

University of Missouri School of Law Scholarship Repository

Faculty Publications

Faculty Scholarship

Summer 2016

Book Review: Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals

S. I. Strong

University of Missouri School of Law, strongsi@missouri.edu

Follow this and additional works at: <https://scholarship.law.missouri.edu/facpubs>

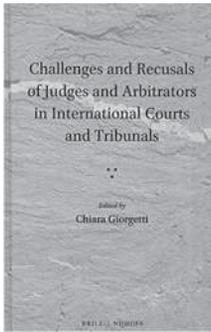
 Part of the [Courts Commons](#), [Dispute Resolution and Arbitration Commons](#), and the [International Law Commons](#)

Recommended Citation

S. I. Strong, Book Review: Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals, 22 *Dispute Resolution Magazine* 18 (2016).

Available at: <https://scholarship.law.missouri.edu/facpubs/824>

This Article is brought to you for free and open access by the Faculty Scholarship at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.



Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals

Brill/Nijhoff, 2015 | Edited by Chiara Giorgetti

Reviewed by S.I. Strong

The proliferation of international courts and tribunals over the last few decades has made it increasingly important to ensure that such proceedings are entirely above reproach. In particular, questions have arisen about what should be done in cases where a judge's or arbitrator's continued presence threatens the legitimacy of the proceedings. As fundamental as this question is, very little has been written about the standards for challenge and removal of such officials. Fortunately, *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals*, a new collection of essays edited by Chiara Giorgetti, Associate Professor of Law at the University of Richmond School of Law, has filled this lacuna.

In many ways, this book is groundbreaking. Each chapter is written by a knowledgeable expert with extensive experience, and a number of contributors have compiled comprehensive charts outlining decisions on challenges and recusals, including those involving the International Court of Justice, the Iran-US Claims Tribunal, and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, that are difficult or impossible to find elsewhere. As a result, this is an extremely useful resource for both practitioners and academics.

Structurally, the text is broken into four sections. The first focuses on challenges and recusals in specific settings, including those involving the International Court of Justice (ICJ), the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), the Permanent Court of Arbitration (PCA), the Iran-US Claims Tribunal, the International Chamber of Commerce (ICC), the World Trade Organization (WTO), and various types of international criminal tribunals such as the International Criminal Court.

The second section focuses on reasons why a recusal or challenge might arise. These chapters describe the problems associated with issue conflicts, meaning "a conflict arising from an arbitrator's relationship with the subject matter of the dispute;"¹ late challenges and resignations that are used for strategic purposes (i.e., "guerrilla" tactics); and repeat arbitrators in investment proceedings.

The third section provides special perspectives on challenges and recusals. The chapters in this section not only provide essays from the point of view of both the arbitrator and counsel but consider the somewhat unique question of challenges to party representatives and counsel. This latter discussion is particularly intriguing because it does not typically arise in the context of domestic litigation or arbitration. The book concludes with two chapters focusing on regional concerns relating to Asia and Latin America, providing a valuable introduction to international arbitration in these parts of the world.

Each individual chapter is well written and full of interesting and important information. Unfortunately, as every student of classical mythology knows, virtually any strength can be transformed into a weakness if carried to its logical extreme. In this case, the highly descriptive nature of the text proves to be its Achilles' heel, since the emphasis on factual material results in relatively little critical or normative analysis.

The method of presentation differs significantly among the chapters, depending on the topic. For instance, Chapter 2 on ICSID proceedings contains numerous statistics and an almost dizzying array of references to decisions on arbitral challenges. Although ICSID challenges are relatively rare considering the number of appointments made (only 84 challenges out of a total of 1,620 appointments over the last 50 years), the actual number of challenges is much higher than in other areas. The chapter

summarizes a number of these decisions but unfortunately does not provide detailed analysis.

In contrast, Chapter 3, which focuses on proceedings at the PCA, provides an insider's perspective on actual practice at the PCA, information that is not always readily available to litigants. Furthermore, the relatively high number of challenges that have been heard by the PCA (28 in the last 40 years) allows readers to compare various approaches and factual scenarios.

The tension between detail and overview is apparent in other chapters. Chapter 8, on issue conflicts, uses a single case (*Devas v. India*)² as the foundation for the overall discussion. While the *Devas* decision is undoubtedly important in the field of investment arbitration, readers would have benefitted from a more wide-ranging analysis of how issue conflicts are handled. This chapter also reflects an emphasis on investment arbitration, which is evident elsewhere in the book. While investment arbitration has recently received a great deal of attention from the international dispute resolution community, the number of investment proceedings filed each year (20 to 50 matters on average) pales in comparison to the number of international commercial proceedings (reported to be well over 5,000) that are filed annually.

As strong as this text is, there are some gaps. For example, it would have been helpful if more of the discussion had provided critical or theoretical analysis rather than focusing predominantly on cases and procedural rules. There are also other issues that might usefully have been included in the book. For example, it would have been useful if the final two chapters on Asia and Latin America had discussed some of the more novel issues that could arise, such as the possibility of a constitutional challenge (*acción de tutela*) in some Latin American countries in cases where an arbitrator's continuing presence on a tribunal might reflect a violation of a fundamental procedural right.³ It might also have been useful to consider challenges or recusals of mediators or conciliators, since the international legal community has been showing increased interest in the use of consensus-based proceedings in both the international commercial and investment contexts. Discussion of multi-tiered (step) clauses and hybrid proceedings such as Med-Arb or Arb-Med would have been particularly welcome.

Another issue that might be considered by future scholars is whether and to what extent decisions regarding challenge determinations should be fully reasoned and publicly available. Although several contributors noted this question in passing, recent scholarship suggests more in-depth analysis is warranted.⁴

Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals is a substantial book that provides invaluable assistance to both practitioners and scholars working in international dispute resolution. While the reader is occasionally left wanting more, the fact that such questions arise demonstrates not only the breadth of the analysis in these pages but the importance of the subject matter. This book belongs on the shelf of every specialist in international dispute resolution and should also be read by domestic practitioners and scholars. The authors and the editor deserve credit for providing such intriguing food for thought. ■

Endnotes

1 CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS 227 (Chiara Giorgetti ed., Brill/Nijhoff 2015).

2 See PCA Case No. 2013-09, available at <http://www.italaw.com/sites/default/files/case-documents/italaw3161.pdf>.

3 See S.I. Strong, *International Arbitration and the Republic of Colombia: Commercial, Comparative and Constitutional Concerns From a U.S. Perspective*, 22 DUKE J. COMP. & INT'L L. 47, 102-05 (2011).

4 The reasoning requirement in international dispute resolution has been receiving increased attention from the academic community lately. See, e.g., Conference on Arbitration and Legal Reasoning, Queen Mary University of London (forthcoming Nov. 16-17, 2016); S.I. Strong, *Reasoned Awards in International Commercial Arbitration: Embracing and Exceeding the Common Law-Civil Law Dichotomy*, 37 MICH. J. INT'L L. 1 (2015).



S.I. Strong is the Manley O. Hudson Professor of Law and Senior Fellow at the Center for the Study of Dispute Resolution at the University of Missouri. She serves as an arbitrator on a variety of international and commercial matters and can be reached at strongsi@missouri.edu.

