The LCIA Announces Adoption of New Arbitration Rules

On July 25, 2014, the London Court of International Arbitration ("LCIA") announced the adoption of the new LCIA Arbitration Rules ("2014 Rules"). The 2014 Rules, which replace the 1998 LCIA Arbitration Rules ("1998 Rules"), will apply to arbitration proceedings instituted on or after October 1, 2014, unless the parties agree otherwise.

The 2014 Rules preserve all of the notable features of LCIA arbitration, including with respect to the role of the LCIA in the appointment of the arbitral tribunal,[1] multi-party proceedings,[2] expedited constitution of the arbitral tribunal in cases of urgency,[3] and the confidentiality of the arbitration proceedings.[4] At the same time, several significant changes have been made, including with respect to (1) the form of and law governing the arbitration agreement, (2) the conduct of the proceedings, and (3) the granting of interim relief prior to constitution of the arbitral tribunal. These changes are summarized below.

1. The Arbitration Agreement

The preamble to the 2014 Rules contains a definition of "*Arbitration Agreement*" which includes "*any agreement, submission or reference howsoever made or evidenced in writing (whether signed or not)*." Thus it is possible under the 2014 Rules to institute LCIA proceedings based on an oral arbitration agreement, provided that such agreement is evidenced by a writing. This provision is subject to party agreement and any applicable mandatory rules to the contrary.

Pursuant to Article 16.4 of the 2014 Rules, the law of the seat of the arbitration (also known as the *lex arbitri* or the curial law) shall govern the arbitration agreement, including any question relating to its substantive validity, the arbitrability of the dispute submitted to arbitration, and the determination of the scope of the agreement. This provision aims to reconcile uncertainty regarding the law governing the arbitration agreement in the absence of a choice-of-law clause applicable specifically to the agreement.

State courts in different jurisdictions have adopted a variety of approaches to determination of the law governing the arbitration agreement. Depending on the circumstances, they have assigned weight to (a) the *lex arbitri*, (b) the law governing the agreement that contains the arbitration clause, and (c) the principle of good faith and the parties' legitimate expectations, without reference to any national system of law. The establishment of a uniform conflict of laws rule applicable to the arbitration agreement could reduce uncertainty in this area,

[1] *Compare* Article 5.7 of the 2014 Rules *with* Article 5.5 of the 1998 Rules.

[2] *Compare* Article 8 of the 2014 Rules *with* Article 8 of the 1998 Rules.

[3] *Compare* Articles 9A and 9C of the 2014 Rules *with* Article 9 of the 1998 Rules.

[4] *Compare* Article 30 of the 2014 Rules *with* Article 30 of the 1998 Rules.

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thereby making the arbitral process more predictable, regardless of which approach a given national court at the seat of the arbitration or at the place of attempted recognition and enforcement might take.

In this regard, Article 16.4 of the 2014 Rules could constitute a welcome contribution in this area. This is particularly the case in those disputes in which *bona fide* disagreements exist as to the intended law governing the arbitration agreement and different outcomes regarding the validity or scope of the agreement might result depending on which law ultimately did govern.

2. The Arbitration Proceedings

Consistent with Article 16.3 of the 1998 Rules and the generally accepted territoriality principle, Article 16.4 of the 2014 Rules provides that the law applicable to the arbitration proceeding shall be the law of the seat. Among other things, the law of the seat determines which state courts are competent to undertake supervisory, conservatory or other interim measures at the seat in relation to the arbitration proceedings. Unless the parties agree otherwise, the default seat of any LCIA arbitration "*shall be London*," but while the 1998 Rules provide that the LCIA Court will take a final decision concerning the seat, notably the 2014 Rules foresee that the arbitral tribunal will take such decision.[5] If the parties reach agreement as to the seat of the arbitration after constitution of the arbitral tribunal, such agreement will be subject to the tribunal's consent.[6]

In view of the importance of the seat, under the same territoriality principle, as dictating the nationality of any award and thus the court of appropriate jurisdiction for any petition to set aside the award, Article 16.1 of the 2014 Rules is indeed noteworthy. Whereas certain other leading institutional rules of international arbitration such as the recently revised 2012 International Chamber of Commerce Rules ("ICC Rules," Article 18.1) provide that absent party agreement the institution will fix the seat, the LCIA has shifted the final say in this regard to the tribunal. This shift in the case of the LCIA is notable in two respects. On the one hand, it reinforces the principle of party autonomy by affording the parties the opportunity still to agree on the seat even after the arbitral tribunal has been constituted, also as a function of the perceived "fit" between tribunal members and the nationality of the seat. On the other hand, the new rule enables the arbitral tribunal to fix a different seat than the parties have agreed after constitution of the tribunal, notwithstanding the same principle of party autonomy.

In addition, the 2014 Rules introduce several amendments to the rules governing the conduct of the proceedings, including with respect to the following matters:

Request for Arbitration. The Claimant is not required to pay the LCIA filing fee prior to institution of the arbitration, but rather merely to state in its Request that such fee "*is being paid*."[7] This provision may be seen as enabling commencement of an LCIA arbitration effectively for all purposes, including timely interruption of any statute of limitations or

[5] Article 16.1 of the 2014 Rules.

[6] Article 16.1 of the 2014 Rules.

[7] Article 1.1(vi) of the 2014 Rules; Article 1.1(f) of the 1998 Rules.

prescription period, even in those cases where for logistical or other reasons simultaneous payment of the filing fee is not possible. The 2014 Rules also contemplate that the Claimant may file its Request and accompanying exhibits with the LCIA Registrar in "*electronic form (as e-mail attachments)*,"[8] including by using a "*standard electronic form*" that will be made "*available on-line from the LCIA's website*."[9] This too promises to facilitate even further the effective commencement of an LCIA arbitration, particularly in international cases.

Response to the Request for Arbitration. Pursuant to Article 2.1(ii) of the 2014 Rules, in its Answer the Respondent must "*confirm or deny*" all or part of the claims set forth in the Request, "*including the Claimant's invocation of the Arbitration Agreement in support of its claim*." In terms of possible waiver of jurisdictional objections, prudence may therefore dictate that a respondent who contemplates possibly making a jurisdictional objection should at least expressly reserve, in the Response, its right to make such an objection more fully in the subsequent proceedings, and normally at the latest in its fuller Statement of Defence, consistent with the express provision to this effect in Article 23.3 of the 2014 Rules.

Time limits. Consistent with the general trend toward more express provisions respecting time and cost efficiency, the 30-day time limits set forth in the 1998 Rules have been reduced to 28 days. This new time limit applies, in particular, to the filing of the Respondent's Response. While this difference may be considered modest, it can be seen as serving as an additional basis for contending that the 2014 Rules are meant overall to provide for greater speed.

Constitution of the tribunal. Pursuant to Article 5.1 of the 2014 Rules, no dispute concerning the "*sufficiency of the Request or the Response*" impedes the constitution of the tribunal. In this respect, the 2014 Rules, like the prior 1998 Rules, do not provide for any kind of "*prima facie*" assessment by the institution as to whether it is satisfied that an arbitration agreement under the Rules may exist; this stands in contrast to the 1998 ICC Rules and, arguably in reinforced form, the 2012 ICC Rules (Article 6.4). Consistent with the practice under certain other administered arbitration rules, all prospective LCIA arbitrators must file a statement of acceptance and independence, including to the effect that the prospective arbitrator is "*ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious conduct of the arbitration*."[10] Lastly, certain provisions concerning appointment of arbitrators that were previously included in the constitution of the LCIA are now included in the Rules themselves.[11]

Calendar of the proceedings. Again, consistent with the general trend to include express provisions respecting increased speed and efficiency in arbitration, Article 15.10 of the 2014 Rules provides that the tribunal "*shall seek to make its final award as soon as reasonably possible following the last submission from the parties (whether made orally or in writing)*." To that effect, the tribunal is required to "*set aside adequate time for deliberations as soon as*

[8] Article 1.2 of the 2014 Rules.

[9] Article 1.3 of the 2014 Rules.

[10] Article 5.4 of the 2014 Rules.

[11] *Compare* Article 5(10) of the 2014 Rule *with* Section F of the Constitution of the LCIA, setting forth the conditions for the appointment of the president and vice-president of the LCIA as arbitrators.

possible after that last submission," and "*notify the parties of the time it has set aside*." In this regard, it is notable that unlike certain other institutional rules such as the ICC Rules (Article 27) or the Rules of the German Institution of Arbitration ("DIS," Article 31), the LCIA Rules do not expressly foresee a formal declaration by the arbitral tribunal of the "closing" of the proceedings with respect to the matters to be decided in the award. Depending on the case, it may therefore make sense to clarify in an LCIA arbitration that after the "*last submission*" for purposes of Article 15.10 no further submissions may be made, or evidence produced, with respect to the matters to be decided in the award unless requested or authorized by the arbitral tribunal itself.

Legal representation. Article 18.3 of the 2014 Rules provides that any changes in, or additions to, the parties' legal representatives should be notified to all other parties, the tribunal and the LCIA Registrar. Any such changes are conditional upon the tribunal's approval, which may be withheld if the change "*compromise*[s] *the composition of the Arbitral Tribunal or the finality of the award (on the grounds of possible conflict or other like impediment)*."[12] This notable provision, which does not have a counterpart in most other leading institutional rules, may be seen as enabling the tribunal to address potential conflicts issues at as early a stage as possible, and not only when new counsel makes a formal first appearance in the proceedings. It may also be seen as encouraging parties who contemplate changes in or additions to their counsel to consider them earlier and more specifically with respect to their possible effect on the composition of the tribunal and the relevance of that composition to enforceability of the award.

Parties' conduct and apportionment of costs. The 2014 Rules contain an Annex prescribing "*general guidelines*" for the conduct of the parties' legal representatives in the arbitration, which are intended to "*promote the good and equal conduct of the parties' legal representatives appearing by name within the arbitration*." Pursuant to Article 18.5 of the 2014 Rules, each party is required to ensure that its legal representatives have agreed to comply with these guidelines, which broadly provide that such representatives must not:

(i) engage in activities intended unfairly to obstruct the arbitration or to jeopardize the finality of the award;

(ii) knowingly make any false statements to the tribunal or the LCIA Court;

(iii) knowingly procure or assist in the preparation of or rely upon any false evidence presented to the tribunal or the LCIA Court;

(iv) knowingly conceal or assist in the concealment of any document which is ordered to be produced by the tribunal; and

(v) initiate unilateral contact with a member of the tribunal or the LCIA Court without written disclosure to all the parties, the tribunal and (where appropriate) the LCIA Registrar.

A breach of these standards would typically be considered by the tribunal when apportioning costs between the parties in the final award pursuant to Article 28.4 of the 2014

[12] Article 18.4 of the 2014 Rules.

Rules. It could also give rise to adverse inferences against the non-compliant party (for instance, in the context of a failure or refusal to produce documents or to make available any evidence, including witness testimony, ordered to be produced).

Notably, Article 18.6 of the 2014 Rules expressly provides that in the event of a violation of the general guidelines the tribunal may order one or more sanctions against the legal representative, including a "*written reprimand*," a "*written caution*" and any other measure necessary to fulfill the tribunal's own general duties to act fairly and impartially, to give each party a reasonable opportunity to be heard, and to adopt procedures "*suitable to the circumstances of the arbitration*."[13] In this regard, the 2014 Rules may be seen as taking even further, through an express recitation of rights and duties of the parties' legal representatives and the tribunal members, the trend toward codification of a duty of good faith in arbitration raised in, e.g., the 2010 International Bar Association Rules on the Taking of Evidence in International Arbitration (Preamble No. 3, Article 9.7).

3. <u>The Emergency Arbitrator</u>

The 2014 Rules include provisions for the appointment of an emergency arbitrator to "*conduct emergency proceedings pending the formation or the expedited formation of the Arbitral Tribunal*" for the adoption of "*emergency relief*," "*unless otherwise agreed by the parties*."[14] The increasing inclusion of emergency arbitrator provisions in institutional arbitration rules reflects the potential importance of interim emergency relief requests in arbitration generally and an increasing dissatisfaction of some arbitration users with the ability to obtain such relief through the state courts, whether at the seat or elsewhere.[15] It may also be seen as a growing acknowledgment on the part of arbitral institutions that there can be a significant "vacuum of authority" between the time of commencement of the arbitration and the subsequent constitution of the tribunal, and that some form of emergency procedure is therefore required to fill that gap.

The main features of the LCIA emergency arbitrator provisions set forth in the 2014 Rules are similar to those of other arbitral institutions, and can be summarized as follows:

(i) the party seeking emergency relief must file an application for the appointment of an emergency arbitrator with the LCIA Registrar. A copy of the application must be provided to all other parties to the arbitration; [16]

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[13] Article 14.4(i) and (ii) of the 2014 Rules.

[14] Article 9.4 of the 2014 Rules. The rules on the emergency arbitrator are intended to bring the LCIA Rules closer to the rules of arbitration of competing institutions, including: (i) the Stockholm Chamber of Commerce ("SCC") (Appendix II of the 2010 SCC Rules); (ii) the Singapore International Arbitration Centre ("SIAC") (Schedule 1 of each of the 2010 and 2013 SIAC Rules); and (iii) the ICC Rules (Appendix V of the 2012 ICC Rules).

[15] Pursuant to Article 9.12 of the 2014 Rules, the emergency arbitrator's provisions would not affect a party's right to seek interim measures from any court of competent jurisdiction in appropriate circumstances prior to the constitution of the tribunal.

[16] Article 9.5 of the 2014 Rules.

(ii) the LCIA Court shall determine the application "*as soon as possible in the circumstances*" and, if the application is granted, appoint an emergency arbitrator "*within three days of the Registrar's receipt of the application (or as soon as possible thereafter)*;"[17]

(iii) consistent with the nature of the emergency proceedings, the emergency arbitrator may conduct the proceedings in any manner that is deemed appropriate, affording each party an opportunity to be consulted on the claim for emergency relief, but without being required to hold a hearing;[18]

(iv) the emergency arbitrator "*shall decide*" the claim for emergency relief "*as soon as possible, but no later than 14 days following*" the emergency arbitrator's appointment;[19] and

(v) the claim for emergency relief may be decided by "*order or award*." In the event the claim is decided in an award, it "*shall*" "*take effect as an award under Article 26.8*," and thus "*shall be final and binding*" (subject to variation, discharge, or revocation by the tribunal) and the parties "*undertake to carry out*" it "*immediately and without delay*."[20]

Importantly, pursuant to Article 9.14 of the 2014 LCIA Rules parties may "opt in" or "opt out" of the new emergency arbitrator provisions, and thus careful attention to this option is called for. Thus the provisions shall not apply if the parties have concluded their LCIA arbitration agreement before October 1, 2014 and have not agreed in writing to "opt in" to the provisions. The provisions shall also not apply if the parties have agreed in writing at any time to "opt out" of them. Accordingly, recitals in arbitration agreements such as "agree to the LCIA Rules as in effect on the date of signing of this contract" or "agree to the LCIA Rules as in effect on the date of commencement of arbitration" are to be treated with circumspection by parties who wish, or do not wish, as the case may be to avail themselves of the new emergency arbitrator provisions.

Furthermore, the provision that emergency relief could be granted in the form of an award is a considerable improvement relative to similar emergency proceedings under other rules and should make it comparatively easier to enforce interim measures. At the same time, the enforcement of an award for emergency relief is unlikely to fall within the scope of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, and would thus depend on the law of the place where enforcement is sought.

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[17] Article 9.6 of the 2014 Rules. Pursuant to the ICC Rules, an emergency arbitrator will be appointed "*normally within two days*."

[18] Article 9.7 of the 2014 Rules.

[19] Article 9.8 of the 2014 Rules.

[20] Article 9.9 of the 2014 Rules.

Overall, the 2014 LCIA Rules may be seen as a welcome and effective improvement of arbitration under the rules of this important institution, and as being largely consistent with trends toward greater time and cost efficiency reflected in the recent revisions of other leading institutional rules. At the same time, as described above, the 2014 LCIA Rules have seen fit to go in slightly new directions or slightly farther than other leading rules, and in this respect in particular they deserve careful attention and their implementation will be watched with great interest. Whether or not in connection with a choice of a London seat or English substantive law, they are an important contribution to international arbitration for experienced and first-time users alike.

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If you have any questions, please feel free to contact any of our partners and counsel listed under Litigation and Arbitration located in the Practices section of our website http://www.clearygottlieb.com, or any of your regular contacts at the firm.

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