

# Journal of International Arbitration



Wolters Kluwer  
Law & Business

---

---

Published by *Kluwer Law International*

P.O. Box 316

2400 AH Alphen aan den Rijn

The Netherlands

Sold and distributed in North, Central and South

America by *Aspen Publishers, Inc.*

7201 McKinney Circle

Frederick, MD 21704

United States of America

Sold and distributed in all other countries

by *Turpin Distribution*

Pegasus Drive

Stratton Business Park, Biggleswade

Bedfordshire SG18 8TQ

United Kingdom

ISSN 0255-8106

© 2013, Kluwer Law International

This journal should be cited as (2013) 30 J. Int. Arb. 2

The *Journal of International Arbitration* is published six times per year.

Subscription prices for 2013 [Volume 30, Numbers 1 through 6] including postage and handling:

Print subscription prices: EUR 943/USD 1124/GBP 620

Online subscription prices: EUR 781/USD 1041/GBP 574 (covers two concurrent users)

This journal is also available online at [www.kluwerlawonline.com](http://www.kluwerlawonline.com).

Sample copies and other information are available at [www.kluwerlaw.com](http://www.kluwerlaw.com).

For further information please contact our sales department at +31 (0) 172 641562 or at [sales@kluwerlaw.com](mailto:sales@kluwerlaw.com).

For Marketing Opportunities please contact [marketing@kluwerlaw.com](mailto:marketing@kluwerlaw.com).

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, mechanical, photocopying, recording or otherwise, without prior written permission of the publishers.

Permission to use this content must be obtained from the copyright owner.

Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th floor, New York, NY 10011, United States of America.

E-mail: [permissions@kluwerlaw.com](mailto:permissions@kluwerlaw.com). Website: [www.kluwerlaw.com](http://www.kluwerlaw.com).

The Journal of International Arbitration is indexed/abstracted in the European Legal Journals Index.

*Printed on acid-free paper*

---

---

<i>General Editor</i>	Dr. Michael J. Moser
<i>Notes and Current Developments Editor</i>	Dominique Hascher
<i>Assistant Editor</i>	Friven Yeoh
<i>Advisory Board</i>	Dominique Brown-Berset Professor Dr. Bernard Hanotiau Michael Hwang S.C. Professor Dr. Gabrielle Kaufmann-Kohler Dr. Wolfgang Kühn Toby Landau Q.C. Ramon Mullerat Dr. Horacio A. Grigera Naón Lucy Reed Samir A. Saleh Audley Sheppard Abby Cohen Smutny Dorothy Udeme Ufot V.V. Veeder Q.C.

All correspondence should be addressed to:  
 Dr. Michael J. Moser  
 Journal of International Arbitration  
 c/o Hong Kong International Arbitration Centre  
 38th Floor, Two Exchange Square, 8 Connaught Place, Hong Kong S.A.R., China  
 Tel: +852 3512 2398, Fax: +852 2877 0884, Email: [editorjoia@kluwerlaw.com](mailto:editorjoia@kluwerlaw.com)  
 For subscription queries please see copyright page overleaf.

© Kluwer Law International  
 All rights reserved

ISSN 0255-8106

Mode of citation: 30 J.Int.Arb. 2

# Are Challenges Overused in International Arbitration?

Mark BAKER & Lucy GREENWOOD\*

*This article discusses the prevalence of challenges to arbitrators in international arbitration proceedings. The authors analyse the available data on challenges in both international commercial arbitrations and in public investment treaty arbitrations and highlight differences between the two in relation to this issue.*

## 1 INTRODUCTION

Almost 350 years ago, Sir Matthew Hale, Chief Justice of England and Wales, publicly resolved to ‘abhor all private solicitations of whatever kind so ever and by whomsoever in matters depending’ in his administration of justice.<sup>1</sup> Challenges to international arbitrators are often rooted in a suspicion that modern arbitrators will not abhor ‘private solicitations’ as ardently as Sir Matthew promised to do. Yet are these suspicions always well founded, or is there an increasing tendency to challenge or threaten to challenge simply in order to delay arbitral process? Are challenges now invoked simply to disrupt, to intimidate and to deprive? Do they diminish rather than enhance the arbitration process?

Challenges are freely available under most arbitration laws and rules and, increasingly, parties are availing themselves of these procedures. Challenges do not require significant briefing, therefore are not a particularly onerous or expensive undertaking for a party and they can either ‘succeed’, in which case the offending individual (usually an arbitrator, but on occasion counsel or expert witness) is removed, or ‘fail’ in which case the individual stays on. In both cases, the

---

\* Mark Baker, FCIArb, admitted to practice law in Texas, Executive Committee Member and Member of the Board of Directors of the American Arbitration Association and Chairman of its International Advisory Committee, co-head of the Fulbright & Jaworski LLP International Arbitration Group. Lucy Greenwood, FCIArb, Solicitor, England & Wales, accredited Foreign Legal Consultant in Texas, member of the Fulbright & Jaworski LLP International Arbitration Group. All views expressed herein are the authors’ own and do not necessarily reflect the views of Fulbright & Jaworski LLP. The authors acknowledge the assistance of Mark Stadnyk, associate in the Fulbright & Jaworski LLP International Arbitration Group, in the preparation of this article.

<sup>1</sup> Sir Matthew Hale (1609–1676), Chief Justice of England & Wales (1671–1676), *Things Necessary to be Continually Had in Remembrance*, in *The Rule of Law* and in *Sir Matthew Hale’s Resolution*, 27 Arb. Intl. 281 (2011).

arbitration is disrupted. In short, challenges can be a cost-effective way to ensure an expensive delay. A third possibility, which is also becoming more frequent, is where an arbitrator simply resigns in the face of a challenge. This approach is often taken with the noblest of intentions and in a belief that if there is a challenge, no matter how spurious, then the parties do not or will not have confidence in the arbitration process. Yet, the consequences of taking this approach are significant: a party will be deprived of its right to appoint its first choice arbitrator or to have the first choice of chair of the proceedings.

Challenges to arbitrators, expert witnesses and counsel further slow international arbitrations, which already move at a glacial pace. The 2007 Fulbright & Jaworski Litigation Trends survey found that the percentage of respondents who believed that arbitration was quicker than litigation fell dramatically from 43% in 2006 to 11% in 2007 (and only 9% of respondents believed that international arbitration was cheaper than litigation (down from 26% in 2006 and 32% in 2005)).<sup>2</sup> The time taken to reach an award in an international arbitration is generally in the region of one to two years, and often longer.<sup>3</sup>

We have been anchored by the view that arbitrations can take years to resolve. Delay in proceedings has become both acceptable and expected. However, the overuse of challenges has an effect which is more insidious than pure delay, namely, that a party is deprived of its first choice for its arbitrator. There is an argument that challenges are not simply being overused by parties' counsel, they are being abused by parties' counsel.

## 2 WHAT DO WE MEAN BY 'CHALLENGES' TO ARBITRATORS?

The procedure adopted in relation to most international arbitration proceedings allows a party to 'challenge' (i.e., seek the removal of) an arbitrator on the grounds that circumstances exist that give rise to justifiable doubts about the arbitrator's independence and impartiality. The procedure is rooted in the principle *nemo iudex in causa sua* (no one should be a judge in their own cause) enhanced by the mantra that 'justice must not only be done, but must be seen to be done'.<sup>4</sup> Allowing parties to challenge, principally, the adjudicators of their disputes on the grounds that the parties have genuine doubts as to the independence and impartiality of the decision-maker is a fundamental element of the arbitral process and one that, of

<sup>2</sup> Available at [www.fulbright.com](http://www.fulbright.com).

<sup>3</sup> Michael McIlwrath & John Savage, *International Arbitration and Mediation: A Practical Guide* 225 (Kluwer L. Intl. 2010). Gary Born estimates that an international commercial arbitration takes between 18 and 36 months to complete. Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* 6 (3d ed., Kluwer L. Intl. 2010). It is the authors' experience that arbitrations often take considerably longer than this to conclude.

<sup>4</sup> *R v. Sussex Justices, ex parte McCarthy*, [1924] 1 KB 256.

course, must be respected in order to preserve the integrity of the arbitral process. However, the fact that only around 10% of challenges which are ruled upon by the London Court of International Arbitration (LCIA) Court<sup>5</sup> and approximately 7% of challenges before the International Chamber of Commerce (ICC) Court result in the removal of the challenged individual indicates that a significant proportion of challenges are relatively without merit and, arguably, have been precipitated not by genuine doubts as to the decision-maker's partiality, but by other motives. Challenges made primarily to disrupt proceedings are more prevalent in the early stages of an arbitration, where they are also more likely to result in the removal of the challenged individual. Further, what the available statistics do not show us is the number of situations in which arbitrators simply resigned in the face of a challenge so that the matter was not dealt with formally.

The rise in challenges in recent years is, of course, largely attributable to the dramatic rise in overall numbers of international arbitration proceedings. Whilst the overall number of arbitrations has increased, the available pool of arbitrators has not necessarily increased at the same rate; therefore, more perceived 'conflicts' arise. However, there is also support for the notion that the rate of challenges is increasing.

### 3 CHALLENGE PROCEDURES IN COMMERCIAL AND INVESTOR-STATE ARBITRATIONS

In 2011, the LCIA Court began publishing sanitized digests of arbitrator challenge decisions.<sup>6</sup> Under the LCIA Rules, when deciding a challenge to an arbitrator, the LCIA Court reaches a reasoned decision that is conveyed to the parties. Apparently, the LCIA is the only commercial arbitration institution that communicates reasoned decisions: the ICC, ICDR and Stockholm Chamber of Commerce (SCC) all reach decisions on challenges to arbitrators without providing reasons to the parties.<sup>7</sup> Aside from this, most of the major commercial arbitration institutions have similar procedures for dealing with challenges to participants in the arbitral process. There is, however, a distinction that can be drawn between commercial and investor-state arbitrations. Generally, in commercial arbitrations the challenge is decided by a third party, usually a body of the institution, and in the most common investor-state arbitrations the challenge is decided by the tribunal (with the challenged arbitrator recusing himself or herself).

<sup>5</sup> In statistics provided by the LCIA, five of 50 challenges were upheld by the LCIA during the period of 2007 to 5 Oct. 2012. However, ten arbitrators voluntarily resigned upon challenge during this time period. Email from the LCIA to the authors dated 5 Oct. 2012.

<sup>6</sup> See Thomas Walsh & Ruth Teitelbaum, *The LCIA Court Decisions on Challenges to Arbitrators: An Introduction*, 27 *Arb. Intl.* 283 (2011).

<sup>7</sup> ICSID and the Iran-United States Claims Tribunal provide reasoned decisions to the parties.

Challenges in ICC arbitrations are made in writing to the ICC Secretariat.<sup>8</sup> The ICC Court decides on both the admissibility and the merits of any challenges. A challenge is inadmissible if not submitted ‘within 30 days from receipt by that party of the notification of the appointment or confirmation of the arbitrator, or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification’.<sup>9</sup> The parties, the challenged arbitrator, and the other tribunal members may comment in writing on the challenge.<sup>10</sup> Until 2010, challenges were heard in the monthly plenary session of the ICC Court. However, most challenges are now decided by the smaller Committee Session, which meets weekly.<sup>11</sup> The ICC Arbitration Rules do not provide for the suspension of proceedings during a challenge, instead this decision is left to the tribunal. In making a determination on this issue, the arbitrators frequently refer to a range of factors, including the ‘stage of the arbitration proceedings’ and usually seek the parties’ input. Article 37(4) of the ICC Arbitration Rules requires the tribunal to fix the costs of the arbitration, including challenge costs, in the final award. It also empowers the tribunal to ‘decide which of the parties shall bear them or in what proportion they shall be borne by the parties’, therefore enabling a tribunal to require the parties to share costs equally or to impose costs on the unsuccessful party. The ICC does not provide reasons to the parties.<sup>12</sup>

In LCIA arbitrations, challenges must be submitted in writing to the LCIA Court, the tribunal and all other parties ‘within 15 days of the formation of the Arbitral Tribunal or (if later) after becoming aware of any circumstances referred to in Article 10.1, 10.2 or 10.3’.<sup>13</sup> These circumstances include situations or relationships that ‘give rise to justifiable doubts as to his impartiality or independence’.<sup>14</sup> Either ‘a single individual – be it the President, a Vice President, an Honorary Vice President or a former Vice President – or . . . a three of [*sic*] five-member division of the Court’<sup>15</sup> decide upon the challenge. Similar to arbitrations conducted according to the ICC Arbitration Rules, the tribunal is empowered to suspend or to continue the proceedings. However, because of the speed with which the LCIA Court responds to challenge applications, the

<sup>8</sup> Article 14(1) of the 2012 ICC Arbitration Rules.

<sup>9</sup> *Ibid.*, Art. 14(2).

<sup>10</sup> *Ibid.*, Art. 14(3).

<sup>11</sup> Karel Daele, *Challenge and Disqualification of Arbitrators* paras. 4-026–4-027 (Kluwer L. Intl. 2012).

<sup>12</sup> See Art. 11(4) of the 2012 ICC Arbitration Rules: ‘The decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final, and the reasons for such decisions shall not be communicated.’

<sup>13</sup> Article 10.4 of the LCIA Arbitration Rules.

<sup>14</sup> *Ibid.*, Art. 10.3.

<sup>15</sup> Daele, *supra* n. 11, at para. 4-029.

arbitration proceedings are usually not suspended. We understand that the average duration of the eighteen challenge procedures before the LCIA Court between 1 January 2006 and 31 December 2011 was two and a half months.<sup>16</sup> Under the LCIA Rules, ‘there is an assumption that ‘costs follow the event’ and that the challenging party will therefore bear the costs of a rejected challenge’.<sup>17</sup> However, Karel Daele, analysing thirty LCIA Court challenge decisions, found that in practice the Court most frequently ‘reserved both the arbitration costs and the parties’ legal fees in connection with the challenge’.<sup>18</sup>

In arbitrations administered by the SCC, challenges must be made in writing to the SCC Secretariat ‘within 15 days from when the circumstances giving rise to the challenge became known to the party’; otherwise, the right to challenge is waived.<sup>19</sup> The parties and arbitrators are afforded the opportunity to provide comments before the SCC Board makes a final decision.<sup>20</sup> A majority of the SCC Board is required to decide such matters, though we understand that in practice most decisions are taken unanimously.<sup>21</sup> Under the SCC Rules, the arbitration proceedings are usually suspended pending a decision on a challenge application. Under Article 43(5) of the SCC Rules, the cost of a challenge is to be apportioned ‘between the parties, having regard to the outcome of the case and other relevant circumstances’.

Challenges in ICDR arbitrations require a written submission to the administrator ‘within 15 days after being notified of the appointment of the arbitrator or within 15 days after the circumstances giving rise to the challenge become known to that party’.<sup>22</sup> If the other party or parties contest the challenge or the challenged arbitrator does not withdraw, the administrator is empowered to decide on the challenge.<sup>23</sup> Under Article 31, the tribunal may apportion the costs of a challenge ‘among the parties if it determines that such apportionment is reasonable, taking into account the circumstances of the case’. The Rules are silent on whether or not proceedings should be suspended while the challenge is ongoing.

As noted above, investor-state arbitrations take a different approach. Under International Centre for the Settlement of Investment Disputes (ICSID) Arbitration Rule 9, parties challenging an arbitrator must do so in writing to the Secretary-General ‘promptly, and in any event before the proceeding is declared

<sup>16</sup> *Ibid.*, para. 4-056.

<sup>17</sup> *Ibid.*, para. 4-106.

<sup>18</sup> *Ibid.*

<sup>19</sup> Article 15(2) of the SCC Arbitration Rules.

<sup>20</sup> *Ibid.*, Art. 15(3) and (4).

<sup>21</sup> Daele, *supra* n. 11, at para. 4-032.

<sup>22</sup> Article 8(1) of the ICDR Arbitration Rules.

<sup>23</sup> *Ibid.*, Art. 9.



closed'. Disqualification applications are usually heard by the other two members of a three-member panel. However, if the disqualification concerns a sole arbitrator or a majority of the panel, or if the two arbitrators hearing the challenge cannot agree, the Chairman of the Administrative Council takes the decision.<sup>24</sup> In practice, the Chairman requests recommendations from the Secretary-General of ICSID or, less frequently, the Secretary-General of the Permanent Court of Arbitration. Under Arbitration Rule 9(6), the 'proceeding shall be suspended until a decision has been taken on the [challenge] proposal'. The ICSID Convention grants tribunals a wide discretion to apportion the costs of a challenge.<sup>25</sup> In practice, ICSID tribunals have taken three approaches: costs are imposed on the unsuccessful party; costs are shared by the parties equally; or costs are imposed on one party to penalize inappropriate behaviour.<sup>26</sup>

#### 4 APPLICABLE STANDARDS IN COMMERCIAL AND INVESTOR-STATE ARBITRATION

Differences between commercial and investor-state arbitration can also be discerned in a review of the applicable standards to be considered in determining challenges to arbitrators. The 2012 ICC Arbitration Rules provide that an arbitrator may be challenged 'whether for an alleged lack of impartiality or independence, or otherwise'.<sup>27</sup> While 'independence' and 'impartiality' have relatively clear meanings, the addition of 'otherwise' expands the circumstances in which arbitrators may be challenged. The LCIA Rules set out the standard applicable to arbitrator challenges in Article 10(3). It provides that, '[a]n arbitrator may also be challenged by any party if circumstances exist that give rise to justifiable doubts as to his impartiality or independence'. The SCC Arbitration Rules provide a standard similar to the LCIA Arbitration Rules: '[a] party may challenge any 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 qualifications agreed by the parties'.<sup>28</sup> The ICDR Arbitration Rules also adopt a 'justifiable doubts' standard. Article 8(1) states that '[a] party may challenge any arbitrator whenever circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence'.

In ICSID arbitrations, however, there is a different approach. Article 57 of the ICSID Convention provides the primary standard applicable to arbitrator

<sup>24</sup> ICSID Convention, Art. 58. See also ICSID Arbitration Rules, Rule 9(2)(a).

<sup>25</sup> ICSID Convention, Art. 61(2).

<sup>26</sup> Daele, *supra* n. 11, at para. 4-089.

<sup>27</sup> Article 14 of the 2012 ICC Arbitration Rules.

<sup>28</sup> Article 15.1 of the SCC Arbitration Rules.

challenges. It reads: ‘A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under section 2 of Chapter IV.’ Section 2 of Chapter IV primarily concerns the nationality of the arbitrators vis-à-vis that of the parties to the dispute. Parties may seek to establish a ‘manifest lack of the qualities required’ by Article 14(1), which provides that:

Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.

So ICSID arbitrations differ in two key ways from commercial arbitrations: (i) the adjudicating body is the tribunal; and (ii) the right to challenge is limited to circumstances in which facts exist which indicate an absence of the three required qualities in an arbitrator: high moral character, competence and the ability to exercise independent judgment.<sup>29</sup> In a field in which greater transparency exists and is required, ICSID arbitrations actually impose a seemingly lower standard of independence and impartiality upon their arbitrators than commercial arbitrations.

## 5 TACTICAL CHALLENGES

The frequency of challenges in arbitral proceedings is increasing. One reason for this could be the increased reliance on the IBA Guidelines on Conflicts of Interest in International Arbitration, which are heavily relied upon by parties in formulating challenges.<sup>30</sup>

The IBA Guidelines were issued by the IBA in 2004 and represent an attempt to establish a consensus within the international arbitration community on the evaluation of conflict issues. Some institutions appear to rely heavily on the IBA Guidelines in resolving challenges to arbitrators. For example, the SCC ‘always consults the IBA Guidelines when an arbitrator is challenged’.<sup>31</sup> Similarly, [w]hen briefing the ICC Court on challenges and contested confirmations of arbitrators, the ICC Secretariat usually mentions any articles of the IBA Guidelines, which

<sup>29</sup> We exclude for present purposes the right to challenge on the grounds of lack of eligibility relating to nationality.

<sup>30</sup> Available at [www.ibanet.org](http://www.ibanet.org).

<sup>31</sup> IBA Conflicts of Interest Subcommittee, *The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years 2004–2009*, 4 Dispute Res. Intl. 5, 33 (2010) (available at [www.ibanet.org/Document/Default.aspx?DocumentUId=18DB5162-50F1-4D6D-ABE9-93C7CE86B659](http://www.ibanet.org/Document/Default.aspx?DocumentUId=18DB5162-50F1-4D6D-ABE9-93C7CE86B659)).

somehow contemplate the factual situation alleged'.<sup>32</sup> Statistics from 2004–2009 indicate that, in 106 of 187 ICC challenge decisions, 'at least one article of the Guidelines was referred to as potentially contemplating the situation. In the remaining 81, the secretariat considered that no article of the Guidelines contemplate the situation'.<sup>33</sup> At least nine ICSID decisions have discussed the relevance of the IBA Guidelines, with some going as far as observing that '[t]he IBA Guidelines are widely recognized in international arbitration as the preeminent set of guidelines for assessing arbitrator conflicts'.<sup>34</sup> It appears, therefore, that the IBA Guidelines are cited regularly in challenges to arbitrators (and, albeit more rarely, counsel<sup>35</sup>).

There is an argument, however, that the IBA Guidelines provide a platform from which less meritorious challenges can be launched. This is not to criticize the Guidelines, which manage to find common ground in an area which is characterized by vastly different views and opinions, influenced by a variety of legal cultures and backgrounds. Assessing a conflict such as to determine whether there is an appearance of bias requires a greatly nuanced approach, and the Guidelines have been undoubtedly of use to counsel, tribunals and arbitral institutions alike in formulating, presenting and ruling on challenges. However, the development of the Guidelines certainly 'opened the door to both opportunity and opportunism',<sup>36</sup> and the Guidelines have, to some significant extent, provided a platform from which challenges can be launched.

The underlying reason for many challenges may well be to delay the arbitration proceedings. Under the SCC and the ICSID Rules, the arbitral proceedings are suspended whilst challenges are decided, and under the other arbitral regimes, there is a significant risk that the tribunal will decide to suspend proceedings. Under the UNCITRAL Rules, for example, '[i]t is within the Tribunal's discretionary powers to suspend the arbitration proceedings or not'.<sup>37</sup> A review of the available data shows that challenges rarely succeed, but nonetheless

<sup>32</sup> Daele, *supra* n. 11, at para. 5–103.

<sup>33</sup> *Supra* n. 31, at 29.

<sup>34</sup> *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Professor Brigitte Stern and Professor Guido Santiago Tawil, Arbitrators, at para. 74.

<sup>35</sup> The Guidelines have also been referred to in relation to recent challenges to counsel, such as in the ICSID cases of *Hrvatska Elektroprivreda, d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Tribunal's Ruling regarding the participation of David Mildon QC in further stages of the proceedings. See, e.g., para. 19, which cites 'Paragraph 4.5 of [the IBA Guideline's] Background Information . . . [on] the question of barristers who practise as arbitrators'; also note *Rompétrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision of the Tribunal on the Participation of a Counsel, which cited general standard 2(c) in the IBA Guidelines in n. 4.

<sup>36</sup> Leon Trakman, *The Impartiality and Independence of Arbitrators Reconsidered*, 10 Intl. Arb. Rev. 999 (2007).

<sup>37</sup> Daele, *supra* n. 11, at para. 2–109.

may have a significant impact on the cost of the arbitration and the time it takes to reach an award.

## 6 ANALYSIS OF AVAILABLE DATA

Challenges to arbitrators can generally be divided into two categories: challenges based on relations between an arbitrator and another entity and challenges based on the behaviour of an arbitrator during the arbitration proceedings. From a review of the data provided by the LCIA, ICC, ICDR, and ICSID, the following trends can be discerned.

Many of the challenges could be classed as frivolous. Among the (unsuccessful) challenges considered by the LCIA Court was a challenge to the Chair's impartiality for refusing to postpone the final hearing, alleged impropriety in procedural orders, with the LCIA concluding that the constant objections by the challenging party 'had amounted to an increasingly vexatious attempt to hinder the proceedings and/or evidenced a fundamental lack of understanding of the process'.<sup>38</sup> In another decision, the LCIA Court rejected the allegation that an arbitrator's 'long-standing commitment to Arab studies and Arab culture', evidenced primarily by his specialization in Arab and Islamic law, established partiality.<sup>39</sup> The LCIA Court rejected another challenge contending that the sole arbitrator, while not a UK citizen, possessed 'de facto UK nationality' by virtue of extended ties to the country.<sup>40</sup> In one case, the claimant sought numerous extensions of deadlines for the payment of the advance, the arbitrator refused to order that the respondent pay the claimant's deposit and refused to order the suspension of proceedings to attempt to reach settlement without the agreement of the respondent, which was not forthcoming. The claimant issued a challenge to the arbitrator, but the challenge failed as the Vice President found nothing in the facts which indicated that any actions of the arbitrator could have given rise to justifiable doubts as to the arbitrator's independence or impartiality.<sup>41</sup>

Challenges rarely succeed. Under the ICC Arbitration Rules, approximately 7% of challenges between 2007 and 2011 succeeded.<sup>42</sup> The rate for challenges of proposed (but not confirmed) arbitrators is even lower: only 169 arbitrators failed

<sup>38</sup> LCIA Reference No. 3431 (3 Jul. 2003, 18 Dec. 2003 and 18 Feb. 2004).

<sup>39</sup> LCIA Reference No. 5660 (5 Aug. 2005).

<sup>40</sup> LCIA Reference No. 8086 (30 Sep. 1998).

<sup>41</sup> LCIA Reference No. 7990 (21 May 2010).

<sup>42</sup> Jason Fry, Simon Greenberg & Francesca Mazza, *The Secretariat's Guide to ICC Arbitration*, ICC Publ'n 175 (2012). In 2007 and 2008, challenges succeeded only 3.8% and 2.3% of the time, respectively, though in 2010 approximately 13% of challenges succeeded. We understand that, in 2011, three of 38 challenges, or 7.9%, were upheld: ICC Representative, Speaker at *Hot topics in arbitration*, IBA Annual Conference, Dublin, 3 Oct. 2012.

to be confirmed by the ICC out of 5,830 total decisions from 1998 to 2006.<sup>43</sup> In 2011, only thirty-four arbitrators were not confirmed by the ICC.<sup>44</sup> The LCIA statistics are similar: between 2007 and 5 October 2012, only five challenges were upheld out of a total of fifty challenges brought against arbitrators.<sup>45</sup> Four of the upheld challenges occurred in 2012, meaning that, between 2007 and 2011, only one of forty-one arbitrator challenges (or 2.5%) was upheld. Arbitrator challenges under the ICDR International Arbitration Rules appear, however, to be more likely to succeed. In 2011, forty-four challenges were filed in international commercial cases, resulting in twenty-three removals (i.e., a 52.3% success rate).<sup>46</sup> The vast majority of these removals (twenty-one) occurred at the 'appointment/disclosure' phase, while only two removals occurred at the 'pre-hearing/award' stage. In 2010, the ICDR's challenges statistics were broadly similar: of fifty-eight challenges filed, twenty-five (or 43.1%) resulted in removals. Of these, only one challenge resulted in removal at the 'pre-hearing/award stage'.<sup>47</sup> ICSID challenges are even more unlikely to succeed than challenges under the rules of most international commercial arbitration institutions. One commentator recently observed that only one of forty-two challenges brought thus far succeeded, that is, approximately 2.4%.<sup>48</sup>

However, these figures do understate the 'success' of challenges as arbitrators tend to resign in the face of challenges. The LCIA statistics from 2007 to 5 October 2012 demonstrate that, of fifty challenges to arbitrators, ten arbitrators voluntarily resigned. Thus, the number of arbitrators who voluntarily resigned during this period was double that of the number who were removed.<sup>49</sup> The ICC recently stated to the authors that it does not have statistics for the rate of voluntary resignation.<sup>50</sup> However, Anne Marie Whitesell has observed that '[d]uring the period 1998 and 2006, 184 resignations were tendered by arbitrators in ICC proceedings'.<sup>51</sup> During the same period, only twenty challenges were successful.<sup>52</sup> While resignations can occur for reasons unrelated to independence and impartiality, the number of resigning arbitrators is significantly greater than the

---

<sup>43</sup> Anne Marie Whitesell, *Independence in ICC Arbitration: ICC Court Practice Concerning the Appointment, Confirmation, Challenge and Replacement of Arbitrators*, ICC Intl. Ct. Arb. Bull.– 2007 Spec. Supp. 14 (2008).

<sup>44</sup> ICC Representative, Speaker at *Hot topics in arbitration*, IBA Annual Conference, Dublin, 3 Oct. 2012.

<sup>45</sup> Email from the LCIA on file with the authors dated 5 Oct. 2012.

<sup>46</sup> Email from Thomas Ventrone, ICDR, on file with the authors dated 26 Oct. 2012.

<sup>47</sup> *Ibid.*

<sup>48</sup> Daele, *supra* n. 11, at para. 4–084.

<sup>49</sup> Email from the LCIA on file with the authors dated 5 Oct. 2012. Only five challenges of the 50 were upheld, as discussed above.

<sup>50</sup> Email from the ICC on file with the authors dated 9 Oct. 2012.

<sup>51</sup> Whitesell, *supra* n. 43, at 33.

<sup>52</sup> *Ibid.*, at 27.

number of arbitrators successfully challenged, tending to support the notion that arbitrators frequently resign in the face of challenge.

## 7 CONCLUSION

International commercial arbitrations and investor-state arbitrations probably have more differences than similarities. The key difference for present purposes is the fact that a significant portion of an investor-state arbitral proceeding is made public. As more and more ICSID arbitrations are concluded and the awards published, a body of jurisprudence of public international law is developing that, whilst not formally binding on subsequent tribunals, has probably reached the level at which it is more than merely persuasive. International commercial arbitrations, in contrast, are private and generally confidential. Commercial arbitrators are required to apply national laws to a factual situation to determine whether or not contractual obligations have been breached. The findings of other commercial arbitration panels, even if they were to be available, have no precedential or, arguably, persuasive value whatsoever. Arbitrators, particularly commercial arbitrators, are not judges. It is ironic that challenges appear to both be more prevalent in commercial arbitrations and more likely to succeed, yet in investment treaty arbitrations, where justice really must be seen to be done, the arbitrators are not only held to a lower standard, but are also judged by their peers as to whether or not the standard has been breached.

It is our view that the codification process that arbitration, in general and challenges in particular, are undergoing is not always useful. Arbitrator independence and impartiality can only be properly maintained by a high degree of self-policing by the arbitrator. In the absence of highly moral, self-policing players, it does not matter how many codes or guidelines are enacted, there will not be an independent and impartial tribunal. In sum, the key is not to further regulate, but to ostracize – via the free market of appointments – dishonest arbitrators and to relentlessly award costs and annul awards against parties who try to exploit the system to their or their appointers' advantage.

One of the significant advantages of the commercial arbitration process is the ability to select a particular arbitrator with a particular level of expertise for a particular dispute. Yet such arbitrators are commercial people and do not work in isolation. Few arbitrators are exclusively employed as arbitrators, nor should we want them to be. Professor Catherine Rogers has argued that standards of independence and impartiality of arbitrators should reflect the specific features of arbitrators 'rather than being simply a watered-down version of the mythological

“impartial” judge’.<sup>53</sup> Whilst counsel will usually employ delaying tactics if it suits the party whom counsel is representing, institutions need to deter frivolous challenges where possible, by ruling on challenges promptly, efficiently and, above all, robustly. Further, all institutions should, at a minimum, provide reasoned decisions to the parties, and all decisions should be published to raise awareness of the low ‘success’ rate of challenges and to help reduce the number of frivolous challenges. For their part, arbitrators should not be intimidated into resigning when facing a challenge. The default approach of a tribunal should be to continue the arbitration, challenge notwithstanding. We also need to question whether we have become habituated to delay in an arbitration such that challenges are more acceptable. In the past, counsel might have been concerned whether a tribunal would be alienated by a tactical challenge; now, it seems as if both counsel and tribunals are more tolerant of such tactics.

In fixating upon the issue of challenges to arbitrators, we are at risk of forgetting that arbitrators are often selected because of their particular knowledge or level of experience. As Professor Park recently put it ‘it would be a shame to exclude from service those who really know something, leaving arbitration only to the ignorant’.<sup>54</sup>

---

<sup>53</sup> Catherine Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 *Stan. J. Intl. L.* 53, 59 (2005).

<sup>54</sup> William Park, *Rectitude in International Arbitration*, 27 *Arb. Intl.* 473, 483 (2011).

**[A] Aim of the Journal**

Since its 1984 launch, the Journal of International Arbitration has established itself as a thought provoking, ground breaking journal aimed at the specific requirements of those involved in international arbitration. Each issue contains in depth investigations of the most important current issues in international arbitration, focusing on business, investment, and economic disputes between private corporations, State controlled entities, and States. The new Notes and Current Developments sections contain concise and critical commentary on new developments. The journal's worldwide coverage and bimonthly circulation give it even more immediacy as a forum for original thinking, penetrating analysis and lively discussion of international arbitration issues from around the globe.

**[B] Contact Details**

Manuscripts as well as questions should be submitted to the Editor at EditorJOIA@kluwerlaw.com.

**[C] Submission Guidelines**

- [1] Final versions of manuscripts should be sent electronically via email, in Word format; they must not have been published or submitted for publication elsewhere.
- [2] The front page should include the author's name and email address, as well as an article title.
- [3] The article should contain an abstract of about 200 words.
- [4] Heading levels should be clearly indicated.
- [5] The first footnote should include a brief biographical note with the author's current affiliation.
- [6] Special attention should be paid to quotations, footnotes, and references. All citations and quotations must be verified before submission of the manuscript. The accuracy of the contribution is the responsibility of the author. The journal has adopted the Association of Legal Writing Directors (ALWD) legal citation style to ensure uniformity. Citations should not appear in the text but in the footnotes. Footnotes should be numbered consecutively, using the footnote function in Word so that if any footnotes are added or deleted the others are automatically renumbered.
- [7] For guidance on style, see the House Style Guide available on this website: <http://www.kluwerlaw.com/ContactUs/>

**[D] Review Process**

- [1] After review by the Editor, manuscripts may be returned to authors with suggestions related to substance and/or style.
- [2] The author will also receive PDF proofs of the article, and any corrections should be returned within the scheduled dates.

**[E] Publication Process**

- [1] For accepted articles, authors will be expected to execute a Consent to Publish form.
- [2] Each author of an accepted article will receive a free hard copy of the journal issue in which the article is published, plus an electronic version of the article.