

SCC PRACTICE NOTE

SCC Board Decisions on Challenges to Arbitrators 2013-2015

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1. Introduction

Now in its 100th year, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) has developed into one of the world's leading forums for dispute resolution. The SCC registers around two hundred new arbitrations a year – ranging from small, local disputes to high-profile investor-state cases. The SCC maintains two main sets of rules, the Arbitration Rules and the Rules for Expedited Arbitrations (together, the “SCC Rules”).¹ Both provide for a procedure in line with the best practices in international arbitration. While the Rules set the framework for each SCC arbitration, they are flexible and allow parties and arbitrators to adapt the procedure to suit the dispute at hand.

The SCC Rules stipulate, as do most institutional rules, that arbitrators must be impartial and independent. Before being appointed, arbitrators must disclose any circumstances that may give rise to doubts as to his or her impartiality or independence. And if new such circumstances arise during the course of the arbitration, arbitrators must disclose them immediately. If the disclosed circumstances – or other circumstances of which a party is aware – give rise to justifiable doubts as to the arbitrator's independence or impartiality, the party may challenge the arbitrator under Article 15 of the SCC Rules. If all other parties agree to the challenge, the arbitrator must resign. In all other cases, the SCC Board makes a decision on the challenge.

This article will review the SCC Board's decisions on challenges to arbitrators during the years 2013-2015. In this period, the number of challenges was relatively low in comparison to the number of new arbitrations registered. From January 2013 through December 2015, 567 arbitral proceedings were initiated at the SCC. In the same time period, a total of 28 challenges to arbitrators were filed. Many of these challenges resulted in the arbitrator stepping down as a result of party agreement. The Board was required to make a decision on 14 of the challenges. Those decisions will be discussed in section 4 below.

¹ Revised versions of both sets of rules will enter into force on 1 January 2017. The provisions related to challenges to arbitrators remain unchanged in the revised rules.

2. The standard for arbitrator impartiality in SCC arbitrations

2.1. The SCC Rules

Article 15(1) of the SCC Rules provides that a party may challenge an arbitrator “if circumstances exist which give rise to justifiable doubts as to the arbitrator’s impartiality or independence or if he/she does not possess the qualifications agreed by the parties.” The rules do not define “justifiable doubts”, or explain which circumstances may legitimately give rise to such doubts. Therefore, when determining whether a challenge filed under this provision should be sustained, the SCC Board looks to applicable law and best practices in international arbitration for guidance.

2.2. The Swedish Arbitration Act

Most SCC arbitrations have their formal seat in Sweden, rendering the Swedish Arbitration Act applicable to the proceedings. Section 8 of the Act states that an arbitrator shall be discharged “if there exists any circumstance which may diminish confidence in the arbitrator’s impartiality”. In doctrine and jurisprudence, the “impartiality” requirement has been interpreted to include “independence” as spelled out in the UNCITRAL model law and the SCC Rules.² In the proposed revisions to the Act, which may be adopted in 2017, the word “independence” has been added to Section 8.³

Section 8 of the Act provides a non-exhaustive list of circumstances that may diminish confidence in an arbitrator’s impartiality or independence, including (1) the arbitrator or a person closely associated with him may “expect benefit or detriment worth attention, as a result of the outcome of the dispute”, (2) the arbitrator represents a party who may expect such benefit or detriment, and (3) the arbitrator has taken a position in the dispute.⁴ Of course, circumstances other than those enumerated in Section 8 may serve as grounds for disqualifying an arbitrator. Nonetheless, this provision of the Act guides the SCC Board’s determination of which situations give rise to “justifiable doubts” under the SCC Rules.

2.3. Jurisprudence

Sweden’s Supreme Court has held that an arbitrator’s impartiality should be assessed *objectively*. This means that an arbitrator should be removed if the circumstances would normally lead to doubts as to impartiality, even if in the case at hand there is no reason to suspect that the arbitrator is *actually* partial.⁵

² Patrik Schöldström, “The Arbitrators”, in Ulf Franke et al (eds.) *International Arbitration in Sweden: A Practitioner’s Guide* (Wolters Kluwer 2013) p. 116.

³ Översyn av lagen om skiljeförfarande (“Review of the Arbitration Act”) SOU 2015:37 p. 176. Available at

<http://www.regeringen.se/49c859/contentassets/78c079328bef401abd6b57f90744e504/oversyn-av-lagen-om-skiljeforfarande-sou-201537> (in Swedish with a summary in English).

⁴ The list is illustrative and not exhaustive (Govt. Bill 1998/99:35 p. 218). See, e.g. decision of the Supreme Court, Case T 156-09 of 9 June 2010, available at <https://www.arbitration.sccinstitute.com/dokument/Court-Decisions/952262/Judgment-of-the-Supreme-Court-of-Sweden-9-June-2010-Case-No-T-156-09NJA-2010-s-317?pageid=95788>.

⁵ See Judgment of the Supreme Court of Sweden in case T 2448-06 of 19 November 2007. Available at <http://www.arbitration.sccinstitute.com/dokument/Court-Decisions/1083436/Judgment-of-the-Supreme-Court-of-Sweden-19-November-2007-Case-No-T-2448-06NJA-2007-s-481?pageid=95788>.

The Svea Court of Appeal has held, and the Supreme Court has affirmed, that the decision on whether to sustain a challenge to an arbitrator should be based on an “overall assessment taking all relevant circumstances into consideration”.⁶ In other words, even if one circumstance is not sufficient to doubt the challenged arbitrator’s impartiality, a number of individually rather marginal circumstances may lead the decision-maker to a different conclusion.⁷

2.4. The IBA Guidelines on Challenges to Arbitrators

The IBA Guidelines on Conflicts of Interest in International Arbitration have gained wide acceptance within the international arbitration community since their first issuance in 2004.⁸ Arbitrators commonly rely on the Guidelines when making decisions about prospective appointments and necessary disclosures, and the Guidelines are frequently cited in challenges. The SCC Board routinely consult the Guidelines when deciding challenges under the SCC Rules. Finally, Sweden’s Supreme Court has noted that, while its decisions are based on the provisions in the Arbitration Act, it may also consider the IBA Guidelines – especially in cases involving non-Swedish parties.⁹

The IBA Guidelines provide that “doubts are justifiable when a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.”¹⁰ In other words, it is the *appearance* of bias — not *actual* bias — that may trigger dismissal of the arbitrator.¹¹

In order to promote greater consistency, and to avoid unnecessary challenges and arbitrator withdrawals and removals, the Guidelines list specific situations, relationships and circumstances and indicate whether disclosure or disqualification is warranted. The situations are divided into Red, Orange and Green lists. The Red List describes situations in which an objective conflict of interest exists from the point of view of a reasonable third person having knowledge of the relevant facts. The Orange List describes situations which in the eyes of the parties may give rise to justifiable doubts as to the arbitrator’s impartiality or independence. The Green List describes situations or circumstances where there is *no* appearance of or actual conflict of interest from an objective point of view.

The holding regarding objectivity was reaffirmed in Case T 156-09, decision of 9 June 2010, available at <https://www.arbitration.sccinstitute.com/dokument/Court-Decisions/952262/Judgment-of-the-Supreme-Court-of-Sweden-9-June-2010-Case-No-T-156-09NJA-2010-s-317?pageid=95788>.

⁶ See decision of the Svea Court of Appeal, Case T 10321-06 of 10 December 2008. Available at <https://www.arbitration.sccinstitute.com/dokument/Court-Decisions/952259/Decision-of-the-Svea-Court-of-Appeal-10-December-2008-Case-No-T-10321-06?pageid=95791>. Upheld in the decision of the Supreme Court, Case T 156-09 of 9 June 2010, available at <https://www.arbitration.sccinstitute.com/dokument/Court-Decisions/952262/Judgment-of-the-Supreme-Court-of-Sweden-9-June-2010-Case-No-T-156-09NJA-2010-s-317?pageid=95788>.

⁷ Stefan Lindskog, *Skiljeförfarande: En kommentar*. (“Arbitration: A Commentary”) (Norstedts 2012) p. 421.

⁸ Available at

http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

⁹ See the decision in the Supreme Court in Case No. T 2484-11 of 10 April 2013. Available at <https://www.arbitration.sccinstitute.com/dokument/Court-Decisions/1973471/Judgment-of-the-Svea-Court-of-Appeal-10-April-2013-Case-No-T-2484-11?pageid=95791>. See also Patrik Schöldström, “The Arbitrators”, in Ulf Franke et al (eds.) *International Arbitration in Sweden: A Practitioner’s Guide* (Wolters Kluwer 2013) p. 117.

¹⁰ IBA Guidelines, Explanation to General Standard 2(c), p. 5. See also 2(b), p. 5.

¹¹ See the decision in the Supreme Court in Case No. T 2484-11 of 10 April 2013. Available at <https://www.arbitration.sccinstitute.com/dokument/Court-Decisions/1973471/Judgment-of-the-Svea-Court-of-Appeal-10-April-2013-Case-No-T-2484-11?pageid=95791>.

The SCC Board routinely references the Red, Orange and Green lists when assessing whether a circumstance, relationship or situation invoked as a ground for challenge gives rise to “justifiable doubts” as stipulated by the SCC Rules.

3. The SCC procedure for challenges to arbitrators

A party who wants to challenge an arbitrator must submit a written statement to the Secretariat setting forth the reasons for the challenge. The challenge must be filed within 15 days from when the circumstances giving rise to the challenge became known to the party. Failure by a party to challenge an arbitrator within the stipulated time period constitutes a waiver of the right to make the challenge, and the SCC Board will dismiss a challenge on this ground.

When a challenge is filed by a party, the Secretariat gives the other party and the arbitrators an opportunity to submit comments on the challenge. If the other party agrees to the challenge, the arbitrator must resign. In all other cases, including in those where the arbitrator offers to voluntarily step down but one party objects, the Board makes the final decision on the challenge.

The SCC Secretariat compiles a memorandum for the Board, which includes the grounds for challenge, the comments submitted by the arbitrator and the other party, and an analysis of the circumstances based on SCC precedent, legal authorities, the IBA Guidelines. The Board discusses the challenge at one of its monthly meetings, or electronically in situations where an urgent decision is needed. Once the SCC Board has made a decision, the parties and the arbitrators are notified whether the challenge was sustained or dismissed. The SCC currently does not provide reasons for its decisions, but may begin doing so in the future.

The SCC aims to handle all challenges to arbitrators efficiently, and so as to avoid delaying the arbitral proceedings. Arbitrators and opposing parties are typically given one week to comment on the challenge, and the SCC Board usually renders its decision within 4 weeks of the challenge being filed.

4. SCC Board Decisions 2013-2015

This section includes summaries of all decisions on challenges that the SCC Board made between January 2013 and December 2015, excluding only decisions made in arbitrations that are still ongoing.

4.1. Challenge dismissed

4.1.1. SCC arbitration 2012/002¹²

The claimant challenged the arbitrator appointed by the respondent based on a conversation between the arbitrator and the respondent’s counsel, overheard by the claimant’s counsel, in which the arbitrator had questioned the credibility of the claimant’s expert evidence in other arbitral proceedings related to the dispute. The claimant’s counsel submitted a polygraph test in support of his witness statement. The claimant subsequently challenged the entire tribunal, arguing that the respondent’s arbitrator might have influenced the other arbitrators.

The respondent admitted that a conversation had taken place between the respondent’s counsel and the arbitrator, but that the arbitrator had not made the remark alleged by the claimant’s

¹² Nationality of the parties: Pakistani, Norwegian. Nationality of the arbitrators: British, Swedish (chair). Seat: Stockholm.

counsel. Respondent also objected to the admissibility of the polygraph test. The challenged arbitrator denied having made the alleged remark and stated that the conversation between him and the respondent's counsel was merely small talk by the coffee machine. The SCC Board dismissed the challenge.

4.1.2. SCC arbitration 2012/148¹³

The claimant challenged the arbitrator appointed by the respondent on the ground that the arbitrator belonged to the same professional body of public notaries as one of the partners of the respondent's counsel, and that the arbitrator had failed to disclose this circumstance according to Article 14(2) SCC Rules. The respondent opposed the challenge, maintaining that the information relevant for the challenge had been included in the Request for Arbitration, and the claimant had waived the right to make the challenge by failing to submit it within the stipulated 15-day time limit imposed by the SCC rules. Moreover, membership in the same professional body is included on the Green List of the IBA Guidelines (para 4.3.1), meaning that there is no appearance of or actual conflict of interest from an objective point of view. The arbitrator did not comment on the challenge. The SCC Board dismissed the challenge.

4.1.3. SCC arbitration 2013/112¹⁴

The claimant submitted a request under Article 16(1)(iii) of the SCC Rules to release a replacement arbitrator appointed by the respondent during the proceedings. The new arbitrator had disclosed that he would be unavailable during the previously scheduled hearing dates, and consented to the appointment subject to the hearing being rescheduled. The claimant opposed the delay, arguing that making witnesses available for the new dates would cause disruptions in the claimant's operations.

Respondent opposed the request on numerous grounds: (1) the claimant had not challenged the arbitrator on the basis of Article 15 of the SCC Rules; (2) Article 16 can be invoked only by the SCC Board on its own motion and only in extreme cases; (3) in any event, rescheduling the hearing did not amount to an unacceptable delay; (4) releasing the arbitrator would likely cause even further delay. The request for release was dismissed.

4.1.4. SCC arbitration 2013/134¹⁵

Upon being appointed, the chairperson disclosed that he had worked for more than 30 years at the law firm representing the claimant in the arbitration. He had left the firm seven years before the appointment at issue. Respondent challenged the chairperson on these grounds, adding that the claimant may have been a client of the firm at the time – meaning that claimant had been a de facto client of the chairman. The challenged arbitrator commented that he did not recall claimant being a client of the firm while he was a partner there, and the two lawyers representing the claimant had joined the law firm after the chairman had left. The chairman left the law firm representing claimant seven years prior to appointment; under Section 3.1 of the IBA's Orange List, the relevant time limit for this circumstance is three years. The SCC Board rejected the challenge.

¹³ Nationality of the parties: Russian, German. Nationality of the arbitrators: Russian, German, Swedish (chair). Seat: Stockholm.

¹⁴ Nationality of the Parties: Belgian, Dutch. Nationality of the Arbitrators: Swedish. Seat: Stockholm.

¹⁵ Nationality of the parties: Swedish. Nationality of the arbitrators: Swedish. Seat: Stockholm.

4.1.5. SCC arbitration 2013/180¹⁶

The claimant challenged the arbitrator appointed by the respondent on the basis that the arbitrator and claimant's counsel were opposing counsel in another dispute pending in district court. In that dispute, the claimant's counsel had objected to the legal fees charged by the arbitrator in his role as counsel. As the issue of fees concerned the arbitrator in his personal capacity, the claimant argued that it may undermine his impartiality and independence in the instant case. Respondent noted that the fees concerned an unrelated dispute between unrelated parties. There was no connection to the parties in the present arbitration, and the arbitrator had no economic interest in the present dispute. There were no indications of a personal conflict between the arbitrator and the claimant's counsel. The SCC Board dismissed the challenge.

4.1.6. SCC arbitration 2014/104¹⁷

The claimant challenged the arbitrator appointed by the respondent on the basis that he had provided legal advice to the respondent in the past, and that he had an interest in continuing to receive engagements from respondent. The respondent opposed the challenge, explaining that the arbitrator had represented respondent in unrelated matters some seven years ago, and has not been retained by the respondent since then. An engagement this far in the past cannot be seen to create any financial or commercial dependency, and does not give rise to justifiable doubts regarding the arbitrator's impartiality. Paragraph 3.1.1 of the IBA's Orange List sets the time limit for this kind of circumstance to three years. The challenged arbitrator confirmed that his contacts with the respondent had been limited in nature and taken place many years ago. The SCC Board rejected the challenge.

4.1.7. SCC arbitration 2015/025¹⁸

The respondent challenged the arbitrator appointed by the claimant on three grounds: (1) the arbitrator's firm was engaged in two transactional projects with claimant's counsel; (2) the arbitrator and the chairperson were both included on another arbitral institution's list of arbitrators; (3) lawyers working at the arbitrator's firm had previously worked for the same firm as claimant's counsel. The claimant opposed the challenge, explaining that (1) the arbitrator's firm and the firm of claimant's counsel advised opposing parties in the transactional projects; (2) being included on the same list of recommended arbitrators does not affect impartiality or independence; (3) the lawyers who had previously been affiliated with claimant's counsel do not work in the same office as the arbitrator and have no connection to the arbitration. The claimant also argued that the challenge was time-barred, as it was not made within the 15 days as required by the SCC Rules.

The arbitrator declined to resign and commented that (1) she was unaware and not involved in the joint transactional projects referenced in the challenge, and the fact that the two law firms represented opposing parties in an unrelated transaction does not affect the arbitrator's impartiality; (2) being included on the same list of recommended arbitrators does not indicate that those listed are connected or even acquainted with each other. The SCC Board dismissed the challenge.

¹⁶ Nationality of the parties: Swedish, Swiss. Nationality of the arbitrators: Swedish. Seat: Stockholm.

¹⁷ Nationality of the parties: Swedish. Nationality of the arbitrators: Swedish. Seat: Stockholm.

¹⁸ Nationality of the parties: Estonian, Kazakh. Nationality of the arbitrators: Swedish, Kazakh, Swedish (chair). Seat: Stockholm.

4.1.8. SCC arbitration 2015/041¹⁹

The claimant challenged the arbitrator appointed by respondent because the claimant's counsel and the arbitrator were opposing counsel in an unrelated court proceeding. In that case, a central issue had been the fees charged by the arbitrator in his role as counsel; the court of appeal had significantly reduced the fees that he was to be reimbursed. Because claimant's counsel had challenged the arbitrator's compensation in this way, the claimant argued that the arbitrator's impartiality may be affected.

The arbitrator explained that the outcome of the court proceeding had no effect on the compensation he received from his client, and that he suffered no financial loss as a result. Challenging the attorney's fees of opposing counsel is within the usual scope of counsel's role in court proceedings, and does not affect the arbitrator's impartiality in an unrelated proceeding. The SCC board dismissed the challenge.

4.1.9. SCC arbitration 2015/093²⁰

The claimant challenged the arbitrator appointed by respondent on the ground that claimant's counsel and the arbitrator represented opposing parties in unrelated court proceedings. Respondent stated that an opposing-counsel relationship in an unrelated case did not diminish confidence in the arbitrator's impartiality. The challenged arbitrator clarified that the relationship between him and claimant's counsel was collegial and uncontroversial, and that there was neither friendship nor antagonism between them. The SCC Board rejected the challenge.

4.2 Challenge sustained

4.2.1. SCC arbitration 2013/139²¹

The respondent challenged the arbitrator appointed by the claimant based on the arbitrator's participation as counsel in another ongoing arbitration involving the respondent, although not as a party. In that parallel proceeding, the arbitrator advocated against the actions of respondent, and was likely to face the respondent's employees in cross-examination. The claimant and the challenged arbitrator confirmed that the two arbitrations involved some related issues, and admitted that there was a possibility of some overlap. The SCC Board sustained the challenge.

4.2.2. SCC arbitration 2013/192²²

The respondent challenged the chairperson on the basis that he had served as an expert witness for claimant's law firm several times in the past – three times in the past five years – and that he had received significant fees for these assignments. The last of the assignments had been so recent that the relationship could be viewed as ongoing. Moreover, claimant argued, the chairman's failure to disclose these circumstances when accepting the appointment should be seen as an aggravating factor. The claimant responded that there was no ongoing consultancy relationship and no economic dependency between his firm and the chairperson. Because the chairperson was a former judge, it was unsurprising that he would be engaged as an expert and consultant by various law firms. The SCC Board sustained the challenge.

¹⁹ Nationality of the parties: Swedish, Swiss. Nationality of the arbitrators: Swedish. Seat: Stockholm.

²⁰ Nationality of the parties: Swedish. Nationality of the arbitrators: Swedish. Seat: Stockholm.

²¹ Nationality of the parties: Norwegian, Swedish. Nationality of the arbitrators: Swedish. Seat: Gothenburg.

²² Nationality of the parties: Swedish, Swiss. Nationality of the arbitrators: Swedish. Seat: Stockholm.

4.2.3. SCC arbitration 2014/169²³

The dispute arose out of a bilateral investment treaty (BIT). In the dispute, the claimant investor alleged that the legislative acts and regulatory measures implemented by the respondent state violated its obligations under the BIT; respondent denied the allegations.

The respondent state challenged the arbitrator appointed by the claimant investor on the following grounds: The arbitrator acted as counsel for the investor in another investor-state arbitration, where he advocated a position contrary to respondent's defense in the present arbitration. A decision favorable to respondent in this arbitration would be prejudicial to the interests of the arbitrator's clients in the other arbitration. Although the two arbitrations were unrelated, the overlapping issues give the arbitrator a personal and financial stake in this dispute.

The claimant opposed the challenge, arguing that the respondent's defenses in this arbitration were completely different than the defenses advanced in the case where the arbitrator acted as counsel for the investor. The claimant further maintained that there is no rule preventing individuals from serving as counsel and as arbitrator in similar but unrelated arbitrations. The challenged arbitrator commented that his duties as counsel and as arbitrator did not conflict with each other, as the issues in the arbitration where he acted as counsel were different from the issues in this arbitration.

The SCC Board sustained the challenge.

4.2.4. SCC arbitration 2015/064²⁴

The respondent challenged the arbitrator appointed by the claimant on the grounds that (1) he was co-counsel with the claimant's counsel in another dispute, with the respondent's counsel opposing them, and (2) he had received repeated arbitrator appointments from the claimant's counsel. The respondent also argued that the arbitrator's failure to disclose these circumstances when accepting the appointment was an aggravating factor. Taken together, these circumstances raised justifiable doubts regarding the arbitrator's impartiality and independence in the present proceeding.

The claimant opposed the challenge, explaining that claimant's counsel and the arbitrator represented different parties, and were not co-counsel, in the referenced dispute. Regarding the lack of disclosure, claimant stated that the arbitrator's assignments were known to respondent's counsel. The challenged arbitrator confirmed that he was not strictly co-counsel with claimant's counsel, and explained that he had been appointed by claimant's counsel only twice in the last three years. The arbitrator also stated that he had informed the respondent's counsel about his related assignments.

The SCC Board sustained the challenge.

²³ Nationality of the parties: Polish, EU state. Nationality of the arbitrators: German, Italian, French (chair). Seat: Stockholm.

²⁴ Nationality of the parties: Swedish. Nationality of the arbitrators: Swedish. Seat: Stockholm.

5. Conclusion

This note has discussed SCC practice on challenges to arbitrators, and summarized decisions taken by the SCC Board between January 2013 and December 2015. From these decisions, some general tendencies can be discerned. While these may be indicative of how the Board would rule on future challenges, each challenge is considered on its own merits and in the specific context of the arbitration in which it was filed.

When deciding whether a challenge should be sustained – that is, whether circumstances give rise to justifiable doubts as to an arbitrator’s impartiality or independence – the SCC Board considers applicable law, jurisprudence, and best practices in international arbitration. The IBA Guidelines on Conflicts of Interest influence the Board’s analysis, but are not conclusive in the Board’s decision-making.

Again, it should be noted that it is the appearance of bias that may trigger removal of the arbitrator; not the existence of actual bias in the dispute at hand. For example, where the arbitrator’s adjudication of an issue in one case *could* influence the outcome in a related case where the arbitrator serves as counsel, this overlap *may* create the appearance of bias.

During the relevant period, the SCC Board considered several challenges where the party alleged that the arbitrator was biased because of an opposing-counsel relationship in a separate but parallel proceeding. This circumstance, on its own, is rarely grounds for justifiable doubts as to the arbitrator’s impartiality. In a small legal community, such as Stockholm, it is unsurprising that arbitration lawyers face each other in different settings and different roles.

A challenge will generally not be sustained if it is based on circumstances or relationships that ceased to exist several years ago. For example, where a relationship between the arbitrator and a party or counsel ended more than three years before the start of the arbitration, it typically does not give rise to justifiable doubts regarding the arbitrator’s impartiality. The time frames set out in the IBA Guidelines serve as a reference, but they are not conclusive.

When a party presents several grounds for challenge, the SCC Board will make an overall assessment, taking all relevant circumstances into consideration. It may be that several relationships or circumstances, when viewed in combination, are sufficient to sustain a challenge, even where, seen separately, they would not warrant release of the arbitrator. For example, if an arbitrator and the claimant’s counsel were both involved in a separate dispute, but not as co-counsel, and the same arbitrator had received some, but not many, repeat appointments from claimant’s counsel, the combination of those circumstances may give rise to justifiable doubts as to the arbitrator’s impartiality and independence.

In 2015, the SCC Board also had the opportunity to consider the topic of issue conflict. Because the question arose in a very specific context involving a complex investor-state issue, the decision should not be seen to indicate an SCC policy for issue conflicts in general, or even in the investor-state context. Similarly, the Board’s decision in the challenge based on the arbitrator’s engagement as expert witness by one of the law firms involved as counsel was limited to the circumstances of that particular case. It should not be interpreted to mean that serving as an expert witness for a particular law firm necessarily gives rise to a conflict of interest in arbitrations involving that firm.

Past decisions rendered by the SCC Board may indicate the Board’s view on various grounds for challenging an arbitrator. These views, however, should not be seen as definitive. Each challenge will always be considered on the grounds presented, and in the context of the dispute in which it was filed.