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An introduction to the work and workings of the LCIA

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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, 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 ROLE OF NATIONAL COURTS IN ARBITRATION

Even if contracting parties are 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.

THE ADMINISTERED ARBITRATION OPTION

Given that there are effective arbitration laws in place in the jurisdictions of most, if not all, 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.

We 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 in 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 to 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 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 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 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 [ ].

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.

The proper and most significant role of the Courts is, therefore, as we have described earlier, whilst the established institutions are best placed to deal with most regulatory matters during the course of the arbitral proceedings themselves.

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.

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

Where acting as fundholder in non-LCIA arbitrations, the Secretariat sets up a dedicated bank account, in sterling, in euros or in US dollars, into which sums directed by the Tribunal are paid by the parties and from which we disburse the costs of the arbitration are disbursed to the order of the Tribunal. An accounting is made periodically to the parties and to the Tribunal for funds lodged and disbursed.

The parties’ funds attract interest at the prevailing HSBC rates, of which the parties are advised, from time to time.

The LCIA’s charges for acting as fundholder are levied at £100 per hour and are logged by the minute. Time spent administering funds is generally quite modest; accrued administrative charges can be advised from time to time.

It is up to the Tribunal when to submit interim accounts for payment, though the LCIA recommends that this should be on a regular basis, so that the level of funds can be monitored and maintained. It is usual practice for parties to be notified of a request for interim payment, and of the amount requested, before fee notes are settled. Subject to that, the LCIA aims to settle accounts within seven to ten days of our receiving them.

The LCIA is also happy to issue directions for deposits on the Tribunal’s instructions. If, however, the Tribunal is to issue those directions, the parties are normally given a date by which any funds should be lodged, so that we may monitor receipts and send any reminders that may be necessary.

If more comprehensive administration is considered desirable, the full range of support services provided in LCIA-Rules arbitrations are available. These include booking suitable venues for hearings, together with any attendant services that may be required, booking accommodation for attendees and assisting with the obtaining of visas for entry into the UK.
Parties interested in this ad hoc fundholding service should contact the Secretariat in the first instance.

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.

The LCIA has a unique database of around 700 arbitrators with the widest range of professional qualifications and expertise (legal and non-legal), guaranteeing a tribunal of the highest calibre. The database is not, however, a closed list and parties are free to nominate arbitrators who are not on the database. Similarly, the LCIA will look outside its own database when necessary.

In all cases, the LCIA Court alone may appoint arbitrators, whether or not the arbitrators are nominated by the parties and in accordance with the following procedure*:

1. The LCIA Secretariat reviews the Request for Arbitration and the accompanying contractual documents.
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 database, 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 to ascertain their availability and willingness to accept appointment.
8. The Registrar sends those candidates 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.

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.

* Steps 4 and 5 are omitted in the case of party-nomination.
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 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.

**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.

**THE LCIA AND ITS ARBITRATION RULES**

**International Credentials**

The LCIA is one 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 thoroughly 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 operation and outlook are 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 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 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 LCIA Court meets regularly in plenary session, most of the functions to be performed 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 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 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.

Casework

Many major international businesses 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.

The subject matter of contracts in dispute is wide and varied, and includes all aspects of international commerce, including telecommunications, insurance, oil and gas exploration, construction, shipping, aviation, pharmaceuticals, shareholders agreements, IT, finance and banking.
Although the LCIA saw a levelling-off in casework referrals in 2004 (the most recent year for which complete statistics are available), the quality, complexity and value of cases ensured a busy time for the Secretariat staff.

And despite the softening in the absolute number of referrals in 2004, our biennial monitoring period showed a 23% increase in arbitrations commenced in 2003/2004, as compared to the previous twenty-four month period. For 2005, on a year to date basis, referrals are up substantially over 2004.

Underlying the versatility, and universal applicability, of arbitration, the types of contracts out of which 2005 referrals have arisen are as wide and varied as ever, from share sale and agreements, to the sale and supply of raw materials; from a variety of joint ventures, construction and infrastructure projects; from engineering drawing and design, to oil exploration; from banking to insurance.

As in the past, the LCIA has continued to undertake a range of administrative roles in non-LCIA typically providing a fundholding facility in otherwise ad hoc cases, or taking an administrative role in arbitrations which had begun under the UNCITRAL Rules.

The LCIA has also acted as appointing authority and/or administrator in a number of construction adjudications and expert determinations.

Sums in issue

In around 33% of the cases filed in 2004, the Claimants sought a combination of unspecified damages and declaratory relief, though the value of these cases generally proved to be very substantial as the proceedings progressed. Of the remaining 67% of referrals in which damages were quantified in the Request, around one third of Claimants filed sums in excess of US$5million. The value of counterclaims typically doubled the stakes.

The parties

There was the usual wide range of nationalities among the parties involved in cases in 2004. Over the last two years there has been a relative decline in the number of UK and North American parties and an increase in the total number coming from broader Europe, and the Middle East.

The Tribunals

In 2004 the LCIA Court made a total of 150 individual appointments of arbitrators, to a total of 83 tribunals, marking a shift in favour of one member Tribunals when compared to 2003. The parties, or the party-nominated arbitrators, nominated 82 of the 150 individuals, sometimes from lists proposed, at the parties’ request, by the LCIA. The LCIA Court selected the remaining 68, in cases in which there was either no express provision for party nomination, or where a party, or parties defaulted.

68% of the 82 arbitrators nominated by the parties, that is 56 individuals, were of UK nationality. 57% off the 68 arbitrators nominated by the court, were of UK nationality. Compared with the previous year, the percentage of the arbitrators nominated by the parties and by the court, who were of English nationality, increased slightly,
principally because of the consistency of the applicability of English law, both
procedural and substantive, to a high proportion of the arbitrations brought to the
LCIA.

Other nationalities appointed during 2004 included American, Australian, Austrian,
Bermudian, Canadian, Danish, Dutch, Egyptian, French, German, Irish, Italian,
Lebanese, Malaysian, New Zealand, Nigerian, Swedish, Swiss and Syrian.

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.

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 (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.

**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

We 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.

**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.
Challenges to arbitrators (Article 10)

There is some evidence of an increase in the number of challenges brought against sitting arbitrators and a suggestion that some of these challenges are made for tactical advantage. It is timely, therefore, that the IBA has promulgated guidelines on conflicts and disclosure, though it is also important to stress that the leading institutions, including the LCIA, the ICC and AAA/ICDR, have their own tried and tested procedures for determining challenges, which may not sit squarely with the IBA guidelines.

At the LCIA, challenges which are not agreed by all parties, or accepted by the arbitrator, are determined by the LCIA Court and it is the practice of the LCIA Court to give reasons for its challenge decisions, although these are administrative in nature and it is not required to do so. This practice has been adopted in light of the importance that the LCIA Court attaches to transparency in these matters.

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.

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

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