LCIA
Arbitration and ADR worldwide

70 Fleet Street, London EC4Y 1EU

Telephone: +44 (0)20 7936 7007
Facsimile: +44 (0)20 7936 7008
Email: aw@lcia.org

www.lcia.org

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Adrian Winstanley
Director General and Registrar
LCIA

INTRODUCTION – EVOLUTION IN DISPUTE RESOLUTION

Changes in commercial dispute resolution procedures are, quite properly, driven by the end-user. That is, the international business community.

There is ample evidence that arbitration is, today, the first choice for the binding resolution of commercial disputes in the widest range of contractual relationships and across many jurisdictions, as the extraordinary reach of the New York Convention, currently extending to around 140 jurisdictions, testifies. Litigation, in many jurisdictions, is seen increasingly as too expensive, time-consuming and contentious. Certainly, there has been a significant reduction in recent years in the number of cases brought before the English Commercial Courts, which have responded by greatly simplifying, and improving, case management procedures.

However, even as the use of arbitration has become more and more prevalent, so an ever-increasing number of alternatives are being introduced for use as adjuncts to arbitration.

The traditional underpinnings of private procedures for dispute resolution are neutrality, party autonomy, confidentiality, cost effectiveness and speed and, in the case of arbitration, finality and enforceability, but the range and flexibility of such procedures is now frequently cited as being of equal importance. Thus, many contractual disputes may be amenable to resolution by one or more of the following methods:

early neutral evaluation;
dispute review boards;
expert determination;
mediation;
adjudication;
arbitration;
litigation; and
any combination of these.

In addition to these procedures for resolving disputes once they have arisen, there is also a trend towards dispute avoidance techniques.

Which of the options is to be chosen in the contract documentation will depend upon the desired outcome of the process.

Is a binding decision required, either for enforcement purposes or for insurance purposes? Or is an expert opinion sufficient? Is time likely to be of the essence? To what extent will an investigation be required? In an infrastructure dispute, for example, should the procedures be tracking the project? How many contracting parties and how many separate contracts may be involved?

THE CASE FOR ADMINISTERED ARBITRATION

Given that there are effective arbitration laws in place in the jurisdictions of most, if not all, of the important trading regions of the world, and that there is growing expertise and sophistication on the part of parties and practitioners in this field, it is, perhaps, not surprising that the number of *ad hoc* arbitrations exceeds the number of administered arbitrations, by some considerable margin.

I should, therefore, like to say a few words about why there remains significant added value in opting for administered arbitration, if arbitration is the preferred choice.

Certainty in Drafting

By incorporating established rules into their contract, the parties have the comfort of a comprehensive and proven set of terms and conditions upon which they can rely, regardless of the seat of the arbitration; minimising the scope for uncertainty and the opportunity for delaying or wrecking the process.

Ad hoc clauses are frequently either inadequate or overly complex.

Recommended Clauses

For contracting parties who wish to have future disputes referred to arbitration/mediation under the auspices of the LCIA, the following clauses are recommended. Words/blanks in square brackets should be deleted/completed as appropriate.

...Arbitration only

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Rules of the LCIA, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be [one/three].

The seat, or legal place, of arbitration shall be [city and/or country].

The language to be used in the arbitration shall be [ ].

The governing law of the contract shall be the substantive law of [ ].

...Mediation only

In the event of a dispute arising out of or relating to this contract, including any regarding its existence, validity or termination, the parties shall seek settlement of that dispute by mediation in accordance with the LCIA Mediation Procedure, which Procedure is deemed to be incorporated by reference into this clause.

...Mediation and Arbitration

In the event of a dispute arising out of or relating to this contract, including any regarding its existence, validity or termination, the parties shall first seek settlement of that dispute by mediation in accordance with the LCIA Mediation Procedure, which Procedure is deemed to be incorporated by reference into this clause.

If the dispute is not settled by mediation within [ ] days of the commencement of the mediation, or such further period as the parties shall agree in writing, the dispute referred to and finally resolved by arbitration under the LCIA rules, which Rules are to be incorporated by reference into this clause.

The language to be used in the mediation and in the arbitration shall be [ ].

The governing law of the contract shall be the substantive law of [ ].

In any arbitration commenced pursuant to this clause,

(i) the number of arbitrators shall be [one/three]; and

(ii) the seat, or legal place, of arbitration shall be [city and/or country].

Taking care of the fundamentals...

The incorporation of a set of established rules will automatically and unequivocally take care of the fundamentals of effective arbitral procedures, including

(a) the mechanism and timeframe for the appointment of the tribunal;
(b) determining challenges to arbitrators;
(c) default provisions for the seat and language of the arbitration;
(d) interim and conservatory measures; and
(e) control of the costs of the arbitration.

...without recourse to the Courts

The procedural law applicable at the seat of the arbitration may well also provide for these matters. However, it can be time-consuming and costly to invoke the jurisdiction of national Courts at every procedural impasse. Court intervention may also jeopardise the confidentiality of the process.

Professional administration...

Institutional rules, as opposed to general provisions, like the UNCITRAL Rules, bring with them the additional advantage of a professional administrative service, which an *ad hoc* tribunal, with or without the co-operation of the parties, frequently cannot adequately provide.

...Cost-effective administration

If the concern is that the institution's costs are costs which would not otherwise be incurred, consider the fact that the administration will be more efficiently, and more cost-effectively, done by an institution whose speciality it is.

Ad hoc arbitrations do not run themselves. Someone has to take care of practical matters. If the task is allocated to a member of the arbitrator's own staff; to members of the parties' legal teams; or to the parties themselves, there will be considerable opportunity and financial cost incurred, and rarely will the job be as well done as by the specialists.

Controlled costs

An arbitral institution will also have in place a framework of charges, both for its own administrative services and for its arbitrators.

Administration of Funds

The major institutions will also act as secure and independent fundholders of sums deposited by the parties, disbursing these funds as required and, at all times, accounting to the parties for sums held and disbursed.

Calling for, and administering, advances on the costs of the arbitration, are important parts of the LCIA's role in arbitrations referred under the LCIA Rules.

The LCIA also provides a fundholding service for both UNCITRAL-Rules and ad hoc arbitrations.

Knowledge of Arbitrators

An institution will also have detailed knowledge of, and ready access to, the most eminent and most appropriately qualified arbitrators. Institutions have their finger on the pulse of developments and individual progress within the pool of arbitrators. Institutions also have tried and tested procedures for dealing with the increasingly-contentious issue of conflicts.

Keeping the Process Moving

Whilst it is not the role of an institution to interfere with the conduct of the proceedings as agreed between the parties, directed by the tribunal or prescribed by the rules, institutions do have an important role in monitoring the process, in lending support to parties, counsel and arbitrators, and in giving the occasional judicious nudge if things get stuck.

Even the strongest and most experienced of arbitrators frequently turn to the institutions for guidance and support.

Conversely, even the strongest and most experienced of arbitrators may be prone to lapses of concentration and to taking a longer term view than the parties may wish.

Parties are, quite naturally, hesitant to hurry up their Tribunals, for fear of antagonising. Institutions can often be a useful tool with which to prompt the Tribunal, at one remove, and they will absorb the arbitrators' displeasure.

A good secretariat can also provide a valuable sounding board on procedural matters.

Balance of Relationships

There are at least two sides to every dispute. In many cases, however, there is not a balance of knowledge, experience, expertise and sophistication in the arbitral process, either on the part of the parties or of their attorneys.

Established rules can act effectively to safeguard due process and, thereby, the reputation of the arbitral process and, indeed, the quality and enforceability of awards.

The Imprimatur of the Institution

There is also anecdotal evidence that arbitrations conducted under the auspices of the major institutions may be regarded by parties, and by the Courts, with greater respect and confidence than some *ad hoc* arbitrations.

The institutions see a number of decisions rendered by the Courts in the context of their arbitrations. The mere fact of the institution's involvement is often favourably cited in these decisions.

THE ROLE OF NATIONAL COURTS IN ARBITRATION

Though contracting parties may be referring fewer disputes to national Courts, the Courts retain a crucial role in supporting (though not interfering with) the arbitration process. The parties and the process need a positive, arbitration-friendly legal environment and the Courts of jurisdiction are able to contribute to this in many ways; not least in granting urgent interim relief before the arbitral tribunal is established; in requiring compliance with arbitration agreements in breach of which a party seeks to commence litigation; and in deciding applications to set aside or to enforce arbitral awards.

These, then, are the proper and most significant tasks of the Courts, whilst the established institutions are best placed to deal with most regulatory matters during the course of the arbitral proceedings themselves.

AN INTRODUCTION TO THE LCIA

History

In April 1883, the *Court of Common Council* of the City of London set up a committee to draw up proposals for the establishment of a tribunal for the arbitration of trans-national commercial disputes arising within the ambit of the City.

The initiative came from the London business community, which was becoming increasingly dissatisfied with the ponderous, and often expensive process of litigating through the English Courts.

As *The Law Quarterly Review ("LQR")* was to report at the inauguration of the tribunal a few years later:

> *"This Chamber is to have all the virtues which the law lacks. It is to be expeditious where the law is slow, cheap where the law is costly, simple where the law* is *technical, a peacemaker instead of a stirrer-up of strife."*

What the business community wanted was the adjudication of their disputes by their own; by a tribunal precisely familiar with the area of business in which the dispute had arisen, though, as the same *LQR* report noted, this was not, in fact, a new idea:

"We have the germ of it .... in the old Court of Pied Poudre, in the aldermen arbitrators of the fifteenth century, in the committees of the Stock Exchange, Corn Exchange, Coal Exchange."

In 1884, the committee submitted its plan for a tribunal that would be administered by the City Corporation, with the co-operation of the London Chamber of Commerce. But, though the plan had arisen out of an identified and urgent need, it was to be put on ice pending the passing of the Arbitration Act of 1889.

In April 1891, the scheme was finally adopted and the new tribunal was named *The City of London Chamber of Arbitration*. It was to sit at the Guildhall in the City, under the administrative charge of an arbitration committee made up of members of the London Chamber and of the City Corporation

The Chamber was formally inaugurated in November 1892, in the presence of a large and distinguished gathering of politicians, judges, lawyers and the press.

In April 1903, the tribunal was re-named the *London Court of Arbitration* (LCA) and, two years later, the Court moved from the Guildhall to the nearby premises of the London Chamber of Commerce, whereafter the LCA's administrative structure remained largely unchanged for the next seventy years.

In 1975, the Institute of Arbitrators (later the Chartered Institute) joined the other two administering bodies and the earlier arbitration committee became the *Joint Management Committee*, reduced in size from the original twenty four members to eighteen, six representatives from each of the three organisations and the Director of the Institute became the Registrar of the LCIA.

In 1981 the name of the Court was changed to the *London Court of International Arbitration* (LCIA), better to reflect the nature of its work. In 1985, new and innovative rules were adopted and the LCIA arbitration Court was established, marking the coming of age of the LCIA as an international institution. In 1986, the LCIA became fully independent of the three founding bodies.

Thus, the LCIA is one of the longest-established arbitration institutions. It must be said, however, that it is also one of the most modern and forward-looking. Although based in London, the LCIA is a thoroughly international institution, providing efficient, flexible and impartial administration of arbitration and other ADR proceedings, regardless of location, and under any system of law. Typically, 80% of the parties involved in pending LCIA cases are not of English nationality.

The Organisation

Today, the LCIA operates under a three-tier structure, comprising the Company, the Arbitration Court and the Secretariat.

The Company

The LCIA is a not-for-profit company limited by guarantee. The LCIA Board is concerned with the operation and development of the LCIA's business and with its compliance with applicable company law. The Board is made up largely of prominent London-based arbitration practitioners.

The Board does not have an active role in the administration of dispute resolution procedures, though it does maintain a proper interest in the conduct of the LCIA's administrative function.

The Arbitration Court

The LCIA Court is made up of up to thirty five members, selected to provide and maintain a balance of leading practitioners in commercial arbitration, from the major trading areas of the world and of whom no more than six may be of UK nationality.

The LCIA Court is the final authority for the proper application of the LCIA Rules. Its principal functions are appointing tribunals, determining challenges to arbitrators, and controlling costs.

Although the Court meets regularly in plenary session, most of the functions to be undertaken by it under the LCIA Rules are performed, on its behalf, by the President, by a Vice-President or by a Division of the Court.

The Secretariat

Headed by the Registrar, the LCIA Secretariat is based at the International Dispute Resolution Centre in London and is responsible for the day-to-day administration of all disputes referred to the LCIA.

LCIA case administration is highly flexible. All cases are allocated dedicated computer and hard-copy files and computerised account ledgers. Every case is computer-monitored, but the level of administrative support adapts to the needs and wishes of the parties and the tribunal, and to the circumstances of each case.

The LCIA also offers an extensive administration service that is not confined to the conduct of arbitration under its own rules. It will, for example, and frequently does, act as administrator in UNCITRAL-Rules cases and not merely as appointing authority. It will, and does, also administer scheme-specific dispute resolution provisions in such sectors as major construction and infrastructure projects.

The Parties

Many major international businesses, based in a large number of different jurisdictions, entrust their disputes to the LCIA. Many cases are technically and legally complex and sums in issue can run into US$ billions. Parties come from a very large number of jurisdictions, of both civil law and common law traditions.

In 2005 cases, for example, 22% of the parties were from Western Europe (other than the UK); 21% from the UK; 9% from Eastern Europe; 22% from the Americas; with the remainder coming from various Middle Eastern, Asian and African countries.

Seat of Arbitration

Although the LCIA is headquartered in London, the choice of seat, or legal place, is up to the parties. Parties wishing to provide for a seat elsewhere than London should not, therefore, be deterred from adopting the LCIA rules. Parties adopting, or adapting, the LCIA's recommended clauses will, anyway, specify the seat in their contract. If they do not follow the standard wording, and cannot subsequently agree the seat, Article 16.1 of the LCIA rules provides the safety net of a London default seat, although, if the parties still argue for an alternative seat, the LCIA Court will determine the issue.

Types of Contract in Dispute

The subject matter of contracts in dispute is wide and varied. Contracts out of which cases referred in 2005 arose included agreements for the manufacture of oil storage tanks and oil pipelines, a variety of insurance policies, agreements for the sale and purchase of carbon fuels, terrestrial and satellite telecommunications contracts, contracts for computer software, catering franchise agreements, numerous shareholders and joint venture agreements, construction projects, charterparties, power supply agreements and investment agreements.

Costs of LCIA Arbitration

The LCIA's charges, and the fees charged by the tribunals it appoints, are not based on the sums in issue. The LCIA is of the view that a very substantial monetary claim (and/or counterclaim) does not necessarily mean a technically or legally complex case and that arbitration costs should be based on time actually spent by administrator and arbitrators alike.

The LCIA's registration fee is £1,500, payable on filing the Request for Arbitration. Thereafter, hourly rates are applied both by the LCIA and by its arbitrators, with part of the LCIA's charges calculated by reference to the tribunal's fees. The LCIA sets a range within which the arbitrators it appoints must (other than in exceptional cases) set their fees.

Interest on sums deposited by the parties is credited to the account of each party depositing them at the rate applicable to the amount of the deposit.

Parties may call for financial summaries at any time to keep track of costs. Every payment on account of arbitrators' fees will be notified in advance and accounted for on disbursement.

It is the LCIA Court which, under the Rules, must, determine the costs of each arbitration, according to the following procedure.

The secretariat provides the Court with a financial dossier, which includes a complete financial summary of sums lodged by the parties, sums paid to the arbitrators, outstanding fees and expenses and interest accrued. The dossier also includes a copy of the original confirmation to the parties of the arbitrator's fee rate, copies of the arbitrator's accounts, a copy of the LCIA's own time and disbursements ledger, copies of directions for deposits, and copies of all notices given to the parties of payments made from deposits.

The Court reviews the dossier and, if necessary, calls for any further information, or initiates any investigation, it may require to satisfy itself that the costs are reasonable and are in accordance with the schedule of costs, before notifying the Secretariat of the amount that may be included in the award.

Any dispute regarding administrative charges or the fees and expenses of the tribunal are determined by the LCIA Court.

THE TRIBUNAL

The LCIA Rules

By Article 1.1(e), if the arbitration agreement calls for party nomination, the Claimant should nominate an arbitrator in the Request for Arbitration.

By Article 2.1(d), the Respondent should nominate an arbitrator at the time of the Response.

By Article 2.3, failure by the Respondent to nominate within time (or at all) constitutes a waiver of the opportunity to nominate.

By Article 5.3, there is a presumption in favour of a sole arbitrator unless the parties have agreed in writing otherwise, or unless the LCIA Court decides that the circumstances of the case demand three.

By Article 5.5, the LCIA Court alone is empowered to appoint arbitrators, though always having due regard for any method or criteria for selection agreed by the parties.

By Article 6.1, nationality restrictions apply in the selection of a sole arbitrator or Chair.

By Article 7.1, any purported agreement that the parties themselves, or some third party, shall **appoint** an arbitrator is deemed an agreement for party **nomination**.

By Article 7.2, the LCIA Court may, itself, select an arbitrator, notwithstanding an agreement for party nomination, if any party fails to nominate, or nominates out of time.

By Article 8, multiple parties lose the right to nominate if they cannot agree that they represent two sides to the dispute for the purposes of the formation of the tribunal.

By Article 9, the LCIA Court may abridge the time for the appointment of the tribunal, in cases of *"exceptional urgency"* and may, thus, require a Respondent to nominate its arbitrator within a shorter period than the 30 days prescribed by Article 2.

By Article 11.1, the LCIA Court may refuse to appoint a party-appointed arbitrator if it determines that the nominee is not independent or impartial or is not *"suitable"*.

Procedures

In all cases, whether or not the arbitrators are nominated by the parties, the basic LCIA procedure is as follows, save that steps 4 and 5 are omitted in the case of party nomination:

1. The Secretariat reviews the Request for Arbitration and the accompanying contractual documents, and the Response (if any).
2. A résumé of the case is prepared for the LCIA Court.
3. Key criteria for the qualifications of the arbitrator(s) are established and recorded.
4. The criteria are entered into the LCIA's database of arbitrators, from which an initial list is drawn.
5. If necessary, other institutions are consulted for further recommendations.
6. The résumé, the relevant documentation, and the names and CVs of the potential arbitrators are forwarded to the LCIA Court.
7. The LCIA Court advises which arbitrator(s) the Secretariat should contact (who need not be, but usually will be, those put forward by the Secretariat), to ascertain their availability and willingness to accept appointment.
8. The Secretariat sends the candidate(s) an outline of the dispute.
9. When the candidate(s) indicate their availability, confirm their independence and impartiality, and agree to fee rates within the LCIA's bands, the form of appointment is drafted.
10. The LCIA Court formally appoints the tribunal and the parties are notified.

In addition to the basic procedures, above, the following features of common LCIA practice should be noted.

Given the Secretariat's considerable experience in selecting arbitrators, and personal knowledge of many candidates, there are some cases in which a suitable selection of candidate arbitrators may be put forward to the Court by the Secretariat, without the need to interrogate the database. (See step 4, above.)

Whilst the LCIA is, of course, concerned that each arbitrator should be appropriately qualified as to experience, expertise, language and legal training, it is also mindful of any other criteria specified by the parties in their agreement and/or in the Request and Response.

The LCIA is also concerned to ensure the right balance of experience, qualifications and seniority on a three-member tribunal; in particular, what qualities the Chair should have to complement those of his co-arbitrators. The LCIA is mindful also of any particular national and/or cultural characteristics of the parties to which it should be sensitive, so as to minimise conflict. Similarly, it addresses such issues as whether the arbitrator(s) should have a light touch or a firm touch, bearing in mind, for example, the degree of professionalism it expects of the parties given whom they have chosen to represent them.

Of course, the LCIA also considers the nature of the case (sum in issue, declaratory, technically complex, legally complex, etc); the initial stance of the parties (aggressive, constructive, etc); the identity and known characteristics of the parties' lawyers and, indeed, whether the parties are represented at all.

The LCIA is equally concerned to ensure that all arbitrators are not only suitably qualified and without conflict, but are also available to deal with the case as expeditiously as may be required. This does not mean that an arbitrator must have an immediately clear diary, but some cases place greater demands on an arbitrator's time (in reviewing submissions, dealing with preliminary issues, in hearings etc) earlier in the proceedings than do others.

Finally, the LCIA is always amenable to a joint request by the parties that it provide a list of candidate arbitrators, from which they may endeavour to select the tribunal, whether in straightforward negotiation, or by adopting an UNCITRAL-style list procedure. In such cases,

the selection process described above is carried out in respect of all candidates to be included on the list, so that any candidate(s) selected by the parties have already confirmed their willingness and ability to accept appointment and have been approved for appointment by the LCIA Court.

Thus, the process of selecting arbitrators is by no means mechanical; it is a considered combination of science and art, as to which the LCIA, both in its Secretariat and in its Court is well qualified.

INDEPENDENCE, IMPARTIALITY AND CHALLENGES

Parties to international arbitrations are entitled to expect of the process, a just, well reasoned and enforceable award. To that end, they are entitled to expect their arbitrator to disclose possible conflicts of interest at the outset; to avoid putting himself or herself in the position where conflicts will arise during the course of the proceedings; to conduct the arbitration fairly and mindful of due process; to maintain the confidentiality of the arbitration; and to reach his or her decision in an impartial manner.

They are also entitled to expect some consistency in the standard to be applied by arbitrators when considering the circumstances that may automatically disqualify them from appointment; those that may not automatically disqualify, but should be brought to the parties' attention; and those that do not give rise to the need for disclosure at all.

There is, however, a question as to whether the exhaustively-rehearsed debate about the independence and impartiality of arbitrators had been leading us inexorably towards a body of arbitrators who must isolate themselves from all social, professional and commercial intercourse, to avoid any possible conflict of interest.

The role of the LCIA

The administering institutions have a vital role in the selection and appointment of independent and impartial arbitrators and in determining challenges. Indeed, it is one of the key advantages of administered arbitration that these matters can de dealt with without recourse to state courts and the institutions have established procedures to minimise the risk of bias and to deal with bias swiftly and effectively, if and when it arises.

LCIA procedures

The following provisions of the LCIA Rules are specifically aimed at ensuring independence and impartiality.

Arbitrator not to act as advocate (Article 5.2)

It is an express requirement that an arbitrator shall not act as advocate to any of the parties and shall not advise a party on the merits or outcome of the arbitration.

Statement of Independence (Article 5.3)

Arbitrators are required to complete a statement of independence before appointment, declaring that they are independent of the parties and impartial. The statement may, however, be qualified if there are circumstances that the arbitrator believes may give rise to doubts as to his or her independence or impartiality.

Any doubts as to whether circumstances ought to be disclosed must be resolved in favour of disclosure.

The LCIA's response to a disclosure will depend upon the LCIA Court's assessment of its significance. Thus, a disclosure that is regarded by the institution as one that should have led the arbitrator simply to decline the appointment will lead to the institution rejecting the arbitrator.

A disclosure, considered to be such that it might raise doubts as to the arbitrator's independence or impartiality in the mind of one or more of the parties, will be placed before the parties before confirmation of the appointment, to elicit any objections that might lead the LCIA Court to decline the appointment and thus avoid a more disruptive challenge at a later stage.

A disclosure that is made through an abundance of caution, rather than for any reasonable doubts that it might raise, would not inhibit the appointment, but would, nonetheless, be brought to the parties' attention at the time of notifying the constitution of the tribunal.

Right of veto (Article 11.1)

The institution alone may appoint arbitrators. Where a contract provides for party appointment, that will be treated by the institution as party nomination. The institution has the right, therefore, to veto the appointment of party-nominated arbitrators, where it considers the nominee not to be independent or impartial, or to be in some other way unsuitable.

This is a significant safeguard against bias and inefficiency in the case of party nominations, where the institution's rigorous selection process has not been applied.

Otherwise unsuitable (Article 11.1)

This last ground will cover, typically, a situation where an arbitrator lacks the requisite knowledge of the language of the arbitration, of the applicable laws, or of the subject matter.

Nationality (Article 6)

There is a bar on the appointment of sole arbitrators or chairmen of the same nationality as any of the parties, unless the parties who are not of the same nationality as the proposed appointee all expressly agree in writing.

Multiple parties and party nomination (Article 8)

Where multiple parties deny that they have a commonality of interest when they are required to select one arbitrator on a panel of three, the institution will select the tribunal without regard for any nomination.

Officers of the institution

By the Constitution of the LCIA Court, the President of the Court is only eligible for appointment if all parties agree to nominate him as sole arbitrator or as Chairman. Vice Presidents may only be appointed if nominated by a party, or by the parties jointly.

The President or any Vice Presidents nominated in this way are, of course, excluded from taking part in the appointment of the tribunal to which they have been nominated and from any other function of the Court relating to that arbitration.

Removal of a sitting arbitrator (Article 10)

The removal of an arbitrator, once appointed, may be initiated by fellow arbitrators; by the institution of its own motion; or, most commonly, by a party mounting a formal challenge.

By Article 10.1, co-arbitrators may ask the LCIA Court to revoke the appointment of a colleague, in the event that that colleague refuses to act or is considered to be unfit for his or her responsibilities.

By Article 10.2, the LCIA Court may, of its own motion, remove an arbitrator who it considers to be acting in deliberate violation of the Rules, or failing to act impartially, or failing to avoid unnecessary delay.

However, the removal of an arbitrator at the initiation either of co-arbitrators or of the institution are rare, which is an affirmation of the effectiveness of the rigorous selection process employed by the institution.

The challenge

The procedure to deal with party challenges prescribed by the major institutions runs along similar lines. In the LCIA's case, Article 10.3 provides that an arbitrator may be challenged by a party *"if circumstance exists that give rise to justifiable doubts as to his impartiality or independence"*.

The challenging party must lodge its challenge within 15 days of becoming aware of the circumstances giving rise to it. If, within a further 15 days, the challenged arbitrator steps down or the other party or parties to the arbitration accept(s) the challenge, the arbitrator will automatically be removed, with no inferences being drawn as to the validity or otherwise of the challenge. More usually, however, the challenge will be referred to the LCIA Court for determination.

Under LCIA procedures, challenges referred to the Court for determination are most commonly dealt with by a Division of three Court members, the chairman of the Division being the President or a Vice President.

By Article 29.1 of the LCIA Rules, all decisions of the Court are administrative and no reasons need be given. However, the LCIA Court has adopted the practice of giving reasons in the case of challenges, so as to afford both tribunal and parties the opportunity to understand the standards that the Court is applying.

Consequences of challenge

The adverse consequences of challenges, whether successful or not, are in the delay and cost that they occasion. Even where applicable law contemplates that proceedings will continue whilst a challenge is pending (for example Section 24(3) of the English Act), a tribunal facing a challenge may be inhibited from proceeding, particularly where the challenge comes shortly before or even during oral hearings.

The broader consequences of challenge, whether successful or not, may include damage to the reputation of the arbitrator himself or herself, and damage to the reputation of the arbitral process.

LCIA RULES

The LCIA arbitration rules are universally applicable. They offer a combination of the best features of the civil and common law systems, including in particular:

- maximum flexibility for parties and tribunals to agree on procedural matters
- speed and efficiency in the appointment of arbitrators, including expedited procedures
- means of reducing delays and counteracting delaying tactics
- tribunals' power to decide on their own jurisdiction
- tribunals' power to order security for claims and for costs
- special powers for joinder of third parties
- *"fast-track"* option
- waiver of right of appeal
- costs computed without regard to the amounts in dispute
- stage deposits - parties are not required to pay for the whole arbitration in advance

I highlight below a handful of the LCIA's arbitration rules, which address current and legitimate concerns about expediting procedures, about multiple parties, about the prompt issue of awards, and about costs.

***Prima facie* decisions**

There are two key circumstances in which the LCIA Court is required to make *prima facie* decisions.

The first is where a Request is submitted pursuant to an arbitration agreement in which the reference to the LCIA is not clear; the so called *"pathological clause"*. For example, where the component parts of its name have been transcribed.

The preamble to the LCIA Rules states that *"where any agreement, submission or reference provides in writing and in whatsoever manner for arbitration under the rules of the LCIA or by the Court of the LCIA, the parties shall be taken to have agreed in writing that the arbitration shall be conducted in accordance with the following rules..."*.

As it is one of the most important functions of an institution to appoint a Tribunal as soon as reasonably practicable and, as the rules provide that the Tribunal may rule on its own jurisdiction (Article 23), it is the policy of the LCIA Court to accept jurisdiction, *prima facie*, whenever there is a reasonable prospect that the parties intended to refer their dispute to the LCIA. Where the relevant contractual provision is particularly vague, however, and/or where a Respondent contests the LCIA's jurisdiction at the outset, the LCIA will be careful to advise the Claimant of the possible cost consequences of failure in an application to the Tribunal to confirm that it has jurisdiction.

The second situation relates to applications made pursuant to Article 9 of the LCIA Rules for the expedited formation of the Tribunal (see further below). In such cases, the LCIA is required to decide, *prima facie*, whether the applicant party has made its case for *"exceptional urgency"*, as required by Article 9.2. In this, the Court will consider, among other things, whether the harm alleged by the applicant cannot be repaired by a monetary award. In the majority of such cases to date, the LCIA has erred on the side of caution and has granted some abridgement of the time for the formation of the Tribunal, so as to allow the competent Tribunal to examine the matter more fully, along with the prayer for interim measures that usually accompanies the application for the expedited formation of the Tribunal.

Determination of these matters is generally made by the President or by one of the Vice Presidents of the LCIA Court, acting alone, on behalf of the Court.

Three or More Parties (Article 8)

Article 8 addresses the contentious issue of party nomination of arbitrators in multi-party arbitrations, where parties cannot conveniently be split into two opposing camps.

Though joint Claimants identify themselves as one side of the dispute in submitting a single Request for arbitration and jointly nominating an arbitrator, joint Respondents may deny that they have commonality of interest and object to having jointly to nominate one arbitrator.

In such cases, the LCIA Court will appoint the tribunal without regard to the nomination made by any of the parties.

Expedited Formation of the Tribunal (Article 9)

The process of appointing a tribunal can become protracted, particularly where a Respondent is deliberately obstructive (though also where a Claimant sees tactical advantage in delay). Article 9 takes account of this in providing for expedited appointment in cases of *"exceptional urgency"*.

Any party may apply in writing to the LCIA Court (setting out its case for *"exceptional urgency"*) to abridge or curtail the time limit for appointment, to which the LCIA Court may agree, in its complete discretion (see also above).

Majority Power to Continue Proceedings (Article 12)

If one arbitrator on a panel of three refuses to participate in the deliberations of the tribunal, the remaining two may proceed with the arbitration and make an Award, without the non-participating arbitrator. If, however, the two willing arbitrators do not wish to proceed on their own, then they, or any of the parties, may apply to the LCIA Court for the revocation of the third arbitrator's appointment and for the appointment of a replacement.

Additional Powers of the Tribunal (Article 22)

Article 22 is a useful and extensive check-list of the powers that the Tribunal may exercise for the efficient, expeditious and effective conduct of the proceedings.

Article 22.1(h) is of particular interest. On the application of any party, and after giving the parties the opportunity to state their views, the tribunal may allow a third person to be joined in the arbitration as a party, provided only that the third person and the applying party have consented to the joinder. The tribunal may then go on to make a single final award, or separate awards in respect of all the parties, including the joined third party. The important point here is that there is no requirement for the consent of all parties to the joinder.

Interim and Conservatory Measures (Article 25)

Article 25 lists a range of powers by which the Tribunal may order interim and conservatory measures, including orders for security for costs and for all or part of the amount in dispute.

Article 25.1(c) provides a wide-ranging power for the Tribunal to order on a provisional basis, subject to final determination in an award, any relief which the Tribunal would have power to grant in an award, including a provisional order for the payment of money or the disposition of property as between any parties.

The Award (Article 26)

By Article 26.5, the only matter that will delay the issue of an LCIA Award, once delivered to the LCIA by the tribunal, is the settlement of the costs of the arbitration. As, in the majority of cases, advances on costs are adequate to cover the costs of the arbitration up to and including the issue of an Award, there is rarely any delay in the parties' receiving their Award, once written.

The LCIA Court does not scrutinise the Awards of its tribunals, relying upon the experience and expertise of the tribunals it appoints to render properly drafted and reasoned Awards, and upon Article 27 for any corrections (see below). However, the LCIA Secretariat does routinely review draft Awards, at the request of the Tribunal for obvious typographical and similar errors.

Dissenting Opinions (Articles 26.3 and 26.4)

In the great majority of cases, Tribunals reach unanimous conclusion in their Award and, where dissent arises among the members of the Tribunal, they will invariably work long and hard to try to resolve the points of disagreement in order to achieve unanimity.

For the small number of cases in which such differences cannot be resolved and a dissenting opinion is to be issued, Articles 26.3 and 26.4 of the LCIA Rules set out the requisite procedures, including the requirement that the reason for any omitted signature shall be stated in the Award.

Correction of Awards and additional Awards (Article 27)

Although there is no Court scrutiny under the LCIA Rules, Article 27 gives the parties the opportunity to request the amendment of clerical and computation errors and, significantly, to request an additional Award as to claims or counterclaims presented in the arbitration but not determined in any Award.

On those rare occasions, therefore, where the tribunal may fail to deal with an issue, parties may seek to have that omission rectified.

Arbitration and Legal Costs (Article 28)

The LCIA Court has a vital role in the monitoring and control of the costs of LCIA-administered arbitrations (see also above).

By Article 28.1 of the Rules, the costs of the arbitration (other than the legal or other costs incurred by the parties themselves) are determined by the LCIA Court in accordance with the LCIA schedule of costs and, by Article 28.2, arbitration costs specified in an award must be those determined by the LCIA Court.

Confidentiality (Article 30)

The unwritten (and sometimes contentious) principle of the confidentiality of arbitral proceedings is expressly provided for in the LCIA rules. In agreeing to arbitrate under LCIA rules, the parties undertake to keep the materials introduced during the proceedings, the deliberations of the tribunal, and all Awards, confidential, subject to a legal obligation or right to disclose. LCIA Awards (or parts of Awards) are not published.

For further information about the LCIA, and for full contact co-ordinates, please refer to the LCIA's website www.lcia.org

Adrian Winstanley
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