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Client Alert

The Expediency, Ethics, and Express Powers of the Draft LCIA Arbitration Rules

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In early 2014, the Drafting Sub-Committee of the London Court of International Arbitration (LCIA) published a "final draft" of its new Arbitration Rules, available online here. Before finalising these updates to the standing 1998 rules, the LCIA will hold a debate at Tylney Hall in May. Given the rapid expansion of the field of international commercial arbitration in the last sixteen years, the LCIA's decision to review its rules has been widely welcomed.

The sub-committee tasked with producing an updated draft of the LCIA Rules is constituted of leading figures from arbitration practice and academia: James Castello of King & Spalding, Boris Karabelnikov, Professor at The Moscow School of Social and Economic Sciences, and VV (Johnny) Veeder of Essex Court Chambers. Of course, in finalising its 2014 revisions to the LCIA arbitration rules, the sub-committee has benefited from the opportunity to reflect on recent amendments to the rules of other major institutions, including the ICC in 2012 and SIAC in 2013. In common with those amendments, the draft revised LCIA Rules modernize many elements of the existing rules, bringing them into line with current best-practice. However, some bolder changes are also included, ensuring LCIA arbitral practice retains a distinctive edge. Understandably, it is anticipated that these are the areas which will be the primary focus of the upcoming debate, and the extent to which these bolder changes will be retained once the new rules are finalised, remains to be seen.

We may categorise the main areas of change as "the three E's": expediency, ethics, and express powers.

Expediency

The draft rules seek to accelerate the course of an arbitration. This can be viewed as a response to mounting concern from commercial parties, manifest in the recent arbitration surveys produced by Queen Mary University of London, about delays in commercial arbitration.

To this end, the draft rules make various minor changes, including tighter procedural time limits. For example, Article 2.1 reduces the time for filing a Response from 30 to 28 days. Other changes are more significant: under Article 5.1, the formation of the tribunal can no longer be delayed by any controversy about the sufficiency of the Request or Response (although Article 5.6 includes a proposal to extend the length of time the LCIA Court has to constitute a tribunal from the current 30 days up to 35). Also, under Article 15.2, a claimant now has the right, to elect that its Request will serve as its Statement of Case.

Arguably the most substantive change to ensure the timely progress of arbitration is to be found in Article 9B, which delineates the powers and procedure for appointment of an emergency arbitrator. Emergency arbitrators are appointed to enable a party to apply for an order for interim measures – typically to prevent its opponent

from dissipating assets or destroying evidence – before the constitution of the tribunal, without having recourse to domestic courts.

While the emergency arbitrator procedure is set out in some detail, it bears emphasizing that the entire draft article is included in brackets, suggesting the sub-committee acknowledges the need for considerable debate before a final form is agreed.

The new power to appoint an emergency arbitrator before a tribunal has been constituted is in keeping with many of the recent institutional updates (see Article 29 of the ICC Arbitration Rules, and Schedule 1 to the SIAC Arbitration Rules). The draft envisages that "in exceptional urgency," either party would be able to apply to the LCIA for the appointment of an emergency arbitrator. If the LCIA Court accedes to the request, an emergency arbitrator – who, pursuant to Article 9.4, will always be a "temporary sole arbitrator" - must be appointed within three days from receipt of the party's application, as set out in Article 9.6. Once appointed, under Article 9.7, the emergency arbitrator has a maximum of 20 days to decide the claim for emergency relief. To this end, he or she is expressly permitted in Article 9.8 to forego holding any hearings. These provisions are designed to minimize the risk of delays at this early stage of proceedings.

The draft rules have also recognized the need for the tribunal, once constituted, to facilitate a swift resolution of a dispute. Article 5.4 seeks to ensure potential arbitrators are cognisant of this from the outset, requiring that declarations provided by tribunal candidates now include a statement that the candidate is "ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious conduct of the arbitration". This focus on efficiency is emphasized in the general duty of the tribunal, under Article 14.4(ii), to adopt procedures to avoid "delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute."

Experience shows that delays are more likely to be attributable to the parties, or in many instances only one party, than the tribunal. The draft rules have taken steps to encourage the parties to advance their respective cases with all deliberate speed. For example, upon receiving notification of the tribunal's formation, Articles 14.1 and 14.2 provide that the parties must, within 21 days, make contact with a view to agreeing joint proposals for the conduct of the proceedings.

Generally, though, arbitrators are responsible for ensuring that there are no delays associated with handing down an award. To minimize this risk, Article 15.10 provides that a tribunal must seek to make its final award "as soon as reasonably possible". Unless the tribunal is constituted of a sole arbitrator, it must notify its timeframe to the registrar. The tribunal should specifically set aside time for the requisite deliberations, which should take place "as soon as possible".

To hasten communication, Article 13.1 provides that the parties must now ensure they liaise directly with the tribunal, and not the registrar as was previously the case.

To keep the parties' minds focused, Article 28.4 encourages the parties to avoid delays by setting out the tribunal's power to order cost sanctions for inappropriate conduct, which specifically includes "non-co-operation resulting in undue delay."

Ethics & Conduct

The most significant change in the proposed rules is the inclusion of an annex setting out "General Guidelines for Parties' Legal Representatives." The question of ethical standards, particularly for a party's legal representatives, is one which has provoked much debate in the arbitration community.

In its nascent form, international arbitration was a far less diverse practice than the one we see today, with only a few major centres and a handful of leading institutions. As the emphasis of global commerce has shifted to emerging economies, so, too, has commercial arbitration; with institutions emerging in new economic centres in Africa, Asia, and the Middle East. While, previously, a comparative cultural homogeneity meant arbitration could function successfully with only an implied, mutually understood, ethical framework, this shift towards a truly global practice has highlighted the need for more concrete ethical requirements.

The IBA Guidelines on Party Representation in International Arbitration, for example, attempted to set a framework for counsel appearing before arbitral tribunals. However, the LCIA draft rules appear to be the first attempt at an institutional level to set out an ethical framework.
The Annex to the draft rules defines, in broad terms, the standard of ethical conduct to be expected, including:

- The promotion of "the good and equal conduct of the parties' legal representatives."
- The avoidance of "activities intended unfairly to obstruct the arbitration or jeopardise the finality of any award, including repeated challenges to an arbitrator's appointment or to the Arbitral Tribunal's jurisdiction or authority known to be unfounded."
- Refraining from knowingly making "any false statement to the Arbitral Tribunal."
- The avoidance of unilateral contact with "any member of the Arbitral Tribunal or with any member of the LCIA Court."

Paragraph 7 of the Annex makes clear that the power to determine whether these guidelines have been violated lies with the tribunal. The sanctions for such violations are set out in Article 18.6, and include:

- A written reprimand;
- A written caution as to future conduct in the arbitration;
- A reference to the legal representative's regulatory and/or professional body; and
- Any other measure necessary to maintain the general duties of the Arbitral Tribunal under Article 14.4(i) and (ii). It is worth considering these general duties in full:

> 14.4(i) "to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent(s)";
>
> 14.4(ii) "to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute."

This list of sanctions has various interesting features. First, there is an explicit carve-out for the obligations imposed on practitioners by their own regulatory bodies. As professional rules often require adherence, even when appearing before an arbitral tribunal outside the practitioner's home jurisdiction, this provision explicitly recognises the primacy of such rules.

In addition, the scope of potential sanctions is extremely broad as currently drafted enabling tribunals to use "any other measure necessary." One imagines this is likely to face serious opposition from practitioners, as it seems to open the door to unknown and potentially severe consequences for those appearing before tribunals. While, of course, the vast majority of practitioners appearing before tribunals uphold the highest ethical standards, even they will be uneasy about tribunals acquiring sweeping powers without the safeguards that would accompany judicial decisions in many national courts. There is also the additional concern of how such a provision might affect the power of the parties to seek to remove an arbitrator.

Article 32.2 provides the final word on ethical standards, requiring the LCIA Court, the LCIA, the Registrar, the Arbitral Tribunal and each of the parties to "act at all times in good faith".

Express powers

The final area of change includes amendments to the express powers of the arbitral tribunal.

In a move some would consider a healthy rebalancing of power, the draft rules remove the right of the parties to curtail the Additional Powers of the tribunal set out in the current Article 22. These powers enable, among other things, a party to supplement or amend its submissions, amend time periods, request documents from a party, and order a third party to join in the arbitration. Under the proposed wording of the new Article 22, the Tribunal does not require permission for the parties to exercise these powers, but, rather, need only give the "parties a reasonable opportunity to state their views".

Similarly, the parties will no longer be able to remove the tribunal's power to award interim and conservatory measures under draft Article 25. Such powers include ordering the provision of security for some, or all, of the amount in dispute and making any award, on a temporary basis, and before the conclusion of the arbitration, which the tribunal would have the power to make as a final award. Under draft Article 25, the tribunal need only provide a party with "a reasonable opportunity to respond" to an application asking the tribunal to exercise such powers.

The provision under the current Article 21, which allows the parties to withhold their consent to the tribunal's appointing an expert of its own, is set to be removed by draft Article 21.1. The new article permits the tribunal to appoint its own expert or experts, with only a requirement to "consult" with the parties.

Under the current rules, should an arbitrator refuse or persistently fail to take part in the tribunal's deliberations, the remaining arbitrators have the express power, under Article 12.1 "to continue the arbitration…notwithstanding the absence of the third arbitrator." The proposed Article 12 makes this power subject to "the written approval of the LCIA Court."

Unsurprisingly, the default seat for an LCIA arbitration remains London, England. However, Article 16.2 clarifies that, in the absence of an express election, the default seat will only apply up until the formation of the tribunal. Then, the tribunal has the power, after consultation with the parties, to order that another seat is more appropriate. Previously, this determination was made by the LCIA Court.

Perhaps the largest change to the express powers of the tribunal is in relation to the consolidation of related arbitrations. Article 22.1(ix) expressly provides that the tribunal may, with the consent of the parties and approval of the LCIA Court, order the consolidation of multiple arbitrations. Where multiple arbitrations involving the same parties have begun, so long as only one tribunal has been appointed, that tribunal can order consolidation of these arbitrations **without** requiring the consent of the parties. The consent of the LCIA Court is, however, still required.

Other updates

In addition to these three categories, the draft rules seek to update other aspects of LCIA arbitration. A few of the most significant are considered briefly below:

- Formation of the tribunal

  Under Article 5.8, the LCIA will now have the power to appoint a tribunal of more than three arbitrators in exceptional circumstances.

- Applicable law

  Article 16.4 expressly provides that unless otherwise agreed by the parties, the law of the arbitration agreement, as well as that of the arbitration, shall be the law of the seat.

- Modernisation

  As one might expect from a set of arbitration rules drafted in 2014, telex has been removed as a method of communication under Article 1.1. Also, under Articles 1.3 and 2.3, the parties may now elect to submit their Request or Response using the LCIA's standard electronic form.

- Costs

Article 28.5 provides that if the parties have agreed before the dispute how the costs of the arbitration should be paid regardless of the outcome, to be effective, this agreement must be confirmed by the parties in writing after the commencement of the arbitration.

Conclusion

The LCIA is generally recognized as the oldest arbitration centre in existence today. The draft revised rules will modernise the arbitration procedure under the auspices of this long-standing institution. They seek to reduce

the risk of delays, a real concern to commercial disputants, while also retaining the distinct features of LCIA arbitration. Existing hallmarks, like the LCIA Court's non-scrutiny of awards, and its sole right to appoint arbitrators, are maintained, but are augmented by new features such as the ethical guidelines. No doubt many in the arbitration community are keeping a close eye on the progression of the draft rules.

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