Arbitrator Challenges: Too Many or Not Enough?

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The newly revised IBA Guidelines on Conflicts of Interest for International Arbitrators (the “Guidelines”) this year invite renewed reflection on the impact of the Guidelines since they were first introduced in 2004.\(^1\) When first published, the Guidelines were met with mixed reaction, including a chorus of the-sky-is-falling-down predictions. Critics claimed that the Guidelines unnecessarily expanded the scope of disclosure for arbitrators. Expanded disclosure, they forecasted, would lead increased challenges to arbitrators and awards. Despite widespread acceptance of the IBA Guidelines overall, some of these critiques have persisted. Most recently, these criticisms have been given new life by an assessment of the Guidelines by Gary Born in the second edition of his treatise.

Specifically, Born argues that the Guidelines “add an additional set of grounds for challenging arbitrators (and requiring disclosures), without excluding any existing ground for challenge (and disclosure) under national law or institutional rules.”\(^2\) This increase in disclosure and grounds for challenge, he argues, creates a risk of increased challenges.

As support for this position, Born cites statistics that appear to suggest an increase in the annual rate of challenges after adoption of the IBA Guidelines. Specifically, he argues that from 1993–2003, at the ICC arbitrators were challenged in only 2.10% of pending, while in the 9 years after 2004 through 2012, the rate increased to 3.23%. Born argues that this increase of “more than 50%” is cause for potential concern.\(^3\) While Born rightly

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1 The new Guidelines are available here: [link](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCAQFjAA&url=http%3A%2F%2Fwww.ibanet.org%2FDocument%2FDefault.aspx%3FDocumentUid%3De2fe5e72-eb14-4bba-b10d-d33df34e89f8&ei=ZVe6VN56ZB4T3yQ5Vg4K4BA&usg=AFQjCNFevNZgKiVwoCZPEmhTwotnS2QLA&bvm=bv.83829542,d.aWw).

2 Born at 1895 (emphasis added).

3 Born at 1895. Similarly, the average annual rate of challenges per new ICC cases (based on annual filings) was 4.10% from 1993 to 2003 and 6.37% from 2004 to 2012—again an increase
acknowledges that it is “impossible to conclude whether or not the IBA Guidelines caused, or contributed materially to, the increased frequency of challenges” he nevertheless argues that the statistics suggest that the IBA Guidelines “had some connection to the increased frequency of challenges over the past decade.”

In this chapter, we make some preliminary observations about observed changes in the rates of challenges. Ultimately the data we were able to obtain is insufficient to draw meaningful conclusions, but it does suggest that it might be an oversimplification to assume that the enactment of the Guidelines led to an increase in challenges.

This topic is clearly an area where more sustained empirical research would be valuable. With the existing data, there are numerous inherent limitations, such as sample size and the presence of numerous variables that cannot be meaningfully controlled for. Moreover, the data published by institutions are often not systematic even within an institution, and are not uniform as among different institutions. Despite limitations in the data, however, we believe some preliminary observations can be drawn, which are interesting in themselves and provide a basis for future research.

**Limitations on Data**

Before providing analysis, it is important to note a few limitations in the data. First, and most importantly, the total number of challenges is quite small overall and the percentage of cases in which arbitrators are challenged mostly hovers in the single digits. As a result, an increase of even a few challenges per year can result in a seemingly dramatic increase when characterized as a percentage.

Statisticians warn against characterizing increases in these terms to avoid creating an impression that the increase is more significant than it is in real terms. For example, the annual Uniform Crime Reports reported that since 1964 rate of crimes committed older people had tripled, while the rate of crimes committed by younger people had only doubled. But people over 65 years of more than 50%. Finally, the average annual rate of challenges per arbitrator appointed in ICC arbitrations between 1997 and 2003 was 3.00% and between 2004 and 2012 was 3.76%—an increase of some 25%.

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4 Born at 1856–1857.