

Arbitration

Contributing editors

Gerhard Wegen and Stephan Wilske



2016

GETTING THE
DEAL THROUGH 

GETTING THE
DEAL THROUGH 

Arbitration 2016

Contributing editors

Gerhard Wegen and Stephan Wilske

Gleiss Lutz

Publisher
Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com



Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

© Law Business Research Ltd 2016
No photocopying without a CLA licence.
First published 2006
Eleventh edition
ISSN 1750-9947

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of January 2016, be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Introduction	7	China	82
Gerhard Wegen and Stephan Wilske Gleiss Lutz		Shengchang Wang, Ning Fei and Fang Zhao Hui Zhong Law Firm	
CEA	14	Colombia	91
Pablo Poza and Ana Blanco Spanish Court of Arbitration		Alberto Zuleta-Londoño, Juan Camilo Fandiño-Bravo and Juan Camilo Jiménez-Valencia Cárdenas & Cárdenas Abogados	
CEAC	17	Croatia	97
Eckart Brödermann and Christine Heeg Chinese European Arbitration Centre Thomas Weimann Chinese European Legal Association		Zoran Vukić, Iva Sunko and Ana Pehar Vukić & Partners Ltd	
DIS	22	Denmark	104
Renate Dendorfer-Ditges DITGES PartGmbH		Peter Lind Nielsen and Morten Grundahl Bird & Bird Advokatpartnerselskab	
European Court of Arbitration	26	Dominican Republic	110
Mauro Rubino-Sammartano European Centre for Arbitration and Mediation		Fabiola Medina Garnes Medina Garrigó Attorneys at Law	
HKIAC	29	Ecuador	118
Paulo Fohlin Magnusson		Rodrigo Jijón Letort, Juan Manuel Marchán, Juan Francisco González and Javier Jaramillo Pérez Bustamante & Ponce	
LCIA	32	Egypt	125
Claire Stockford, Jane Wessel and Tom Stables Shepherd and Wedderburn LLP		Ismail Selim Khodeir and Nour in association with Al Tamimi and Company	
The Polish Chamber of Commerce	35	England & Wales	132
Justyna Szpara and Maciej Łaszczuk Łaszczuk & Partners		Adrian Jones, Gordon McAllister, Edward Norman and John Laird Crowell & Moring LLP	
Angola	38	Equatorial Guinea	143
Agostinho Pereira de Miranda, Sofia Martins and Jayr Fernandes Miranda & Associados		Agostinho Pereira de Miranda and Sofia Martins Miranda & Associados	
Austria	44	Finland	148
Klaus Oblin Oblin Melichar		Tom Vapaavuori and Juha Ojala Bird & Bird Attorneys Ltd	
Belgium	50	France	155
Johan Billiet Billiet & Co Cecile Oosterveen Association for International Arbitration		Thomas Bevilacqua and Ivan Urzhumov Foley Hoag LLP	
Brazil	60	Germany	165
Hermes Marcelo Huck, Rogério Carmona Bianco and Fábio Peixinho Gomes Corrêa Lilla, Huck, Otranto, Camargo Advogados		Stephan Wilske and Claudia Krapfl Gleiss Lutz	
Canada	67	Ghana	172
John Judge and Daniel Dawalibi Arbitration Place		Kimathi Kuenyehia and Sarpong Odame Kimathi & Partners, Corporate Attorneys	
Chile	75	Greece	180
Paulo Román, Marta Arias and Rodrigo Donoso Aninat Schwencke & Cía		Antonios D Tsavdaridis Rokas Law Firm	
		Hong Kong	188
		Paulo Fohlin Magnusson	

Hungary	196	Scotland	313
Chrysta Bán Bán, S Szabó & Partners		Brandon Malone Brandon Malone & Company	
India	203	Singapore	321
Shreyas Jayasimha, Mysore Prasanna, Rajashree Rastogi, Spandana Ashwath and Sujaya Sanjay Aarna Law		Edmund Jerome Kronenburg and Tan Kok Peng Braddell Brothers LLP	
Italy	215	Slovakia	330
Cecilia Carrara Legance – Avvocati Associati		Roman Prekop, Monika Simorova, Peter Petho and Eduard Kutenic Barger Prekop sro	
Japan	222	Spain	338
Shinji Kusakabe Anderson Mōri & Tomotsune		Alberto Echarri Echarri & Brindle, Abogados	
Korea	229	Sweden	346
BC Yoon, Richard Menard and Liz (Kyo-Hwa) Chung Kim & Chang		Simon Arvmyren Sandart & Partners	
Lithuania	237	Switzerland	353
Ramūnas Audzevičius and Rimantas Daujotas Motieka & Audzevičius		Xavier Favre-Bulle, Harold Frey and Daniel Durante Lenz & Staehelin	
Malaysia	244	Taiwan	360
Foo Joon Liang Gan Partnership		Helena H C Chen Pinsent Masons LLP	
Morocco	253	Tanzania	367
Azzedine Kettani Kettani Law Firm		Wilbert Kapinga, Jacqueline Tarimo and Kamanga Kapinga Mkono & Co Advocates	
Mozambique	260	Thailand	373
Agostinho Pereira de Miranda, Sofia Martins and Filipa Russo de Sá Miranda & Associados		Kornkieat Chunhakasikarn and John Frangos Tilleke & Gibbins	
Myanmar	266	Turkey	380
Kelvin Poon, Min Thein and Daryl Larry Sim Rajah & Tann Singapore LLP		İsmail G Esin, Özgün Çelebi and Doğan Gültutan Esin Attorney Partnership	
Nigeria	272	Ukraine	388
Dorothy Udeme Ufot, SAN Dorothy Ufot & Co		Oleg Alyoshin and Yuriy Dobosh Vasil Kisil & Partners	
Portugal	281	United Arab Emirates	397
Sofia Martins and Pedro Sousa Uva Miranda & Associados		Robert Stephen and Laura Askew Herbert Smith Freehills LLP	
Qatar	288	United States	404
James Bremen, Christopher Humby and Gillian Carr Herbert Smith Freehills Middle East LLP		Jack Thomas, Arlen Pyenson and Randa Adra Crowell & Moring LLP	
Romania	296	Venezuela	411
Cristiana-Irinel Stoica, Andreea Micu and Daniel Aragea Stoica & Asociații		Fernando Peláez-Pier and José Gregorio Torrealba Hoet Pelaez Castillo & Duque	
Russia	304		
Ilya Nikiforov, Alexey Karchiomov and Svetlana Popova Egorov, Puginsky, Afanasiev and Partners			

LCIA

Claire Stockford, Jane Wessel and Tom Stables Shepherd and Wedderburn LLP

The London Court of International Arbitration (LCIA) is the leading English institution that deals with international arbitration and one that can date its roots back to 1883. A not-for-profit company limited by guarantee and headquartered in London, it provides services and facilities for arbitration and mediation throughout the world.

As its name suggests, the LCIA primarily deals with an international caseload; in fact only around 15 per cent of the parties using the LCIA are English. In addition to its London headquarters, the LCIA has established arbitration centres in India, Mauritius and the Dubai International Financial Centre. In January 2016, the LCIA announced that it would be closing its India operation at the end of May 2016.

Structure

The LCIA operates a three-tier structure, comprising the company, the arbitration court and the secretariat. The director-general fulfils the role of CEO of the company responsible for the day-to-day conduct of the LCIA and acts as the principal point of contact between the board and court. The Court is made up of 35 members, plus representatives of associated institutions and former presidents, of whom no more than six may be of UK nationality. The LCIA Court appoints arbitrators, controls costs and determines challenges to arbitrators. It also provides the final word on the application of the LCIA Rules. The secretariat is headed by the registrar who is responsible for the day-to-day administration of all the disputes referred to the LCIA.

Fees

Distinct from a number of other arbitration centres around the world, the LCIA administrative charges and tribunal appointment fees are based on hourly rates rather than being related to the sums in issue. The arbitrators charge for their time at an hourly rate, which is currently capped at £450.

Recent changes

The latest edition of the rules governing LCIA arbitrations entered into effect on 1 October 2014 (the 2014 Rules). This followed a five year consultation by the drafting committee aimed at improving and bringing the rules up to date with current practice and procedure while preserving the previously successful specificities of the existing rules. The 2014 Rules apply to all arbitrations filed on or after 1 October 2014, even if the relevant agreements were entered into before that date, unless the parties have explicitly agreed otherwise. There is one important exception to this principle: article 9B – the emergency arbitrator provision – only applies where the parties have specifically agreed to opt in to it and the arbitration agreement was signed on or after 1 October 2014.

The 2014 Rules have been supplemented with three guidance notes published on 29 June 2015, designed to facilitate the diligent and timely conduct of arbitration (the Notes).

Who uses LCIA arbitration and for what kinds of disputes?

According to the most recent data provided by the LCIA, in 2014, 302 requests for dispute resolution were made to the LCIA, 296 of these for arbitration (the remainder for some other form of ADR). The nature of the contracts, and the industry sectors, out of which referrals arose in 2014 was diverse, including agreements relating to mining, offshore oil and gas, the sale and purchase of business assets and shares, joint ventures and partnerships, construction and engineering, shipbuilding, telecommunications,

loan and other financial agreements, insurance, culture, media and sports, commodities and professional services.

Parties to LCIA arbitrations come from a broad spectrum of jurisdictions around the world, from places as far afield as Brazil, Mongolia and Saudi Arabia. Only 10.6 per cent of parties in 2014 were from the UK. LCIA arbitrators also come from all around the world. In addition to UK nationals, in 2014 arbitrators were appointed to LCIA tribunals from countries as diverse as Australia, China, India, Nigeria, Sweden and the US.

The default position under the 2014 Rules is for the LCIA Court to select candidates for appointment as arbitrators, and for there to be a sole arbitrator (articles 5.8 and 5.9). However, many parties prefer to nominate arbitrators themselves to retain control over the selection, which is an often-cited advantage of arbitration over litigation. Nonetheless, in a substantial minority of cases (approximately 40 per cent), the LCIA Court selects the arbitrator. This can be quicker than other nomination methods. Where the LCIA does select arbitrators, it is actively using this power to promote diversity in the arbitrator ranks. For example, 20 per cent of LCIA appointees in 2014 were women; against only 4 per cent of party appointees. The LCIA reports that in approximately 60 per cent of cases, the parties choose to deviate from the default position of one arbitrator, in favour of a three-member tribunal.

Cost and duration

Data relating to the cost and duration of LCIA proceedings were published in November 2015. These indicate that the median length of an LCIA arbitration is 16 months and the median costs are US\$99,000. No other international arbitration institution has published comparable data.

What is new in the 2014 Rules?

The changes brought about by the 2014 Rules have been referred to by some commentators as evolution rather than revolution. While almost every article of the Rules has been updated, in many cases the changes are relatively minor. However, there are a number of more significant changes introduced by the 2014 Rules.

Electronic filing

Reflecting advances in technology, the 2014 Rules permit electronic filing via a web form. The parties are given the choice of submitting a request for arbitration and response either by email (which was possible before the introduction of the 2014 Rules) or via a new electronic form on the LCIA's website. When a request for arbitration is submitted electronically, payment of the registration fee may be made by credit card (in addition to the usual methods of cheque or bank transfer).

Arbitrator availability

The 2014 Rules have addressed a criticism frequently levelled at arbitration – that it can take too long because arbitrators have insufficient availability. Article 5.4 of the 2014 Rules requires candidate arbitrators to provide a declaration that they are 'ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration'.

Expedited and emergency proceedings

As was the case under the 1998 Rules, the 2014 Rules permit the expedited formation of the tribunal or expedited appointment of a replacement arbitrator (articles 9A and 9C). In addition, a procedure for the appointment

of an emergency arbitrator has now been introduced for arbitration agreements concluded after 1 October 2014 (article 9B). An emergency arbitrator is a temporary appointment, to address an urgent issue pending the appointment of a permanent tribunal, at which stage the emergency arbitrator stands down. The LCIA reports that no emergency arbitrator appointments have yet been requested under the 2014 Rules although there has been a significant increase in requests for expedited appointments since the 2014 Rules came into effect.

Multiparty arbitration

In line with current trends in arbitration, the 2014 Rules have expanded the provisions relating to multiparty arbitration. While the 1998 Rules permitted joinder of a third party under certain circumstances, the 2014 Rules go considerably further, allowing the consolidation of proceedings both by agreement and, in certain limited circumstances, without it (article 22).

Party representation

A particularly interesting change is introduced by articles 18.3 and 18.4 of the 2014 Rules. These provisions require parties to obtain the approval of the tribunal for changes or additions to their legal representatives. Approval may be withheld if the change could compromise the composition of the tribunal or finality of an award. This is intended to prevent proceedings being derailed by circumstances such as those that arose in *Hrvatska Elektroprivreda v The Republic of Slovenia* (ICSID Case No. ARB/05/24) in which, at a late stage in the proceedings, one of the parties instructed a barrister from the same set of English barristers' chambers as the tribunal chairman. This led to a successful challenge by the other party against the instruction of that barrister in the proceedings.

Counsel conduct

A novel and controversial change was introduced in articles 18.5 and 18.6 and the Annex to the 2014 Rules. These provisions require a party to an LCIA arbitration to ensure that its legal representatives have agreed to comply with the conduct guidelines set out in the Annex. A tribunal has the power to sanction counsel by way of a written reprimand or caution, or 'any other measure necessary to fulfil within the arbitration the general duties required of the Arbitral Tribunal' (article 18.6).

The standards set out in the Annex are not in themselves controversial. For example, they provide that legal representatives should not knowingly make false statements or assist in the preparation of false evidence, practices that would be beyond the contemplation of most lawyers. However, some dissenters object to the idea that a tribunal determining the substantive dispute between the parties should also address issues of counsel ethics, which may impact on the parties' confidence in the unbiased character of the tribunal. Taken to an extreme, the tribunal could, in theory, exclude a party's chosen representative, which might compromise enforcement of the award.

Party conduct

Article 28.4 of the 2014 Rules permits a tribunal to take party conduct into account when awarding costs. A provision of this kind will be familiar to users of the English courts. Nonetheless, such a provision is quite unusual in the international arbitration world.

Guidance notes

Following the introduction of the 2014 Rules, on 29 June 2015, the LCIA published three guidance notes, intended to facilitate the 'diligent and timely conduct of arbitrations'.

Parties

The first guidance note provides parties with a helpful narrative guide to LCIA proceedings.

Arbitrators

The second guidance note outlines the responsibilities of arbitrators undertaking LCIA cases. It covers issues such as the declarations candidate arbitrators are required to make, covering impartiality and availability. It makes a number of recommendations aimed at procedural efficiency, such as holding an early procedural conference and ensuring that hearings are held on consecutive days.

Emergency proceedings

The third guidance note relates to emergency procedures, supplementing the new provisions in the 2014 Rules by providing guidance on how the emergency procedures work in practice. The guidance note explains that each application for expedited formation of the tribunal is considered on its own merits, setting out case studies giving examples of circumstances that have (and have not) been considered by the LCIA Court to meet the 'exceptional urgency' threshold. The note also makes clear that the LCIA will be 'particularly mindful' of experience and availability when considering emergency appointments.

Conducting an LCIA arbitration

The following are the key elements of an LCIA arbitration, from the arbitration agreement, to the tribunal's award and costs.

LCIA model arbitration clause

The LCIA recommends the following arbitration clauses for parties who wish to refer future disputes to arbitration under the 2014 Rules:

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be [one or three].

The seat, or legal place, of arbitration shall be [City and/or Country].

The language to be used in the arbitral proceedings shall be [].

The governing law of the contract shall be the substantive law of [].

Commencing proceedings

An LCIA arbitration is commenced by submission to the registrar of the LCIA Court, either by e-mail or in written form, of a written request for arbitration, including the following elements:

- full contact details for the claimant and its legal representatives, and all other parties to the arbitration;
- the full terms of the arbitration agreement and a copy of the contract or other document in which the arbitration agreement is recorded;
- a brief summary of the nature and circumstances of the dispute, its estimated value, the transactions at issue, and the claim advanced in the arbitration;
- a statement on procedural matters such as the seat and language of the arbitration, and the number of arbitrators and their qualifications;
- full contact details for any arbitrator nominated by the claimant;
- confirmation of payment of the registration fee (currently £1,750); and
- confirmation that the request for arbitration has been or is being delivered to the other parties, and the means of delivery, supported as soon as possible thereafter with written proof of delivery.

The commencement date of the arbitration is deemed to be the later of the date the request is received by the registrar or the date when the registration fee is received by the LCIA.

Article 2 requires the respondent to submit a response to the LCIA registrar within 28 days of the commencement date.

Constituting the tribunal

The parties to an LCIA arbitration are free to agree a process for nomination of the arbitrators, but as stated in article 5.7 of the 2014 Rules, all arbitrators are formally appointed by the LCIA Court. Article 5.6 provides that the LCIA Court shall appoint the tribunal promptly after receipt of the response to the request for arbitration, or if no response is received, within 35 days of the commencement date.

Article 5.3 provides that arbitrators must be impartial and independent of the parties. Potential arbitrators are required to provide a statement of their qualifications and professional positions, to agree fee rates conforming to the LCIA's Schedule of Costs, and to sign a written declaration, confirming their impartiality, independence and availability.

Under article 5.8, if the parties have failed to agree the number of arbitrators, the LCIA will appoint a sole arbitrator unless the LCIA Court

determines that in the circumstances a tribunal consisting of three arbitrators (or, exceptionally, more than three) would be appropriate. Article 5.9 provides that the LCIA Court will take account of any agreement between the parties as to the constitution of the tribunal. If the parties to the arbitration are of different nationalities, article 6 provides that a sole arbitrator or the presiding arbitrator of a three-member tribunal cannot share the nationality either of the parties or their controlling shareholders.

Under article 9A of the 2014 Rules, a party may apply to the LCIA Court for the appointment of the tribunal to be expedited, setting out the specific ground for the exceptional urgency justifying the need for expedited appointment.

If the parties have opted in to article 9B in an agreement concluded after 1 October 2014, in cases of extreme urgency, a party may apply to the LCIA Court for the appointment of a sole emergency arbitrator to determine a claim for emergency relief. The appointment must be made within three days, and the emergency arbitrator must decide upon the claim for emergency relief within 14 days of his or her appointment. An additional fee of £8,000 is payable for the appointment of an emergency arbitrator, and the emergency arbitrator's fee is set at £20,000.

Seat and language of the arbitration

The 2014 Rules include default provisions to deal with the situation where the parties have not agreed on the seat or language of the arbitration.

Article 16.1 provides that the parties may agree on the seat of the arbitration at any time before the formation of the tribunal, or after formation with the consent of the tribunal. In the absence of any such agreement, article 16.2 provides that the seat of the arbitration shall be London, England, unless the tribunal determines otherwise following submissions by the parties.

The 2014 Rules include detailed default provisions dealing with the language of the arbitration at article 17. The initial assumption is that the language of the arbitration will be the language in which the arbitration agreement is written. If the arbitration agreement is written in more than one language of equal standing, the LCIA Court may determine which of those languages should be used for the arbitration.

Applicable law

Article 16.4 of the 2014 Rules provides that the law applicable to the arbitration agreement and to the arbitration shall be the law of the seat unless the parties have otherwise agreed.

The award

Article 26 of the 2014 Rules deals with the award. The tribunal may make separate awards on different issues at different times. The award must be in writing and state its reasons unless the parties have agreed otherwise, and be signed by each of the arbitrators who assent to it. A majority award is permissible. The award of the tribunal is final and binding on the parties. Under article 26.9, the tribunal may issue an award recording a settlement agreed by the parties, and such a consent award need not contain reasons.

Costs

As mentioned above, under the 2014 Rules, unlike many other institutional arbitration rules, the arbitrators' fees are charged on an hourly basis (rather than ad valorem), currently capped at £450 per hour. In addition, the LCIA charges administrative fees based on the time spent by the staff of the LCIA secretariat on the administration of the case. There is no charge for the time of the members of the LCIA Court.

Article 28 provides that the award must specify the amount of arbitration costs determined by the LCIA and the proportions in which those costs are to be borne by the parties. As indicated above, the tribunal is also empowered to determine the reasonable amount of the parties' legal costs and make any award of costs based on the general principle that costs should reflect the parties' relative success in the proceedings.

Where next for the LCIA?

As the 2014 Rules become established, the LCIA expects to see its first applications for the appointment of an emergency arbitrator soon. As this is an 'opt in' process parties could not include it in their arbitration agreements until the 2014 Rules came into force on 1 October 2014, so the first cases invoking the provision had not yet emerged at the time of writing.

The director-general has indicated that she plans to consult LCIA users over the use of tribunal secretaries, and will consider whether the LCIA should issue further guidance on the use of tribunal secretaries in LCIA arbitrations. She also wishes to continue focusing on the cost and duration of arbitration, addressing two key concerns of arbitration practitioners and parties.



SHEPHERD+ WEDDERBURN

Claire Stockford
Jane Wessel
Tom Stables

claire.stockford@shepwedd.co.uk
jane.wessel@shepwedd.co.uk
tom.stables@shepwedd.co.uk

Condor House
10 St Paul's Churchyard
London
EC4M 8AL

Tel: +44 20 7429 4900
Fax: +44 20 7329 5939
www.shepwedd.co.uk

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Class Actions
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Enforcement of Foreign Judgments
Environment & Climate Regulation
Executive Compensation & Employee Benefits
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally



Online

www.gettingthedealthrough.com



Arbitration
ISSN 1750-9947



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



Official Partner of the Latin American
Corporate Counsel Association



Strategic Research Sponsor of the
ABA Section of International Law