CHALLENGING ARBITRATORS IN INTERNATIONAL ARBITRATION: HOW ARE CHALLENGES MADE AND WHAT IS THE LIKELY OUTCOME?

James Thompson examines how challenges to arbitrators in international arbitration are made and dealt with, some of the statistics relating to challenges and looks at practical considerations in making or responding to these challenges.

Introduction

Practitioners involved in international arbitration may have perceived, over recent years, an increased willingness of parties to raise a challenge to an arbitrator in their proceedings. The aim of this article is to attempt to answer some of the important questions relating to challenges such as: how do such challenges work, on what grounds can they be justifiable, and are they likely to succeed? What considerations are relevant to the decision whether to make a challenge, and how should the other party respond to a challenge?

How Challenges Are Made and Dealt With in International Arbitrations

Due to space limitations, a comprehensive review of how challenges are made and dealt with by all of the major institutions is not possible. This section therefore focusses on the position under the ICC Rules, but reference is made to other major institutional rules by way of comparison.

Challenges to arbitrators in ICC arbitrations are made pursuant to Article 14 of the 2017 Rules. Those provide that challenges must be made by submitting a written statement to the ICC Secretariat *"specifying the facts and circumstances on which the challenge is based"*[1].

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The ICC Secretariat notes that the requirement to specify the facts and circumstances in writing *"is an initial but important barrier to frivolous challenges as it forces the challenging party to explain itself"*[2]. The Secretariat also gives helpful guidance as to the form and content of the challenge, noting that the submission should be *"concise and measured"*[3]. It notes that attachments such as supporting evidence and even witness statements can be provided but cautions the use of restraint in this regard. In particular, the provision of articles and extracts from text books is unlikely to be helpful to the Court in deciding the challenge, although extracts of relevant caselaw and other authority relevant to the legal standards of impartiality at the place of the arbitration may well be.

The requirement to make challenges in writing gives rise to the question of whether a party will be entitled, or allowed, to make oral submissions either in support of, or against, a challenge. There is no provision in the Rules for such oral submissions, and the Secretariat notes that, although parties have occasionally sought permission to do so, such requests have consistently been refused[4].

The requirement for a challenge to be made in writing is common across the different institutional rules, and for good reason. The LCIA Rules require a challenge to be made in writing[5]. The UNCITRAL Rules similarly require a notice of challenge to be sent to all other parties and the arbitrators, which shall state the reasons for the challenge[6]. The DIAC Rules also require the challenging party to send a written statement of the reasons for the challenge to all other parties and the tribunal members[7].

The grounds on which such a challenge may be made are *"an alleged lack of impartiality or independence, or otherwise"*[8]. This is plainly a very broad statement of the potential basis for challenge and challenges are in practice brought on a wide range of grounds. The most common ground for challenge is an alleged lack of independence, usually based on alleged relationships between the arbitrator and a party or counsel to one of the parties. In practice, the alleged offending relationship is likely to be between the arbitrator's law firm rather than himself or herself as an individual.

However, it is clear that challenges are not limited to considerations of independence and can also be brought on the basis of perceived unfairness in the way that a party has been treated giving rise to alleged impartiality. Such challenges are, however, unlikely to be successful. Furthermore, what is meant by the words *"or otherwise"* is open to interpretation. They are surely wide enough to include a challenge brought on the basis of an alleged lack of ability to conduct the proceedings or the failure

1 Article 14(1)
2 Paragraph 3-559 of the Secretariat's Guide to ICC Arbitration (commenting on the 2012 Rules)
3 Ibid, paragraph 3-560
4 Ibid, paragraph 3-561
5 Article 10.1 of the 2014 Rules refers to a "written challenge" and Article 10.3 requires the submission of a written statement of the reasons for the challenge.
6 Article 13(1) and (2) of the UNCITRAL Rules
7 Article 13.4 of the DIAC Rules 2007
8 Article 14(1)

"If the challenge is made on the basis of perceived lack of independence, objecting to it may well strengthen that impression."

to possess a necessary skillset, but such challenges are unlikely to be successful unless the parties have agreed that the arbitrator(s) should have such skills. An example might be the inability of the arbitrator to conduct the proceedings in the required language, but it would seem unlikely that an arbitrator who was clearly unable to do so would have been appointed in the first place.

Challenges in ICC arbitrations can be made at any time but must be submitted either within 30 days from receipt by the party making the challenge of 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"*[9]. Failure to comply with these time limits will render any challenge inadmissible. Given this draconian consequence, it is likely that the party not making the challenge will wish to examine the facts on which the challenge is based carefully in order to see whether an argument can be made that they were known to the other party more than 30 days before the challenge was submitted.

Other arbitral institutions set down an even stricter time limit for raising a challenge. Both the UNCITRAL Rules and the DIAC Rules require such challenges to be made within 15 days[10] and the LCIA Rules require challenges to be raised within 14 days[11].

The question arises as to whether the various rules require actual knowledge on the party bringing the challenge or whether constructive knowledge is sufficient. The wording of Article 14(2) of the ICC Rules would suggest the former ("was informed"), but the Secretariat notes that in practice the Court will often conduct an assessment of the factual circumstances to determine whether the challenging party should have known of particular facts and matters at an earlier time[12]. The position is likely to be the same under other institutional rules.

When a challenge is made, the Secretariat will seek comments from the challenged arbitrator as well as the other members of the tribunal, and the other party[13]. The Secretariat will then produce a written report to the Court on the challenge, but this will not include any recommendation regarding the outcome[14]. The decision on the admissibility and the merits of the challenge will then be made by the ICC Court at its monthly plenary session. However, the practice of the ICC in recent years is to deal with straightforward challenges at a weekly committee session of the Court to deal with such challenges as quickly as possible[15]. The Secretariat notes that, as at 2012, it had never been the case that a challenge referred to the weekly committee session for decision was subsequently referred to the Court on the basis that sufficient doubt existed not to reject the challenge.

As will be readily apparent, all of this takes time and it is usually the case that a challenge will cause (potentially substantial) delay to the proceedings. There is no fixed period in which a decision on a challenge will be made and communicated to the parties, and the ICC will not provide guidance to the parties on an ad hoc basis as to when a particular challenge is likely to be resolved. However, if a challenge is made which is sufficiently arguable to require a decision of the Court at its monthly plenary session, as well as potentially extensive submissions from the arbitrators and the parties themselves, it is reasonable to expect that the process could take some 2-3 months overall to be resolved, and quite possibly longer.

Statistics Relating to Challenges

The ICC Secretariat published challenge statistics for the decade between 2001 and 2011[16]. During that period, some 397 challenges were filed, and the proportion of challenges as a percentage of the total number of arbitrators appointed or confirmed in that period was 3.3%. The proportion in each year ranged from 1.8% (2002) to 4.4% (2009) but there is no discernible trend over the period (either increasing or decreasing).

Of the 397 challenges made in that ten-year period, only 30 were accepted by the ICC Court (some 7.6%). There was a broader range of success in each year, from 2.3% (2008, when only one challenge out of 44 was accepted by the Court) to 29.4% (2002, when 5 challenges out of 17 were accepted). However, given the relatively small numbers it is difficult to attribute any statistical significance to these figures, and there is again no discernible trend in terms of success over the period.

9 Article 14(2)
10 Article 13(1) and Article 13.4 respectively
11 Article 10.3 of the 2014 Rules
12 Ibid, paragraph 3-581
13 Article 14(3)
14 Ibid, paragraph 3-589
15 Ibid, paragraph 3-590
16 Ibid, paragraph 3-573 Table 20

More recent figures do not suggest a marked departure from the picture painted by these figures. For example, the number of challenges filed in ICC arbitrations in 2017, whether based on an alleged lack of impartiality, independence or otherwise, amounted to 48, out of which 6 were accepted by the Court (an acceptance rate of 12.5%)[17]. In light of these statistics, it would appear that any perception that challenges are on the rise, and/or more likely to be accepted, does not reflect the reality.

Statistics relating to other arbitral institutions paint a similar picture. For example, some 50 challenges were raised in LCIA arbitrations in the period between 2007 and 2012, with just 5 being upheld (a success rate of 10%)[18].

However, taking the figures for accepted challenges by the Court does not give the whole picture. This is because it is of course possible for an arbitrator to resign in response to a challenge, and thereby avoid the need for the Court to rule upon it. For example, in the course of 2017 some 29 arbitrators resigned in ICC arbitrations[19]. If only half of these were in response to a challenge, when combined with the 6 cases in which the Court accepted a challenge that year it would mean that the "success rate" (in terms of achieving the result intended, namely the removal of the arbitrator in question) would be far higher than 12%.

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Furthermore, the acceptance rate does not take into account a further way in which an arbitrator might be replaced as the result of a challenge, namely upon the agreement of the parties pursuant to Article 15(1) of the ICC Rules. As will be explored later, the party not making the challenge may decide that it would rather that a new arbitrator is appointed in place of the challenged arbitrator, particularly where the proceedings have not reached the latter stages and there have been no substantive hearings. In such a case it would be open to the parties to simply agree that the arbitrator should be replaced, again removing the need for the Court to rule upon the challenge. It is therefore very likely that the statistics for acceptance of challenges alone underestimate (and possibly by some margin) the true picture in terms of how many challenges ultimately result in the replacement of an arbitrator.

Practical Considerations in Making and Responding to Challenges

In light of the statistics set out above, it is clear that very few challenges are likely to be accepted by the ICC Court or other decision-making body in the case of different arbitral institutions. The question then arises: what practical considerations should a party bear in mind when deciding whether to raise a challenge?

Firstly, and most obviously, a party should consider very carefully whether the facts do amount to convincing grounds for a challenge. In that regard, the *IBA Guidelines on Conflicts of Interest in International Arbitration* are likely to be useful. Many arbitral institutions will rely on the Guidelines when considering challenges, and it is clear that the ICC Secretariat will often do so when briefing the Court[20]. For example, a common basis for challenge is an alleged lack of independence arising out of the activities of an arbitrator's law firm. In that regard, General Standard 6 deals with the relationship of an arbitrator to his or her law firm. The explanation provides that *"the growing size of law firms should be taken into account as part of today's reality in international arbitration"* and makes clear that *"the activities of the arbitrator's firm should not automatically create a conflict of interest"*[21]. A party considering a challenge on this basis should therefore be aware that a more detailed and careful consideration of the relevance of the activities of the law firm will be required, and the decision will turn on the facts of the particular case.

Secondly, a party considering a challenge should be aware of the possible ramifications of a challenge which fails (especially given that many do). An arbitrator who has been the subject of a failed challenge will, of course, be expected to put it out of his or her mind when considering the merits of the case. But a challenge which fails may be perceived as an attempt to delay the proceedings, and that may be taken into account when the tribunal comes to make a decision as to costs. The ICC Rules expressly empower the tribunal to take into account *"the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner"*[22] (and a challenge designed simply to delay is obviously the opposite of such required behaviour).

Turning now to the position of the party not making the challenge. What should that party do in response? Should it object, if it considers that the challenge has no merit? Or should it keep out of the arena and politely decline to offer a response if and when requested? Plainly, if the other party considers that the challenge has been made out of time, then making submissions to that effect are unlikely to do much harm. However, where the merits of a challenge are involved, the position is more difficult. In particular, if the challenge is made on the basis of perceived lack of independence, objecting to it may well strengthen that impression. In such circumstances, it may well be advisable to say little or nothing.

However, it is entirely possible that the party not making the challenge may feel that there are arguable grounds for it, but for obvious reasons does not wish to expressly support the challenge. In such circumstances there may be a risk that the Court will nevertheless not accept the challenge and the arbitration will proceed to an award which could later be impugned by the challenging party at enforcement stage. Equally, the other party may wish to cut short the potentially lengthy process of formally determining the challenge, regardless of its merits, for the sake of getting on with the arbitration. Is there an alternative route out in such a case? In such a scenario, the other party may simply agree that the arbitrator should be replaced, regardless of the merit of the challenge itself, in order to avoid the need to determine the challenge. In an ICC arbitration, such agreement would be reached in line with Article 15(1) of the Rules, pursuant to which the Court may accept a request from all the parties to replace the arbitrator.

Practical Guidance

To conclude, parties should be cautious both in making a challenge and responding to a challenge. The numbers of challenges which are accepted remain low, and that is likely to be only in the clearest of cases. A failed challenge raises the question of whether it was genuinely made, or whether it was simply a tactical attempt to disrupt the proceedings. Parties considering a challenge should do so carefully in the knowledge that a rejected challenge could form the basis for a submission in due course that the challenging party's behaviour should be penalised in any subsequent costs award.

17 ICC Dispute Resolution Bulletin Number 2 (2018)
18 M Baker & L Greenwood, "Are Challenges Overused in International Arbitration?" Journal of International Arbitration 30, no.2 (2013), 110
19 ICC Dispute Resolution Bulletin Number 2 (2018)
20 M Baker & L Greenwood, "Are Challenges Overused in International Arbitration?" Journal of International Arbitration 30, no.2 (2013), 107-108
21 Explanation to General Standard 6
22 Article 38(5)