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Endnotes

[1] Chinese version: http://wzs.mofcom.gov.cn/article/n/201406/20140600637866.shtml. English version: none.

[2] Chinese version: http://tjtb.mofcom.gov.cn/article/y/au/201403/20140300504604.shtml. English version: none.

[3] Chinese version: http://www.mofcom.gov.cn/aarticle/b/f/200207/20020700031172.html. English version: http://english.mofcom.gov.cn/aarticle/lawsdata/chineselaw/200301/20030100064559.html.

[4] Chinese version: http://www.mofcom.gov.cn/aarticle/b/f/200207/20020700031172.html. English version: http://china.findlaw.cn/gongsifalv/gongsifalvfagui/qt/52309_2.html

EUROPEAN UNION

The LCIA Takes Control: Whether You Want It To Or Not

Jane Wessel and Gordon McAllister

Au début de 2014, la Cour d'arbitrage international de Londres (CAIL) a publié la version définitive de son projet de nouvelles règles d'arbitrage. Par ce projet, la CAIL cherche à aligner ses règles sur les meilleures pratiques actuelles et à s'assurer que l'arbitrage conserve son caractère distinctif. Ces nouvelles règles se classent sous trois rubriques : la célérité, les pouvoirs exprès du tribunal et l'éthique.

Concernant la célérité, les nouvelles règles visent à préserver l'un des aspects les plus attrayants de l'arbitrage : le fait que les arbitrages soient généralement beaucoup plus rapides que les procédures judiciaires. Les nouvelles règles confèrent notamment aux tribunaux le droit d'imposer des dépens pour « non-coopération entraînant des retards déraisonnables », obligent les tribunaux à « minimiser les retards et les dépenses », et prévoient un mécanisme pour la désignation d'arbitres d'urgence. Ensuite, dans le but de faciliter le bon déroulement des arbitrages, les règles élargissent les pouvoirs exprès des tribunaux, les autorisant à modifier les délais ou à exiger des documents d'une partie, à accorder des mesures conservatoires, à nommer leurs propres experts et à consolider des arbitrages. Pour finir, les nouvelles règles introduisent pour la première fois un cadre éthique à l'intention des avocats. Ces lignes directrices vigoureuses représentent une étape importante dans l'avancement de la procédure d'arbitrage.

While many think of arbitration as a modern mechanism for resolving disputes, the reality is quite different. One of the leading arbitral institutions, the London Court of International Arbitration (LCIA), can trace its roots back over more than one hundred and thirty years. The current LCIA Arbitration Rules were introduced in 1998. Some sixteen years later, this has become increasingly problematic, as the rules reflect neither the technological changes nor, more significantly, the considerable developments in arbitral practice in the intervening period. Other institutions have responded to these developments by updating their own arbitration rules – the International Court of Arbitration in 2012 and the Singapore International Arbitration Centre in 2013 being two of the most recent examples.

In early 2014, the LCIA's Drafting Sub-Committee published a "final draft" of proposed new Arbitration Rules.[1] The Draft Rules update the existing rules, bringing them into line with current best-practice, while also including some bolder changes to ensure LCIA arbitral practice retains a distinctive edge. The LCIA opened the proposed draft rules to debate in May 2014, and it is expected that the new rules will become effective in October 2014.

The preamble to the 1998 rules provides that, where the parties have selected LCIA arbitration, the applicable rules are those in effect when the arbitration is commenced. A similar provision exists in the Draft Rules.

The key changes contained in the Draft Rules fall into three categories: (1) expediency, ensuring arbitration is

not subject to avoidable delays; (2) express powers of the tribunal, ensuring the tribunal can facilitate an effective arbitration; and (3) ethics, expressly setting out required ethical standards for counsel in arbitration proceedings. The highlights from each category are discussed below.

1. Expediency

Traditionally, one of the aspects of arbitration that appealed to parties was the speed with which the parties could expect to receive a binding decision, compared with the often slower pace of litigation in national courts. However, recent studies concerning arbitration trends demonstrate that parties to arbitration are concerned about increasing delays in commercial arbitration.[2]

To address the issue of delay, the Draft Rules clearly recognise the role of both the parties and the tribunal to ensure the expeditious conduct of the arbitration.

To discourage the parties from attempting to delay proceedings, the tribunal is expressly permitted to order costs sanctions in cases of "non-co-operation resulting in undue delay."[3] With respect to the responsibility of the tribunal to ensure expediency, prior to appointment, potential arbitrators will now have to declare themselves "ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious conduct of the arbitration."[4] In addition, once constituted, the tribunal will have a general duty 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."[5]

Similar to other institutional rules, the Draft Rules set out a new procedure for the appointment of an emergency arbitrator, which may happen when a party requires relief prior to the arbitral panel being appointed. Typically this would be to prevent the other party from dissipating assets or destroying evidence. The Draft Rules now provide for the appointment of an emergency arbitrator in situations of "exceptional urgency," and contain an accelerated twenty-day time limit within which the arbitrator must decide a claim for emergency relief.[6]

2. Express powers

To facilitate the smooth progress of arbitration, the Draft Rules broaden the express powers of the tribunal. They mark a noticeable shift away from party autonomy towards broader tribunal powers not subject to party veto. This can be seen, for example, in the tribunal's "Additional Powers" which enable it to amend time periods or request documents from a party;[7] in the tribunal's power to award interim and conservatory measures;[8] and in the tribunal's power to appoint its own expert.[9] In each case, these powers are subject only to an obligation to consult with the parties.

The area where this shift will likely have the largest effect is in the consolidation of related arbitrations. In instances where the same parties are involved in multiple arbitrations, where only one tribunal has been appointed, that tribunal no longer requires the consent of the parties to consolidate the arbitrations.[10]

3. Ethics & Conduct

The final and most significant area of change is that to ethics and conduct. Attached to the Draft Rules is an annex setting out "General Guidelines for Parties' Legal Representatives" (the "Guidelines"). This represents the first attempt by a major arbitral institution to establish an ethical framework for counsel.

Commercial arbitration is increasingly common in international contexts. To address the wide range of ethical expectations that exist amongst different jurisdictions, the Guidelines propose a uniform ethical code. They include requirements to avoid "activities intended unfairly to obstruct the arbitration or jeopardise the finality of any award," or making "any false statement to the Arbitral Tribunal."[11]

Along with cautions or reprimands, the Draft Rules empower the tribunal to order "any other measure necessary to maintain the general duties of the Arbitral Tribunal," where the Guidelines have been breached.[12] This appears to provide the tribunal with unfettered discretion to devise sanctions for perceived ethical failings. The breadth of this discretion will doubtless be an issue of concern to all professionals appearing before LCIA tribunals.

Conclusion

The world of commercial arbitration has moved on significantly since the introduction of the 1998 LCIA Arbitration Rules. The Draft Rules represent both an attempt to keep up with these developments, and further, to shape the direction of arbitration for years to come. While the Draft

Rules respond to the parties' concerns about the speed of arbitration, they also seek to shift some of the powers away from the parties, enabling the tribunal to conduct the arbitration without being impeded by parties using guerrilla tactics to cause delay. The proposed Guidelines also represent a bold step forward.

A word of caution for parties who have already entered into an arbitration agreement that incorporates the LCIA rules, but does not specify which version of those rules will apply if the parties proceed to arbitration. While the 1998 version of the rules may have been in effect at the time the agreement was entered into, the 1998 rules will only apply to arbitrations commenced after the effective date of the Draft Rule if the agreement says so explicitly. Where arbitration is commenced after the Draft Rules come into effect without such explicit language, the pre-amble states that the amended rules will govern the arbitration. As such, the proposed changes may have a far wider effect than many parties would contemplate.

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Endnotes

[1] The London Court of International Arbitration, New LCIA Rules 2014 (Revised Draft – 18/02/2014), London, UK: LCIA, online: LCIA <http://www.lcia.org//media/download.aspx?MediaId=336> (accessed on July 12, 2014) (the "Draft Rules").

[2] Queen Mary University of London 2013 International Arbitration Survey, Corporate choices in International Arbitration, Industry Perspectives, online: PWC <http://www.pwc.com/gx/en/arbitration-dispute-resolution/index.jhtml> (accessed on July 14, 2014) at 5.

[3] Draft Rules, *supra* note 1, art 28.4.

[4] *Ibid*, art 5.4.

[5] *Ibid*, art 14.4.

[6] *Ibid*, art 9.

[7] *Ibid*, art 22

[8] *Ibid*, art 25.

[9] *Ibid*, art 21.

[10] *Ibid*, art 22.1

[11] *Ibid*, Annex to Draft Rules.

[12] *Ibid*, art 18.6.