Revised LCIA Arbitration Rules

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The London Court of International Arbitration ("LCIA") has revised its international arbitration rules. The LCIA's revised rules, came into force on 1 October 2014.

The LCIA is one of the oldest and best known international arbitration institutions, with a growing and increasingly international caseload.[1] In updating its rules, which were last revised in 1998, the LCIA joins a number of other major arbitral institutions that have revised their rules in the past few years, including, among many others, the ICC, HKIAC, SIAC, and, most recently, AAA/ICDR.[2]

The LCIA's revised rules generally apply to arbitration proceedings commenced after 1 October 2014, although the provisions concerning Emergency Arbitrators, discussed below, only apply if the arbitration agreement under which the proceedings are commenced was entered into after that date.

The 2014 LCIA Rules leave the overall framework and basic structure of the previous LCIA Rules intact, but almost every provision has been amended to some extent. Some changes are primarily semantic (e.g., the "chairman" of the tribunal is now called "presiding arbitrator") or aim at bringing the rules in line with existing LCIA practice (e.g., referring to the possibility of hearings through video conferencing). Other changes, however, are of considerable practical importance.

Key changes in the LCIA Rules are discussed below. For a more detailed discussion of the 2014 LCIA Rules, and how they will apply in practice, see *Arbitrating under the 2014 LCIA Rules* (Wolters Kluwer, forthcoming), co-authored by Dr. Maxi Scherer, as well as the discussion of the LCIA Rules in "International Commercial Arbitration" in *The Law of Transnational Business Transactions* (Thomson Reuters, forthcoming), co-authored by Steven Finizio. For further information about developments at the LCIA, read a discussion between Steven Finizio and the new Director General of the LCIA, Jacomijn van Haersolte-van Hof, which appears in "Running the Rule," *Legal Business Disputes Yearbook 2014*.

I. NEW FEATURES IN THE 2014 LCIA RULES

The 2014 Rules contain a number of new features:

Emergency Arbitrator and Expedited Formation of Tribunal

Article 9B of the 2014 Rules allows parties to seek "emergency" relief from an Emergency Arbitrator, appointed pending the formation of the arbitral tribunal.[3] In recent years, emergency arbitrator provisions have become a common feature in many institutional arbitration rules.

Unlike most other institutions' rules, the LCIA Rules already contain another tool to provide urgent relief to the parties at the outset of the proceedings, by allowing expedited formation of the arbitral tribunal (now in Article 9A). The 2014 Rules add the Emergency Arbitrator provision, which provides parties requiring urgent relief at the outset of an arbitration two options: the expedited formation of the arbitral tribunal (Article 9A) and/or the appointment of an Emergency Arbitrator (Article 9B). In addition, the parties can also seek interim and conservatory relief from state courts (Article 9.12 and 25.3 preserve the parties' right in this respect).

Under the 2014 Rules, a party may request the appointment of an Emergency Arbitrator with the Request for Arbitration (for the Claimant) or with the Response (for the Respondent) or "any time" prior to the formation of the arbitral tribunal. The LCIA determines whether the requirement of "emergency" is met. If the LCIA is satisfied that the prerequisites are fulfilled, the LCIA Court appoints an Emergency Arbitrator within three days of the receipt of the application or as soon as possible thereafter. The Emergency Arbitrator has wide discretion to conduct the proceedings as he or she deems fit, including in deciding whether to conduct a hearing or to proceed on a documents-only basis. The Emergency Arbitrator is to render a decision no later than 14 days after appointment. The decision may take the form of an award or order, but in any event must be reasoned and is subject to review by the arbitral tribunal, once formed.

As noted above, the new Emergency Arbitrator provisions apply to proceedings based on an arbitration agreement entered into after 1 October 2014 (unless the parties have "opted out" of the Emergency Arbitrator mechanism). For arbitration agreements entered into *before* 1 October 2014, the parties may specifically "opt in" to the emergency arbitrator provisions by mutual agreement.

Complex and Multi-Party Arbitrations

The 2014 LCIA Rules contain several tools-some new, some already existing under the 1998 Rules-to deal with complex, multi-party arbitrations.

The 1998 LCIA Rules already provided for the possibility of joining a third party to the arbitration (even over an objection by one of the parties to the proceedings). That rule remains essentially the same in the 2014 Rules (Article 22.1(viii)).

However, Article 22 also contains a new provision allowing the consolidation of parallel proceedings in two circumstances. First, Article 22.1(ix) provides expressly that, if all the parties have agreed in

writing, the tribunal may order consolidation of multiple arbitration proceedings with the approval of the LCIA Court. While this provision is new in the 2014 LCIA Rules, it confirms existing LCIA practice. Second, and more importantly, the 2014 LCIA Rules permit consolidation even without the parties' agreement if the parallel arbitrations (i) involve the same parties; (ii) are based on the same or compatible arbitration agreements; and (iii) are conducted by the same arbitrators or no arbitral tribunals have been formed yet (Article 22.1(x)). In such cases, and subject to the approval by the LCIA Court, the parallel proceedings can be consolidated into one proceeding.

The consolidation provisions under the 2014 LCIA Rules appear to be more cautious than consolidation provisions found in some other institutions' rules. For instance, the HKIAC rules allow consolidation even if the parties to the parallel proceedings are not identical, which has raised questions as to the enforceability of an award rendered in such consolidated proceedings. The more conservative approach of the 2014 LCIA Rules avoids this concern.

In addition to joinder and consolidation, the 2014 LCIA Rules expressly refer to "cross-claims." Cross-claims include not only counter-claims (i.e. claims brought by the Respondent against the Claimant) but also claims brought between Respondents. According to Article 2.1(iii), the Respondent must identify any possible cross-claims in the Response. While cross-claims were permitted in practice previously, the revised rules expressly recognize and define them.

Conduct of Legal Representatives

The 2014 LCIA Rules also contain several new provisions concerning the parties' legal representatives and their conduct. These provisions have attracted significant attention, and are arguably one of the most controversial additions to the 2014 LCIA Rules. The LCIA is the first major institution that has attempted to address issues of the conduct of party representatives through mandatory provisions in its Rules.

First, under the 2014 LCIA Rules, parties are required to notify the arbitral tribunal, the LCIA Registrar and the other parties of the names of their legal representatives (Articles 18.2-18.3). Any change to the legal representatives after the formation of the arbitral tribunal is subject to the tribunal's approval, and approval may be withheld if the change "could compromise the composition of the arbitral tribunal or the finality of the award (on the grounds of possible conflict or other like impediment)" (Article 18.4). This provision will apply in situations like the one in *Hrvatska Elektroprivreda vs Slovenia* (ICSID Case No ARB/05/24), where the addition of new legal counsel (a barrister from the same chambers as one of the arbitrators) shortly before the final evidentiary hearing raised an issue as to the independence or impartiality of the arbitral tribunal. The 2014 LCIA Rules now specifically grant the tribunal the power to refuse changes to a party's legal representatives in similar circumstances, although this power has been criticized by some as an undue limitation of the parties' freedom to choose their legal representatives.

Second, in an Annex, the 2014 LCIA Rules contain guidelines for "good and equal conduct" by legal

representatives. These guidelines define, in broad terms, the duties of legal representatives, including, e.g., "not to unfairly obstruct the arbitration" or "not knowingly [to] procure or assist in the preparation of or rely upon any false evidence."[4]

The 2014 LCIA Rules provide that it is for each party to ensure that all its legal representatives have agreed to abide by these guidelines (Article 18.5). The tribunal has the power to decide whether a legal representatives has violated the guidelines and to order sanctions.[5] Such sanctions include a written reprimand, a written caution, or "any other measure necessary" for the arbitral tribunal to fulfill its general duties under the Rules, such as the duty to provide for a fair, efficient and expeditious process. It remains to be seen how tribunals will use this authority, and whether they will order measures such as the exclusion of legal representatives who are found to have violated the guidelines.[6]

In addition, the 2014 LCIA Rules now address several other issues related to the conduct of party representatives. Specifically:

- ***Ex parte* communications (Articles 13.4 and 13.5):** The 2014 Rules expressly prohibit parties from initiating any type of unilateral communication relating to the dispute with the arbitral tribunal or any member of the LCIA Court. The 2014 Rules clarify, however, that this prohibition does not prevent arbitrators or arbitrator candidates from consulting with any party in order to obtain their views regarding the selection of the presiding arbitrator, provided that such arbitrator or arbitrator candidate informs the Registrar about such consultation.
- **Interviewing witnesses (Article 20.5):** The 2014 LCIA Rules clarify that it is not improper for any party or its legal representative to interview any potential witness for the purpose of presenting his or her testimony in written or oral form to the arbitral tribunal. However, Article 20.5 states that this possibility is subject to "the mandatory provisions of any applicable law."

II. OTHER NOTABLE REVISIONS

In addition to the new features discussed above, the 2014 LCIA Rules contain further changes which aim at promoting the efficient and speedy conduct of the arbitral proceedings, including:

- **Shortened deadlines (Articles 2, 10.3 and 27.1):** Several procedural stages have been changed, including slightly shorter deadlines for the parties (i) to submit the Response to the Request for Arbitration (reduced from 30 to 28 days); (ii) to file a challenge against an arbitrator (reduced from 15 to 14 days); and to request the correction of an award (reduced from 30 to 28 days).
- **Arbitrator's availability (Articles 5.4 and 14.4(ii)):** Several additions to the 2014 Rules reinforce the arbitrators' duty to devote sufficient time and to conduct arbitrations in an efficient and expeditious manner. For instance, the written declaration which arbitrator candidates must sign before being appointed now includes an express statement that they are ready, willing and able to devote sufficient time, diligence and industry to ensure the

expeditious conduct of the arbitration. Moreover, the list of general duties of the arbitral tribunal now expressly includes the duty to provide an "expeditious" resolution of the dispute.

- **Number of tribunal members (Article 5.8):** The 1998 Rules were unclear as to whether the LCIA Court could appoint an arbitral tribunal composed of more than three arbitrators. Article 5.8 now expressly allows this, although in practice, such possibility should be used only in exceptional circumstances (e.g., disputes with a highly political stake).
- **Electronic submissions and standard forms (Articles 1.2, 1.3, 2.2, 2.3 and 4.3):** The 2014 LCIA Rules have been updated in various sections to acknowledge the use of newer technology for submissions of written pleadings. The Rules now provide that the Request for Arbitration and Response can be submitted to the Registrar in electronic form and the LCIA has published on its website standard forms for the Request and Response, which the parties are free (but not obliged) to use. These standard forms might prove helpful for parties or counsel with limited arbitration experience.
- **Initial case management (Articles 14.1 and 14.2):** The 2014 LCIA Rules provide that the parties and the arbitral tribunal should make contact no later than 21 days after the receipt of the Registrar's notification of the constitution of the tribunal. This initial contact can be in the form of an in-person hearing, telephone conference call, video conference or exchange of correspondence. Moreover, the 2014 LCIA Rules now specifically encourage parties to agree on joint proposals for the conduct of the arbitration for the tribunal to consider.
- **Hearings (Article 19.2):** The 2014 Rules now expressly allow hearings to take place through video or telephone conference (which was done by practice even under the 1998 Rules).
- **Timetable for the final award (Article 15.10):** The 2014 Rules do not provide a specific time limit for the final award, but Article 15.10 now requires the tribunal to render the award "as soon as reasonably possible" following the parties' last submission. The tribunal also must provide a timetable for the making of the award to the parties and Registrar.
- **Allocation of costs (Article 28.3 and 28.4):** The general principle remains that costs should reflect the parties' relative success and failure. However, the 2014 LCIA Rules generally provide more guidance as to the factors to be taken into consideration by the tribunal when assessing and allocating costs. Importantly, under the 2014 Rules, the tribunal is now encouraged to consider the parties' conduct, such as non-cooperative or obstructive behaviour.

Finally, a further set of changes in the 2014 Rules clarifies the legal framework of proceedings conducted under the auspices of the LCIA, including:

- **Default seat (Article 16.2):** Where the parties have not agreed on a seat for the arbitration, the Rules continue to state that the default seat will be London. However, the 2014 Rules provide that once the tribunal is constituted, it can choose a different arbitral seat, taking into account the circumstances and after giving the parties an opportunity to comment. This

reflects the LCIA's aim to expand its international reach and allow for a broader range of arbitral seats.

- **Law applicable to the arbitration agreement (Article 16.4):** The 2014 LCIA Rules clarify that the law applicable to the arbitration agreement shall be the law of the seat of the arbitration.

Overall, the 2014 LCIA Rules contain a number of important changes which parties will need to take into account for any LCIA arbitration commenced after 1 October 2014 and when considering whether to incorporate the LCIA Rules into future arbitration agreements. The 2014 Rules introduce several distinctive features that are unique to the LCIA, but which should allow arbitration under the LCIA Rules to remain flexible and to encourage the efficient resolution of disputes.

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[1] The LCIA was founded in 1892. In 2013 it reported that it received 290 new cases. Less than 20% of the parties in those cases came from the United Kingdom. The LCIA also has created an independent arbitral institution in India (LCIA India) with its own rules, and entered into partnerships in the Dubai International Financial Centre (the DIFC|LCIA), and in Mauritius (the LCIA-MIAC).

[2] *See* WilmerHale Client Alerts: Investment Treaty Arbitration: ICSID Amends Investor-State Arbitration Rules; Revised UNCITRAL Arbitration Rules; Revised ICC Rules of Arbitration.

[3] Pursuant to Article 9B, the Emergency Arbitrator can grant any type of relief that the arbitral tribunal could grant under the arbitration agreement; the LCIA Rules only limit the Emergency Arbitrator's power to decide on issues of arbitration and legal costs.

[4] These guidelines are similar to the IBA Guidelines on Party Representation in International Arbitration, published in 2013.

[5] Authorizing the arbitral tribunal to regulate counsel's conduct has not received universal acceptance. For example, the president of ASA, the Swiss Arbitration Association, recently criticized the approach in the 2014 LCIA Rules, and proposed that the issue would be better suited for a transnational body with the jurisdiction to decide over the implementation of international rules of conduct for counsel. *See* E. Geisinger, *President's Message: Counsel Ethics in International Arbitration - Could One Take Things a Step Further?*, (September, 2014), available at www.arbitration-ch.org/pages/en/asa/news-&-projects/presidents-message/index.html.

[6] While the possibility of excluding counsel was expressly included as a sanction in an earlier draft, it was not retained in the final version of the 2014 LCIA Rules.

Authors

Steven P. Finizio

PARTNER

steven.finizio@wilmerhale.com

+44 (0)20 7872 1073

Professor Dr. Maxi Scherer

SPECIAL COUNSEL

maxi.scherer@wilmerhale.com

+44 (0)20 7872 1067