Arbitrator challenges: the long view

Philip Clifford QC, Hanna Roos & Eleanor Scogings track the nature & trends of two decades of arbitrator challenges

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IN BRIEF

▶ An analysis of LCIA court and English court decisions on challenges to arbitrators between 1996 and 2017 reveals a robust and consistent approach.

The London Court of International Arbitration (LCIA) recently published 32 anonymised summaries of arbitrator challenges decided by the LCIA during the period 2010 to 2017, supplementing the previous publication of 28 decisions from 1996 to 2010. When analysed together with applications to the English court to remove arbitrators brought between 1996 and 2017, it is evident that both the LCIA court and the English court have dealt with challenges robustly and consistently.

An overview

The majority of the challenge decisions reviewed were brought under Article 10.3 of the 1998 LCIA Arbitration Rules, on the ground that there were justifiable doubts as to the arbitrators' independence or impartiality. However, there were also a significant number of challenges under Article 10.2, on the grounds that the arbitrators deliberately violated the arbitration agreement, failed to act fairly and impartially as between the parties and/or did not conduct or participate in the proceedings with reasonable diligence, avoiding unnecessary delay or expense. A small number of challenges were brought under corresponding provisions of other LCIA Arbitration Rules and the UNCITRAL Arbitration Rules.

An analysis of the LCIA court's decisions demonstrates that:

- challenges are rare and even more rarely successful: challenges were made in less than 2% of the cases and were only successful (completely or in part) approximately 23% of the time;
- the majority of challenges were made by respondents and these had a lower success rate than challenges made by claimants: approximately 70% of the published decisions concerned challenges made by respondents and only about 20% of those succeeded. By contrast, of the approximately 30% of the challenges brought by claimants, about 40% were successful.
- There has been no significant change in the rate of challenges (see Table 1).
- There is little difference between the rates of challenge to sole arbitrators and the rates of challenge to members of three-member tribunals.
- For three-member tribunals, challenges were most often made against the other side's nominee.
- Decisions were released quickly and efficiently: for the 2010 to 2017 period, over 50% of the decisions were provided to the parties in less than 14 days, with an overall average of 27 days. Data has not been published for the 1996–2010 period.

Trends: LCIA challenge decisions

The challenges may broadly be divided into two categories (with only two falling outside both):

- those concerning the arbitrators' connections and resulting conflicts of interest, for example based on their nationality or relationships with the parties ('conflict challenges'); and
- those based on procedural decisions that were contrary to the challenging party's interests ('procedural challenges').

Procedural challenges were less successful than conflict challenges: there were 31 procedural challenges of which three (10%) succeeded, compared with 27 conflict challenges of which 11 (41%) succeeded completely or in part. There was no significant difference between the 1996–2010 and 2010–2017 data sets.

While each case is fact specific, the data suggests (unsurprisingly) that the following conduct is unlikely, on its own, to raise justifiable doubts as to an arbitrator's impartiality or independence:

- making a procedural decision in favour of one side (No 101735);
- rejecting unmeritorious document requests (No 152906);
- refusing to accept supplementary reports or evidence (No 132551 and 122085);
- investigating claims as they see fit (No 132551 and 122085);
- setting deadlines for the production of documents and witness statements (Nos 91431–91442);
- setting a hearing date that is not ideal for both sides (No 111933);
- restricting the scope of a preliminary hearing and the length of submissions (No 142778);
- denying cross-examination of an expert (No 132551);
- holding a preliminary issues hearing (No 142778);
- denying last-minute and repeated requests to postpone a conference (No 111996); or
- joining a further party (No 152914).

In addition, with regard to conflict challenges, the following circumstances do not appear, on their own, to raise justifiable doubts as to an arbitrator's impartiality or independence:

- the same arbitrator being appointed in more than one arbitration, where one party is party to all of the arbitrations but the other party is party to some but

Table 1: Challenges as a percentage of new referrals to LCIA

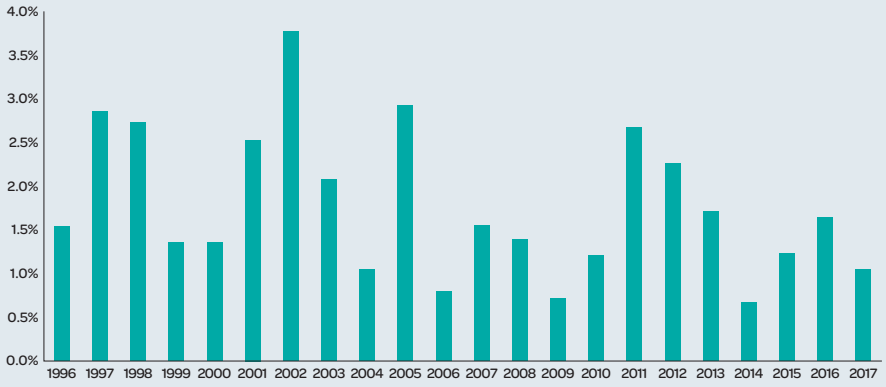

Table 2: Arbitrator challenges before the LCIA and English courts between 1996 and 2017

1996–2017	Outcome/nature of challenges	LCIA data	English court data
Successful?	Completely or partly successful	14 (23%)	5 (24%)
	Rejected	46 (77%)	16 (76%)
Who brought the challenge?	Claimant	16 (27%) (40% successful)	9 (43%)
	Respondent	43 (72%) (20% successful)	11 (52%)
	Both / NA	1 (1%)	1 (5%)*
Who was challenged?	Sole arbitrator	30 (50%)	16 (76%)
	One, two or all members of the tribunal of three arbitrators	30 (50%)	5 (24%)
	One or both co-arbitrator(s)	16 (27%) (10 concerned a party-nominated co-arbitrator, and 6 LCIA selected co-arbitrators)	2 (10%)
	Chair	6 (10%)	2 (10%)
	Chair and one or both co-arbitrator(s)	8 (13%)	1 (4%)
Procedural Challenge	Brought	31 (52%***)	11 (52%)
	Successful	3 (10%)	1 (9%)
Conflict Challenge	Brought	27 (45%***)	10 (48%)
	Successful	11 (41%)	4 (40%)

* In *Save and Prosper Pensions Ltd v Homebase Ltd* [2001] L. & T.R. 11 (Ch D), it is unclear whether the applicant was the claimant or respondent in the underlying arbitration.
** This includes LCIA references 132445 and 132456, which concerned a challenge against a common arbitrator sitting as sole arbitrator in 132445 and as chair in 132456. The figure is counted only here and not again in the sole arbitrator column, on the basis that there was a single challenge rather than two separate challenges.
*** As explained above, references 142603 and 142683 are excluded from the figures as they were neither a conflict challenge nor a procedural challenge.

not all of the arbitrations (Nos 132445 and 132456);
- the arbitrator having knowledge of previous cases involving the same parties, although repeat appointments 'should not be taken lightly' as they give rise to 'not infrequently justified doubts, as to the arbitrator's independence and impartiality' (No UN101693);
- the arbitrator having, in the last few years, acted as an arbitrator in proceedings on a related issue involving an affiliate of one of the parties, but having not received any arguments from the parties in the other case and the issues being tangential to the present case (although the past involvement should be disclosed) (No 101642);
- the arbitrator being instructed as an expert in related proceedings by one of the parties several years before (No 97/X27);
- the arbitrator and a party's counsel being of the same nationality (No UN9155);
- the arbitrator being familiar with the law of the country of origin of one party, and for example being admitted to practise there, being a member of the local Bar Association or having an office in that country (No 122073) or other professional experience in the jurisdiction, such as language ability, arbitral appointments administered by institutions of that jurisdiction, or having made substantial contributions to the development and modernisation of laws in that jurisdiction (No 101682);
- long-term residency in a country with which an arbitrator has a long and meaningful association such that he could be regarded as a *de facto* national of that country, especially if the arbitrator has maintained a strong affiliation with their home state (No 8086);
- the arbitrator and opposing party's counsel practising from the same barristers' chambers (No UN97/X11); and
- the arbitrator and a party's lead counsel appearing together on an educational panel covering an unrelated topic or being members of the same professional organisation (No 81116).

By contrast, the following circumstances, among others, could raise justifiable doubts as to impartiality or independence:
- where the arbitrator, or a partner in their firm, is acting in an unrelated case, or previously had acted, for one of the parties or associated companies of one of the parties (No UN96/X15, 101689 and 101691, 122053, 111947);
- where, in addition to having accepted instructions to act as counsel for and against each of the co-respondents that has nominated him, the arbitrator has significant financial relations with the solicitor of one party, has failed to disclose the ties at the outset, and has refused to disclose new retainers in the course of the arbitration /confirm that such retainers would be turned down (No 81160);
- where the arbitrator has publicly made

negative comments about the parent company of one of the parties, including how it is managed, the way it conducts its business and how experts in other proceedings view that company (No UN152998);
- where the arbitrator's dissenting opinion in a preliminary award on jurisdiction demonstrates that they prejudged the merits of the counterclaims in the case (No 132498); and
- where the chair publicly identifies themselves as a member of the arbitral tribunal (where this has not been publically reported) (No 142683).

English court challenge decisions

During the same period, there were 21 challenge applications made to the English court, mainly under section 24 of the Arbitration Act 1996 ('Power of court to remove arbitrator'). The majority of the applications were made on the ground that there were circumstances that existed that gave rise to justifiable doubts as to the arbitrator's impartiality (section 24(1)(a)). However, there were also a significant number of challenges made on the ground that the arbitrator(s) had failed to conduct the proceedings properly and that substantial injustice would be caused to the applicant (s 24(1)(d)(i)). Some of the applications concerned institutional and others *ad hoc* arbitrations.

As demonstrated in Table 2, of the 21 applications, an arbitrator was removed in only five (24%) cases, and only one of those was a procedural challenge. As with the LCIA court decisions, the majority of applications to court to remove an arbitrator were made by the respondent. However, the majority of challenges under section 24 were against sole arbitrators.

The English courts have supported the approach taken by the LCIA court. For example, in *A v B* [2011] EWHC 2345 (Comm), [2011] All ER (D) 71 (Sep) and *P v Q* [2017] EWHC 194 (Comm), applicants whose challenge had been rejected by the LCIA court went on to apply for the removal of the arbitrator(s) in the English courts. In both cases, the English courts upheld the LCIA court's decisions and refused to remove the arbitrator(s). Similarly, in *Halliburton Co v Chubb Bermuda Insurance Ltd et al* [2018] EWCA Civ 817 the English court refused to remove an arbitrator and agreed with the approach of the LCIA rules that disclosure is only required of facts and circumstances known to the arbitrator, without a duty of inquiry.

Conclusions

The data, as summarised in Table 2, shows that challenges remain rare and are even more rarely successful, whether before the LCIA court or the English court. Both courts adopt a consistent approach to determining challenges and dispose of unmeritorious applications robustly, with the likelihood of success in the challenge applications before both of them being similarly low.

The proportion of procedural and conflict challenges is broadly consistent as between both the LCIA court and the English courts, as is the rate of success for each. Conflict challenges appear more likely to succeed in both fora, with procedural challenges having a very low success rate.

The data is very encouraging for arbitrators wishing to adopt a robust approach in the face of an uncooperative party, as the cases demonstrate that the tribunal's broad discretion to conduct the proceedings will largely be upheld. **NLJ**

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