



SETTERWALLS

Challenge to Arbitrators under Swedish Law in Light of the IBA Guidelines

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Challenge to arbitrators - introduction

- In what fora are challenges tried?
- The relevant test under the SAA – impartiality
- Recent case law and the application of the IBA Guidelines
- Conclusions and propositions



Challenge to arbitrators – what fora?

- Ad hoc proceedings
 - Challenges are tried by the arbitrators (or by agreement referred to an arbitration institution)
 - A dismissed challenge is subject to appeal to the District Court
 - A sustained challenge is not subject to appeal



Challenge to arbitrators – what fora?

- Setting aside proceedings
 - Court of Appeal - first instance
 - Supreme Court - second instance (leave to appeal only under certain circumstances)



Challenge to arbitrators – what fora?

- SCC Proceedings
 - SCC Secretariat
 - Decisions by the SCC Board – not subject to appeal



Challenge to arbitrators - the relevant test under the SAA

- An arbitrator must be "impartial"
- No reference to "independent" – however no difference in relation to the Guidelines
- The assessment - an objective viewpoint



Challenge to arbitrators - the relevant test under the SAA

- Non-exhaustive list:
 - If the arbitrator is a party of the dispute or in close relationship with a party or has a notable benefit or detriment of the outcome
 - If the arbitrator or a person close to him is a director of a company which is a party or represents a party or other person who may expect notable benefit or detriment of the outcome
 - If the arbitrator as an expert or otherwise has taken position in the dispute or assisted a party in the preparation of the dispute
 - If the arbitrator has received or demanded compensation outside the scope of the fee agreement concluded jointly between the arbitrator and the parties

Challenge to arbitrators – case law

- NJA 2007 p 841 (Jilkén v. Ericsson)
 - The chairman arbitrator was consultant with the law firm that had Ericsson as one of its major clients
 - The arbitrator had his office within the law firm
 - The arbitrator had rendered legal opinions for the Ericsson group
 - Procedural correspondence written on the law firm's letter-head
- Supreme Court set aside the award and noted
 - Ericsson was economically important to the law firm
 - The law firm had previously declined assignments against Ericsson due to conflict of interest
 - According to the Guidelines the arbitrator was not considered impartial

Challenge to arbitrators – case law

- NJA 2010 p 317 (Korsnäs v. Fortum)
 - Arbitrator engaged five times the last three years in matters where the same law firm was involved
 - Court of Appeal applied the Guidelines directly (item 3.3.7)
 - Dismissed the challenge since the arbitrator in fact had only been appointed twice by the same law firm the last three years
 - The Supreme Court upheld the lower instance, however:
 - Did not mention the Guidelines
 - Made an overall assessment based on the SAA

Challenge to arbitrators – case law

- Court of Appeal 27 September 2011 (Profilgruppen v. KPMG)
 - The KPMG appointed arbitrator was a partner and head of the law firm's local office
 - New assignment against KPMG before the award was rendered
 - Law firm sent demand letters to KPMG before the award was rendered
 - Assignment against KPMG had significant economic value for the law firm
 - Assignment against KPMG was registered the day after the award was rendered



Challenge to arbitrators – case law

- Findings in the KPMG case
 - The circumstances diminished the impartiality of the arbitrator
 - Arbitral award was set aside
 - No reference to the Guidelines



Conclusions and propositions

- SCC proceedings – the Guidelines are taken into account
- Swedish Courts – the Guidelines not directly applicable but important supplement to the SAA
- The Swedish approach conforms with the Guidelines' objectives
- Guidelines have contributed to increased conformity
- The Swedish approach seems to conform with that of other host states of international arbitrations – international “best practice”



Thank you for your attention!