What makes for Effective Arbitration? A Case Study of the London Court of International Arbitration Rules

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Abstract

This chapter provides an overview of arbitration conducted pursuant to the arbitration rules of the London Court of International Arbitration (LCIA) and specifically identifies why the arbitrator appointment and challenge mechanisms set out thereunder enable a robust, efficient and transparent arbitral procedure. It also looks to the LCIA's practice of publishing vital information about LCIA arbitration, including in respect of the average duration and costs of an arbitration, and calls for the broader dissemination of such information by all arbitral institutions to inform and benefit users.

1 Introduction

The now London Court of International Arbitration (LCIA), formerly the tribunal of the Court of Common Council of the City of London founded in 1883, renamed the London Court of Arbitration in 1903, and then the London Court of International Arbitration in 1981, is one of the oldest arbitral institutions in the world.¹ The organisation is comprised of a company, the Secretariat and the Court.² The company is not-for-profit and limited by guarantee. Its Board of Governors is primarily concerned with the operation and development of the LCIA's business and compliance with applicable law.³

The Secretariat is responsible for the day-to-day administration of all disputes referred to the LCIA. It is staffed by a team of experts who supervise each

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1 Scherer, Richman and Gerbay 2015, 175.

2 LCIA, 'Organization'.

3 Ibid.

arbitration, providing invaluable assistance to parties and arbitrators in the implementation and enforcement of the Rules of the LCIA (Rules).⁴ The LCIA Court is made up of up to 35 distinguished international arbitration practitioners. It is the final authority for the proper application of the Rules. Its principal functions are appointing tribunals, determining challenges to arbitrators, and controlling costs.⁵

The LCIA's distinguished reputation in the sphere of international arbitral institutions is in large part down to the calibre of individual arbitrators that are appointed by the Court. This chapter sets out to explain the principles and procedures that govern how arbitrators are selected and appointed. It goes on to describe how and why arbitrators may be challenged once appointed. The chapter argues that a transparent challenge procedure, as espoused by the LCIA, serves to enhance users' confidence in LCIA arbitration. Similarly, the LCIA seeks to provide other information pertaining to LCIA arbitration to users, including information regarding the average costs and duration of LCIA arbitration, in order to enable users to identify which arbitral institution best serves their purposes in a given context.

1.1 *The LCIA's Services*

The LCIA, like other international arbitration institutions,⁶ provides a wide range of dispute resolution services to parties to international commercial disputes. These services are fivefold: (i) administering arbitration proceedings conducted pursuant either to the LCIA Arbitration Rules (the Rules) or to the UNCITRAL⁷ Arbitration Rules, (ii) acting as the tribunal appointing authority in UNCITRAL arbitrations, (iii) administering mediation proceedings conducted pursuant to the LCIA Mediation Rules, (iv) providing fundholding services to parties to dispute resolution proceedings, and (v) administering other alternative dispute resolution (ADR) proceedings such as expert determination and adjudication.

Notwithstanding its name, the LCIA provides dispute resolution services to parties regardless of their location and irrespective of the system of law applicable to their dispute. Indeed, the international nature of the LCIA's services is reflected in the fact that, typically, over 80% of parties in pending LCIA

4 Ibid.

5 Ibid.

6 e.g. the International Court of Arbitration of the International Chamber of Commerce (the ICC), the China International Economic and Trade Arbitration Commission, Hong Kong International Arbitration Centre, Singapore International Arbitration Centre.

7 United Nations Commission on International Trade Law.

cases are from outside the United Kingdom.⁸ The LCIA receives around 300 arbitration referrals each year⁹ from parties representing a diverse range of industries. Disputes in the banking and finance and the energy and resources sectors constitute the bulk of arbitrations. The majority of disputes concern loan agreements, service agreements, and sale of goods agreements.¹⁰

In addition to its administrative work relating to cases pending before it, as performed by the LCIA's Secretariat, the LCIA is a key exponent of institutional arbitration and seeks to improve both the quality of, and information about, arbitral institutions worldwide. It has over 2000 members globally, for which it organises an international programme of conferences, seminars and other events of interest to the arbitration and ADR community.¹¹ In addition, the LCIA sponsors a 'Young International Arbitration Group' (YIAG), an association for practitioners, students and younger members of the arbitration community.¹²

1.2 *The LCIA Arbitration Rules: An Overview*

The majority of cases referred to the LCIA are arbitrations referred under the Rules. Developed in consultation with the broader international arbitration community, the Rules are designed to give parties and arbitrators a framework for resolving disputes, while remaining flexible enough to accommodate any idiosyncrasies that might arise in a given dispute. Principal features of the Rules include the efficient appointment of arbitrators, tribunals' power to decide on their own jurisdiction, mechanisms to minimise delays and counteract delaying tactics, interim and conservatory measures, including security for claims and for costs, the joinder of third parties and consolidation of proceedings, waiver of the right of appeal, and the computation of costs without regard to the amounts in dispute.

2 Quality Arbitrators, Quality Arbitration

The LCIA's experience and expertise make it a popular choice of arbitral institution for users worldwide.¹³ A key means of ensuring that it provides robust and efficient dispute resolution arbitration services are the mechanisms for

8 LCIA, 'Casework Report' 2017, 6.

9 Ibid 4.

10 Ibid, 11.

11 LCIA, 'Membership of the LCIA Users' Councils'.

12 LCIA, 'Young International Arbitration Group'.

13 Queen Mary University of London and White & Case, 13.

appointing and challenging arbitrators, as provided in the Rules and examined in greater detail below.

2.1 *The Appointment of Arbitrators*

A central component of an effective and efficient arbitration is the selection, appointment, and supervision of arbitrators, as the quality and conduct of arbitrators will play a pivotal role in ensuring a successful arbitration. In forming a tribunal, there are two principal considerations, namely, (i) who selects the arbitrators, and (ii) how many arbitrators are selected.

2.1.1 Who Selects the Arbitrators?

Parties commonly provide, in their arbitration agreement, that each party will select (or nominate) one arbitrator, with the Chair selected by either the two nominated arbitrators or by the LCIA Court.¹⁴ In the absence of any provision on the parties' right to nominate arbitrators in the arbitration agreement, the LCIA will invite the parties' views. Should the parties subsequently fail to reach agreement on the principle of party-nomination, the arbitrator(s) will be selected by the LCIA Court. While the parties may select (or nominate) arbitrators, the LCIA Court alone is empowered to appoint arbitrators, although in doing so, it will follow any particular selection method agreed by the parties in their arbitration agreement, to the extent doing so does not cause unnecessary delay and expense.¹⁵ Numbers vary from year to year, but on average, the parties select the arbitrators in 50% of cases, with the LCIA making the selection in the remaining 50%.¹⁶

2.1.2 How many Arbitrators are Selected?

By default, under Article 5.8 of the Rules, the LCIA Court will appoint a sole arbitrator:

A sole arbitrator shall be appointed unless the parties have agreed otherwise or if the LCIA Court determines that in the circumstances a three-member tribunal is appropriate (or, exceptionally, more than three).

Accordingly, unless the parties have agreed otherwise or the LCIA Court considers the case requires three (or more) arbitrators, a sole arbitrator shall

¹⁴ LCIA, 'Casework Report' 2017, 13.

¹⁵ See LCIA, Arbitration Rules 2014, art 5.7.

¹⁶ LCIA, 'Casework Report' 2017, 13.

determine the parties' dispute. Statistics show, over time, an even split between the number of tribunals composed of a sole arbitrator and the number of three-member tribunals.¹⁷

2.2 *Arbitrator Selection Factors*

When required to select an arbitrator or arbitrators, the LCIA takes into account the following factors:¹⁸

- any requirements set out in the arbitration agreement (for example a requirement that the arbitrator has experience in a certain industry, such as insurance, or a requirement that a barrister is selected);
- the transaction(s) at issue;
- the nature and circumstances of the dispute;
- the monetary amount or value of the dispute;
- the location and languages of the parties;
- the number of parties; and
- all other factors which it may consider relevant in the circumstances.

In practice, the LCIA Court will also consider the diversity of the arbitral tribunal. In this regard, the LCIA is a major proponent of the Equal Representation in Arbitration (ERA) Pledge,¹⁹ an initiative that seeks to increase, on an equal opportunity basis, the number of women appointed as arbitrators. In 2018, women were appointed in 43% of those cases where the Court selected the arbitrators. However, women were appointed in just 23% of cases overall (which is to say, including those cases where the arbitrators were nominated by the parties or by co-arbitrators). Accordingly, much work remains to be done before the ultimate goal of the ERA Pledge, namely full parity as between the number of male and female arbitrators, is fulfilled. These numbers further show that while the LCIA should obviously support and encourage other stakeholders to 'do their bit', the LCIA has almost exhausted the means available to it to achieve parity itself.

Finally, where parties are of different nationalities, a sole arbitrator or the Chair must not be of the same nationality as any party unless otherwise agreed by all parties.²⁰ This requirement reflects the broad aim of parties to arbitration having their dispute heard in a neutral forum. Regardless of who selects the arbitrator, each candidate must provide to the LCIA Registrar a summary of

¹⁷ Ibid.

¹⁸ LCIA, Arbitration Rules 2014, art 5.9.

¹⁹ See <http://www.arbitrationpledge.com/>.

²⁰ LCIA, Arbitration Rules 2014, art 6.1.

their qualifications and professional positions, giving the LCIA an opportunity to ensure quality even where the LCIA has not itself selected the candidate.²¹

2.3 *The Independence, Impartiality and Availability of Arbitrators*

In order to ensure the independence and impartiality of arbitrators, candidates must provide to the LCIA a written statement identifying any circumstances known to the candidate which are likely to give rise, in the mind of any party, to any justifiable doubts as to the candidate's impartiality or independence.²² When providing such information, a candidate is to consider their relationship with the parties (in other words, their independence), and their relationship with the dispute (or, in other words, their impartiality).

The Rules do not provide explicit guidance on what type of circumstances might give rise to justifiable doubts as to a candidate's impartiality or independence. This allows for the development of norms over time and depending upon the circumstances of each case including, for instance, the jurisdiction and industry sector. As a matter of practice, the LCIA will not select an arbitrator that belongs to the same chambers of barristers as counsel in a case, unless the parties expressly agree that such an appointment be made. Similarly, no tribunal should be composed of two arbitrators from the same chambers of barristers unless the parties agree otherwise.

Upon receipt of the candidate's disclosure of relevant information, the LCIA Court will then determine what, if any, information should be passed on to the parties. The LCIA provides a template 'Statement of Independence and Consent to Appointment' to assist candidates. This template also contains a declaration that the candidate will, once appointed, disclose any new circumstances that could give rise to doubts as to their impartiality and independence.²³

Parties are obliged to notify other parties, the tribunal, and the LCIA if they wish to change (or engage additional) legal representatives, as such a change risks affecting the tribunal's independence and impartiality. The change in counsel will therefore be subject to approval from the tribunal.²⁴ Such approval is only likely to be withheld in exceptional circumstances, in light of the tribunal's obligation to consider the parties' right to choose their legal representatives, the stage of the arbitral proceedings, the efficiency resulting from maintaining the composition of the tribunal, and any likely waste of costs resulting from changing the tribunal.²⁵ Although the rule regarding changes to a

21 LCIA, Arbitration Rules 2014, art 5.4.

22 Ibid.

23 LCIA, Arbitration Rules 2014, art 5.5.

24 LCIA, Arbitration Rules 2014, art 18.4.

25 Ibid.

legal team is directed at the tribunal, its explicit nature provides the LCIA Secretariat with an important and practical tool to monitor its proper application.

Candidates must also provide confirmation in writing that they are 'ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration'.²⁶ To this end, candidates must provide details of their foreseeable workload, in order to encourage them to reflect on their obligations, and to allow the LCIA to make an assessment of the candidate's availability. In some circumstances, the LCIA may pass on availability information to the parties where it deems it relevant.

2.4 *The Remuneration of Arbitrators*

LCIA arbitrators are paid an hourly rate which is presently capped at £450/hour.²⁷ The rate in a given case is determined by the LCIA Court during the appointment process, predominately taking into account the complexity of the dispute in question. An hourly rate ensures that arbitrators dedicate the time necessary to conduct the arbitration up to and including the rendition of a final award, and that parties pay an amount that closely relates to the actual work required. In contrast, it has been observed that where arbitrators are paid in proportion to the sum in dispute (i.e. using an *ad valorem* system), arbitrators may be incentivised to spend less time than is necessary on a matter to obtain a higher effective hourly rate.²⁸

The LCIA Secretariat closely monitors arbitrators' fees and may make enquiries of an arbitrator where the fees appear excessive in light of the circumstances of the case in question. In the event of persistent disagreement between the LCIA Secretariat and the arbitrator, the LCIA Court will determine the fees payable.²⁹

2.5 *Challenges of Arbitrators*

Supporting the robust appointment procedures of arbitrators, the LCIA Rules also provide for a rigorous and transparent challenge mechanism which may lead to the revocation by the LCIA Court of the arbitrator's appointment. The grounds for revocation, set out in Article 10.2 of the Rules, are as follows:

- the arbitrator concerned giving notice of his/her intention to resign;
- the arbitrator falling seriously ill, refusing or becoming unable or unfit to act; or

²⁶ LCIA, Arbitration Rules 2014, art 5.4.

²⁷ LCIA, Schedule of Arbitration Costs 2014, art 2(1).

²⁸ LCIA, 'Comments in Tylney Hall Symposium', May 2018.

²⁹ LCIA, Arbitration Rules 2014, art 28.1.

- circumstances giving rise to justifiable doubts as to the arbitrator's independence or impartiality.³⁰

Article 10.2 of the Rules provides that an arbitrator is 'unfit to act' if they act in deliberate violation of the parties' arbitration agreement, does not act fairly or impartially as between the parties, or does not conduct or participate in the arbitration with reasonable efficiency, diligence or industry. The parties' right to challenge the arbitral tribunal (or a member thereof) is essential to a system which holds tribunals to account, and is the logical corollary of the tribunal's duty, at all times, to act fairly and impartially as between the parties, and to adopt procedures suitable to the circumstances of the case so as to provide a 'fair, efficient and expeditious means for the final resolution of the parties' dispute', in accordance with Article 14.4 of the Rules.

The LCIA took the lead amongst the major arbitral institutions in adopting a policy of issuing reasoned challenge decisions to the parties and the arbitral tribunal.³¹ In a further step designed to provide guidance in relation to acceptable standards of conduct of arbitrators as viewed by the Court applying the Rules, the LCIA has also taken to the periodical publication of anonymised digests of the Court's challenge decisions.³² A review of the decisions reveals that challenges are rare in LCIA arbitrations, and even more rarely succeed. Just six challenges have been introduced each year over the course of the last four years, of which just two were upheld or partially upheld. The rarity of a successful challenge stems directly from the rigorous appointment process—if high quality arbitrators are appointed and there are processes in place to ensure independence and impartiality at the outset, the likelihood of a successful challenge is greatly diminished. Moreover, it is apparent that the challenge process is efficient. From the day a member or division of members of the LCIA Court is appointed to decide the challenge, it takes just 27 days on average to provide a reasoned decision, and over half of all decisions are provided in fewer than 14 days.³³

Finally, it is shown that in the majority of cases, the applicants alleged justifiable doubts as to the arbitrator's independence or impartiality—most often citing a procedural decision that was contrary to their interests as evidence of bias, rather than any conflict of interest on the part of the challenged arbitrator(s).

³⁰ LCIA, Arbitration Rules 2014, art 10.1.

³¹ As of 2015, the ICC has communicated reasons for administrative decisions including a decision made on the challenge of an arbitrator where all the parties to a case so agree. See ICC, 'Communicate Reasons'.

³² See LCIA, 'Challenge Decision Database'.

³³ See LCIA, 'Challenge Decision Database'.

To trigger the challenge mechanism, a party must lodge its challenge within 14 days of the formation of the tribunal or, if later, within 14 days of becoming aware of the grounds giving rise to the challenge.³⁴ Upon receipt of the challenge, the other party or parties will be given the opportunity to provide their comments on the challenge, following which a member or division of members of the LCIA Court will decide the challenge.³⁵ The decision maker(s) may hold a hearing or seek further submissions. The decision shall be written and fully reasoned.³⁶

The law of the seat of the arbitration is typically identified as the law governing the merits of the challenge. As LCIA arbitrations are most often seated in London, the law of England and Wales has commonly been applied to determine challenges. It is notable however, that whereas the Rules refer to 'justifiable doubts as to the arbitrator's independence or impartiality', Section 24(1) of the Arbitration Act 1996 simply refers to 'justifiable doubts as to his impartiality'. In addition to national law, decision makers often refer to the IBA Guidelines on Conflicts of Interest in International Arbitration.³⁷

3 Costs and Duration of LCIA Arbitration

The LCIA embraces initiatives that enhance users' understanding of—and confidence in—arbitration. Thus, in addition to publishing digests of challenge decisions, it took the ground-breaking step, in 2015, of producing a comprehensive analysis of the costs and duration of arbitration conducted under its auspices. In October 2017, a second costs and duration report was published, relating to the 224 cases in respect of which a final award was rendered between 1 January 2013 and 31 December 2016, the findings of which are briefly summarised below.³⁸

Perhaps unsurprisingly, there is an interplay between the quality of the arbitrators and the arbitral procedure on the one hand, and the costs and duration of arbitration, on the other. Specifically, the rigorous procedure by which arbitrators are appointed means a strong calibre of arbitrator, resulting in a minimal number of challenges. Where a challenge is merited, it occurs through a robust but efficient process.

³⁴ LCIA, Arbitration Rules 2014, art 10.3.

³⁵ LCIA, Arbitration Rules 2014, art 10.4.

³⁶ LCIA, Arbitration Rules 2014, art 10.6.

³⁷ Scherer, Richman and Gerbay 2015, 175.

³⁸ LCIA, 'Cost and Duration Report' 2017.

3.1 *Costs*

The average arbitration conducted under the Rules costs US\$ 97,000, comprised of median tribunal fees of US\$ 82,000, and median LCIA administrative charges of just US\$ 17,000.³⁹ Unsurprisingly, a correlation is observed between duration and costs, with longer arbitrations requiring more hours of work by arbitrators and therefore resulting in higher costs. A comparison of the actual costs of LCIA arbitration to the estimates generated by other institutions (which estimates are a function of the sum in dispute, the number of arbitrators and prescribed schedules of costs) reveals that LCIA costs are significantly lower than those of any other leading arbitral institution, with 50% lower tribunal fees and 40% lower administrative charges on average.⁴⁰

3.2 *Duration*

The average arbitration conducted under the Rules lasts 16 months. Within that 16 months, the average time taken for a tribunal to render an award once the parties have completed their submissions is just three months. Naturally, cases with larger sums in disputes—often a proxy for the legal and factual complexity of the case—typically take longer. Conversely, 70% of cases where the sum in dispute is less than US\$ 1 million are resolved within a year. The time taken to render awards is uniform, irrespective of the sum in dispute. In other words, the longer duration of high-value cases is due to the additional time taken by parties to make their submissions, as opposed to the time taken by arbitrators to draft the award. Thus, arbitrators appear to be consistently preforming their core task swiftly and efficiently.

4 *Conclusion*

Today, the global growth in the number of arbitral institutions offering a bespoke set of arbitral rules attests to the increasing demand for institutional, cost-effective and efficient administration of often sensitive disputes. Arbitration users can benefit from this multiplicity, identifying which institution will best serve their interests in a given dispute. It is incumbent upon the institutions to provide data that will allow users to make an informed decision, and it is hoped that other institutions will follow the LCIA's lead in this regard.

Naturally, information regarding arbitrator challenges and costs and duration are amongst a number of factors that users may consider when deciding

³⁹ These sums do not reflect the cost of engaging counsel and experts.

⁴⁰ LCIA, 'Cost and Duration Report' 2017, 20.

between arbitral institutions. The governing law of the dispute, the nationality and location of the parties, the sector of business and the nature and complexity of the dispute may all have a bearing on which arbitral institution is preferable. For instance, the LCIA is widely considered to be the world's premier arbitral institution for disputes in the banking and finance sectors and is unparalleled in its offering when it comes to the administration of disputes governed by English law and/or of arbitrations seated in England and Wales.

Additionally, parties will want to consider the independence of the institution in question from judicial or governmental bodies. (The LCIA, in this regard, offers the advantage of not being bound by either political or financial ties, nor by an overarching organization's goals and constitution.) Ultimately, in an increasingly competitive market, arbitral institutions must make every effort to meet the needs and aspirations of arbitration users. These may include diversity, technology and cyber security, and regulatory requirements. Above all, however, users should expect arbitral institutions to provide a cost-effective and efficient dispute resolution service. All the more reason therefore, to ensure that arbitrator appointment and challenge mechanisms are robust, and the provision of information which enables users to choose the institution that best serves their purposes.

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