facilitate the disclosure process, the SCC provides each arbitrator, whether party-appointed or appointed by the SCC, with a Confirmation of Acceptance form¹², *i.e.* a standard form to be completed and signed by the arbitrator. The form gives the arbitrator an opportunity to, besides declaring his or her independence and impartiality, disclose any other circumstances he or she finds appropriate. When completed and signed, the form is returned to the SCC, which forwards a copy thereof to the parties and the other arbitrators. If the form contains a disclosure it is for the parties to assess its content and, if so deemed motivated, act accordingly. The SCC does not take any action *ex officio* where a form contains a disclosure. Furthermore, an arbitrator, who in the course of the proceedings becomes aware of any circumstances, which may disqualify him or her, must immediately, in writing, inform the parties and the co-arbitrators thereof.

Pursuant to the SCC Rules, a party who wishes to challenge an arbitrator shall send a written statement to the SCC setting forth the reasons for such challenge. Notification of the challenge must be made within 15 days from the date on which the allegedly disqualifying circumstance became known to the party. Failure by a party to notify the SCC within the time stipulated will be considered a waiver of the right to initiate a challenge.

¹² See appendix 1.

If the SCC receives a challenge of an arbitrator, the parties and the arbitrators are provided an opportunity to comment on the challenge before a decision is made. Generally, the parties and the arbitrators are given a time limit of one week to submit comments. When the time limit has passed, the SCC Board will decide upon the challenge. If the Board finds an arbitrator disqualified, the arbitrator is removed.

Should the SCC decide to remove the arbitrator, the SCC shall, if the SCC had appointed the removed arbitrator, appoint another arbitrator, replacing the person being discharged. If the removed arbitrator was party-appointed, the party will be given an opportunity to appoint a new arbitrator, unless otherwise deemed appropriate by the SCC Board.

The SCC does not provide reasons for its decisions concerning challenges of arbitrators regardless of whether a challenge is dismissed or sustained. In the below description of seven recent cases¹³ from the SCC, no reasons for the decisions are offered by the SCC.

3.1.3 Case Studies

3.1.3.1 Cases where the SCC rejected the challenge

Case 1: *Challenge by the Respondent of the sole arbitrator appointed by the Stockholm Chamber of Commerce*

Applicable section in the IBA's guidelines: The situation described below does not correspond to any of the specific situations described in the guidelines.

Facts: The Respondent asserted that there had been irregularities and improprieties in the proceedings before the SCC and before the arbitrator. The Respondent asserted that the SCC had sent communications to another address than that reported to the SCC by the Respondent, thereby preventing them from exercising their rights in relation to the appointment of the arbitrator. The Respondent further argued that the arbitrator, by failing to examine these issues, had unlawfully seized and assumed jurisdiction. The Respondent requested that the SCC dismiss the arbitrator due to his failure to perform his functions in an adequate manner. The arbitrator reverted stating that the letters that

¹³ All from 2005-2007.

the Respondent claimed not to have received where communicated prior to his appointment. Therefore the sending of those letters did not concern the manner in which the arbitrator had conducted the proceedings. The arbitrator further stated that matters concerning the appointment of the arbitrator were not the arbitrator's responsibility. The Claimant reverted that the Respondent should be estopped from raising the present challenge. The Claimant stated that the Respondent has had opportunities to raise these issues earlier in the proceedings, and that the Respondent was trying to avoid providing a reply on the merits of the case. The Claimant requested that the challenge be dismissed without being tried on its merits. The SCC did not find any ground for disqualification of the arbitrator. The SCC rejected the challenge.

Case 2: *A challenge by the Respondents of the arbitrator appointed by the Claimant and a challenge by the Claimant of the arbitrator appointed by the Respondents*

Applicable section in the IBA's guidelines: The situations described below can be found on the orange list, section 3.3.6. The section addresses the situation in which a close personal friendship exists between an arbitrator and a counsel of one party.

Facts: The arbitrator appointed by the Respondents ("the arbitrator") disclosed in his Confirmation of Acceptance form that he had worked for 12 years in the law firm of the Respondents' counsel. He left the firm seven years prior to the commencement of the present arbitration. He further disclosed that he had referred a client to the law firm of the Respondents' counsel in an unrelated matter three years ago. The Claimant stated that the fact that the law firm of the Respondents' counsel had employed the arbitrator for 12 years meant that the arbitrator was not untied and free of the parties and their counsel in a way that can be required by an arbitrator. The Claimant therefore requested that the arbitrator be released from appointment in the arbitration. The arbitrator commented on the challenge and stated that it is common that judges later become lawyers and that they appear as counsels in courts where they used to work. The arbitrator also stated that one should assume that counsels appoint arbitrators whose qualifications and capacity are known to them. The SCC did not find any ground for disqualification of the arbitrator. The SCC rejected the challenge. The arbitrator appointed by the Claimant ("the arbitrator") did not find reasons to make any disclosures in his Confirmation of Acceptance Form. The Respondents challenged the

arbitrator on the grounds that the arbitrator had for four years been a partner of the law firm where the Claimant's counsel worked and that they assumed there would be a deep and long going friendship between the arbitrator and the Claimant's counsel. On a request by the Respondents the arbitrator answered specific questions put forward by the Respondents. The content of the answers disclosed that the arbitrator had received assignments from the law firm of the Claimant's counsel during the time in which he was a partner of the law firm. The arbitrator submitted further comments on the challenge in which he stated that at the time he left the law firm of the Claimant's counsel, the counsel was not yet working at the firm. He disaffirmed that there was a deep and long going friendship between himself and the Claimant's counsel. To his knowledge, they had never met. The Claimant confirmed that the Claimant's counsel and the arbitrator had never met. The SCC did not find any ground for disqualification of the arbitrator. The SCC rejected the challenge.

Case 3: *Challenge by the Respondent of the arbitrator appointed by the Claimant*

Applicable section in the IBA's guidelines: The situation described below does not correspond to any of the specific situations described in the guidelines.

Facts: The Respondent challenged the arbitrator on the ground that the arbitrator worked for a company that on several occasions had performed work for the Respondent. It was therefore likely that the arbitrator had knowledge about the workings within the Respondent company and the Respondent company's systems that might affect his impartiality and assessment of the case. The Respondent therefore requested that the arbitrator be released from appointment. The arbitrator claimed that the challenge lacked basis. He recognized that the Respondent had been a client of the company in which he was employed. He further stated that he did not have knowledge about the workings within the Respondent company nor knowledge about their systems which could affect his impartiality. He stated that he did not have any knowledge about the workings of the Respondent company and let alone anything connected to this dispute. As far as he knew, the company in which he was employed did not possess any information remotely connected to this dispute. The Claimant stated that the reservations that the Respondent had raised against the arbitrator seemed to be based solely on the fact that the company in which the arbitrator was employed had at one or a

few occasions been a supplier for the Respondent. The Claimant further argued that the Respondent had not claimed that the arbitrator had had any actual involvement in the relations between his company of employment and the Respondent Company. The Respondent had not claimed that the arbitrator in any other way had gained actual knowledge about the Respondent Company nor the dispute that could affect his impartiality as arbitrator. The SCC did not find any ground for disqualification of the arbitrator. The challenge was dismissed.

Case 4: *Challenge by the Claimant of the arbitrator appointed by the Respondent*

Applicable section in the IBA's guidelines: The situation described below does not correspond to any of the specific situations described in the guidelines.

Facts: The Claimant was a party to an arbitral proceeding administered by the International Commercial Arbitration Court of the Russian Federation (ICACRF). The arbitrator appointed by the Claimant in that proceeding was challenged because he acted as an expert for the Claimant in the present proceeding.

According to the ICACRF Rules a challenge of an arbitrator shall be considered and resolved by the other members of the arbitral tribunal. If the arbitrators cannot reach an agreement the issue shall be decided by the presidium of the ICACRF. The presidium of the ICACRF examined the challenge and found that the challenge was already considered and resolved by the other members of the arbitral tribunal. The co-arbitrators had rejected the challenge. The presidium therefore found that it lacked jurisdiction to decide over the issue.

At the same time, the Russian Arbitration Act entitles a party, whose challenge has been rejected, to apply to the president of the Russian Federation Chamber of Commerce and Industry (RFCCI) with a request to decide on the challenge. The challenging party applied to the abovementioned president. The president decided to satisfy the challenge and released the arbitrator.

The Claimant argued that the president's decision was made on the instruction of the presidium of the ICACRF. The Claimant alleged that the president of the RFCCI solicited the views of the presidium of the ICACRF. The presidium of the ICACRF

allegedly decided, despite of its earlier decision that it lacked jurisdiction on the matter, that the arbitrator should be released and communicated that decision to the president of the RFCCI. As the arbitrator appointed by the Respondent is a member of the presidium of the ICACRF he may not be considered impartial in the present proceeding.

The arbitrator reverted and stated that after the decision was made that the ICACRF lacked jurisdiction to decide on the challenge there was a regular meeting of the ICACRF's presidium. After the regular meeting some members of the presidium expressed their views on the challenge. Their opinion on the challenge was given to the president of the RFCCI as arbitration specialists expressing their personal opinion. They stated their personal opinion on the request by the president of the RFCCI. The request was addressed not to the ICACRF presidium but to its members individually. The arbitrator stated that he neither took part in the discussion nor expressed any views on the matter due to a conflict of interest. No decision was taken on behalf of the presidium, nor even put on ballot.

The Respondent stated that the challenge was without merit. The mere disagreement of the Claimant with the merits of a procedural decision in a different matter in which the arbitrator had no involvement could in no way serve as a basis for removing the arbitrator in the present arbitration.

The Claimant maintained that the request from the president of the RFCCI was addressed to the presidium of the ICACRF and not to its members individually. The discussion on the challenge was noted in the minutes of the meeting of the ICACRF and even if the arbitrator did not take part in the discussion on the challenge it did not limit his responsibility for the legal consequences the decision by the presidium had caused the Claimant.

The SCC did not find any ground for disqualification of the arbitrator. The challenge was dismissed.

3.1.3.2 Cases where the SCC sustained the challenge

Case 1: *Challenge by the Respondent of the chairperson appointed by the party-appointed arbitrators*

Applicable section in the IBA's guidelines: The situation described below can be found on the orange list, section 3.1.4. The section addresses the situation in which the arbitrator's law firm has within the past three years acted for one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator.

Facts: The arbitrator, who was jointly appointed by the party-appointed arbitrators, declared that his law firm had during recent years been given a number of assignments from the Claimant. The Respondent challenged the arbitrator and argued that since the law firm of the arbitrator had provided services for the Claimant he couldn't be objective and independent in the pending case. The Claimant stated that it did not wish to comment on the challenge. The arbitrator appointed by the Claimant submitted that it was his understanding that the law firm of the arbitrator no longer had assignments for the Claimant. He stated that since the arbitrator himself had not had any assignments for the Claimant the present circumstances did not disqualify him as arbitrator in the pending case. The arbitrator appointed by the Respondent stated that he did not know of the relationship between the arbitrator's law firm and the Claimant at the time the arbitrator was appointed. He further stated that he did not see any formal circumstances on which to challenge the arbitrator. He stated that the situation could however give rise to some ethical questions. He stated that he would respect any decision on the challenge as given by the Board of the SCC. The arbitrator stated that he had himself not worked on any assignments for the Claimant. He further stated that his law firm had had three assignments for the Claimant in 2005. Three companies tied to the arbitrator's law firm had had assignments for the Claimant in 2005. Finally the arbitrator stated that his law firm was not financially dependent on the Claimant. The challenge to the arbitrator was sustained. The arbitrator was released from the appointment.

Case 2: *Challenge by the Respondent of the arbitrator appointed by the Claimant*

Applicable section in the IBA's guidelines: The situation described below can be found on the orange list, section 3.1.1. The section addresses the situation in which the arbitrator has within the past three years served as counsel for one of the parties or an affiliate of one of the parties or has previously advised or been consulted by the party or an affiliate of the party making the appointment in an unrelated matter, but the arbitrator and the party or the affiliate of the party have no ongoing relationship.¹⁴

Facts: The arbitrator disclosed that he had given a legal opinion in a pending arbitration between the Respondent and a group company of the Respondent, on behalf of the group company. The Respondent challenged the arbitrator and argued that it would be unfortunate and unsuitable if one of the arbitrators in the present arbitration were engaged as a legal expert for any of the two group companies engaged in the other arbitration. Clearly, the Respondent could not have appointed the arbitrator (or any other of the legal experts appearing for one or the other of the group companies in the other arbitration) in the present arbitration. The unsuitableness of the arbitrator remained even though it was the Claimant who appointed the arbitrator. The Respondent stated that it was therefore obliged to challenge the appointment of the arbitrator and requested that the Board of the SCC decide the issue. The Respondent pointed out that it was not suggesting any actual bias on the part of the arbitrator. The Claimant contested the challenge on the ground that the other pending arbitration was completely unrelated to the present arbitration both with regard to factual and legal circumstances. The Claimant argued that “any bias had to consist of actual or specific circumstances giving rise to reasonable doubt of the prospective arbitrator’s objectiveness and not just some sort of abstract or theoretical bias based on principles”. The arbitrator had stated that he had delivered a legal opinion as an expert but not acted as counsel to a party in any way involved in the present matter. The Claimant also pointed out that a person suggested as arbitrator had previously not been considered biased or impartial if such person prior to his appointment had made his position clear regarding certain legal matters in literature or journals. The Claimant also stated that the fact that the Respondent had expressly stated that it did not suggest any actual bias on the part of the arbitrator should be sufficient to determine that there were no

¹⁴ In the case described it is not the party making the appointment that has had the described relationship but instead the other party.

circumstances that hindered the appointment of the arbitrator. The Claimant also disclosed, since the Respondent had raised the issue regarding the arbitrator's impartiality, that according to the arbitrator, the arbitrator during the first six months in 2004 had assisted one of the counsels in the other pending arbitration. Since this professional relationship ended three years prior to the commencement of this arbitration the arbitrator had not viewed it as relevant for his participation as arbitrator in this arbitration. The challenge to the arbitrator was sustained. The arbitrator was released from the appointment.

Case 3: *Challenge by the Claimant of the chairperson appointed by the SCC
Applicable section in the IBA's guidelines*

The situation described below can be found on the orange list, section 3.3.3. The section addresses the situation in which the arbitrator was within the past three years a partner of, or otherwise affiliated with, another arbitrator or any of the counsel in the same arbitration.

Facts: The chairperson disclosed in his Confirmation of Acceptance form that he had worked at the same law firm as the Respondent's counsel and that he recently ended an arbitral proceeding where he acted as co-arbitrator and the Respondent's counsel as counsel. The Claimant further stated that the arbitrator's law firm drafted the contract in dispute when the arbitrator was still a partner of that firm. The challenge to the arbitrator was sustained. The arbitrator was released from the appointment.

3.1.3.3 Commentary

One should be cautious to draw far-reaching conclusions based on the few challenges made during the examined time period. But it can be noted that when it comes to the most common ground for a challenge, namely that the arbitrator or the arbitrator's law firm have had previous contact with one of the parties, the decisions by the SCC reflect a rather strict view. If an arbitrator or the arbitrator's law firm had previous contact with one of the parties within the past three years and the arbitrator is challenged, the SCC tends to sustain the challenge and dismiss the arbitrator, even if no actual bias has been shown. In this sense the decisions by the SCC represent a strict interpretation of the IBA's guidelines. If a party challenges an arbitrator based on a disclosure falling under the orange list of the IBA's guidelines, the SCC will most likely sustain the challenge.

It can further be noted that there are several situations described above which are not enumerated in the IBA's guidelines. But challenges based on those situations do not tend to lead to the SCC dismissing the arbitrator.

3.2 The procedure and the recent practice of the ICC

The standard of arbitrator neutrality under the ICC Rules is that the arbitrator must be and remain independent of the parties involved in the arbitration. According to the ICC, no increase in the number of challenges to arbitrators has been seen in the latest years.¹⁵ The procedure of the ICC differs from that of the SCC when it comes to appointments of arbitrators. The ICC considers the independence of a prospective arbitrator in two steps. When a party names an arbitrator of its choice that arbitrator is not considered appointed but merely nominated for appointment. First after the arbitrator has filed a statement of independence with or without disclosures, the arbitrator may or may not be confirmed by the ICC.

When it comes to the IBA's guidelines the ICC makes it clear that they do not bind the ICC. When parties agree on ICC arbitration they contract in the ICC Rules and not the IBA's guidelines. The ICC recognizes the value of the IBA's work to harmonize the standard of independence and impartiality in international arbitration but point out that there is "a fundamental incompatibility"¹⁶ between the ICC Rules and the IBA guidelines. According to the ICC Rules disclosure by a prospective arbitrator should be made when there are facts that in the eyes of the parties may call into question the independence of the arbitrator. Therefore the ICC cannot agree to the lists of specific situations in the IBA's guidelines. If a subjective test is to be applied when deciding whether or not to make a disclosure there can be no such thing as the IBA's green list, stating that certain situations never need disclosure.¹⁷

With regard to the IBA's orange list the ICC states that it may be helpful for prospective arbitrators and parties in considering what to disclose. But the list does not provide any guidance for institutions as to the impact of such disclosure for confirmations or

¹⁵ Whitesell, p 27.

¹⁶ Whitesell, p. 36.

¹⁷ Whitesell, p. 36.

challenges. Therefore the ICC questions the utility of the IBA guidelines for an arbitration institution such as the ICC.¹⁸

In the section to follow the procedure regarding appointment and challenging of arbitrators of the ICC will be described.

3.2.1 Challenges under the ICC Rules

The ICC, like the SCC, has no pre-established list from which arbitrators must be selected. The parties may appoint any person of any nationality and profession as arbitrator, so long as he or she is independent. Unlike in the SCC Rules, there is no direct mention of impartiality. However, two other provisions of the ICC Rules allow for impartiality to be considered. The ICC Rules state that in all cases, the Arbitral Tribunal shall act fairly and impartially and a challenge can be brought for an alleged lack of independence “or otherwise”, which therefore might include a lack of impartiality.¹⁹

A person nominated as arbitrator must disclose any facts or circumstances which might be of such a nature as to call into question the arbitrator’s independence in the eyes of the parties. The ICC Rules are unique between the four sets of Rules examined within the scope of this thesis in applying the “in the eyes of the parties” test to determine what disclosures a prospective arbitrator needs to make. When determining the merits of a challenge, however, all abovementioned institutions use an objective test.²⁰

The ICC, as the SCC, provides each arbitrator, whether party-nominated or nominated by the ICC, with a standard form that requires the prospective arbitrator to disclose any circumstances which might call into question the arbitrator’s independence. The ICC form is called the Arbitrator’s Declaration of Acceptance and Statement of Independence.²¹ When completed and signed, the form is returned to the ICC, which forwards a copy thereof to the parties. Regardless of whether the form contains a disclosure or not the ICC may choose to confirm or not to confirm the arbitrator. The parties may object to the nomination and the ICC takes the objection into consideration when determining whether the arbitrator should be confirmed or not. In this way the

¹⁸ Whitesell, p. 36.

¹⁹ Whitesell, p. 10.

²⁰ Lawson, p. 26-27.

²¹ See appendix 2.

ICC differentiates between an arbitrator that does not get confirmed at the outset of the proceedings and an arbitrator who is challenged later on.

This procedure differs from that of the SCC in that the SCC need not confirm a party-appointed arbitrator but merely forwards the arbitrator's Confirmation of Acceptance form, with the disclosures it may contain, to the other party which then decides whether it finds grounds on which to challenge the arbitrator or not. It should be stressed that when it comes to arbitrators appointed by the SCC, the SCC does ask the arbitrator to confirm their independence and impartiality before it determines whether or not to proceed with the appointment. Under the ICC Rules, as under the SCC Rules, an arbitrator shall immediately disclose any potentially disqualifying facts or circumstances that arise during the arbitration.

Pursuant to the ICC Rules, a party who wishes to challenge an arbitrator shall send a written statement to the ICC specifying the facts and circumstances on which the challenge is based. Notification of the challenge must be made within 30 days from the date on which the allegedly disqualifying circumstance became known to the party. The time stipulated in the ICC Rules is thus twice as long as the time under the SCC Rules. This may have consequences for the speed by which arbitrations can proceed. In this respect the ICC follows the IBA's general standard, which stipulates a time frame of 30 days for parties to raise objections.

If the ICC receives a challenge of an arbitrator, the parties and the arbitrators are provided an opportunity to comment on the challenge before a decision is made. When the time limit for commenting on the challenge has passed, the ICC Court will decide upon the challenge. If the Court finds an arbitrator disqualified, the arbitrator is removed. Should the Court decide to remove the arbitrator, the Court has discretion to decide whether or not to follow the original nominating process.

Pursuant to its rules, the ICC does not provide reasons for its decisions concerning challenges of arbitrators regardless of whether a challenge is dismissed or sustained. The ICC states that this is preferable partly because it allows the members of the court to reach the same decision without agreeing on the reasons for the decision.²² Therefore

²² Whitesell, p. 47.

you find, in the below description of eleven recent cases²³ from the ICC, included the confirmation/challenge situation and the decision by the ICC but excluded any reasons by the ICC. Thereafter commentary are made on what conclusions might be drawn from the recent practice.

3.2.2 Case studies

3.2.2.1 Cases where the ICC confirmed the arbitrator/the ICC dismissed the challenge

Case 1: Nomination by the Respondent of an arbitrator who made disclosures

Facts: The Respondent nominated an arbitrator, who indicated that several offices of his law firm had ongoing attorney-client relations with the Respondent, but the work was unrelated to the dispute, did not involve the arbitrator personally and did not involve significant amounts of money. No objection was made. The arbitrator was confirmed.²⁴

Case 2: Nomination by the Claimant of an arbitrator who made disclosures

Facts: The arbitrator nominated by the Claimant stated that he had given legal opinions for a party in a non-ICC case in which a lawyer from the firm representing the Claimant had acted as counsel. He also disclosed that he was involved as co-counsel with one of the Claimant's counsel in two unrelated cases. He was also co-editor, with the Claimant's counsel, of a book on arbitration. Finally, he also stated that he had given legal opinions for clients represented by counsel for one of the Respondents in an unrelated case. No objection was made. The arbitrator was confirmed.²⁵

Case 3: Nomination by the Respondent of an arbitrator who made disclosures

Facts: The arbitrator nominated by the Respondent disclosed that five years previously he had given advice to a law firm in which one of the Claimant's counsel then worked. The Claimant objected to his confirmation. The arbitrator was confirmed.²⁶

²³ All from 1998 – 2006.

²⁴ Whitesell, p. 17.

²⁵ Whitesell, p. 18.

²⁶ Whitesell, p. 19.

Case 4: *Nomination by the Respondent of an arbitrator who made disclosures*

Facts: The arbitrator nominated by the Respondent indicated that seven years previously she had rendered a legal opinion for the Respondent. The Claimants objected to her confirmation, alleging that she had not mentioned the subject of the legal opinion, that the law firm for which she worked when she wrote the opinion might conceivably still have close relations with the Respondent, and that she might still have close relations with that firm. The Respondent replied that the Respondent had not retained the nominee after her legal opinion, that the opinion concerned an unrelated project, and that there was no personal or business relationship between the proposed arbitrator and the Respondent. The arbitrator was confirmed.²⁷

Case 5: *Challenge by the Respondents of the chairman of the tribunal*

Facts: The Respondents challenged the chairman of the arbitral tribunal, who after taking up his position disclosed that a partner of his law firm was representing a party in an unrelated non-ICC arbitration in which the counsel for the Claimant was the chairman of the arbitral tribunal. Neither the parties, the issues nor the subject matter were the same in the two arbitrations. Also, in neither case had the chairman been appointed by the counsel appearing before them. The ICC rejected the challenge.²⁸

Case 6: *Challenge by the Claimant of the arbitrator appointed by the Respondents*

Facts: The Claimant filed a challenge against the co-arbitrator nominated jointly by the Respondents. The co-arbitrator had submitted an unqualified Statement of Independence. The Claimant alleged that the co-arbitrator's law firm had represented a party in a non-ICC case against a subsidiary of the Claimant. The representation had taken place over a two-year period and had finished approximately five years before the co-arbitrator had been confirmed in the ICC matter. The Respondent replied that the facts on the basis of which the challenge had been filed did not show any "actual existence or even the appearance of a lack of independence". The co-arbitrator commented that he had not been personally involved in the non-ICC arbitration and that he knew nothing about the case. He indicated that the facts alleged by the Claimant,

²⁷ Whitesell, p. 18.

²⁸ Whitesell,, p. 31.

which had taken place “so many years ago”, would not affect his independence or impartiality in the ICC case. The ICC rejected the challenge.²⁹

3.2.2.2 Cases where the ICC did not confirm the arbitrator/the ICC sustained the challenge

Case 1: *Nomination by the Claimant of an arbitrator who did not make disclosures*

Facts: The arbitrator nominated by the Claimant filed an unqualified Statement of Independence, without disclosing that the same party in three related ICC cases involving the same counsel to the Claimant had nominated him. Neither the Respondent nor its counsel was involved in the other two related matters. When contacted by the Secretariat of the ICC enquiring whether he would consider making a disclosure, the arbitrator refused such disclosure. The ICC did not confirm the arbitrator.

Case 2: *Nomination by the Claimants of an arbitrator who made disclosures*

Facts: The arbitrator nominated jointly by the Claimants filed a qualified Statement of Independence, disclosing that he had worked in the legal department of a subsidiary of one of the Claimants for six years. He had also been employed in the legal department of an indirect subsidiary of the same Claimant during the following four years and had ceased the latter activity one year prior to making his Statement of Independence. The Respondent did not participate in the proceedings and therefore raised no objection. The ICC did not confirm the arbitrator.³⁰

Case 3: *Nomination by the Claimants of an arbitrator who made disclosures*

Facts: The arbitrator nominated by the Claimant indicated that two years previously the Claimant had consulted a law firm with respect to the agreement from which the new dispute arose. One of the lawyers at that firm who had participated in the consultation later joined the firm to which the nominated arbitrator belonged. The Respondent objected, stating that the nominated arbitrator would not be able to decide independently upon an agreement drafted under the responsibility of one of his colleagues. The ICC did not confirm the arbitrator.³¹

²⁹ Whitesell, p. 32.

³⁰ Whitesell, p. 22.

³¹ Whitesell, p. 23.

Case 4: *Challenge by the Claimant of the arbitrator appointed by the Respondents*

Facts: The co-arbitrator nominated by the Respondent had filed an unqualified Statement of Independence. After his confirmation and while the proceedings were at an early stage, he informed the parties that he had just learned that his firm had undertaken an engagement on behalf of the Respondent. The transaction was being chiefly handled by one of the foreign offices of his firm of over 700 lawyers and was an isolated event completely unrelated to the arbitration. Additionally, the co-arbitrator's firm stated that the strictest possible internal confidentiality restrictions were in place to isolate the co-arbitrator from any contact with the engagement. The Claimant commented that the Respondent was nevertheless a client of the co-arbitrator's firm, and the impact of the attorney/client relationship on the appearance and the reality of independence were not affected by the proposed restrictions. The ICC accepted the challenge.

Case 5: *Challenge by the Respondent of the chairman of the tribunal*

Facts: The Respondent filed a challenge against the chairman of the arbitral tribunal, claiming that a foreign office of his law firm was representing a client in a lawsuit against the parent company of the Respondent. The lawsuit was not related to the arbitration. The ICC accepted the challenge.

3.2.2.3 Commentary

Initially it can be noted that the ICC, like the SCC, is not experiencing an increase in the number of challenges in relation to the caseload.³²

It can further be noted that the ICC states that a challenge is decided on approximately 1-2 months after the ICC received all information in the matter.³³ This can be compared to the SCC who after it received all information in a challenge matter renders a decision within one month and often as soon as within a couple of weeks.

A difference in how the ICC and the SCC handle independence issues is, as mentioned above, that the ICC may make ex officio decision with regard to arbitrator neutrality. From the above referenced practice it is indicated that this does provide a difference. The ICC seem to protect a non-participating party by not confirming an arbitrator when

³² Whitesell, p. 27.

³³ Whitesell, p. 28.

disclosures are made which in the eyes of the ICC disqualify the arbitrator. Also the ICC sometimes elects to not confirm an arbitrator who refuses to make disclosures deemed necessary by the ICC.

It is the view of the author that a party who agreed to arbitration as the mean of dispute resolution between the parties and later elects to not participate in the process does not deserve a high degree of protection. In such a situation the Claimant most likely had to provide the total payment required by the arbitration institute for the case to be referred and is thus bearing a higher burden than the parties agreed.³⁴ In the case when the arbitration institute has knowledge that goes towards the independence of an arbitrator and said arbitrator refuses to make a disclosure it is my view that the ex officio power of the institute serves a good purpose.

When it comes to the most common ground for lack of independence, that the arbitrator or his or her law firm had a previous contact with one of the parties to the arbitration, the practice of the ICC seem to reflect as strict a view as the SCC. The problem of arbitrator independence for large national and international law firms is thus very real. The trend of setting up new law firms to avoid the problem therefore seems motivated.

3.3 The procedure of the LCIA

The joint meeting of the LCIA Court and Board voted, in May 2006, to publish the LCIA Court's decisions on challenges to arbitrators. Work is under way to prepare the abstracts, which have not yet been published.³⁵

The procedure by which an arbitrator declares himself neutral in a case under the LCIA Rules is similar to the procedure of the SCC as described above. An arbitrator shall, prior to appointment, sign a declaration of independence and provide the LCIA with a current CV. The duty to make disclosures about circumstances likely to give rise to any justified doubts as to the impartiality and independence of the arbitrator continue throughout the arbitral proceeding.

³⁴ See for example the SCC Rules according to which the parties as a main rule shall provide half of the advance on costs each.

³⁵ Nicholas & Partasides, http://www.lcia.org/NEWS_folder/news_archive3.htm.

The LCIA have adopted the practice, prescribed by its constitution, of referring challenges to a division of three or five members of the court rather than to the full membership of the court.³⁶ A recent challenge alleging apparent bias against two members of a three-man tribunal in an ongoing LCIA arbitration led to the appointment of a separate three-man division of the LCIA to determine the application.³⁷

The LCIA does not apply the IBA guidelines directly when determining challenges.³⁸ But members of the LCIA court find it timely that the IBA has published guidelines on conflicts and disclosure even though they stress that the LCIA has its own tried and tested procedures for determining challenges that may differ from the IBA guidelines.³⁹ The LCIA court determines challenges, which are not agreed by all parties or accepted by the arbitrator and, without being required to do so, give reasons for its decisions on challenges.⁴⁰

It is my reflection that giving reasons for decisions on challenges adds transparency for the parties but inevitably makes the challenge procedure more time consuming. I believe it is a better approach for an arbitral institution to not give reasons when rendering each decision but instead publish case law and thereby making public the institutions view on the standard of arbitrator neutrality in general.

The LCIA court is able to make decisions ex officio, just as the ICC, if it determines that an arbitrator nominated by a party does not meet the standard of neutrality under its rules.

3.4 The procedures of the AAA

The AAA has never published any decisions on challenges to arbitrators.⁴¹ Therefore what will follow is a description of the procedure of the AAA.

³⁶ Winstanley, <http://www.globalarbitrationreview.com/handbooks/3/sections/11/chapters/71/foreword>

³⁷ Terkildsen, Korsgård Petersen,

<http://www.globalarbitrationreview.com/handbooks/3/sections/5/chapters/68/challengestoarbitrators>

³⁸ Winstanley, <http://www.globalarbitrationreview.com/handbooks/3/sections/11/chapters/71/foreword>

³⁹ Winstanley & Rowley, LCIA Conference, New Delhi, 12-13 November 2005

⁴⁰ Winstanley, <http://www.globalarbitrationreview.com/handbooks/3/sections/11/chapters/71/foreword>

⁴¹ Pons, oral source.

The procedure by which an arbitrator is appointed under the AAA Rules⁴² differs from that of the SCC. The AAA has a pre-established list from which arbitrators are selected. The AAA's National Roster contains over 8 000 impartial neutrals to hear and resolve cases.⁴³ The AAA works with the parties to identify and select arbitrators from its roster of neutrals. The parties' criteria are used to identify neutrals with qualifications that match the needs of the case. Once parties agree on the neutral, the arbitration proceedings may begin.⁴⁴

An arbitrator under the AAA Rules shall be impartial and independent and shall perform his or her duties with diligence and in good faith. The parties may agree in writing, however, that arbitrators directly appointed by a party shall be non-neutral, in which case such arbitrators need not be impartial or independent and shall not be disqualified for partiality or lack of independence. The concept of non-neutral arbitrators does not exist within the framework of the SCC rules. This is thus a significant difference but one which I will not explore further within the framework of this thesis.

As under the SCC Rules, an arbitrator shall under the AAA Rules disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence. The AAA rules go on to explicitly state that this includes lack of bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. The obligation of disclosure shall remain in effect throughout the arbitration.

Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified. This provision differs from the procedure of the SCC, where the Institute does not on its own initiative raise questions of lack of independence or impartiality.

The AAA and the American Bar Association (ABA) have published a Code of Ethics for Arbitrators in Commercial Disputes. The code includes provisions on impartiality and independence. The code is, like the IBA guidelines, not binding upon parties to

⁴² The AAA has different rules for different types of disputes. The rules here referred to are the Commercial Arbitration Rules.

⁴³ http://www.adr.org/about_aaa

⁴⁴ <http://www.adr.org/sp.asp?id=29016>

international arbitration. But the code aspires to set forth generally accepted standards of ethical conduct for the guidance of arbitrators and parties in commercial disputes, in the hope of contributing to the maintenance of high standards and continued confidence in the process of arbitration.⁴⁵

⁴⁵ The Code of Ethics in Commercial Disputes,
<http://www.abanet.org/intlaw/policy/civillitigation/codeofethicsarbitrators2004.pdf>

4. Comparative analysis

4.1 Do the procedure and the practice of the SCC differ from that of the other Arbitration Institutes?

At large the procedure regarding appointment and challenges of arbitrators of the abovementioned arbitration institutions is similar. Neutrality is required and any circumstances, which might disqualify an arbitrator, must be disclosed both at the outset and throughout the proceedings.

There are differences in how the challenge procedure is handled. With the SCC, time limits are kept short and the SCC Board decide on challenges within a month at its regular meetings, under the same rules as other decisions by the SCC Board are made. Another circumstance, which serves to keep the procedure short, is that a party must object to a disqualifying circumstance within 15 days.

With the ICC decisions on challenges are made within 1-2 months after the ICC received all the documentation, as opposed to within one month after the challenge was raised with the SCC. Under the ICC rules a party is given 30 days to raise a challenge. A challenge is considered by a much greater number of people than under the SCC rules, as its board consists of 126 members and the SCC board of 12. One might argue that this enables greater substantive review but one should also consider the time aspect of the procedure. It should also be considered that in a comparison of the case law on challenge decisions such as this one, it turns out that the standard of arbitrator neutrality applied by the SCC and the ICC is similar.

When it comes to the ex officio power with regard to assessing arbitrator neutrality of the ICC, the LCIA and the AAA it does constitute a difference. As mentioned above, I believe the ex officio power only serves a good purpose when the arbitration institution has knowledge about the arbitrator which should be disclosed but which the arbitrator refuses to disclose. If an arbitrator discloses information, which the institution would find sufficient for disqualification, but no objection is made by a party not participating in the process, the arbitrator should remain on the tribunal.

Under the LCIA rules, as under the SCC rules, a party has 15 days to raise a challenge. When the LCIA Board needs to decide on the challenge it does so via a special division

of three or five members of the board. This indicates that the challenge is given ample consideration but it also indicates that the procedure becomes time consuming, especially as the LCIA gives reasons for its decision to the parties.⁴⁶

The SCC states that it strives to follow the IBA's guidelines and the ICC does not. In reviewing the cases above it seems as though the two institutions non-the-less apply a similar standard. When for example three or more years have passed since a client-attorney relationship ended between an arbitrator and a party to the arbitration, both institutions admit the arbitrator to serve as an independent arbitrator. When a shorter time has passed and a party makes an objection, both institutions tend to dismiss the arbitrator due to lack of independence.

4.2 Consequences in International Arbitration

Both the SCC and the ICC practice reflect a strict view on how to assess arbitrator neutrality. That serves to strengthen the confidence in arbitration as a means of dispute resolution. As an arbitral award cannot be challenged on its merits it is of great importance that the parties have confidence in the arbitrators trying their dispute. At the same time arbitrators should not step down at the mere allegation of lack of independence when there are no grounds for a challenge. By doing so they are instead undermining the arbitration by causing delays and thereby also increased costs for the parties.

It is my view that a homogenous view on the standard of independence and impartiality in international arbitration serves at least one important purpose. A homogenous standard can increase the confidence in arbitration as method of dispute resolution as it helps increase the foreseeability in the process all over the world. It also makes it easier for prospective arbitrators to determine what disclosures need to be made and when and when not they should turn down assignments.

In line with the reasoning above it is valuable to the arbitration community that arbitration institutes publish deidentified decisions on the topic, thereby helping the arbitrators and parties to determine when a challenge may be warranted under the

⁴⁶ Although I have not been able to review any body of case law as it has not yet been published by the LCIA, I have reviewed a recent case where the decision by the division of the court was 22 pages long.

standard. By publishing decisions the discussion on the standard is kept alive and can more easily adapt to new developments.

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