



Universiteit
Leiden
The Netherlands

LCIA Approach to Challenges to Arbitrators

Haersolte-van Hof, J.J. van; Greenway, F.; Cho, A.

Citation

Haersolte-van Hof, J. J. van, Greenway, F., & Cho, A. (2019). LCIA Approach to Challenges to Arbitrators. *Bcdr International Arbitration Review*, 6(1), 191-216. Retrieved from <https://hdl.handle.net/1887/3277855>

Version: Publisher's Version

License: [Leiden University Non-exclusive license](#)

Downloaded from: <https://hdl.handle.net/1887/3277855>

Note: To cite this publication please use the final published version (if applicable).

Bahrain Chamber for Dispute Resolution
INTERNATIONAL ARBITRATION
REVIEW

Published by *Kluwer Law International B.V.*
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands

Sold and distributed by
Wolters Kluwer Legal & Regulatory U.S.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@wolterskluwer.com

ISSN 2352-7374
© 2021, Kluwer Law International

This Journal should be cited as (2019) 6 BCDR Int.Arb.Rev. 1

The *BCDR International Arbitration Review* is published twice per year.
Subscription prices for 2019 [Volume 6, Numbers 1 through 2] including postage and handling:
Subscription rate (print): EUR 391.00 / USD 526.00 / GBP 313.00

This journal is also available online at www.kluwerlawonline.com.
Sample copies and other information are available at lrus.wolterskluwer.com
For further information please contact our sales department at +31 (0) 172 641562 or at
international-sales@wolterskluwer.com

For Marketing Opportunities please contact international-marketing@wolterskluwer.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, electronic, mechanical, photocopying,
recording, or otherwise, without the prior written permission of the publisher.

Permission to use this content must be obtained from the copyright owner.
More information can be found at: lrus.wolterskluwer.com/policies/permissions-reprints-and-licensing

BCDR International Arbitration Review is indexed/abstracted in the European Legal Journals Index.

Printed on acid-free paper

Bahrain Chamber for Dispute Resolution
INTERNATIONAL ARBITRATION
REVIEW

Volume 6

June 2019

Number 1

GENERAL EDITOR

Nassib G. Ziadé

CONSULTING EDITOR

Adrian Winstanley

DEPUTY GENERAL EDITOR

Judith Freedberg

ADVISORY BOARD

Mohamed Abdel Raouf	Azzedine Kettani
Haya Bint Rashid Al Khalifa	Makhdoom Ali Khan
Essam Al Tamimi	Carolyn B. Lamm
Yas Banifatemi	Antonio R. Parra
Laurence Boisson de Chazournes	Marike Paulsson
Olufemi Elias	Georgios Petrochilos
Hussein Haeri	Adrian Winstanley

EDITORIAL COMMITTEE

Yousif Al Saif
Ahmed Husain
Faris K. Nesheiwat
Salim Sleiman

EDITORIAL ASSISTANT

Khaled Iqbal Chilwan

Bahrain Chamber for Dispute Resolution
INTERNATIONAL ARBITRATION
REVIEW

Volume 6

June 2019

Number 1

**CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION
PART I**

In Memory of Francisco Orrego Vicuña

Francisco Orrego Vicuña (1942–2018): A Life
of Service to International Law and
Diplomacy *Nassib G. Ziadé* 1

Articles

Adapting Disclosure Obligations to the
Realities of Modern Third-Party Funding *Bernardo M. Cremades
Sanz-Pastor* 5

Three Approaches to Challenges of ICSID
Arbitrators for Manifest Lack of Reliability
for Independent Judgment *Antonio R. Parra* 27

The Communication and Publication of
Reasons for Decisions on Arbitrator
Challenges: Increasing the Transparency of
Standards and the Predictability of Decisions *Andrea Carlevaris* 47

Conflicts of Interest in the Code of Best
Practices in Arbitration Published by the
Spanish Arbitration Club *David Arias & Sofia Jalles* 67

JOURNAL OF INTERNATIONAL ARBITRATION

Neutrality, Independence and Impartiality of Arbitrators: Uniformity of Definitions, Dissimilarity of Applications	<i>Stefano Azzali</i>	93
Issue Conflicts: A Net Cast Too Wide?	<i>Francisco González de Cossío</i>	107
State Courts' Attitude to Arbitrator Challenge Applications: Rich Tapestry of Arbitrator Bias Standards	<i>Lord Goldsmith QC, PC, Natalie Reid & Maxim Osadchiy</i>	127
Time after Time: Using Data to Inform the Decision to Disqualify an Arbitrator	<i>Doak Bishop, Lauren Friedman, Ed Bruera & Sara McBrearty</i>	149
SCC Decisions on Challenges	<i>Annette Magnusson & Christoffer Coello Hedberg</i>	175
LCIA Approach to Challenges to Arbitrators	<i>Jacomijn van Haersolte-van Hof, Francis Greenway & Anna Cho</i>	191
Dealing with Corruption in International Arbitration: The Interactions of Conflicts of Interest and Corruption	<i>The Hon. L. Yves Fortier, QC & Laurence Marquis</i>	217

LCIA Approach to Challenges to Arbitrators

Jacomijn van HAERSOLTE-van HOF, Francis GREENWAY & Anna CHO^{*}

ABSTRACT

The LCIA has robust procedures for appointing arbitrators and determining challenges. The LCIA's database of published decisions provides valuable guidance in relation to standards of conduct by the arbitrators, and a greater understanding of the reasoning applied by the LCIA Court. The LCIA Court decisions show that challenges in LCIA cases are rare and are even more rarely successful.

1 INTRODUCTION

At times and in certain circumstances, parties to arbitrations may challenge the appointment of an arbitrator and seek to have that arbitrator's appointment revoked. This article addresses the LCIA's approach to challenges, including how challenges fit within the wider procedural framework of LCIA arbitrations, the relevant legal standard and how the standard has been applied in practice. These challenges may arise either in arbitrations commenced pursuant to the LCIA Rules themselves, or, alternatively, pursuant to the UNCITRAL Rules where the LCIA acts as the appointing authority and/or as the administering institution.¹

2 ARBITRATOR APPOINTMENTS

A rigorous and robust process for appointing arbitrators should identify issues that may compromise an arbitrator's independence and/or impartiality. The

^{*} Professor Dr Jacomijn van Haersolte-van Hof, Director General of the London Court of International Arbitration (LCIA); Francis Greenway, Counsel at the London Court of International Arbitration; Anna Cho, Legal Assistant to the Director General of the LCIA. Jackie van Haersolte sits as arbitrator in commercial and investment cases including as Committee Member in several ICSID annulment proceedings and is a professor of arbitration law at Leiden University. Francis Greenway has acted as counsel in numerous institutional and ad hoc arbitrations and was previously at Wilmer Cutler Pickering Hale & Dorr LLP and Slaughter and May. Anna Cho has worked in private practice in New Zealand before joining the LCIA.

¹ See: LCIA Arbitration Rules in force 1 October 2020: https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx. The challenge decisions reported in this article were made under prior sets of Rules, but there are no substantial differences in the relevant articles of the Rules.

appointment process itself is therefore the first line of defence against arbitral appointments being challenged.

2.1 OVERVIEW OF THE APPOINTMENT PROCESS

The LCIA's procedure for the appointment of arbitrators is, in summary, as follows:²

The LCIA Secretariat reviews the Request and the Response (if any) and their respective supporting documents and prepares a case summary

- If the arbitrator(s) is to be selected by the LCIA Court:
 - Key criteria for the qualifications of the arbitrator(s) are established
 - A shortlist of candidates is created by the Secretariat based on those criteria³
 - The case summary, relevant documentation, and the names and CVs of the candidates are sent to the President or a Vice President of the LCIA Court
 - The LCIA Court selects which arbitrator(s) the Secretariat should contact⁴ and sets a maximum hourly rate
- If the arbitrator(s) is to be selected by party nomination or by the co-arbitrators:
 - Details of the arbitrators so nominated are sent to the LCIA Court
 - The LCIA Court advises whether it considers the nominee(s) suitable, subject to conflicts checks, and sets a maximum hourly rate
- The Secretariat then:
 - Sends the arbitrator(s) the case summary
 - Asks if they are willing and able to accept appointment
 - Sends the arbitrator(s) a “Statement of Independence and Availability and Consent to Appointment” (SOI Form) which prompts them to disclose whether there are any circumstances which could possibly give rise in the mind of any party to any justifiable doubts as to their impartiality or independence
- If the arbitrator(s) make a disclosure in their SOI Form, the disclosure is considered by the LCIA Court which will do one of the following:
 - Decline to proceed with the appointment because the disclosure is of a potentially serious conflict

² LCIA Notes for Parties, [46]; Steps d, e, and g are omitted in the case of party nomination.

³ The shortlist is compiled from the LCIA's database of arbitrators, the Secretariat's own extensive knowledge and from other external sources.

⁴ Who need not be, but often will be, from among those put forward by the Secretariat.

- Decide that the parties should be informed of the disclosure and given an opportunity to comment on/object to the appointment⁵
- Decide that the parties should only be informed of the disclosure once the appointment has been made (where the disclosure is of a minor matter or the parties are already on notice, see below under 2.3)
- Once an arbitrator(s)' availability, independence and impartiality have been established to the satisfaction of the LCIA Court (and the arbitrator(s) agree(s) to the maximum fee rate set by the LCIA Court), the LCIA Court will formally appoint them.

The LCIA Court plays a prominent role in the selection and appointment of arbitrators under the LCIA Rules. It maintains its prominent role whether arbitrators are selected by party nomination or by co-arbitrators, or by the LCIA Court itself.

2.2 ARBITRATOR SELECTION

While party nomination remains the most common method of selecting arbitrators in LCIA arbitrations, an average of more than 40 per cent of arbitrators in the period 2015–2019 were selected by the LCIA Court itself.⁶ This is, in part, a consequence of the fact that, under the LCIA Rules, the LCIA Court will select the arbitrators unless the parties agree otherwise.⁷ It is well placed to do so, drawing on the vast experience of the Court and of the Secretariat, and from its internal database of neutrals.⁸

When selecting an arbitrator, the LCIA Court takes into account a wide range of factors. This is intended to ensure that appointments are tailored to the circumstances of each particular case, while at the same time deepening the pool of talent available to the LCIA's users and the wider arbitration community by promoting diversity where possible.

The LCIA will have regard, in particular, to the following:

- The transaction(s) at issue, the nature and circumstances of the dispute, its monetary amount or value, the location and languages of the parties, the

⁵ Generally, within three working days.

⁶ In 2019, 39 per cent were selected by the LCIA Court, 45 per cent by the parties and 16 per cent by the co-arbitrators; in 2018, 37 per cent were selected by the LCIA Court, 46 per cent by the parties, and 17 per cent by the co-arbitrators; in 2017, 40 per cent were selected by the LCIA Court, 49 per cent by the parties, and 11 per cent by the co-arbitrators; in 2016, 40 per cent were selected by the LCIA Court, 44 per cent by the parties and 16 per cent by the co-arbitrators; in 2015, 43 were selected by the LCIA Court, 45 per cent by the parties and 11 per cent by the co-arbitrators (LCIA Annual Casework Reports 2015–2019).

⁷ LCIA Rules, art. 5 and LCIA Notes for Parties, [41].

⁸ LCIA Notes for Parties, [45].

number of parties and all other factors which the Court may consider relevant in the circumstances.⁹

- Being concerned that each arbitrator should be appropriately qualified as to experience, expertise and language, the LCIA is also mindful of any other criteria specified by the parties.¹⁰
- The LCIA seeks to ensure the right balance of experience, qualifications and seniority on a three-member tribunal and, in particular, what qualities presiding arbitrators should have to complement those of their co-arbitrators.¹¹
- The LCIA is mindful of any particular national and/or cultural characteristics of the parties to which it should be sensitive, so as to minimise conflict.¹²
- As part of its drive to maintain strong diversity among the candidates selected, the LCIA seeks, wherever possible in the particular case, to widen the pool of arbitrators including through first-time appointments where appropriate.¹³
- Article 6.1 of the Rules provides that, if the parties are of different nationalities, a sole arbitrator or the third and presiding arbitrator may not be of the same nationality as any of the parties, unless the other parties agree.¹⁴

Where the parties have agreed to select arbitrators by party nomination, or by nomination by co-arbitrators, it is still the LCIA Court that formally appoints the nominees. This ensures that the LCIA can, before confirming the appointment of the Arbitral Tribunal, check that each candidate arbitrator is independent and impartial and has the requisite availability to proceed expeditiously with the arbitration.¹⁵ Nevertheless, in appointing arbitrators the Court takes into account any written agreement or joint nomination by the parties or co-arbitrators, thus respecting party autonomy.¹⁶ This supervisory role pursuant to the LCIA Rules can be contrasted with the appointment process in arbitrations administered by the

⁹ LCIA Rules 2020, art. 5.9.

¹⁰ LCIA Notes for Parties, [48] and LCIA Rules 2020, art. 5.9.

¹¹ LCIA Notes for Parties, [49].

¹² LCIA Notes for Parties, [49].

¹³ LCIA Notes for Parties, [50].

¹⁴ LCIA Rules 2020, art. 6.1. A citizen of a State's overseas territory is treated as a national of that territory and not of the State, and a legal person incorporated in a State's overseas territory is treated as such and not (by such fact alone) as a national of, or a legal person incorporated in, the State. For example, a company incorporated in the BVI will generally not be treated as British and a British chair or sole arbitrator may still be appointed.

¹⁵ LCIA Notes for Parties, [44].

¹⁶ LCIA Rules 2020, art. 5.7.

LCIA under the UNCITRAL Arbitration Rules (“UNCITRAL Rules”),¹⁷ or in which the LCIA is appointing authority, where party nominated arbitrators are selected and formally appointed by the parties and the co-arbitrators, without review by the LCIA Court.

2.3 PRE-APPOINTMENT DISCLOSURE REGIME

As well as identifying and selecting the right candidate arbitrators (when responsible for doing so), the LCIA Court takes steps to ensure that any potential issues regarding the independence and impartiality of all candidate arbitrators are identified prior to their appointment. It does so by requiring every candidate, whether selected by the Court or nominated by the parties or the co-arbitrators, to complete an SOI Form and disclose any circumstances that could potentially give rise, in the mind of any party, to any justifiable doubts as to their impartiality or independence.

Where a candidate makes a disclosure, following an internal discussion within the Secretariat, the disclosure is referred to the LCIA Court for a decision with the Secretariat’s preliminary view as to whether the disclosure is:

- (a) automatically disqualifying; or
- (b) not automatically disqualifying, in which case the Court will determine whether the disclosure should be:
 - (i) put to the parties for their comments before the appointment of the Tribunal; or
 - (ii) raised when the appointment of the Tribunal is notified in due course (which would be appropriate only where the disclosure was particularly minor or where the candidate has already directly informed the parties of the disclosure).

If it is considered that the disclosure should be put to the parties before the Tribunal’s appointment, the LCIA’s usual practice is that the parties be given three working days within which to raise any objections, with reasons.

In the event that a disclosure is put to the parties for their comments and one party objects, the LCIA’s position is that this is not in itself a reason not to proceed with the appointment of the candidate. Rather, the LCIA Court will consider the objection carefully and will need to satisfy itself that, in light of the circumstances of the case, the disclosure is such that it would be inappropriate to proceed with the appointment. While the LCIA Court is not formally bound by, and will not necessarily apply the standards contained in the IBA Guidelines on Conflicts of

¹⁷ References in this article are to the UNCITRAL Rules as adopted in 2013.

Interest in International Arbitration (“IBA Guidelines”), in practice the Secretariat and the Court will often consider whether and to what extent these guidelines inform best practice.

One issue that has arisen in recent years is advance waivers. On occasion, an arbitrator from a law firm or chambers will inform the LCIA that, while they are happy to accept the appointment, their acceptance should not preclude their law firm or chambers from acting in future matters involving one of the parties. Assuming that the waiver is not overly broad (if it is, it may be rejected by the LCIA Court or a modification proposed), the LCIA Court’s general practice has been to decide that: (a) such statement will not absolve the arbitrator of their ongoing duty of disclosure under the Rules;¹⁸ and (b) the parties will be notified of the statement and given with three days for comment, as with a disclosure.

3 LEGAL FRAMEWORK

When a party is weighing whether to challenge an arbitrator appointed in an LCIA arbitration, it must consider both the substantive legal standard and the procedural framework as these relate to challenges. Below we will focus on the challenge proceedings conducted by the LCIA Court, i.e. the internal challenge mechanism. In addition, and sometimes instead of, this internal remedy there may be a challenge procedure available or prescribed before a national court pursuant to the applicable national arbitration law.¹⁹ The internal and external remedies cannot, however, be reviewed in isolation. The substantive standard applicable to the institutional challenge procedures is informed and prescribed in part by the applicable national arbitration law. Equally, while the procedure for challenges in court and before the institution are separate, the two cannot be seen in isolation. The fact that a robust institutional challenge procedure has been carried out, may carry significant weight in any subsequent court proceedings.²⁰

Article 10 of the LCIA Rules sets out both the substantive legal standard and the challenge procedure. The substantive standard of independence and impartiality is generally interpreted by reference to applicable principles developed under the curial law (or law of the seat), other international legal instruments and provisions of “soft law.” The procedure for challenges, meanwhile, is defined by a combination of the provisions of Article 10 of the LCIA Rules and the LCIA’s practice.

¹⁸ LCIA Rules 2020, art. 5.5.

¹⁹ For example on the basis of Section 24 of the English Arbitration Act, in cases seated in England or Wales.

²⁰ *P v Q* 2017 EWHC 194 (Comm).

The LCIA Court may be called upon to resolve challenges in arbitrations pursuant to the UNCITRAL Rules in which the LCIA acts as the administering institution, appointing authority and/or fundholder. The procedure and legal standard is expressed in Article 12(1) of the UNCITRAL Rules. In this contribution we will address both LCIA and UNCITRAL challenges. It should be noted that for the latter, the LCIA's influence over the formative part of the proceedings and in particular the appointment of the arbitrators is more limited. The involvement of the LCIA in UNCITRAL cases is generally only invoked if and when parties require assistance in relation to an arbitrator selection or removal and they reach out to the LCIA.

3.1 LEGAL STANDARD

The starting point when determining the substantive legal standard in a challenge made pursuant to the LCIA Rules is the language of Article 10 of the LCIA Rules. Pursuant to Article 10.1, the LCIA Court can revoke an arbitrator's appointment upon a written challenge by a party if "circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality or independence."

Article 10.1 also provides that a challenge may be made by a party if an arbitrator "falls seriously ill, refuses or becomes unable or unfit to act." Article 10.2 provides that the LCIA Court may determine that an arbitrator has become unfit to act for the purposes of Article 10.1 if that arbitrator: "(i) acts in deliberate violation of the Arbitration Agreement; (ii) does not act fairly or impartially as between the parties; or (iii) does not conduct or participate in the arbitration with reasonable efficiency, diligence and industry."

The substantive legal standard under the UNCITRAL Rules is similar. Article 12(1) of the Rules provides: "any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence."

When applying these rules, the LCIA Court will have regard to relevant principles under the curial law. With one exception, all the published challenge decisions decided by the LCIA Court have been seated in England,²¹ and English law and the standards derived from judgments of the English Courts interpreting analogous provisions of the Arbitration Act 1996 ("1996 Act")²² have been of particular significance in the cases.

²¹ In LCIA Ref No 132551 the seat of arbitration was Zurich.

²² Such as s. 33(1)(a) of the 1996 Act which provides that "the tribunal shall act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent" and s. 24(1) of the 1996 Act, which is considered below.

Under Section 24(1)(a) of the 1996 Act, for example, a party to arbitral proceedings may apply to the court to remove an arbitrator if “circumstances exist that give rise to justifiable doubts as to [the arbitrator’s] impartiality.”²³ In the landmark case of *Porter v Magill*, the Court held that the question for these purposes is that of apparent bias; in other words, it “is whether the fair-minded and informed observer, having considered facts, would conclude that there was a real possibility that the tribunal was biased.”²⁴

It should be noted that the English law position on both the extent of apparent bias and on arbitrators’ legal duty of disclosure is currently under active consideration by the Supreme Court in the case of *Halliburton v Chubb* (in which the LCIA has intervened).²⁵

The Supreme Court’s decision has the potential to redefine the interaction between an arbitrator’s duty of disclosure and the test for apparent bias. It is therefore of interest to all participants in English seated arbitrations, including institutions such as the LCIA and users selecting England or Wales as the seat.

The LCIA Court has also considered relevant provisions of the European Convention on Human Rights (“ECHR”), which is given effect in domestic English law by the Human Rights Act 1998. Divisions of the LCIA Court have concluded that since England’s adoption of the ECHR, the 1996 Act should be interpreted to require both independence and impartiality.²⁶ The ECHR entitles everyone to a “fair and public hearing ... by an independent and impartial tribunal established by law.”²⁷ Accordingly, Divisions of the LCIA Court have held that for arbitrations under the LCIA Rules seated in England, “the contractual and legal standard to be applied – notwithstanding the wording of the 1996 Act – [is] one which require[s] both independence and impartiality.”²⁸ In this respect, the approach of the LCIA Court resembles that of the English courts, which have also made reference to the standard imposed by article 6 of the ECHR.

Finally, the LCIA will also have regard to certain sources of “soft law” and international arbitral practice, particularly those that are widely recognised within the arbitration community or where there is broad consensus as to their adoption. For example, just as these guidelines are considered in the context of the selection

²³ Arbitration Act 1996, s. 24(1)(a). Section 24(1)(a) is explicitly based on Article 12 of the UNCITRAL Model Law on International Commercial Arbitration and is therefore replicated across numerous jurisdictions (Departmental Advisory Committee on Arbitration, DAC Report on the Arbitration Bill 1996, at [100] – [110]).

²⁴ *Porter v Magill* [2002] 2 AC 357.

²⁵ *Halliburton Company v Chubb Bermuda Insurance Ltd and Others*, UKSC 2018/0100.

²⁶ LCIA Ref. No. 81160, 29 August 2009.

²⁷ ECHR, Article. 6.1.

²⁸ LCIA Ref. No. 81160, 29 August 2009 at [3.6] and LCIA Ref. No. 81224 at [3.7].

process, so the LCIA Court has on occasion referred to the IBA Guidelines for guidance as to the parameters of independence and impartiality.

3.2 CHALLENGE PROCEDURE

A key feature of the LCIA's practice is to provide reasoned challenge decisions. The procedures allow challenges to be heard quickly, while nevertheless ensuring that all interested parties have sufficient time to make submissions. A solid, efficient and effective procedure for challenges (combined with external transparency by means of publication of decisions, see below) not only serves to provide an effective remedy where necessary, but equally serves to dissuade parties from raising unmeritorious, possibly purely tactical challenges that have little real substance.

Article 10.3 provides that parties must deliver "a written statement of reasons for its challenge to the LCIA Court." The written statement must be delivered within 14 days of the formation of the Arbitral Tribunal or within 14 days of becoming aware of any grounds described in Article 10.1 or 10.2.²⁹ Nevertheless, challenges come in many shape and forms. It is not uncommon, for example, to receive many different formulations of challenges in letters or emails complaining of bias by an arbitrator or requesting the removal of an arbitrator.

Unless the challenged arbitrator resigns, or all other parties agree to the challenge, within 14 days of receipt, the challenge will be referred to the LCIA Court for determination.³⁰ The LCIA Court will appoint either an individual member (who must, in accordance with the LCIA Court Constitution, be the President, a Vice President or former Vice President, or an Honorary Vice President), or a Division to do so.

For these purposes, Court members who were not involved in the original appointment process will be contacted, so as to avoid any suggestion of lack of independence or impartiality in the LCIA's handling of the challenge. If a Division is to be appointed to address the challenge it must be chaired by the President, a Vice President, an Honorary Vice President or a former Vice President of the LCIA Court.

The Court will consider the background of the case, and the nature of the challenge (including details of any arguments advanced by the parties or the arbitrators). There are no provisions within the LCIA Rules directing the process for resolving challenges. However, the usual practice is for the individual member or Division to accept written submissions, including supporting documentation

²⁹ LCIA Rules 2020, art. 10.3.

³⁰ LCIA Rules 2020, art. 10.

from the challenging party, the challenged arbitrator and the other party or parties. The individual or Division may allow multiple rounds of written submissions.³¹

The Division or individual members will, on behalf of the LCIA Court, prepare a reasoned decision either upholding or rejecting the challenge. If the challenge is upheld, a replacement arbitrator will be selected, and the revocation and appointment will be notified to the parties.

A party may request that the Court reconsider a challenge decision. In one instance when this occurred, the same Division that issued the original decision reconsidered the decision.³² The Division opined that a party is “entitled to apply for reconsideration if, notwithstanding full diligence on the part of the applicant, factual elements recorded in the initial decision would have led to a different legal evaluation.”³³ This standard would accommodate requests for reconsideration to correct factual mistakes or misapprehensions of the Division.

In cases in which the LCIA acts as appointing authority pursuant to the UNCITRAL Rules, the process for submitting a challenge to an arbitrator to the LCIA Court is largely the same. The UNCITRAL Rules require the challenging party to submit a written notice stating the reasons for the challenge within 15 days of the date of appointment of the challenged arbitrator or of when the party became aware of the circumstances giving rise to the challenge.³⁴ The written notice is to be sent to the LCIA Court, the parties, the challenged arbitrator and other members of the tribunal, if any.³⁵ Unless the parties agree to the challenge or the challenged arbitrator withdraws within 15 days from the notice of challenge, the party making the challenge can elect to pursue it by seeking a decision of the LCIA Court within 30 days from the date of the notice of challenge.³⁶

4 CHALLENGE DECISIONS

4.1 CHALLENGE DECISION DATABASE

The LCIA was the first large arbitral institution to provide direct insight into the reasoning of the challenge decision-makers. On 5 May 2006, Geoff Nicholas and Constantine Partasides presented a report to a joint meeting of the LCIA Court and Board at Tylney Hall proposing to publish the LCIA Court’s challenge decisions. The report observed that the publication of the “wealth of LCIA

³¹ In one unique example, the challenging party and the challenged arbitrator exchanged four rounds of written submissions, LCIA Ref. No. 81160, 28 August 2009.

³² LCIA Ref. No. UN3490, 21 October and 27 December 2005.

³³ As above, at [5.3].

³⁴ UNCITRAL Arbitration Rules art. 13(1).

³⁵ UNCITRAL Arbitration Rules, art. 13(2).

³⁶ UNCITRAL Arbitration Rules, art. 13(4).

learning and guidance on independence and impartiality” would make “‘a unique contribution’ to fulfilling the arbitration community’s need for a greater understanding of the parameters of arbitrator independence and impartiality.”³⁷

In 2011, the LCIA published 28 challenge decision summaries from between 1996 and 2010, providing users with guidance in relation to standards of conduct, and a greater understanding of the reasoning applied by the LCIA Court.³⁸ In February 2018 the LCIA made digests of 32 LCIA arbitration challenge decisions from between 2010 and 2017 available online.³⁹

Of the sixty decisions of the LCIA Court on arbitrator challenges between 1996 and 2017, twelve were upheld and one (to a whole tribunal) was partially upheld, with only the chair being required to step down.

Challenge decisions are highly fact sensitive and every decision turns on its own facts. It is therefore difficult to categorise the published decisions, and it is difficult to derive concrete rules that will apply in every case. Nevertheless, the discussion of the challenges can be divided into two broad categories:

- (a) Challenges based on relations between an arbitrator and another person or entity and resulting conflicts of interests, for example based on their nationality or relationships with the parties (“conflict challenges”); and
- (b) Challenges based on procedural decisions that were contrary to the challenging party’s interests or the behaviour of an arbitrator during the arbitration proceedings (“procedural or conduct challenges”). This category is necessarily broader than the conflict challenges, and encompasses a wider, more disparate, range of grounds for challenge.

Of the twelve challenges that were upheld from 1996 to 2017, seven involved relationship conflicts, and five involved procedural decisions or improper conduct by the arbitrator. The grounds for most of the challenges are that circumstances exist that give rise to justifiable doubts as to an arbitrator’s impartiality or independence, either because of a perception of bias or a perceived conflict of interest.

The grounds for challenge in each of the two categories were explored in the 2011 publication of the challenge decisions between 1996 and 2010.⁴⁰ For the

³⁷ Geoff Nicholas & Constantine Partasides, “LCIA Court Decisions on Challenges to Arbitrators: A Proposal to Publish,” 23 *Arb. Int’l* 1 at 9 (2007).

³⁸ Thomas W Walsh and Ruth Teitelbaum, “The LCIA Court Decisions on Challenges to Arbitrators: An Introduction,” 27 *Arb. Int’l* 3 at 283 (2011).

³⁹ The LCIA’s challenge decision database can be accessed at: <http://lcia.org/challenge-decision-database.aspx>.

⁴⁰ Thomas W Walsh and Ruth Teitelbaum, “The LCIA Court Decisions on Challenges to Arbitrators: An Introduction,” 27 *Arb. Int’l* 3 at 283 (2011).

sake of consistency, this article will adopt the subcategories identified in that publication.

4.2 CONFLICT CHALLENGES

4.2[a] Nationality

The LCIA expressly identifies nationality as a factor affecting the selection of an arbitrator, and thus potentially relevant for their challenge.⁴¹ In the decision resolving the first-ever challenge to an arbitrator based upon an alleged infringement of the LCIA nationality requirement, a Division of the LCIA Court emphasised that the identification of an arbitrator's nationality is a "substantive test as opposed to a merely formal one" and that an arbitrator should be "deemed a *de facto* national" of a country "in circumstances where his connections to it are so concentrated that his technical nationality does not ensure neutrality."⁴²

In LCIA challenge Ref. No. 8086, the US-national respondent challenged the sole arbitrator appointed by the LCIA Court on the ground that, while the arbitrator was not a British national, the arbitrator's links with the United Kingdom were such that he should be deemed a *de facto* British citizen and should be removed because the claimant was British. The Division rejected the challenge, concluding that despite having spent considerable time in England, the arbitrator's connections to the UK were not enough to confer a *de facto* nationality on him. The Division observed that the arbitrator's connections to England were "remarkably well balanced in light of the fact that his connections in the UK predominately involved his activities in a Japanese bank and a US company" and that the arbitrator had "earned legal qualifications in the US but not in the UK," and had entered into an affiliation with a US law firm – not a British one."

Similarly, Divisions of the LCIA Court have rejected challenges brought on the ground of the arbitrator's nationality, where the arbitrator was of the same nationality as one of the parties' counsel,⁴³ the arbitrator had an overseas door tenancy in chambers located in the same country as a party's parent company,⁴⁴ and where the arbitrator of a dispute between an American claimant and a Kuwaiti respondent had long-standing commitment to Arab studies and culture in an arbitration involving Kuwaiti parties.⁴⁵

⁴¹ LCIA Rules 2020, art. 6.

⁴² LCIA Ref. No. 8086, 30 September 1998.

⁴³ LCIA Ref. No. UN9155, 10 November 1999.

⁴⁴ LCIA Ref. No. 5665, 30 August 2006.

⁴⁵ LCIA Ref. No. 5660, 5 August 2005.

In a more recent case, the claimant brought a challenge based on the arbitrator's nationality, the arbitrator's employment at a State university in the country of the respondent.⁴⁶ The claimant also pointed to the presence of the chairman of both the Respondent and its parent company (the "Chairman") on the Board of Trustees of the university in question, and the existence of a contractual relationship for cooperation between the university and the respondent, from which the university allegedly stood to benefit.

The Division observed that the arbitrator having the same nationality as one of the parties and his employment by a State university from the same country were not factors which, in the eyes of a reasonable and informed third party, would impact that arbitrator's independence or impartiality.⁴⁷

However, the Division found that the Chairman had decision-making positions at the respondent company as well as at the Board of Trustees of the university which employed the challenged arbitrator, and that same university stood to benefit from the decisions of the Board of Trustees as well as from the cooperation agreement between the university and the respondent. Given the existence of various connections between the respondent, respondent's Chairman, the Board of Trustees of the university and the university which employed the challenged arbitrator, the challenge was upheld on the basis that a reasonable and objective third party would have justifiable doubts as to the appearance of the arbitrator's independence (but not as to his impartiality).

4.2[b] *Law Firms and Barristers' Chambers*

The IBA Guidelines provide in Part I(6) that "the fact that the activities of the arbitrator's firm involve one of the parties" or another entity in a larger corporate group "shall not automatically constitute a source of [a] conflict," but the LCIA's endorsement of the rule that "a partner in a law firm had to be identified with his partners" suggests a somewhat stricter standard.

In Ref. No. 9147, the Division declined to appoint an arbitrator because partners of the arbitrator had advised one of the parties to the arbitration on the contracts related to the dispute.⁴⁸ Although the advice on the contracts was given before the arbitrator became a partner at the law firm and the arbitrator was not involved in giving the advice, the Division determined that the appointment of the arbitrator could lead to circumstances that should be avoided if possible.

⁴⁶ LCIA Ref. No. 142862, 2 June 2015.

⁴⁷ Article 6 of both the 2020 and 2014 LCIA Rules require that, where the parties are of different nationalities, a sole arbitrator or the presiding arbitrator of a three member tribunal shall not have the same nationality as either party. That did not apply in this challenge, which concerned a co-arbitrator.

⁴⁸ LCIA Ref. No. 9147, 27 January 2000.

Similarly, a Division of the LCIA Court upheld a challenge where one of the arbitrators disclosed that a partner in the Dubai office of his law firm had been instructed by the claimant in relation to a separate and unrelated dispute.⁴⁹ The Division noted that where an overseas office of the arbitrator's law firm is instructed by a party in the arbitration in an unrelated matter, the ongoing commercial relationship between the law firm and the arbitrator, on the one hand and the party on the other hand, reinforces the risk to the arbitrator's independence or impartiality. It was considered that such circumstances were sufficient to give rise to justifiable doubts as to the arbitrator's impartiality and independence. The Division accepted that such conflicts are bound to arise, especially in large international law firms. However, the risk is known by their lawyers and such conflicts may be best resolved within the law firm and not at the expense of the opposing party whose trust in the arbitrator's impartiality and independence might be otherwise broken.

The latter decision can be contrasted with LCIA Ref. No. UN3476, where the Division rejected a challenge based on the arbitrator's own prior work as counsel to the respondent on an unrelated matter, while associated several years previously with a prior law firm. The involvement was brief and largely supervisory, but did include meeting with employees of the respondent. The Division found that the past relationship did not give rise to any doubts as to the arbitrator's impartiality, emphasising that in the years since leaving his prior law firm, the arbitrator did not continue any ties with the respondent. The fact that departure from a prior law firm was deemed in this case to have eliminated any concerns, even where the arbitrator himself had previously served as counsel to a party, contrasts with the previously described case where the Division accepted a challenge based simply on past work by the arbitrator's partners, because the arbitrator nonetheless remained a member of that firm.

4.2[c] Other Relations between Counsel and Arbitrators

In LCIA Ref. No. 81132, the then-president of the LCIA Court resolved a two-part challenge based on the claimant-nominated arbitrator having been twice instructed by claimant's counsel in matters unrelated to the arbitration, and the arbitrator's membership of a professional association founded in part by the law firm acting for the claimant.⁵⁰ The President rejected the challenge on both grounds, finding that the arbitrator's past instructions from the claimant's counsel were minor and entirely unrelated and had no bearing upon the arbitrator's ability

⁴⁹ LCIA Ref. No. 111947, 4 September 2012.

⁵⁰ LCIA Ref. No. 81132, 15 November 2008.

to act impartially and independently towards both parties to the arbitration. In regard to the arbitrator's membership of the professional association, it was noted that the organisation was dedicated to an area of legal practice in which the arbitrator specialised, and that the organisation was founded by a number of law firms, not just by the firm representing the claimant.

In another case, the arbitrator disclosed that he had acted as counsel for the respondent in an arbitration five years previously. The Division noted that an arbitrator acting as counsel against one of the parties in a previous arbitration is not, by itself, enough to give rise to "justifiable doubt" as to that arbitrator's independence and impartiality.⁵¹ Nonetheless, the arbitrator had previously satisfied himself that there was evidence of a party's fraud, and therefore there was held to be a real possibility or real danger that such arbitrator would be influenced by that evidence, consciously or unconsciously, when adjudicating on a further dispute involving the same party. The Division observed that the outcome may have been different if it was clear that no witness evidence would be required or that the issue would be a purely legal or contractual interpretation without any factual evidence.

4.2[d] Repeat Appointments

The IBA Guidelines include repeat appointments by parties and counsel on the "Orange List," a category of intermediate, waivable, situations or circumstances that may give rise to justifiable doubts as to the arbitrator's impartiality or independence.⁵² The Guidelines suggest that justifiable doubts do not arise unless "the arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties" or "the arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm." However, the Guidelines provide an exception to these parameters for repeat appointments in specialised fields of arbitration where it is the practice for parties to repeatedly appoint the same arbitrator in different cases.⁵³

⁵¹ LCIA Ref. No. 122053, 31 July 2012.

⁵² IBA Guidelines on Conflicts of Interest in International Arbitration 22 May 2004 and 23 October 2014.

⁵³ As above, 25 n.6. ('It may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialised pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, no disclosure of this fact is required where all parties in the arbitration should be familiar with such custom and practice'.) The same note also appears in the 2014 version of the Guidelines.

A division of the LCIA Court considered the issue of repeat appointments in LCIA Ref. No. 81160.⁵⁴ The arbitrator in that case (which involved insurance issues) disclosed that he had acted both for and against the respondent underwriters in prior matters, that he was currently acting against one of the respondents in one case and on behalf of another in a second case, and that by the “very nature of this work” in the closely knit London insurance world, he would “no doubt” continue to act for and against them in future. Respondents’ counsel collectively represented 11 per cent of all the instructions he had received over the past 5 years. The Division did not view repeat appointments as a ground for disqualification *per se*, but noted that in this instance, the appearance of the real possibility of bias created by the arbitrator’s current representation of one of the respondent parties in an unrelated matter was “compounded” by the “obvious professional importance to Respondent’s nominated arbitrator of his relationship with Respondent’s Counsel.” The challenge was therefore upheld.

A Vice President of the LCIA Court, in another context, said that “relations with counsel are held as relevant only if the arbitrator draws an important part of his revenues from an ongoing relationship with counsel of the appointing party.”⁵⁵

Notably, the LCIA Annual Casework Report revealed that 60 per cent of all arbitrators appointed in LCIA arbitrations in 2019 were only appointed once during the same calendar year.⁵⁶ The remaining small percentage of arbitrators were appointed more frequently, which was in large part due to appointments in related cases, where in many instances the cases were subsequently consolidated.

4.3 PROCEDURAL OR CONDUCT CHALLENGES

Many of the LCIA Court’s challenge decisions address allegations that the arbitrator(s) demonstrated bias in managing the proceedings or in their conduct or in their behaviour.

4.3[a] *Pre-judgment*

Challenges alleging that an arbitrator has pre-judged an issue typically occur when an arbitrator is thought to have expressed a conclusion about an issue in dispute that has not yet been the subject of evidentiary hearings.⁵⁷

⁵⁴ LCIA Ref. No. 81160, 28 August 2009.

⁵⁵ LCIA Ref. No. 81224, 15 March 2011.

⁵⁶ 2019 LCIA Annual Casework Report.

⁵⁷ William W. Park, *Arbitrator Integrity: The Transient and the Permanent*, 46 San Diego L. R. 629, 683 (2009).

A Division of the LCIA Court rejected a challenge by the respondent to the claimant-appointed arbitrator on the basis that the arbitrator allegedly pre-judged the merits in statements he made in dissent to a procedural order by the majority of the tribunal denying an application by the claimant for provisional measures.⁵⁸ In particular, the respondent took issue with the fact that the arbitrator's dissent included an interpretation of a contract the terms of which were in dispute in the arbitration. The Division found that the arbitrator did not "cross the threshold from the permitted provisional view ... to the prejudgement-of-the-merits, closed state of mind" that the law of the seat, which was England, and the LCIA Rules prohibit.

In contrast, a challenge was upheld where the arbitrator expressed his views on the merits of the case at a preliminary issues hearing. In Ref. No. 132498, the parties informed the Tribunal of an agreed list of preliminary issues which were limited to questions of joinder of the third party and jurisdictional issues over certain counterclaims. The arbitrator, in his dissenting opinion, looked at the language used in the agreement and deed of novation, and concluded that the first respondent's counterclaim was impossible to maintain. The arbitrator further recognised that his reasoning might be characterised as something going to the merits of the alleged counterclaims, and stated in his dissent that "when the merits of the counterclaims do arise for consideration by the Tribunal, I shall reconsider the issue of my participation as a member of it."

The Division held that by expressing his view on the merits of the case in definitive terms without contemplating the possibility that his view might change and by expressing that view prematurely outside the mandate provided for the Preliminary Issues phase of the proceedings, the arbitrator conveyed the impression to an objective and informed observer that he had prejudged the merits of the counterclaims at the jurisdictional phase, creating an appearance of bias.

4.3[b] *Ex parte Communications*

In a successful challenge, an arbitrator was disqualified for providing the party that appointed him with advance notice of the content of the tribunal's award before it was issued.⁵⁹ The claimant's counsel contacted the claimant-appointed arbitrator to inquire about the progress and result of the final award. The arbitrator told counsel that the award would be partially favourable to the claimants. Neither the arbitrator nor counsel advised the other arbitrators and the respondent of their communication. In light of these circumstances, the Division decided that the

⁵⁸ LCIA Ref. No. 81007/81008/81024/81025, 16 June 2008.

⁵⁹ LCIA Ref. No. 0252, 1 July 2002.

arbitrator should be removed from the tribunal. The Division said that the arbitrator should have declined to answer the counsel's questions, and advised the counsel to address any such questions in writing to the chairman of the tribunal, copied to respondent's counsel, and the arbitrator should have immediately informed the other members of the tribunal and the respondents of the approach made to him. The Division concluded that these steps would have allowed the chairman to "remind the parties that *ex parte* communications of this kind were unacceptable and inappropriate in the context of any international arbitration, not least one conducted under the LCIA Rules."⁶⁰

In another challenge, an arbitrator was removed after meeting privately with one of the parties, accusing the other party without foundation of breaking into his chambers, and unilaterally instructing that certain passages be deleted from the hearing transcripts.⁶¹ In that matter, the sole arbitrator held two *ex parte* meetings without the knowledge or consent of the other party, and the arbitrator and counsel discussed topics which the Division determined to be issues material to the arbitral proceedings, namely the possible addition of claimant's expert witness to claimant's legal team, and a possible breach of confidentiality by the respondent. The Division considered that, in light of the circumstances under which the *ex parte* meetings took place and the issues that were discussed in those meetings, and by disregarding his duty to keep a record of the hearing under Article 25(3) of the UNCITRAL Rules which governed the arbitration, "a fair-minded and informed observer would have concluded that there was an appearance of bias, and that there was also a real possibility of an actual bias by the arbitrator."

The Division of the Court in that matter opined that it is not absolutely "unacceptable in all circumstances for an arbitrator to hold meetings with representatives of only one party," but that such private meetings are "not to be recommended, as they may lead the other party, or an outside observer, to suspect a lack of impartiality on the part of the arbitrator." *Ex parte* meetings without the knowledge of the other party that address issues in the arbitration are "a step too far."⁶²

4.3[c] Conduct

The challenge lodged in Ref. No. UN3490 has been addressed in part above: in particular, the issues pertaining to the arbitrator's order to delete a portion of the hearing transcript and the arbitrator's *ex parte* meetings with claimant's counsel.

⁶⁰ As above, at [4.5].

⁶¹ LCIA Ref. No. UN3490, 27 December 2005.

⁶² As above, at [6.7].

Another element of this challenge relates to the intemperate manner with which the arbitrator addressed the respondent's counsel with respect to an alleged theft of luncheon grapes. Shortly after respondent's counsel learned that the arbitrator and claimant's counsel had had two private meetings during the proceedings, the arbitrator accused respondent's counsel of having entered the arbitrator's breakout room without anyone else present and having taken grapes from the room. The arbitrator made this accusation in the presence of the parties and witnesses without investigating the incident or offering any evidence of the alleged grape theft. Despite the counsel's protests, the arbitrator did not withdraw his accusations. The Division aptly said that such conduct is "incompatible with the expected behaviour of an arbitrator" and considered that regardless of the veracity of the arbitrator's allegations against counsel, the accusation had created an "obvious conflict" between the arbitrator and a party's counsel.⁶³ The Division reasoned that the arbitrator's behaviour not only gave the appearance of bias, but there was a real possibility that the arbitrator was actually biased.⁶⁴

4.3[d] Confidentiality

Many institutional arbitration rules protect the confidentiality of arbitration proceedings and any resulting arbitral award. However, a breach by an arbitrator of his or her duty to maintain the requisite level of confidentiality does not necessarily prejudice the arbitrator's independence or impartiality.

In Ref. No. 5665, it was alleged that the chairman breached his duty under the LCIA Rules to maintain the confidentiality of the proceedings as it was discovered during the arbitration that the chairman had included the names of the parties on his curriculum vitae which had been posted on the Internet for a period of approximately seven months.⁶⁵ The Division considered whether the LCIA Rules prohibited the publication of the parties' names, and whether their publication merited the removal of the arbitrator. The Division did not approve of the chairman's publication of the names of the parties in his CV, but to require the chairman's removal, the parties would need to show that the arbitrator had breached the LCIA Rules, and that they suffered "some degree of injustice or harm" as a result. The Division considered that "the very limited disclosure of relevant information for approximately seven months was unlikely to cause significant prejudice or injustice to either of the parties" and added that the

⁶³ As above, at [6.13].

⁶⁴ As above, at [6.14].

⁶⁵ LCIA Ref. No. 5665, 30 August 2006.

publication was due to an “oversight rather than a deliberate breach of a clear obligation.”

More recently, a challenge was made after the chairman erroneously sent an email to a number of the respondent’s legal team which was intended for the tribunal secretary, requesting his “reaction” to that party’s correspondence.⁶⁶ This led to concern on the part of the respondent that the functions of the tribunal were being improperly delegated to the tribunal secretary. The co-arbitrators endorsed the conduct of the chairman and the tribunal secretary. The Division did not find that the email created grounds for removing any of the arbitrators – a decision that was later upheld by the Commercial Court in London.⁶⁷

The chairman, however, was removed on the basis of comments he had made about the case at a conference, identifying himself as a member of the arbitral tribunal (a fact that was not in the public domain) and aligning himself with the views expressed in a publication on the case. The Division found that this was in breach of the confidentiality of proceedings and gave rise to justifiable doubts about his independence and impartiality. This challenge, to the full tribunal, was therefore partly upheld as the Division revoked the chairman’s appointment.

4.3[e] Procedural Decisions

Some challenges are aimed at the arbitrator’s discretion to manage the proceedings. The challenging parties, for example, allege bias in: the scheduling of hearings of evidence,⁶⁸ the denial of additional time to prepare submissions,⁶⁹ making procedural decisions in favour of one side,⁷⁰ rejecting unmeritorious document requests,⁷¹ refusing to accept supplementary reports or evidence,⁷² investigating claims as they see fit,⁷³ setting deadlines for the production of documents and witness statements,⁷⁴ restricting the scope of a preliminary hearing and the length of submissions,⁷⁵ denying cross-examination of an expert,⁷⁶ holding a preliminary issues hearing,⁷⁷ denying last-minute and repeated requests to postpone a

⁶⁶ LCIA Ref. No. 142683, 16 December 2016.

⁶⁷ *P v Q and Ors* [2017] EWHC 194 (Comm).

⁶⁸ LCIA Ref. No. UN0239, 22 June, 3 July and 3 October 2001; LCIA Ref. No. 111933, 23 August 2012 and LCIA Ref. No. UN0239, 3 October 2001.

⁶⁹ LCIA Ref. No. 3431, 3 July and 18 December 2003 and 18 February 2004.

⁷⁰ LCIA Ref. No. 101735, 7 October 2011.

⁷¹ LCIA Ref. No. 152906, 25 May 2016.

⁷² LCIA Ref. No. 132551, 22 July 2015 and LCIA Ref. No. 122085, 14 June 2013.

⁷³ LCIA Ref. No. 132551, 22 July 2015 and LCIA Ref. No. 122085, 14 June 2013.

⁷⁴ LCIA Ref. Nos. 91431 – 91442, 5 April 2011.

⁷⁵ LCIA Ref. No. 142778, 31 March 2017.

⁷⁶ LCIA Ref. No. 132551, 22 July 2015.

⁷⁷ LCIA Ref. No. 142778, 31 March 2017.

conference,⁷⁸ and joining a further party.⁷⁹ These challenges to the arbitrator's procedural decision have been overwhelmingly unsuccessful. Some procedural challenges were seen by the LCIA Court to be little more than "vexatious attempt[s] to hinder"⁸⁰ or "delay"⁸¹ the proceedings, or attacks on an award or procedural order.⁸²

By way of example, the respondent in Ref No. 91431-91442 brought three challenges against the same tribunal on different grounds, all of which were rejected or withdrawn. The matter involved twelve arbitrations brought by the claimant parties against the same respondent in relation to an investment agreement and related guarantees. Three months before the hearing was scheduled to commence, the respondent made an application to suspend the proceedings and asked for time to renegotiate the investment agreements, for time to collect evidence, and for leave under Section 44 of the English Arbitration Act 1996 to apply to the English Courts seeking assistance with the taking of evidence of witnesses in Russia. The Chairman stated that subject to any objections the respondent may make, the Tribunal was prepared to accept the timetable proposed by the claimants. In subsequent correspondence, the respondent expressed "deep concern" that the Chairman was ready to accept a motion from the claimants for an extension of time, while the respondent's motion remained without reaction. The respondent requested the Tribunal to suspend the proceedings, and again reiterated its concerns. The Tribunal decided that the renegotiation issue was irrelevant and noted that the application for stay was far too late. The Tribunal therefore rejected the respondent's application to suspend the proceedings, subject to the respondent providing a draft application under Section 44.

The respondent challenged the entire tribunal on various grounds, including that the Tribunal failed to act with reasonable diligence with regard to jurisdictional objections raised by the respondent, the denial of production of documents vital for the respondent's case, and that the way in which the Chairman was acting was always in favour of the position of the claimants. The respondent asserted that its objection was rejected without a separate hearing which was requested by the respondent and with an erroneous explanation that it was submitted far too late. The respondent also alleged that the Tribunal did not conceal its sympathy with the claimant's counsel, "may be because the legal team of the claimants is headed by a member of the Board of LCIA and does its best to prevent the respondent from defending its case." A Vice President of the LCIA

⁷⁸ LCIA Ref. No. 111996, 22 April 2013.

⁷⁹ LCIA Ref. No. 152914, 6 August 2015.

⁸⁰ LCIA Ref. No. 3431, 18 February 2004.

⁸¹ LCIA Ref. Nos. 81209 and 81210, 16 November 2009.

⁸² LCIA Ref. No. UN3490, 27 December 2005.

Court found no ground upon which it could be said that the Tribunal had failed to act with reasonable diligence and that there was no indication of bias or partiality. It was also observed that the involvement of a board member of an international arbitral institution as counsel for one of the parties should create no cause for concern, while the preclusion of a voluntary unremunerated member of a board of an institution from taking on arbitration work under the auspices of that institution would create concerns.

About a month later, the respondent filed a second challenge to all three members of the Tribunal, which was subsequently withdrawn.

Following another procedural meeting in which the Tribunal issued directions, the respondent challenged the Tribunal for a third time under Article 10.4 of the LCIA Rules. The LCIA noted that the challenge was filed out of the prescribed 15-day period and could not be considered. The respondent provided an explanation as to the delay in filing the challenge, including problems obtaining translations. Despite the challenge being filed out of time, the LCIA Court decided that it would hear the respondent's challenge and appointed a former Vice President to do so.

The challenge by the respondent concerned the Tribunal's directions order setting out deadlines for the delivery of the particulars, documents and other information leading up to the hearing, and rejecting the respondent's application to identify further witnesses from regional companies and thereafter to file witness statements. The respondent complained of the rejection of its application for witness statements and the deadlines for the production of other documents. The respondent also alleged deferential treatment of the partner in charge of the case from the claimant's counsel as a result of his being a member of the LCIA Court.

The Vice President of the Court rejected the challenge and noted that it was not for the LCIA Court to judge each and every decision of the Tribunal, but to judge if the record before it gives rise to justifiable doubts as to the Tribunal's impartiality or independence. The Vice President observed that, rather, the record shows "a Tribunal faced with a recalcitrant party, bending over backward to give it every reasonable opportunity to present its case" when it had relaxed previous deadlines and postponed the hearings to permit the respondent to get its act together.

4.4 OVERALL OBSERVATIONS

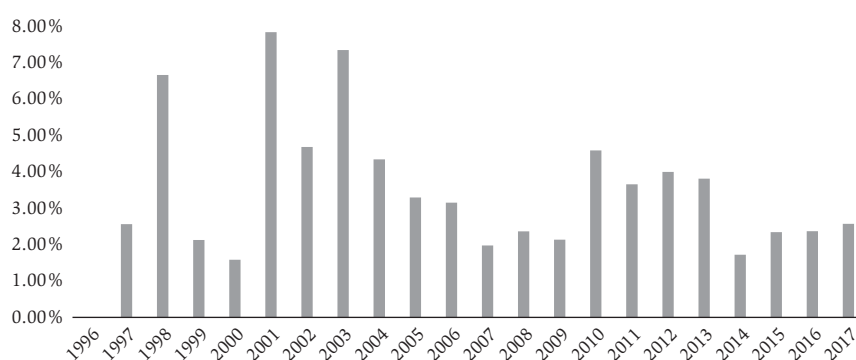
From these decisions, several interesting characteristics and trends emerge.

The number of challenges to arbitrators in LCIA cases have remained consistently small, with even fewer successful challenges (completely or in part). The number of challenges in LCIA arbitrations in each year over the past five

years as a percentage of arbitrations commenced that year has been 2 per cent or lower, demonstrating the paucity of challenges in LCIA cases.⁸³

The graph below shows challenges as a percentage of new referrals to the LCIA pursuant to the LCIA Rules from 1996 to 2017, demonstrating that there has been no significant change in the rate of challenges in recent years.⁸⁴

Challenges as a Percentage of New Referrals



During the course of 2018, there were six challenges in LCIA arbitrations, five of which were rejected and one was not decided as the challenge was withdrawn. There was one challenge where the LCIA acted as the appointing authority, which was rejected.

In 2019, there were seven challenges in LCIA arbitrations, five of which were rejected and two were superseded by events as in one case the parties settled and, in the other, the arbitrator resigned following the challenge. In addition, there were two challenges in UNCITRAL arbitrations, both of which were rejected.

The decisions demonstrate that challenges are rare in LCIA arbitrations, and even more rarely succeed. During the period covered by the decisions, around 2,900 cases were registered with the LCIA. Challenges were heard by the LCIA Court in less than 3 per cent of these cases, and were successful (completely or in part) approximately 10 per cent of the time. In other words, successful challenges were made only in 0.3 per cent of LCIA cases during that time period. Challenges based on deliberate violations of the arbitration agreement or allegations based on the arbitrator's conduct or behaviour were much rarer than procedural challenges.

For the reasons set out earlier in this article, the challenge procedure is robust and decision-makers produce sound decisions. The challenge process is also

⁸³ 2019 LCIA Annual Casework Report. In 2019, there were seven challenges and 346 new cases commenced, whereas in 2018 there were six challenges and 233 new arbitrations.

⁸⁴ In 1996, there were no challenges in LCIA arbitrations.

efficient, as is borne out by the numbers: for the 2010 to 2017 period, from the day decision-maker(s) are appointed, it took on average only 27 days to provide the reasoned decision, and over half of all decisions were provided in less than 14 days.⁸⁵

In addition to these LCIA cases, the LCIA Court dealt with challenges made in cases that were administered by the LCIA, but not commenced under the LCIA Rules. In the same period, 1996–2017, the LCIA received 19 challenges, almost one per year on average. Of the 19 challenges, ten were in arbitrations administered under the UNCITRAL Rules, five were in arbitrations for which the LCIA acted as the appointing authority, and four were arbitrations in which the LCIA acted as both appointing authority and fundholder. For these non-LCIA cases it is obviously not possible to provide comparable statistics as to the proportion of challenges compared to the overall number of cases. There is no record of how many cases are filed pursuant to the UNCITRAL Rules, and the LCIA is not the only Appointing Authority. It should also be noted that in UNCITRAL cases, the LCIA's involvement is predicated by the requirement to have a challenge decided, thus distorting the representativeness of the LCIA Court's involvement. Nevertheless, as the analysis above demonstrates, the LCIA's involvement in this limited number of UNCITRAL cases provides valuable insight in another dataset of cases, even if more caution is required in analysing the information.

Grounds for challenge are diverse, with a focus on procedural matters. In half of all challenge decisions, the challenging party presented a procedural decision contrary to their interests as evidence of bias—more common even than allegations of conflict.

5 CONCLUSION

As set out above, the LCIA has robust procedures for appointing arbitrators and determining challenges. The decisions provide valuable guidance in relation to standards of conduct by the arbitrators, and a greater understanding of the reasoning applied by the Court. The LCIA Court decisions show that challenges in LCIA cases remain rare and are even more rarely successful.

The proportion of conflict and procedural challenges is broadly consistent, although conflict challenges have statistically been more likely to succeed. Challenges based on arbitrator relations generally involve facts that implicate the objective standard of arbitral independence, such as whether a reasonable person would consider the repeat appointment of an arbitrator by a party or counsel to

⁸⁵ Data for the period from 1996 to 2010 has not been published.

create the appearance of bias. Challenges based on procedural decisions or the behaviour of an arbitrator during the proceedings typically address the subjective question of impartiality, such as whether *ex parte* meetings between an arbitrator and counsel or the use of intemperate language by an arbitrator towards counsel would lead a fair-minded and informed observer to conclude that there is a real possibility of bias on the part of the arbitrator.

