



SCC PRACTICE NOTE

SCC Board Decisions on Challenges to Arbitrators 2016–2018

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1 INTRODUCTION

The Arbitration Institute of the Stockholm Chamber of Commerce (the “SCC”) is the most important arbitration institution in Sweden and one of the leading institutions internationally.¹ The SCC is composed of a Secretariat and a Board. The Secretariat provides a trained staff for administration of cases and assists in the Board’s decision making. The Board members, half of which are international, convene monthly and as needed to make decisions in accordance with the applicable rules – including decisions on challenges to arbitrators.

The SCC maintains two main sets of rules, the Arbitration Rules and the Rules for Expedited Arbitrations (together, the “Rules”).² Both sets provide for a procedure in line with 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. Article 18 provides that an arbitrator must disclose, before being appointed, any circumstances that may give rise to doubts as to his or her impartiality or independence. If new such circumstances arise during the arbitration, arbitrators must immediately disclose them. If a party considers the disclosed circumstances – or other circumstances of which the party is aware – to give rise to justifiable doubts as to the arbitrator’s independence or impartiality, the party may challenge the arbitrator under Article 19 of the SCC Rules. If all other parties agree to the challenge, the arbitrator must resign. In all other cases, the SCC Board decides on the challenge. If the Board sustains the challenge, the arbitrator is released from appointment under Art. 20.

Under Art. 20(1)(iii), the Board may also release an arbitrator in the unusual event that he or she is “otherwise unable or fails to perform the arbitrator’s functions”. This provision reflects Section 17 of the Swedish Arbitration Act, which states that where an arbitrator has delayed the proceedings, the District Court shall, upon request by a party, discharge the arbitrator and appoint another arbitrator. Art. 20(1)(iii) applies in the unusual event where an arbitrator becomes ill or for other reasons fails to participate in the proceedings.

This article will review the SCC Board’s decisions on challenges to arbitrators during the years 2016-2018. From January 2016 through December 2018, 551 arbitral

From January 2016 through December 2018, 551 arbitral proceedings were initiated at the SCC, and a total of 46 challenges to arbitrators were filed.

¹ K. HOBÉR, *International Commercial Arbitration in Sweden* (Oxford, United Kingdom; Oxford University Press, 2011), 9. For more information on the SCC, see www.sccinstitute.com.

² Revised versions of both sets of rules entered into force on 1 January 2017. The provisions related to challenges to arbitrators remain unchanged in the revised rules.

proceedings were initiated at the SCC, and a total of 46 challenges to arbitrators were filed. Only three of these challenges resulted in the arbitrator stepping down voluntarily or because of party agreement; in the remaining 43 cases, the Board was required to decide. This compares to 28 challenges and 14 decisions in the previous three-year period.³

2 THE APPLICABLE LEGAL STANDARD

2.1 The SCC Rules

Article 19(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 UNCITRAL Rules

The SCC Board also decides challenges under the 1976 and 2010 UNCITRAL Arbitration Rules, where the parties have designated the SCC as appointing authority. Article 10 of the 1976 Rules and Article 11 of the 2010 Rules stipulate that: “Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.” Like the SCC Rules, the UNCITRAL Rules do not define “justifiable doubts”. Therefore, when determining whether a challenge submitted under the UNCITRAL Rules should be sustained, the SCC Board looks to applicable law and best practices in international arbitration for guidance.

2.3 The Swedish Arbitration Act

Most SCC arbitrations have their legal seat in Sweden, rendering the Swedish Arbitration Act applicable to the proceedings. The same is often true for UNCITRAL arbitrations where the SCC has been designated as the appointing authority. For the period 2016-2018, the 1999 Arbitration Act applied; a revised Act entered into force on 1 March 2019.

³ See the previous report A. HAVEDAL IPP and E. BUROVA, *SCC Decisions on Challenges to Arbitrators 2013-2015*, available at <https://sccinstitute.se/media/176447/scc-decisions-on-challenges-to-arbitrators-2013-2015.pdf> accessed on 4 December 2018).



Section 8 of the 1999 Act stated that an arbitrator could be discharged “if there exists any circumstance which may diminish confidence in the arbitrator’s *impartiality*” (emphasis added). This provision did not explicitly require arbitrator independence, but in doctrine and jurisprudence, the “impartiality” requirement was interpreted to include “independence” as spelled out in the UNCITRAL model law and the SCC Rules.⁴ In the revised Act that went into effect on 1 March 2019, the word “independence” has been added to Section 8.⁵

Section 8 of the Act provides a non-exhaustive list of circumstances that may diminish confidence in an arbitrator’s impartiality or independence. This list, which remains unchanged in the revised legislation, includes: (1) the arbitrator or a person closely associated with the arbitrator 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.⁶ 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.

⁴ P. SCHÖLDSTRÖM, “The Arbitrators”, in ULF FRANKE ET AL (eds.) *International Arbitration in Sweden: A Practitioner’s Guide* (Wolters Kluwer 2013), 116.

⁵ *Översyn av lagen om skiljeförfarande* (Review of the Arbitration Act) SOU 2015:37 p. 176. Available at <https://www.regeringen.se/49c859/contentassets/78c079328bef401abd6b57f90744e504/oversyn-av-lagen-om-skiljeforfarande-sou-201537> (in Swedish, summary in English) accessed on 3 December 2018. See also P. SHAUGHNESSY, *Sweden Adopts Revisions to Modernize its Arbitration Act*, Kluwer Arbitration Blog, 1 December 2018, available at <http://arbitrationblog.kluwerarbitration.com/2018/12/01/sweden-adopts-revisions-to-modernize-its-arbitration-act/> accessed on 3 December 2018.

⁶ 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-theSupreme-Court-of-Sweden-9-June-2010-Case-No-T-156-09NJA-2010-s-317?pageid=95788>.

2.4 Case law

The Supreme Court of Sweden has held that, because arbitral awards cannot be challenged on the merits, the standard for arbitrators' impartiality is necessarily a high one. An arbitrator's impartiality should be assessed objectively: if a situation or a relationship exists that would normally lead to the conclusion that the arbitrator is not impartial, the challenged arbitrator should be dismissed even if there is no reason to assume that he or she will lack impartiality in the specific dispute at hand.⁷

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".⁸ 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.⁹

2.5 The IBA Guidelines on Conflicts of Interest

The IBA Guidelines on Conflicts of Interest in International Arbitration have gained wide acceptance within the international arbitration community since their first issuance in 2004.¹⁰ 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 also routinely consult the Guidelines when deciding challenges under the SCC Rules and the UNCITRAL Rules. Furthermore, Sweden's Supreme Court has noted that it may consider the IBA Guidelines – especially in cases involving non-Swedish parties – in making decisions on challenges to arbitrators under the provisions in the Arbitration Act.¹¹

⁷ 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-theSupreme-Court-of-Sweden-19-November-2007-Case-No-T-2448-06NJA-2007-s-481?pageid=95788>.

⁸ 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-theSvea-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-theSupreme-Court-of-Sweden-9-June-2010-Case-No-T-156-09NJA-2010-s-317?pageid=95788>

⁹ S. LINDSKOG, *Skiljeförfarande: En kommentar*. ("Arbitration: A Commentary") (Norstedts 2012) p. 421.

¹⁰ Available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

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-theSvea-Court-of-Appeal-10-April-2013-Case-No-T-2484-11?pageid=95791>. See also P. SCHÖLDSTRÖM, "The Arbitrators", in U. FRANKE ET AL (eds.) *International Arbitration in Sweden: A Practitioner's Guide* (Wolters Kluwer 2013), 117.

“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.” – IBA Guidelines

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.”¹² In other words, it is the appearance of bias – not actual bias – that may trigger dismissal of the arbitrator.¹³

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.

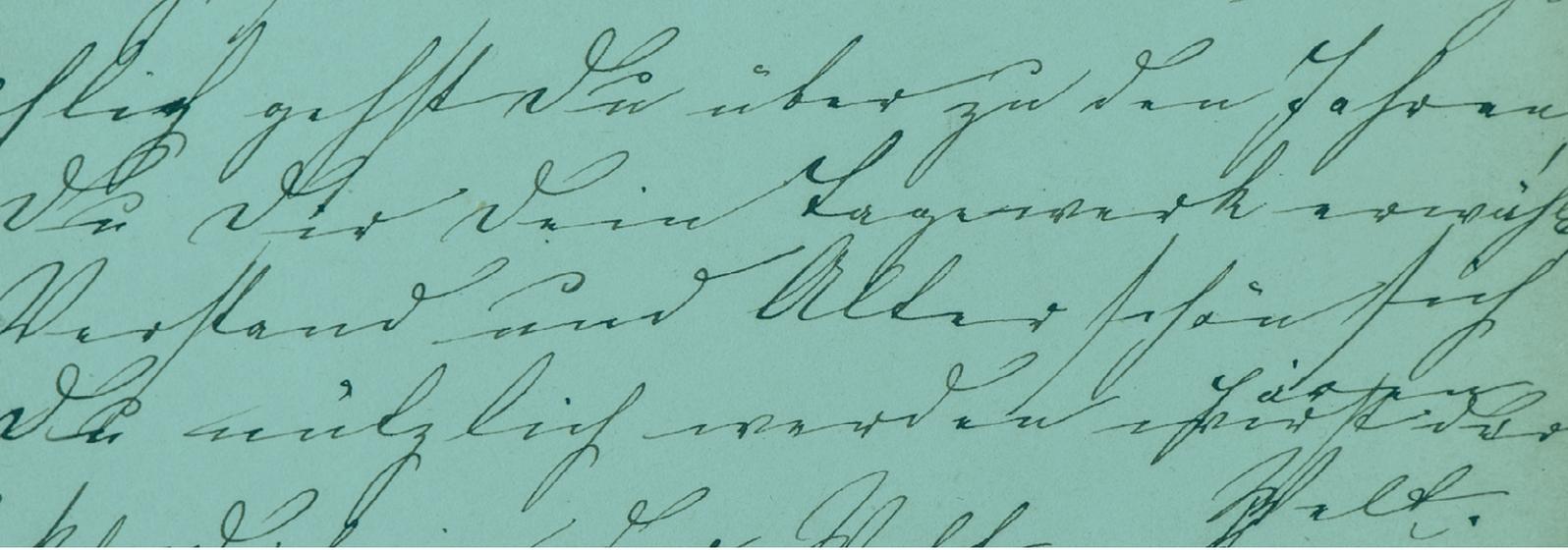
The SCC Board routinely references the Red, Orange and Green lists when assessing whether a circumstance, relationship or situation invoked as a ground for challenge gives rise to “justifiable doubts” as stipulated by the SCC Rules. The Board may, however, choose to deviate from the Guidelines when its own analysis warrants a different outcome.

2.6 The SCC procedure for challenges to arbitrators

Under Article 19 of the Arbitration Rules, 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

¹² IBA Guidelines, Explanation to General Standard 2(c), 5. See also 2(b), 5.

¹³ 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-theSvea-Court-of-Appeal-10-April-2013-Case-No-T-2484-11?pageid=95791>.



giving rise to the challenge became known to the party. Failure by a party to challenge an arbitrator within the stipulated time constitutes a waiver of the right to make the challenge, and the SCC Board can dismiss a challenge on this ground even where other grounds exist to sustain the challenge.

The SCC aims to handle all challenges to arbitrators efficiently, to avoid delaying the arbitral proceedings. Arbitrators and opposing parties are typically given one week to comment on the challenge. The challenging party may, if necessary, get a further opportunity to respond. If all parties agree 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 decision is for the Board to make.

The SCC Secretariat prepares a memorandum for the Board, which includes the grounds for challenge, comments submitted by the arbitrators and parties, and an analysis of the circumstances based on SCC precedent, legal authorities, the IBA Guidelines. The Board discusses the challenge at the next monthly meeting, or in exceptional situations at an extraordinary board meeting. The Board usually reaches a decision by consensus, but in difficult cases, the decision is made by majority vote.

Prior to 1 January 2018, the parties and arbitrators would be informed only whether the SCC Board had sustained or dismissed the challenge. Since 1 January 2018, the SCC provides reasons for its decisions on challenges. While the SCC Rules do not obligate the Board to provide reasons, a policy was introduced to this effect in response to user requests and in light of the general trend toward greater transparency in arbitration.¹⁴ As a main rule, the reasons provided to the parties are brief, but may be more extensive if warranted by the circumstances of a particular challenge.

¹⁴ See, inter alia, GARY BORN, “Institutions Need to Publish Arbitrator Challenge Decisions”, Kluwer Arbitration Blog, 10 May 2010, available at <http://arbitrationblog.kluwerarbitration.com/2010/05/10/institutions-need-to-publish-arbitrator-challenge-decisions/> accessed on 3 December 2018.

3 SCC DECISIONS ON CHALLENGES TO ARBITRATORS 2016–2018

This section includes summaries of selected decisions made by the SCC Board in challenges to arbitrators between January 2016 and December 2018. The Board decided more than forty challenges in this period, significantly more than in previous three-year periods.¹⁵ For this reason, decisions made in arbitrations that were ongoing as of April 2019, and those that repeat circumstances or principles already illustrated by other summaries, have been left out of this section.

3.1 Challenges dismissed

3.1.1 SCC Arbitration 2011/094¹⁶

In this case, respondent challenged all members of the tribunal.

First challenge, against respondent’s own appointee: The arbitrator mistakenly sent to respondent’s counsel an email intended for the chairman. In the email, the arbitrator made certain comments about respondent’s counsel and about the parties themselves. Respondent argued that the comments made in the misdirected email showed that the arbitrator had a “personal animosity” toward respondent’s counsel, fueled by prior events and interactions. With regard to this challenge, claimant observed that regardless of the content of the arbitrator’s email, respondents had failed to make the challenge within the 15-day period stipulated by the SCC Rules.

Second challenge, against the chairperson: Respondent argued that the chair, since the inception of the case five years earlier, had failed to guide the proceedings in an efficient and appropriate manner. With regard to this challenge, claimant responded that the challenge failed to meet the requirements stipulated by the SCC Rules, and amounted to abuse of the parties’ rights and of the challenge rules.

Third challenge, against all members of the tribunal: The respondent argued that the tribunal had rendered a jurisdictional decision *sua sponte* and in violation of the parties’ due process rights. Respondent speculated that the only plausible explanation for the tribunal’s decision was that it had engaged in *ex parte* communications with claimant. Claimant objected that respondents’ challenge was an abuse of the parties’ rights and was intended to delay the arbitration. The arbitrators denied allegations of *ex parte* communication and explained that its decision on jurisdiction had not been *sua sponte*, but based on its understanding of the parties’ submissions.

The SCC dismissed all three challenges.

¹⁵ See 1. Introduction, at p. 4 above.

¹⁶ Nationality of the parties: German, Russian. Nationality of the arbitrators: Russian, British and Swedish. Nationality of Counsels: German, Russian. Seat: Stockholm. Language: English.

3.1.2 SCC Arbitration 2013/094¹⁷

The claimant challenged the tribunal chair based on his engagement as counsel for respondent in another arbitration, the subject matter of which overlapped with the present arbitration. In both arbitrations, the respondents raised the same defense, and the outcome in one case may influence the other. Claimant argued that this amounted to the arbitrator having a significant personal and financial interest in the outcome of the present dispute, and that he may favor respondent in the present arbitration so as not to harm his work and income as the respondent's counsel in the other arbitration.

Respondent objected that (i) the chair's fees as counsel in the unrelated arbitration did not depend on the outcome of the present case; (ii) the chair's personal or financial interest in the outcome of this case was not direct, as required by Section 1.3 of the IBA Guidelines; that (iii) claimant had not shown that there were overlapping issues in the two arbitrations.

The chair noted that it was undisputed that the awards in the two concurrent arbitrations would be based on different laws, facts and evidence. The only overlapping issue was a jurisdictional one that turned on a factual rather than legal assessment. The chair emphasized that any decision that he could make in the present case would not impact, positively or negatively, on the fees that he or his firm would receive in the other arbitration.

The SCC dismissed the challenge.

3.1.3 SCC Arbitration 2015/099¹⁸

The respondent challenged the chairperson based on information included in the arbitrator's disclosure. The arbitrator's law firm had advised a third party with which the respondent was involved as a supplier, and which may be bound by or otherwise have an interest in the outcome of the present dispute.

The claimant stated that neither claimant nor respondent was affiliated with the third party, who was not a party to the disputed contract, nor to the arbitration agreement, and could therefore not be bound by the outcome of the proceedings.

The chairperson noted that his firm had advised the third party on an issue unrelated to the present dispute, and that the party was not a significant client of the firm.

The SCC dismissed the challenge.

¹⁷ Nationality of the parties: Luxembourg, EU member state. Nationality of the arbitrators: Canadian, French. Nationality of Counsels: EU member state. Seat: Hague. Language: English.

¹⁸ Nationality of the parties: Italian, Russian. Nationality of the arbitrators: Russian, Belarussian. Nationality of Counsels: Russian, Swedish. Seat: Stockholm. Language: Russian.

3.1.4 SCC Arbitration 2016/004¹⁹

Respondent challenged the sole arbitrator based on a procedural order that respondent argued gave rise to justifiable doubts as to the arbitrator's impartiality and independence. The language of the arbitration was English, but respondent had submitted some legal opinions and exhibits in German, without translations. The arbitrator, who was a native German speaker, said he would disregard the exhibits submitted in German. Respondent understood this to mean that the arbitrator would disregard the legal opinions and court decisions brought forward in respondent's exhibits.

The arbitrator responded that contrary to respondent's assertions, the procedural order at issue had dealt only with the issue of translations, and did not determine whether or not the award would be based on the laws and legal arguments presented by the parties. Under the principle of *iura novit arbiter*, the arbitrator is not limited to the legal opinions and arguments presented by the parties.

The SCC dismissed the challenge.

3.1.5 SCC Arbitration 2016/019²⁰

Claimant appointed an arbitrator who was already sitting as arbitrator in a related matter. After the arbitrator had accepted the appointment, the claimant changed its mind and stated that it withdrew the appointment. Shortly thereafter, the claimant once again changed its mind and reconfirmed the appointment of the arbitrator.

Respondent submitted a challenge against claimant's arbitrator on the grounds that (i) claimant had forfeited its right to appoint an arbitrator when it withdrew its original appointment, and (ii) the involvement of claimant's arbitrator in the related proceeding gave rise to justifiable doubts as to the arbitrator's impartiality pursuant to 3.1.5 IBA Guidelines, because he had access to privileged information to which the other arbitrators did not have access.

Claimant objected that it had not waived its right to appoint the arbitrator. Upon receipt of claimant's attempted withdrawal, the SCC had advised that the arbitrator already had accepted the appointment and "a party cannot unilaterally withdraw its consent to the appointment of an arbitrator after the appointment has been made." The withdrawal was thus never effective.

The arbitrator stated that because the appointment had been accepted when the withdrawal was made, such withdrawal was neither valid nor effective. He also explained that the relationship between the two related proceedings was not the one described in section 3.1.5 of the IBA Guidelines; here, the related case involved the claimant and an *affiliate* of the respondent, not the respondent itself.

The SCC dismissed the challenge.

¹⁹ Nationality of the parties: BVI, Marshall Islands, Seychelles and Swiss. Nationality of the sole arbitrator: Austrian. Nationality of Counsels: Russian, Swedish and British. Seat: Stockholm. Language: English.

²⁰ Nationality of the parties: Italian, Russian. Nationality of the arbitrators: Italian, Russian. Nationality of Counsels: Italian, British and Russian. Seat: Stockholm. Language: English.

3.1.6 SCC Arbitration 2016/045 ²¹

Claimant’s counsel and Respondent’s arbitrator were opposing counsel in a series of proceedings in Stockholm District Court, unrelated to the arbitration. Claimant’s counsel stated that the disputes were “very infected”, including allegations of antisemitism. These circumstances, claimant argued, gave rise to justifiable doubts regarding the arbitrator’s neutrality and impartiality, so that it would be “inappropriate” for him to serve as an arbitrator.

Respondent observed that claimant’s only ground for challenging the arbitrator concerned a series of court proceedings that had no connection to the current parties. Respondent also noted that the claimant knew of respondent’s intention to appoint this arbitrator already in January 2016 – when the parties were negotiating the joint appointment of a chairperson – and made no objections.

The arbitrator noted that no conflict of interest existed between the parties in the court proceedings and in the arbitration, as the parties and the proceedings were entirely unrelated. The arbitrator further explained that he did not share the claimant’s view that the court proceedings were unusually infected, or likely to instigate “tough discussions” or conflicts between counsels. Instead, he noted that the court proceedings merely involved a question of law and thus neither party was expected to present evidence.

The SCC Board dismissed the challenge.

3.1.7 SCC Arbitration 2016/092 ²²

Claimant’s arbitrator disclosed that she was involved in the organization of a conference in which the committee was chaired by one of claimant’s representatives. The arbitrator explained that she had never met or been in touch with that representative. Respondent challenged the arbitrator, arguing that the arbitrator may come into direct contact with claimant’s counsel through the conference committee, and that this raised reasonable doubts regarding the arbitrator’s neutrality.

Claimant objected that joint participation in conferences or in the organization of such events could not be considered to give rise to an actual or even an appearance of a conflict of interest from an objective point of view pursuant to Section 4.3.4 of the IBA Guidelines.

The SCC dismissed the challenge.

²¹ Nationality of the parties: Swedish. Nationality of the arbitrators: Swedish. Nationality of Counsels: Swedish. Seat: Stockholm. Language: Swedish.

²² Nationality of the parties: American (US) and Italian. Nationality of the arbitrators: French, Russian, Swedish. Nationality of Counsels: American (US), Italian and Russian. Seat: Stockholm. Language: English.

3.1.8 SCC Arbitration 2016/131²³

Respondent challenged the arbitrator appointed by the claimant, arguing that there was an ongoing professional relationship between the arbitrator and counsel for claimant. Specifically, respondent noted that: (i) they served together on another tribunal, where claimant's counsel was the chair; (ii) claimant's arbitrator was also appointed in another arbitration where claimant's counsel was involved, representing a different party. Respondent invoked Section 3.3.9 of the IBA Guidelines, stating that close professional relationships between counsel and an arbitrator can create justifiable doubts as to the arbitrator's independence and impartiality.

Claimant objected that the tribunal on which the arbitrator and claimant's counsel served as co-arbitrators was legally and technically completely different from the present one. According to the IBA Guidelines, for a counsel-arbitrator relationship to be ground for challenge, it must be either much closer or have lasted longer than a relationship of two arbitrators sitting once on the same tribunal.

The SCC dismissed the challenge.

3.1.9 SCC Arbitration 2016/143²⁴

The respondent challenged the arbitrator appointed by the claimant based on the arbitrator's involvement in conference series, where claimant's counsel was co-chair of the organising committee.

The SCC dismissed the challenge.

3.1.10 SCC Arbitration 2016/157²⁵

Respondent challenged the arbitrator appointed by the claimant, on the basis that the arbitrator and claimant's counsel had represented similarly situated clients in related proceedings against a government agency in 2015. In those cases, claimant's counsel represented a sister company of claimant in this case, while the arbitrator acted as counsel for a large group of similarly situated companies in the same industry. There was a joint hearing in the related cases, and the same judgment was rendered in both. Respondent argued that this close relationship amounted to that of co-counsel between the arbitrator and claimant's counsel in this case.

Claimant observed that the relationship between claimant's counsel and the arbitrator in the related cases did not amount to that of co-counsel. Other law firms were involved in the proceedings at issue, and that the clients involved did not share identical interests.

²³ Nationality of the parties: Swedish, Saudi Arabian. Nationality of the arbitrators: Swedish, French, Lebanese. Nationality of Counsels: Swedish. Seat: Lund. Language: English.

²⁴ Nationality of the parties: American (US), Russian. Nationality of the arbitrators: French, Russian and Swedish. Nationality of Counsels: Italian, Russian. Seat: Stockholm. Language: English.

²⁵ Nationality of the parties: Swedish. Nationality of the arbitrators: Swedish. Nationality of Counsels: Swedish. Seat: Malmö. Language: Swedish.

The arbitrator observed that even though the 2015 cases had basic issues in common, his clients had framed their cases differently from claimant's sister company, represented by claimant's counsel. Thus, there were differences in their claims and legal grounds.

The SCC dismissed the challenge.

3.1.11 SCC Arbitration 2016/159²⁶

Respondent challenged the claimant's arbitrator on the basis that claimant had previously appointed the same arbitrator in an SCC arbitration between the same parties, disputing the same contract. Claimant objected that participation of an arbitrator in another case between the same parties does not give rise to justifiable doubts as to the arbitrator's impartiality and independence. The arbitrator noted that his participation in the previous arbitration fell under section 3.1.1. of the IBA's Orange List, and did not warrant his dismissal in the present case.

The SCC dismissed the challenge.

3.1.12 SCC Arbitrations 2016/172 and 2016/173 under the UNCITRAL Rules²⁷

The respondent in these two related arbitrations challenged the sole arbitrator on several grounds. First, the arbitrator had admitted an extensive new written submission from the claimant before the hearing and after the cut-off date. Second, claimant's lead counsel had been appointed chairperson of the SCC Board, which made it impossible to guarantee a fair, impartial and independent hearing. Third, respondent argued there was a close personal relationship between claimant's lead counsel and the sole arbitrator.

The claimant stated that the sole arbitrator had granted the respondent time to comment on the submission at issue. Moreover, as SCC's role in this UNCITRAL arbitration was limited to that of appointing authority, claimant's counsel's position as chair of the SCC Board could not in any way affect the hearing in the case. Regarding the alleged close personal relationship, the stated that the circumstances referenced – serving on the same tribunal, attending the same conferences, or lecturing at the same university – did not give rise to justifiable doubts as to the arbitrator's impartiality.

The SCC dismissed the challenges.

²⁶ Nationality of the parties: Russian, Italian. Nationality of the arbitrators: Russian, Italian. Nationality of Counsels: Russian. Seat: Stockholm. Language: Russian.

²⁷ Nationality of the parties: American (US), Russian. Nationality of the sole arbitrator: Swedish. Nationality of Counsels: Swedish, Russian. Seat: Stockholm. Language: English.

3.1.13 SCC Arbitration 2016/180²⁸

Respondent filed two separate challenges against the sole arbitrator.

The first challenge was based on several of the arbitrator's procedural decisions, which respondent held indicated that the arbitrator failed to maintain his impartiality and conduct present proceedings in expeditious manner. The arbitrator had rejected respondent's request to submit an addendum, limited the number of expert witnesses to respondent's disadvantage, and decided to rule on the issue of applicable law in the final award.

Claimant objected that most of the grounds for challenge were untimely, and that the arbitrator had not shown any pre-judgement or bias in his procedural decisions. The arbitrator responded that, in respect to the addendum, he had merely stated that respondent was not allowed to rely on it until granted permission. With respect to the issue of applicable law, he explained that he had postponed the decision in order to let the parties argue the issue at the hearing.

The respondent's second challenge was based on the sole arbitrator's nationality. Respondent argued that because the claimant was owned by a UK company, the appointment of a UK national was against Article 17(6) of the SCC Rules. Claimant respondent that the cited article addresses nationality of the parties, not their parent companies.

The SCC dismissed both challenges.

3.1.14 SCC Arbitration 2016/190²⁹

Respondent challenged the sole arbitrator on the basis that the claimant, in its Statement of Claim, had revealed information about the parties' settlement discussions. Respondent argued that the arbitrator, having knowledge of this information, could no longer be considered neutral and impartial in the dispute.

The claimant responded that revealing information about settlement discussions is not a valid ground for disqualifying an arbitrator; and even if it were, claimant had not revealed any information about the parties' settlement discussions but merely accounted for respondents' objections to the debt. The arbitrator noted that the circumstances upon which the challenge was based were not grounds to disqualify an arbitrator under applicable law or other guidelines.

The SCC dismissed the challenge.

²⁸ Nationality of the parties: Czech, Uzbek. Nationality of the sole arbitrator: British. Nationality of Counsels: Czech, Uzbek. Seat: Stockholm. Language: English.

²⁹ Nationality of the parties: Swedish. Nationality of the arbitrators: Swedish. Nationality of Counsels: Swedish. Seat: Stockholm. Language: Swedish.



3.1.15 SCC Arbitrations 2017/012, 2017/015, and 2017/016 ³⁰

These three parallel arbitrations were filed by one claimant against three different respondents. Two more non-SCC arbitrations were filed, in which SCC acted as appointing authority. The claimant appointed different arbitrators in all cases, while the respondents all appointed the same arbitrator.

The claimant challenged the arbitrator appointed by respondents, making a range of arguments in several submissions. Claimant's main argument was that the arbitrator's appointment in five cases dealing with overlapping or identical issues would make it impossible for him to segregate the evidence and arguments made in one case from those made in others. Claimant stated that the multiple appointments fundamentally undermined the arbitrator's independence and violated two sections of IBA's Orange List – service within the past three years as arbitrator in another arbitration on a related issue involving one of the parties (Section 3.1.5), and appointment within the past three years on more than three occasions by the same counsel or the same law firm (Section 3.3.8). The respondents here were all represented by the same law firm.

The respondents objected to the argument that this was an issue of multiple appointments as defined by the IBA Guidelines. Here, respondents emphasized, the challenged arbitrator had been appointed once by each respondent, simultaneously by all respondents. This, respondents emphasized, was consistent with the principles of the SCC Rules, Swedish law and international arbitration. Respondents further noted that no “mental segregation” would be needed, as the arbitrations raised the same dispute and the same issues.

The SCC dismissed the challenge.

³⁰ Nationality of the parties: Russian, Turkish. Nationality of the tribunal: British. Nationality of Counsels: British, French. Seat: Stockholm. Language: English.

3.1.16 SCC Arbitration 2017/077 under the UNCITRAL Rules³¹

The claimant challenged the respondent's arbitrator two days before the final award was to be rendered, after several years of proceedings. The challenge advanced three grounds: (i) the arbitrator's daughters had worked for respondent's counsel's law firm; (ii) the arbitrator had served twice as co-arbitrator with a previous counsel to respondent, and the two lawyers also served on the faculty of an LLM program; and (iii) in 2003, the arbitrator had been involved in an arbitration with an entity related to the respondent in the present case.

The respondent objected that the challenge was not timely under the applicable rules; printer markings on the exhibits showed that claimant had known about the alleged circumstances two years before the challenge was filed. The respondent further noted that the arbitrators' daughters' affiliation with respondent's counsel had ended before the present arbitration was initiated, and that the other circumstances relied upon did not fall under the IBA's Orange List.

The arbitrator observed that (i) claimants made the challenge more than four years after the arbitrator's first involvement in the arbitration, that they (ii) alleged facts that were patently incorrect and misstated some of the arbitrator's previous statements.

The SCC dismissed the challenge.

3.1.17 SCC Arbitration 2017/089³²

The claimant challenged the arbitrator appointed by the respondent based on his relationship to the law firm representing the respondent. The arbitrator had been a partner in the law firm for several decades prior to his retirement, and claimant specifically alleged that the arbitrator had a close relationship with one of the lawyers representing the respondent. The claimant argued that there was a significant risk that the arbitrator harboured a deep sense of loyalty toward the firm, that he could not be considered impartial and independent, and that for these reasons, the usual three-year quarantine period should be extended.

The respondent explained that the arbitrator had left the firm well beyond the three-year quarantine period stipulated by the IBA Guidelines and SCC practice. Moreover, the arbitrator did not have the type of strong connection to the firm that the claimant alleged. The arbitrator emphasized that he left the firm more than 7 years earlier, and that any connections that he may have had with the specific lawyer representing respondent dated even further back than that.

The SCC dismissed the challenge.

³¹ Nationality of the parties: Russian, French. Nationality of the arbitrators: German, Belgian, British. Nationality of Counsels: British French and American (US). Seat: Stockholm. Language: English. Rules: UNCITRAL 1976

³² Nationality of the parties: Swedish. Nationality of the arbitrators: Swedish. Nationality of Counsels: Swedish. Seat: Stockholm. Language: Swedish.



3.1.18 SCC Arbitration 2017/123 under the UNCITRAL Rules³³

The claimant challenged the chair on the following grounds: (i) the arbitrator's law firm had an ongoing client relationship with a company similarly situated to one of the parties in the arbitration, and who may indirectly benefit from any precedent set; and (ii) the arbitrator previously acted as lead counsel for another party adverse to respondent in this case, in which role he argued against the positions taken by respondent in this case.

Respondent objected that claimant's assertions did not establish any legal basis, either under the UNCITRAL Rules or Swedish law, for removal of the arbitrator.

The arbitrator noted, with respect to the first ground, that the client at issue was unrelated to the parties in the present case and would not benefit from the outcome of the arbitration. With regard to the second ground, the arbitrator stated that, as counsel, one represents the position and interests of the party for whom one acts, on instructions. The arbitrator emphasized that this is in large part why there is a temporal limit beyond which one's prior work as counsel ceases to be meaningful from an impartiality perspective and need not even be disclosed.

The SCC dismissed the challenge.

3.1.19 SCC Arbitration 2017/169³⁴

The respondent challenged the sole arbitrator based on alleged enmity between the arbitrator and counsel appearing in the arbitration, a circumstance included on IBA's Orange List (3.3.7). In 2000, the arbitrator had made claims of professional negligence against a lawyer who later became a partner at the law firm representing respondent in the present arbitration. The two lawyers had been opposing counsel in an unrelated dispute, but had only met in person once. The arbitrator had subsequently opposed that lawyer's admission to the Swedish Bar.

³³ Nationality of the parties: Russian, Turkish. Nationality of the arbitrators: American (US), British, Greek. Nationality of Counsels: American (US), French and Turkish. Seat: Stockholm. Language: English.

³⁴ Nationality of the parties: Swedish. Nationality of the sole arbitrator: Swedish. Nationality of Counsels: Swedish. Seat: Stockholm. Language: Swedish.

The claimant did not comment on the challenge. The arbitrator explained that (i) as a member of the Swedish Bar, he had been required to comment truthfully on the bar application of the lawyer in question, and (ii) the lawyer in question was not actively involved in the present arbitration, and his affiliation with respondent's counsel's firm had only been disclosed at the first case management conference. The arbitrator noted that it would be too far-fetched to assume that he would be partial in the present dispute only because of this interaction with a lawyer at the counsel's law firm.

The SCC dismissed the challenge.

3.1.20 SCC Arbitration 2017/176 ³⁵

Two arbitrations were consolidated. The two respondents failed jointly to appoint an arbitrator, leading the SCC to appoint the entire tribunal in accordance with Article 17(5) of the SCC Rules. One of the respondents challenged the entire tribunal, arguing in relevant part that the arbitrators were unqualified to decide disputes under the national law at issue in the arbitration.

The SCC dismissed the challenge. Under the SCC policy that went into effect on 1 January 2018, the Board provided a reasoned decision on the challenge. It read, in relevant part:

Section 7 of the Swedish Arbitration Act provides that “[a]ny person who possesses full legal capacity in regard to his actions and his property may act as an arbitrator”. These qualifications are mandatory under the Swedish Arbitration Act and must be met by every arbitrator sitting in an arbitration in Sweden. The Second Respondent has not established that the members of the Tribunal lack full legal capacity pursuant to Section 7 of the Swedish Arbitration Act. The arbitration clauses in the disputed agreements do not provide for any additional qualifications of the members of the Tribunal, such as qualification in [national] law. This limb of the Second Respondent's challenge of the Tribunal is therefore denied.

3.1.21 SCC Arbitration 2018/102 ³⁶

Respondent challenged the sole arbitrator, appointed by the SCC, on two grounds. First, the respondent argued that the arbitrator may be partial to claimant because, even though a Swedish national, he lived and worked in the country of claimant's nationality. Second, the claimant's counsel had copied sole arbitrator on its communication with the SCC concerning claimant's payment of respondent's part of the advance. Respondent contended that the arbitrator's impartiality was compromised because of this communication.

³⁵ Nationality of the parties: Lebanese, Ukrainian. Nationality of the tribunal: French, Latvian, Swedish. Nationality of Counsels: Ukrainian, Swedish. Seat: Stockholm. Language: English.

³⁶ Nationality of the parties: Russian, Italian. Nationality of the sole arbitrator: Swedish. Nationality of Counsels: Russian, Italian. Seat: Stockholm. Language: English.



The arbitrator clarified that he was a citizen of Sweden by birth, studied law in Sweden and was admitted to the Swedish Bar only. Although he worked in a foreign office of a Swedish law firm, but he was not a permanent resident of the country in which he worked.

The SCC dismissed the challenge.

3.1.22 SCC Arbitrations 2018/112 and 2018/113 ³⁷

In these two parallel arbitrations, claimant's first two appointees had stepped down; the arbitrator challenged was thus the third to be appointed by claimant.

Respondent challenged claimant's appointee on two grounds. Firstly, the arbitrator was appointed in five parallel proceedings against respondent, all similar in fact and law. Secondly, the arbitrator served on a tribunal in an investment case that had rendered an award addressing a particular jurisdictional issue pertinent to the present cases. Respondent observed that the claimant had appointed this arbitrator shortly after that award had been made public.

On the first ground, claimant replied that its previous two arbitrators had also been appointed in the five parallel cases, without any objection from the respondent, and that respondent was therefore barred from raising this ground for challenge. On the second ground, the claimant argued that the respondent had similarly waived this argument, as one of claimant's previous appointees had been a member of the same investment tribunal. In any event, claimant noted, the mere exposure of an arbitrator to the same legal issue in multiple arbitrations was insufficient to disqualify that arbitrator.

³⁷ Nationality of the parties: Dutch, Cypriot, Luxembourgish (112); Cypriot, German, British (113). Nationality of the arbitrators: British. Nationality of Counsels: Italian, American (US). Seat: Geneva. Language: English. Rules: UNCITRAL 1976

The SCC dismissed the challenge. Under the SCC policy that went into effect on 1 January 2018, the Board provided a reasoned decision on the challenge. It read, in relevant part:

With respect to the first ground (“parallel appointments”), respondent did not object to the appointment of either of the two preceding arbitrators [...], in any of the relevant arbitral proceedings. For this reason, respondent is deemed to have waived its right to object to the appointment of [the claimant’s arbitrator] on the basis of having been appointed in several parallel proceedings.

The SCC further notes that [the claimant’s arbitrator] has neither participated in nor taken any decisions in respect of any of the concurrent proceedings which could give rise to justifiable doubts as to his impartiality and independence.

With respect to the second ground (“issue conflict”), the SCC considers that a decision on an issue of law, albeit a significant one, does not *per se* give rise to justifiable doubts as to [the arbitrator’s] impartiality and independence. The award was rendered in an unrelated case between different parties. [The claimant’s arbitrator’s] position in an unrelated case cannot be seen as a prejudgment of the outcome of the present arbitration.

In addition, respondent failed to object to [the arbitrator previously appointed by claimant] in the present arbitration, although [he] – together with [the now challenged arbitrator] – was [also] a member of the arbitral tribunal that rendered the award [upon which Respondent bases its claim of issue conflict]. Respondent is therefore deemed to have waived its right to object to the appointment of [the challenged arbitrator] on the basis of the issue conflict argued by respondent.

3.2 Challenges sustained

3.2.1 SCC Arbitration 2015/179³⁸ and SCC Arbitration 2015/166³⁹

These two arbitrations involved different claimants against the same respondent party. Claimants in both arbitrations had appointed the same arbitrator. Respondent challenged the arbitrator appointed by claimants following the merger of the arbitrator’s law firm with a global law firm network. The arbitrator’s new firm had

³⁸ Nationality of the parties: Swedish. Nationality of the arbitrators: Swedish. Nationality of Counsels: Swedish. Seat: Stockholm. Language: Swedish.

³⁹ Nationality of the parties: Swedish. Nationality of the arbitrators: Swedish. Nationality of Counsels: Swedish. Seat: Stockholm. Language: Swedish.

regular assignments with a group of companies affiliated with respondent through a common parent company – a large, state-owned corporation. The parent company, through a holding company, had 50% ownership in the respondent. These circumstances, respondent argued, amounted to a conflict of interest, and the claimants’ arbitrator should therefore be dismissed from both arbitral tribunals.

The arbitrator noted, first, that since the affiliation was between the law firm and the respondent, any alleged partiality would be in favour of respondent, the challenging party. The circumstances may be interpreted to bias the arbitrator against the claimant; yet the claimant did not agree with the respondent’s challenge, but rather objected to the arbitrator’s dismissal. Second, the arbitrator noted that the parent company in question was a big economic entity without any private owner. Under these circumstances, the analysis of what constitutes control and affiliation between related companies should be less strict.

One of the claimants argued that because of the complex ownership structure of the group of companies to which respondent belonged – comprising a large number of entities with a total turnover of EUR 2 billion – the usual analysis concerning related companies should not apply. The claimant instead drew a parallel to the rules governing conflicts of interest relating to banks (Sw. “bankjäv”), under which a lawyer can represent a bank’s local office in one matter while in another matter representing a client against another local office of that bank.

The SCC sustained both challenges.

3.2.2 SCC Arbitration 2016/007⁴⁰

Claimant challenged respondent’s arbitrator following the merger of respondent counsel’s law firm with a global law firm network in which the arbitrator’s wife was a partner. Claimant argued that this provided an incentive for the arbitrator to rule in favour of respondent, and that the circumstance was included in Section 3.3.5 of the IBA’s Orange List (“A close family member of the arbitrator is a partner or employee of the law firm representing one of the parties, but is not assisting with the dispute.”)

Respondent objected that it had appointed the arbitrator due to his unique expertise and language skills, and observed that the arbitrator’s wife worked in a different department of the respondent counsel firm, and was not involved in or advising in the arbitration. The arbitrator observed that due to the law firm’s structure, there was no direct or indirect economic connection between his wife, a partner in the Swedish branch, and lawyers in other offices, including counsel for respondent in this arbitration.

The SCC sustained the challenge.

⁴⁰ Nationality of the parties: Russian, Austrian. Nationality of the arbitrators: Swedish. Nationality of Counsels: Swedish, British, Austrian. Seat: Stockholm. Language: English.

3.2.3 SCC Arbitration 2016/051⁴¹

Claimant challenged respondent's arbitrator based on his previous law firm affiliation. Three years prior, while the arbitrator was a partner in the Stockholm office of the firm, the Gothenburg office had advised respondent in relation to the non-compete clause central to the dispute between the parties. According to claimant, the arbitrator could not be regarded as independent and impartial, where he had been a partner of the law firm advising respondent on the very contract at issue in the arbitration.

The arbitrator stated that before reviewing the case file he had been unaware of respondents' contacts with his former firm, and that he knew nothing about these contacts apart from the information brought up in the challenge proceeding.

The SCC sustained the challenge.

3.2.4 SCC Arbitration 2016/154⁴²

Respondent challenged the arbitrator appointed by the claimant, based on an article published on the website of the arbitrator's law firm. The article commented extensively on the dispute resolution clause in the present case, which had already been made public by a court decision. The article's authors – the challenged arbitrator's partners – were clearly sceptical of the hybrid dispute resolution clause, which referred to SCC arbitration but carved out a certain category of disputes to be heard by national courts. Respondent emphasized that under Section 3.5.2 of IBA's Orange List, justifiable doubts as to the arbitrator's impartiality may exist where the arbitrator has publicly advocated a position on the case.

The arbitrator stated that the article was authored by two of his partners, and that he had never read it.

The SCC sustained the challenge.

3.2.5 SCC Arbitration 2016/183⁴³

Respondent challenged claimant's arbitrator based on the disclosures he made upon appointment. Notably, the arbitrator had disclosed that (i) he was instructed by claimant's counsel to act in proceedings in the BVI; (ii) he acted as co-counsel to claimant's counsel in another treaty arbitration where they together represented the claimant; and (iii) he had been approached by claimant's counsel regarding instructions in London High Court. Respondent argued that these repeated co-counsel

⁴¹ Nationality of the parties: Swedish, Maltese. Nationality of the arbitrators: Swedish. Nationality of Counsels: Swedish. Seat: Stockholm. Language: Swedish.

⁴² Nationality of the parties: Australian, British. Nationality of the arbitrators: Australian, Swedish. Nationality of Counsels: Swedish. Seat: Stockholm. Language: English.

⁴³ Nationality of the parties: a Baltic Republic. Nationality of the arbitrators: British, German. Nationality of Counsels: Bulgarian and American (US), Baltic Republic. Seat: Capital of a Baltic Republic. Language: English.

relationships gave rise to justifiable doubts under section 3.3.9 of the Orange List (“co-counsel in the past three years”).

Claimant’s counsel stated that they had no connection to or familiarity with the domestic litigations in which the arbitrator was and might have been potentially instructed by other offices of the claimant’s counsel’s law firm.

The SCC sustained the challenge.

3.2.6 SCC Arbitration 2017/042 ⁴⁴

Claimant challenged the respondent’s arbitrator following the arbitrator’s disclosure that another office of his law firm had previously been retained by respondent’s parent company. The most recent such engagement had ended two years before the arbitration was filed.

Respondent argued that the connection between the arbitrator and respondent was too remote to warrant dismissal of the arbitrator: It was a foreign office of the arbitrator’s law firm that had rendered advice to respondent’s parent company – not respondent itself – and the assignment had concerned advice on a transaction that was eventually not carried out.

The SCC sustained the challenge.

3.2.7 SCC Arbitration 2017/201 ⁴⁵

Respondent challenged claimant’s arbitrator, invoking a contractual relationship between the arbitrator and the Moscow office of claimant’s counsel, under which the arbitrator was to give expert opinions and participate in the hearings in an ongoing dispute.

Claimant objected to the challenge, but acknowledged the possibility that the arbitrator and the firm may communicate with respect to a case unrelated to the present arbitration.

The Board sustained the challenge. Under the SCC policy that went into effect on 1 January 2018, the Board provided a reasoned decision on the challenge. It read, in relevant part:

[T]he ongoing character of the contractual relationship, as well as the arbitrator’s obligation implied in this relationship to contact and cooperate with the law firm upon its demand, in the opinion of the SCC, may cause justifiable doubts as to impartiality and independence of the arbitrator, from the perspective of a third party.

⁴⁴ Nationality of the parties: Swedish. Nationality of the arbitrators: Swedish. Nationality of Counsels: Swedish. Seat: Stockholm. Language: Swedish.

⁴⁵ Nationality of the parties: Serbian, Belarusian. Nationality of the arbitrators: Serbian, Russian, Latvian. Nationality of Counsels: Russian, Belarusian. Seat: Stockholm. Language: Russian.

4 CONCLUSION

This note has discussed SCC practice on challenges to arbitrators and summarized a selection of decisions rendered by the SCC Board between January 2016 and December 2018. From these decisions, some general guidelines and tendencies can be discerned:

- In each challenge, the SCC Board considers applicable law, jurisprudence, and best practices in international arbitration. The IBA Guidelines on Conflicts of Interest are taken into account, but the Board may also choose to deviate from those Guidelines.
- The SCC Board has 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 considered grounds for justifiable doubts as to the arbitrator's impartiality.
- A challenge will generally not be sustained if it is based on circumstances or relationships that ceased to exist several years ago. For example, a relationship between the arbitrator and a party or counsel that ended more than three years before the start of the arbitration 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 are not necessarily decisive.
- The SCC Board has consistently found that a client of any local law firm office is a client of the whole firm, however global that firm may be. This is in line with the IBA Guidelines. Similarly, a lawyer is generally seen to assume the identity of the firm; a relationship between a party and one of the firm's partners is often, though not always, imputed to the other partners.

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.

While previous decisions may be indicative of how the Board would rule in the future, the Board considers each challenge on its own merits and in the context of all relevant circumstances.