LCIA

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A view from

the London Court of International Arbitration (LCIA)

PROFILE OF THE MODERN LCIA

International Credentials

The LCIA is on of the longest-established international institutions for commercial dispute resolution. It is also one of the most modern and forward-looking. Its organisation, operation and outlook, and the services it provides are worldwide.

Although based in London, the LCIA is a genuinely international institution, providing efficient, flexible and impartial administration of dispute resolution proceedings for all parties, regardless of their location, and under any system of law.

Its entire operation and outlook is geared to ensuring that the parties may have complete confidence in its international credentials and in its impartiality.

The Organisation

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 arbitrations, or mediations, though it does maintain a proper interest in the conduct of the LCIA's administrative function.

The Arbitration Court

The formation of the LCIA Arbitration Court in 1985 represented a major step towards the internationalisation of the LCIA.

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. UK membership of the LCIA Court is restricted to 25%. Other members are drawn from as far afield as Hungary and Australia, Nigeria and the United States, Tunisia and China.

The LCIA Court is the final authority for the proper application of the LCIA Rules. Its principal functions are the appointment of tribunals, the determination of challenges to arbitrators, and the control of costs. The functions of the LCIA Court are performed, in the name of the LCIA Court, by the President, by a Vice-President or by a Division of the LCIA Court of three or five members, of whom one will be the President or a Vice-President, or in the case of administrative functions, by the Registrar.

It is the LCIA's view is that a carefully-selected and, therefore, specifically suitable tribunal will issue a reasoned, well-drafted award in which the parties may have confidence, without the need for external scrutiny. There is, therefore, no LCIA Court scrutiny of LCIA awards, so parties receive their award promptly, and subject only to the payment of the costs of the arbitration.

The Secretariat

Headed by the Registrar, the LCIA Secretariat is based at the International Dispute Resolution Centre in London. It is responsible for the day-to-day administration of all arbitrations and mediations referred to the LCIA, whether or not under its own rules.

The LCIA has established international Users' Councils around the world, which keep the LCIA informed about developments in other jurisdictions and provide local support and advice for the London Secretariat.

The Users' Councils are the European Council, covering Europe and the Middle East; the North American Council, covering North America and adjacent countries; the Asia-Pacific Council, covering South East Asia and the Pacific Rim; the Pan-African Council, covering the whole of Africa; and the Latin American Council, covering Central and South America and the Caribbean.

LCIA case administration is highly flexible. All cases are allocated dedicated computer and a 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 individual 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.

And the LCIA offers a worldwide service, administering arbitration in many other jurisdictions than the UK.

The Secretariat aims to assist the parties and their counsel promptly and with the minimum of bureaucracy, as and when required, and to ensure that proceedings are not allowed to flounder for want of proper supervision.

The Secretariat also organises all necessary back-up for hearings and meetings, including video and teleconferences, real-time court reporting and simultaneous translation.

The Secretariat receives many requests for information each day. Many of these enquiries do not relate to LCIA cases, either projected or pending. The LCIA provides a free information services in the interest of promoting private dispute resolution generally.

Location

Whilst the LCIA's London base is no bar to its administering arbitrations and mediations anywhere else in the world, London is recognised as one of the world's foremost arbitration venues.

The City of London has almost unparalleled importance as a financial and commercial centre. There is a wealth of arbitration and ADR expertise to be found in London, in firms of solicitors, at the English Bar and in other professional bodies. Its location within Europe adds greatly to the readily accessible pool of expertise.

London is also home to the International Dispute Resolution Centre, which provides hearing rooms and a whole range of technical and administrative backup for hearings, and is where the LCIA Secretariat is based.

The English Arbitration Act, 1996

For parties choosing an English seat for their arbitration, the much acclaimed 1996 English Arbitration Act underwrites the flexibility and party control which are embodied in the LCIA Rules. The 1996 Act supports institutional rules which make arbitration proceedings more user-friendly, less costly and quicker than court actions.

Parties have the further significant reassurance that awards may only be challenged in the English courts on very limited grounds, so ensuring that their intention that the dispute should be finally settled by arbitration is realised. Under the 1996 Act, an arbitral award made in an English seat can only be challenged as of right on the grounds that the tribunal "lacked substantial jurisdiction" or for some "serious irregularity".

Arbitration Casework

The nature and the value of the disputes referred to the LCIA are very substantial, with major international users entrusting the administration of their arbitrations to the LCIA. Many of the cases are technically and legally complex and sums in issue can run into billions of US dollars. Parties come from a very large number of jurisdictions, of both civil law and common law traditions.

The subject matter of contracts in dispute is wide and varied, and includes all aspects of international commerce, including, in particular, telecommunications, insurance, oil and gas exploration, construction, shipping, aviation, pharmaceuticals, IT, finance and banking.

Charges

The LCIA is a not-for-profit organisation and offers full and efficient administrative services at competitive charges.

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 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 (unless otherwise agreed) set their fees.

With the trend towards more expeditious proceedings, this method of charging should result in lower charges from the LCIA as the administering body and from the arbitrators.

The LCIA offers a further benefit, in not only managing the funds deposited for the costs of the arbitration, but also crediting to the parties interest accruing to the deposits they file with the LCIA at the rate applicable to the sum lodged. Any deposits which remain unused are returned.

And the LCIA's accounting system is entirely transparent. Parties may call for financial summaries at any time to keep track of costs. In all events, every payment on account of arbitrators' fees will be notified in advance and accounted for on disbursement. Furthermore, it is the LCIA Court which, under the Rules, must, in due course, determine the costs of each arbitration.

LCIA Mediation

At the end of 1999, the LCIA introduced its own mediation procedure. It now offers both mediation and arbitration services under one roof.

For further information about the LCIA, access our website www.lcia-arbitration.com or contact the secretariat on +44 (0)20 7405 8008.

CHOOSING DISPUTE CLAUSES

Changes in commercial dispute resolution procedures are driven by users. Just a litigation has been marginalised in so many areas of international enterprise, so an ever-increasing number of alternatives are being introduced for use as adjuncts to the currently-preferred binding option of arbitration.

To the traditional underpinnings of private processes of dispute resolution (enforceability, neutrality, confidentiality, cost effectiveness and speed) has been added the increasingly important principle of flexibility.

The following options are commonly used in the widest range of contractual disputes:

early neutral evaluation;
dispute review boards;

expert determination;
mediation;
adjudication;
arbitration; and
any combination of these.

In addition to these procedures for resolving disputes once they have arisen, there is a trend towards dispute avoidance techniques, which, time permitting, may form part of the panel discussions for this session.

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 ADMINISTERED ARBITRATION OPTION

Although arbitration remains the first choice of private adjudication, where a binding resolution is required, within that option, the parties also have the critical choice of whether to opt for administered/institutional arbitration or entirely *ad hoc* procedures.

I should like to take this opportunity to propose that there remains significant added value in opting for administered arbitration, if arbitration is the preferred choice, for the following reasons:

1. 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.

2. 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.

3. ……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 cumbersome, 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.

4. 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.

5. …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 is probably 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.

6. Controlled costs

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

7. 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.

8. Knowledge of Arbitrators

An institution will also have detailed knowledge of, and ready access to, the most eminent and most appropriately qualified arbitrators. The LCIA, for example, has a database of around 700 arbitrators from a wide range of jurisdictions and with diverse areas of expertise, and legal and language skills.

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.

9. 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.

10. Balance of Relationships

There are at least two sides to every dispute. In the majority of cases, 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.

11. The Imprimatur of the Institution

There is also evidence that arbitrations conducted under the auspices of the major institutions are regarded by parties, and by the Courts, with greater respect and confidence than *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.

LCIA RULES

I shall now highlight 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.

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.

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).

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.

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.

For these purposes, the LCIA Court reviews a full summary of the costs accrued during the course of proceedings, together with supporting ledgers and invoices.

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.

Adrian Winstanley
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