

Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals (Giorgetti ed., 2015)

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Chiara Giorgetti (Richmond School of Law)

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Challenges of arbitrators seem to have become increasingly common in international investment arbitral proceedings, yet they also seem to be seldom successful.

Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals, a new edited volume by Chiara Giorgetti, analyses arbitrators and judges' challenges and addresses some fundamental, related questions: What does the increase of challenges tell us about the international investment arbitration system? Is it a correct to think that challenges are on the rise, or is this a function of the increase case-load of international arbitration more generally? Are challenges seldom upheld because they are typically spurious and tactical – and thus unmeritorious – or are rejections of challenge procedures a demonstration of a larger problem – a lack of proper control mechanism – possibly resulting from the procedures applicable to challenges, the applicable standard required to uphold a challenge or who the decision makers are?

The book explores these issues from different perspectives. First, it examines the practice in different arbitral tribunals, including ICSID, the ICC and the PCA, but also in non-arbitral tribunals settings, including the International Court of Justice, the WTO, the Iran US Tribunal and various international criminal courts. Then, it explores specific reasons asserted to initiate challenges procedures, including issue conflicts and repeat appointments and the issue of late in the game challenges. The analysis then shifts to a personal perspective and looks at 'tales' from a challenged arbitrator, it then looks at considerations to initiate challenge from a counsel perspective and finally examines challenges of party counsel as a possible alternative to challenge arbitrators. In the last section, the book explores challenges from a geographical point of view – and namely in Asia and Latin America – to see regional variations.

While the detailed exploration and analysis of these questions can only be found in each chapter of the book, some important and interesting general conclusions to these questions are summarized below.

First, are challenges on the rise? Data show that there is certainly a rising number of challenges cases, but these are often consistent with the overall trend of increasing caseload in the respective arbitral institutions. For example, PCA saw an increased in the number of challenges from 3 in 2005 to 15 challenges in 2014 in all cases submitted under the PCA auspices, and this corresponds with an

increase caseload.

Second, is it true that the disqualification attempts mostly fail? The answer is not uniform. Overall yes, but with some interesting variations. For example, there have been no disqualification at the International Court of Justice – but there have been numerous self-recusals. There have been no disqualification at WTO, including of both panelists and appeal body members, but note that the WTO uses unique appointment and challenge procedures. Similarly, there have been no disqualifications at the International Criminal Court, ICTY and ICTR. At ICSID, the total of 84 challenges (as of mid 2014) resulted in 21 resignation of arbitrators, 3 proposals were withdrawn or discontinued prior to a decision, and 59 decisions issued. Four of the 59 decisions were upheld, 55 declined. At the PCA, since 1976, there have been 28 challenges submissions to the PCA Secretary General, of these 17 were rejected, 7 upheld, in 3 cases the arbitrators resigned and one case the party withdrew the challenge.

Third, while the stated requirements to sit as judges and arbitrators in an international courts and tribunals are quite similar, the procedures applicable to challenges are quite diverse.

As for the common requirements: they mostly relate to a requirement of independence and impartiality, often coupled with some form of nationality requirements. For example, ICJ requires independent judges elected “regardless of their nationality from among persons of high moral character who possess the qualification to sit in the highest judicial offices in their countries, or who are jurisconsults of recognized competence.” Under ICSID, arbitrators need to “be relied upon to exercise independent judgment.” UNCITRAL Rules requires arbitrators to be “independent and impartial.”

On the other side, challenges procedures vary in relation to who decides the disqualification, the applicable standard – and to a certain extent the grounds for it. Who decides the challenge? It is the entire court for ICJ, ICC and the other criminal tribunals. It is the appointing authority for UNCITRAL and IRAN-US Claims Tribunal. At ICSID, the remaining members of the Tribunal decide – and only ask the Chairman of the ICSID administrative council to decide only if the majority of the members or the sole arbitrator were challenged or if the remaining arbitrators cannot decide.

The issues of the applicable standards and the reasons for challenges are explored in depth in the book in relation to several courts and tribunals, including the ICJ, ICSID, the ICC, the PCA, the Iran –US Claims Tribunal, the WTO and several international criminal court.

Challenges are important mechanisms to grant a form of control to the parties in binding international dispute proceedings. This book explores the mechanisms, reasons and consequences of challenges and recusals proceedings, and thus seeks to contribute to the scholarship and ongoing dialogue on this important issue.