CLIFFORD
CHANCE

Briefing note February 2014

Draft LCIA Rules 2014 released

The Drafting Committee of the LCIA Court has circulated a "final draft" of the much anticipated new Arbitration Rules (Draft Rules) for consideration by the LCIA Court at the LCIA's Tylney Hall symposium on 9 May 2014. The new LCIA Rules are likely to be finalised and promulgated soon after. The Draft Rules have also been made publicly available on the LCIA's website so that the arbitration community and users have an opportunity to consider the likely changes.

The proposed amendments are the result of a significant review of the 1998 LCIA Rules. Many of these amendments serve to bring the LCIA Rules fully up-to-date with current arbitration practice and procedure.

New to the LCIA, the Draft Rules establish an emergency arbitrator mechanism and prescribe enforceable guidelines for the parties' legal representatives (with the tribunal having power to sanction counsel). However, these two proposals continue to be debated.

This update highlights a few of the most significant draft amendments. References to Articles are to Articles in the Draft Rules unless otherwise stated.

Speed and procedural progress

In general, the timings in the Draft Rules have been slightly shortened. Periods of time which previously ran for 30 days now run for 28 days. For example, under Article 2.1, the Response is due after 28 days, not 30 days as was previously the case). The Draft Rules also prevent parties from delaying the formation of the tribunal; any deficiencies in either the Request or the Response will not impede the formation of the tribunal by the LCIA Court (Article 5.1).

That said, the LCIA Court now has 35 days (not 30 days) in which to constitute the tribunal.

Under the Draft Rules, the declarations to be provided by arbitral candidates now include a statement as to whether the candidate is "ready, willing and able to devote time, diligence and industry to ensure the expeditious conduct of the arbitration" (Article 5.4).

Once constituted, Article 14.1 now provides that the tribunal and the parties should meet to discuss the conduct of the proceedings no later than 21 days after notification that the tribunal has been constituted. As mentioned below parties may face consequences for behaviour which causes delay or expense (Article 28.4).

A new provision provides time parameters for the delivery of the final award. After the final submissions, the arbitral tribunal should render the award "as soon as reasonably possible". The arbitral tribunal (if not a sole arbitrator) should set and notify the

Key changes

Broadly speaking, the key amendments proposed in the Draft Rules address a number of common issues and themes:

- Speed and procedural progress.
- Default seat and the arbitration agreement.
- Formation of the arbitral tribunal.
- Emergency relief and early formation of the arbitral tribunal.
- Augmenting and clarifying the powers of the arbitral tribunal.
- Conduct of legal representatives and parties.
- Modernisation and clarification of the 1998 LCIA Rules.

parties and the Registrar of a timetable for this purpose. This should include time to be set aside for deliberations between the tribunal members which should take place as soon as possible (Article 15.10).

Formation of the tribunal

The Draft Rules now allow the LCIA Court to appoint a tribunal of more than three arbitrators in exceptional circumstances (Article 5.8). Unless the parties agree otherwise, no party can nominate a sole arbitrator or a chairman unilaterally (Article 7.3).

Emergency arbitrator and urgent formation of tribunal

Many arbitration institutions have recently amended their rules to include a mechanism whereby (before the formation of the arbitral tribunal) the parties may apply to the institution for the urgent appointment of an arbitrator.

Article 9B of the Draft Rules also proposes such a mechanism. This is available in exceptional circumstances, on a temporary basis. The Emergency Arbitrator (who will be appointed within 3 days of a party's request and will always be a sole arbitrator) has 20 days to make a decision. No hearing is necessary. The decision may take the form of an order or award, but in all cases, reasons should be given. The decision lapses 21 days after notification of the appointment of the arbitral tribunal unless confirmed by the tribunal. The costs of the process are characterised as "arbitration costs" and are paid out of the deposits by the parties. Which party should ultimately bear these costs is to be decided by the arbitral tribunal.

This mechanism is proposed as an alternative to the existing ability to apply for the expedited formation of the tribunal (now referred to as "emergency" or "urgent" formation under Article 9A of the Draft Rules). Such emergency formation provisions are fairly rare amongst other major institutional rules. It remains to be seen whether or not there is a need for both these mechanisms within the LCIA Rules. This will, no doubt, be a topic for the LCIA Court's discussions in May 2014. The emergency arbitrator and formation provisions are separate from the existing provisions for expedited appointment of a replacement arbitrator, which now appear as Article 9C.

Default seat and the arbitration agreement

Under Article 16 of the LCIA Rules, the parties may agree the seat of arbitration. There has been no change to the seat of the arbitration in the absence of agreement by the parties, which remains London, England. However, Article 16.2 has been amended slightly to clarify that, in the absence of choice, the default seat will apply up to and until the formation of the tribunal. Thereafter, the arbitral tribunal (and no longer the LCIA Court) may order that a different seat of arbitration is more appropriate, after seeking written input from the parties.

There is an interesting set of amendments concerning the scope of and formalities relating to the arbitration agreement:

- Under the Preamble to the Draft Rules, "Arbitration Agreement" is now a defined term that incorporates both the arbitration agreement itself and the LCIA Rules (including its annex and the schedule of costs). This provision places the parties' agreement at the heart of the Rules.
- A new provision seeks to protect the validity of the arbitration agreement. Article 32.3 of the Draft Rules provides that, where part of the arbitration agreement is struck down by a court or a tribunal for invalidity (for example), this does not automatically affect the validity of any award, arbitrator appointment or any other part of the arbitration agreement.
- Lastly and importantly, Article 16.4 now expressly provides that, unless the parties provide otherwise, the law of the arbitration agreement (as well as the law of the arbitration) shall be that of the "seat" of the arbitration. This is significant, as the law of the arbitration agreement (in the absence of the parties' express choice) continues to be a matter of debate, as demonstrated by recent English cases, such as *Sulamerica CIA Nacional de Seguros SA and others v Enesa Engenharia SA and others* [2012] EWCA Civ 6, *Arsanovia Ltd and others v Cruz City 1 Mauritius Holdings [2012] EWHC 3702 (Comm),)* and *Habas Sinai VE Tibbi Gazlar Isthisal Endustri A.S. v Sometal S.A.L*. [2010] EWHC 29 (Comm).

Arbitral tribunal powers

The tribunal's express powers have been augmented under the Draft Rules:

- Notably, there is now express provision that the tribunal may order consolidation of arbitration where the parties have agreed to this in writing and with the approval of the LCIA Court (Article 22.1(ix)). Further, where there are multiple arbitrations involving the same parties and only one tribunal has been appointed (or the tribunal appointed in the different arbitration is

the same), the tribunal can order consolidation. The parties' agreement is not necessary. That said, the tribunal should still seek their views and the agreement of the LCIA Court is still required (Article 22.1(x)).

- Once the arbitral tribunal has been constituted, interim measures that may be available from a court may only be sought in exceptional cases with the tribunal's authorisation (Article 25.3).

Conversely, other powers have been narrowed slightly. The power of the majority to continue the arbitration (and render an award) despite the absence of the minority member(s) may now only be exercised with the LCIA Court's approval (Article 12.1). Other powers have been clarified. For example, Article 26.1 of the Draft Rules provides that the arbitral tribunal may make several different awards during the course of the arbitration, each of which shall take effect as an "award".

Conduct of legal representatives and parties

Legal representatives

The Draft Rules contain a number of new provisions and amendments relating to the conduct of legal representatives. Under Article 18.3 of the Draft Rules, parties must now notify all other parties, the arbitral tribunal and the Registrar if there are any changes or additions to the parties' legal representatives and such changes are conditional upon the tribunal's approval. Article 18.4 makes clear that approval may be withheld if the change or addition compromises the composition of the tribunal or the finality of the award. These changes grant the tribunal some control over who may appear before it and seek to minimise the potential for certain conflict issues arising during the course of the arbitration (as occurred in the case of *Hrvatska Elektroprivreda DD v The Republic of Slovenia* (ICSID Case No ARB/05/24)).

The Draft Rules contain a novel Annex which comprises of general conduct guidelines that apply to all legal representatives appearing by name before the tribunal. It makes clear that legal representatives should refrain from mounting unmeritorious and unfounded challenges (paragraph 2, Annex). The other provisions of the draft Annex seek to create a baseline for the conduct of legal representatives:

- No false statements to the tribunal.
- No procurement of false evidence.
- No concealment of documents ordered by the tribunal.
- No unilateral contact with the tribunal without disclosure to all parties, the tribunal and the Registrar.

These guidelines are subject to the mandatory laws and conduct rules applicable to each legal representative and to the legal representatives' primary duty to the parties. Parties must ensure that their legal representatives have agreed to comply with the Annex (in the new Article 18.5 of the Draft Rules). Significantly, the tribunal has the express power to rule on whether or not the guidelines have been violated, and has a number of express sanctions that may be imposed directly on the legal representative for any such violation (Article 18.6).

The current scope of these sanctions remains open for further discussion by the LCIA Court. In particular, whether the tribunal should in these circumstances be able to refer the legal representative to his regulatory body is not yet finalised.

Party conduct

There are also several amendments aimed at better managing party conduct. For example:

- If a party wishes to challenge an arbitrator, it must do so within 14 days of the formation of the tribunal or the time at which the party becomes aware of the ground giving rise to the challenge. Also, reasons must be given for the challenge (Article 10.3).
- Again, the new rules aim to reduce the chance of conflicts. Article 13.4 of the Draft Rules provides that unilateral communications with the arbitral tribunal are prohibited unless such contact has been disclosed in writing.
- The arbitral tribunal now has an express power to take the parties' conduct into account when awarding costs (Article 28.4). This focuses particularly on conduct that will cause undue delay or unnecessary expense.

Modernisation and clarifications

A number of the amendments reflect the advance of technology. In particular, the Draft Rules now reflect the vast increase in the use of email for communications and the redundancy of other methods such as telex (which has been deleted in the Draft Rules). Notably, the Draft Rules also include non-mandatory provisions for the submission of both the Response and the Request in electronic form (Articles 1.3 and 2.3).

Other amendments clarify key practical issues, such as the service of written communications relating to the arbitration. Accordingly, where no address for service has been agreed between the parties for these purposes, Article 4.3 of the

Draft Rules allows the parties to use an address that has previously been regularly used by them.

Important financial issues, such as how deposits collected by the LCIA are retained by the LCIA, and equally importantly, how they are returned to the parties, have been also been clarified. In particular, it is now clear that the LCIA holds deposits on trust for the parties in accordance with English law in interest earning accounts. If not applied by the LCIA to pay for arbitration costs, such amounts will be returned to the parties at the end of the proceedings together with any interest accrued (Article 24.2) in the proportions and to the payers that paid them (Article 28.7).

Conclusion

The Draft Rules indicate that a welcome modernisation of the 1998 LCIA Rules is imminent. The key changes that are anticipated strengthen and clarify the powers of the tribunal, emphasise the importance of good conduct from all those involved in the process, and clarify important procedural aspects for users, while still retaining the main characteristics of LCIA arbitral practice.

Once finalised after the LCIA Court's meeting in May, the new rules will apply to arbitrations commenced after the date of promulgation (unless the parties have provided otherwise).

The publication of the rules in draft format is helpful and enables parties and their counsel contemplating arbitration to familiarise themselves with the likely new changes that will have a bearing on imminent LCIA arbitrations.

A version of this article first appeared on Practical Law Arbitration and is reproduced here with their permission http://uk.practicallaw.com/country/arbitration.

Contacts

Audley Sheppard
Partner

E: audley.sheppard
@cliffordchance.com

Marie Berard
Partner

E: Marie.berard
@cliffordchance.com

Rob Lambert
Partner

E: robert.lambert
@cliffordchance.com

Alex Panayides
Partner

E: Alexandros.panayides
@cliffordchance.com

Anna Kirkpatrick
Senior Professional Support Lawyer

E: Anna.kirkpatrick
@cliffordchance.com