

TRAVERS SMITH

New LCIA Rules adopted



The London Court of International Arbitration (**LCIA**) has announced the adoption of its much anticipated new arbitration rules (the **New Rules**), which will come into effect on 1 October 2014.

The New Rules aim to ensure that the LCIA's product remains competitive against a backdrop of continued demand for international arbitration. They include modernisations to improve the handling of disputes, the introduction of an emergency arbitrator mechanism and a new Annex of general conduct guidelines applicable to legal representatives appearing before LCIA tribunals.

The outgoing director general of the LCIA has remarked that the New Rules represent "evolution not revolution". While this is largely the case, they nonetheless depart from the LCIA's previous rules (known as the **1998 Rules**) in several important respects as outlined below.

Speed and Efficiency

The New Rules seek to speed up and streamline the arbitral process in the following main ways:

- Arbitrators are now required, prior to their appointment, to attest not only to their impartiality and independence, but also to their ability to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration. (**Article 5.4**)
- The LCIA Court may revoke an arbitrator's appointment of its own initiative if he or she does not conduct the arbitration with reasonable efficiency, diligence and industry. (**Article 10.2**)
- Tribunals are now required to set aside adequate time for their deliberations, to provide a timetable for delivery of their final award, and to hand down that award as soon as reasonably possible following the parties' final submissions. This change is intended to address criticism that under the 1998 Rules parties would face an indeterminate – and potentially lengthy – wait for awards. It also brings the LCIA Rules closer to those of the ICC, which generally require final awards to be handed down within a set 6 month period. (**Article 15.10**)
- Tribunals now have an express power to take into account the parties' conduct when awarding costs, including in particular any non-cooperation by a party resulting in unnecessary delay and/or expense. Again, this brings the New Rules into line with those of the ICC, which also provide that tribunals may take into account party conduct when awarding costs. (**Article 28.4**)
- Greater emphasis is now placed on submission of key documents by email or on standard electronic forms. (**Articles 1.2, 1.3, 2.2 and 2.3**)
- It is explicitly acknowledged that disputes between the parties as to the sufficiency of the

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Request for Arbitration or the Response shall not impede formation of the tribunal, and that an arbitration may proceed notwithstanding that the Request is incomplete or that the Response is incomplete, late or missing. (**Article 5.1**)

- The timeline for challenging an arbitrator's appointment has been reduced slightly to 14 days from formation of the tribunal or, if later, within 14 days of becoming aware of the grounds for challenge. (**Article 10.3**)
- The tribunal and parties are now encouraged to make contact within 21 days of formation of the tribunal for case management purposes, although there is still no explicit requirement for a Case Management Conference along the lines of that imposed by the ICC. (**Article 14.1**)

Emergency Relief

A much anticipated change is the introduction of a new mechanism by which parties can obtain emergency interim relief prior to formation of the tribunal (unless the parties agree in writing at any time to opt out of that regime). Under new **Article 9B**:

- Prior to the formation of the tribunal proper, a party may "in the case of emergency" apply to the LCIA Court for the appointment within 3 days, or as soon as possible thereafter, of a temporary sole arbitrator.
- The temporary arbitrator must then decide the party's claim for emergency relief as soon as possible, and within no more than 14 days of his or her appointment (such deadline being capable of extension by the LCIA Court in "exceptional circumstances").
- The temporary arbitrator has a broad discretion as to how the emergency proceedings should be conducted, and may decide the application with or without a hearing, and by way of either an order or an award, provided in all cases that reasons are given for his or her decision. It is also expressly stated that he or she has the option to make an order adjourning all or part of the claim for emergency relief to the tribunal proper, once formed.
- The tribunal, once formed, has the power to confirm, vary, discharge or revoke any order or award made by the temporary arbitrator as it sees fit.

Article 9B is intended to bolster parties' ability to seek urgent relief at the outset of a dispute as part of the arbitral process, for example to prevent destruction of evidence or dissipation of assets. In this regard it brings the New Rules into line with the ICC's procedure, which also contains a mechanism for appointment of an emergency arbitrator prior to formation of the tribunal. 9B will sit alongside the parties' pre-existing ability under the 1998 Rules to apply for expedited formation of the arbitral tribunal itself, now found in **Article 9A**. It may however prove to be more popular than the 9A procedure, both because it (i) contains express deadlines by which the various steps in the process must be taken; and (ii) does not require the process of constituting the tribunal itself to be rushed.

It will nonetheless remain the case that parties will be unable to compel compliance with interim measures granted by either temporary arbitrators appointed under 9B or tribunals appointed under 9A without first enforcing those measures in the relevant state court (to the extent that it is possible to do so). Parties may therefore continue to prefer where relevant to seek such measures from state courts directly, to the extent permitted by national law. Indeed, the New Rules expressly state that 9B is not intended to prejudice a party's right to apply to a state court for interim relief, and shall not be treated as an alternative to or substitute for the exercise of any such right.

Complex and Multi-Party Disputes

The New Rules also contain modernisations in relation to complex multi-party disputes:

- The possibility of multiple claimants and defendants, and the potential need for tribunals to provide additional case management directions in such circumstances, are now more expressly recognised. (**Articles 1.5, 2.5 and 15.6**)
- The LCIA Court may now "exceptionally" appoint an arbitral tribunal comprised of more than three arbitrators. (By way of contrast the ICC rules limit the number to three.) In light of the indication that this is an exceptional power, and the challenges which can arise in co-ordinating even a three person tribunal, it is likely to be used sparingly. (**Article 5.8**)
- Tribunals now have an express power to consolidate an arbitration with one or more other arbitrations, provided that all parties to the arbitrations and the LCIA Court consent. (**Article 22.1(ix)**)
- If the other arbitrations are between the same parties and arise under the same or compatible arbitration agreements, a tribunal may in certain circumstances order consolidation with the consent of the LCIA Court only. Prior to tribunals for otherwise

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separate arbitrations being formed, the LCIA Court may also order consolidation of its own initiative, provided that the parties have been given a reasonable opportunity to state their views. (**Articles 22.1(x) and 22.6**).

Legal Representatives

The New Rules also represent a major overhaul of the LCIA's approach to legal representatives. Under new **Article 18**:

- Parties are now required to ensure that their legal representatives appearing by name before the tribunal agree to a set of general guidelines intended to promote good conduct. These general guidelines can be found in a new Annex entitled "General Guidelines for the Parties' Legal Representatives". It remains to be seen whether these guidelines (which are unlikely to have much practical effect on legal representatives from jurisdictions with developed professional conduct rules) will be imitated by other arbitral institutions.
- Should a legal representative fail to comply with the guidelines, tribunals are empowered to reprimand or caution them in writing, or to take "any other measure necessary" for maintenance of the tribunal's general duties.
- Tribunals are further empowered to withhold approval in certain circumstances of any intended change or addition to parties' legal representatives.

As a result, tribunals will in future have much more control over who appears before them.

Law of the arbitration agreement

An arbitration clause is regarded as legally distinct from the main agreement in which it resides. Article 16 of the New Rules now expressly provides that the law of the arbitration agreement shall, unless otherwise agreed by the parties, be the law of the seat of the arbitration. This will not be controversial if the law of the seat is the same as the governing law of the main agreement. Where the two differ, consider specifying expressly which law should govern the arbitration clause. (**Article 16.4**)

It is also notable that while the default seat in the absence of choice by the parties remains London, that default choice will now only apply until the tribunal has been formed, following which it may order that a different seat is more appropriate. (**Article 16.2**)

LCIA model arbitration clause

The effect of the LCIA's model arbitration clause is that LCIA arbitrations must be conducted in accordance with whichever LCIA rules are in effect at the time an arbitration is commenced. As a result, if using that clause, LCIA arbitrations commenced before the New Rules come into effect on 1 October 2014 will continue to be conducted under the 1998 Rules. Arbitrations commenced after 1 October 2014 will, unless the parties have specified otherwise, be conducted under the New Rules. The one exception to this is Article 9B (emergency arbitrator regime), which shall not apply to LCIA arbitrations arising from arbitration agreements concluded prior to 1 October 2014 unless the parties "opt in" to it in writing.

Please contact us if you would like further information about the impact of the New Rules.

Travers Smith LLP
10 Snow Hill
London
EC1A 2AL

T: +44 20 7295 3000
F: +44 20 7295 3500

www.traverssmith.com



Caroline Edwards
Partner, Dispute Resolution
T: +44 (0)20 7295 3322
caroline.edwards@traverssmith.com



Jan-Jaap Baer
Partner, Dispute Resolution
T: +44 (0)20 7295 3449
jan-jaap.baer@traverssmith.com



Hannah Burns
Associate, Dispute Resolution
T: +44 (0)20 7295 3365
hannah.burns@traverssmith.com

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