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INNOVATION AT THE LCIA

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Legal Briefings – By **Dr Jacomijn van Haersolte-van Hof, Director of the LCIA**

The London Court of International Arbitration (LCIA) is one of the main international arbitral institutions, chosen by parties across the globe as the institution to administer and supervise the resolution of their complex international disputes. In October 2014, the LCIA revised its arbitral rules substantially, introducing some key new provisions. Now over a year into their application, the LCIA is now seeing arbitrations through their door which are being run under those revised rules. In this article, Dr Jacomijn van Haersolte-van Hof, who became Director General of the LCIA in July 2014, gives us her insight into how the rules have been received and the direction the LCIA has and will take under her leadership.

JACKIE, IF WE MIGHT, CAN WE DELVE A LITTLE INTO YOUR OWN BACKGROUND FIRST AND HOW YOU CAME TO HEAD UP THE LCIA?

My first introduction to arbitration came while I was still a student at law school. I was trying to think of a topic for a paper I had to write and my parents suggested I speak to a lawyer friend of theirs to get some suggestions. It just so happened that this “lawyer friend” was Pieter Sanders, one of the principal drafters of the New York Convention and a true giant in the world of arbitration. He suggested I write a paper on arbitration and I'm afraid I had to look the word up in the dictionary! That led me to a PhD on the Iran-US Claims Tribunal, before moving into private practice in the Netherlands. Arbitration was still a relatively new specialism in mainstream disputes practices and I gained experience very quickly as counsel, while also building up a lot of experience as an arbitrator.

As my practice developed I was keen to get a different insight into the arbitral process. I have always had a close affinity with the LCIA, having helped set up the LCIA's young practitioner body, YIAG, and the opportunity to become its Director General was just too good to miss.

YOU MOVED OVER TO HEAD UP THE LCIA JUST THREE MONTHS BEFORE THE NEW LCIA RULES CAME INTO FORCE. WAS IT DIFFICULT TO TAKE ON SUCH A NEW ROLE WHILE PREPARING TO LAUNCH RULES YOU HAD HAD NO HAND IN MAKING?

It was both a challenge and an opportunity. I did have a little involvement in the discussions around the LCIA's Emergency Arbitrator provisions. I had been involved in many emergency proceedings as counsel and arbitrator. As a sole practitioner I had been quite an obvious “conflict free” choice for appointment as an Emergency Arbitrator for the Netherlands Arbitration Institute (NAI) and was appointed as an EA several times, which is pretty unusual in the field and I suppose it was recognised that I could add some practical insight.

While I was not involved in drafting the rules, once I had familiarised myself with them I felt quite comfortable with them. The introduction of the new rules also presented me with a fantastic opportunity to embed myself in the LCIA and get out and introduce myself and meet people. The most daunting part of joining the LCIA therefore wasn't so much the rules themselves as my hectic travel schedule: I travelled across the world on roadshows explaining the provisions of the Rules. Trying to do this, travelling to meet our overseas ventures, talking at conferences, understanding the internal workings of the LCIA as an institution and developing my strategy for the LCIA going forward has made this an intense first year.

DO YOU HAVE ANY SENSE AS TO HOW THE RULES HAVE BEEN RECEIVED BY THE ARBITRATION MARKET?

I believe they've been received well. To meet the needs of users, all arbitral institutions need to adapt their rules. The 2014 LCIA Rules introduced changes, but they did not fundamentally alter the feel of the rules. A few of the changes prompted quite a lot of comment at the time, particularly the Annex on the conduct of party representatives, but my sense is that, a year on, people increasingly think the LCIA made sensible changes and additions and got the tone and level of the Annex right.

A LOT OF THE NEW PROVISIONS HAVE BEEN AIMED AT IMPROVING EFFICIENCY OF THE ARBITRAL PROCEEDINGS. HAVE THEY MADE A DIFFERENCE?

Perhaps the biggest difference in the new rules is actually a practical one; the e-filing system. The e-filing system enables a party to fill in a form as their Request for Arbitration (or they can just upload a pdf) and to pay the fee by credit card. It has been really successful.

Article 15.10 of the LCIA Rules has been more of a slow-burner, but is a provision that is increasingly changing the way that LCIA arbitrations are run. This provision requires the Tribunal to set out a timetable for producing their award and to set aside time for deliberation. We are starting to see arbitrators putting a timetable in their first procedural order that sets aside a hearing window, with a time for deliberations in the weeks following. Having set out a timetable like this makes a Tribunal self-policing. It is, frankly, difficult and embarrassing to have to write to the parties to tell them that you will not meet the deadline you set yourself.

Setting aside time for Tribunal deliberations also focuses the parties' minds. If a party wants an extension of time for a pleading, it could derail the hearing schedule, but it could also derail the time set aside for the deliberation because the tribunal cannot find another window in their busy schedules. That will obviously then impact on how quickly they get the award. Very few counsel will ask for an extra week if their client is faced with a 6 month delay in an award as a consequence.

AS WE'VE ALREADY MENTIONED, PERHAPS THE MOST CONTROVERSIAL ASPECT OF THE NEW RULES HAS BEEN THE ANNEX RELATING TO CONDUCT OF PARTY REPRESENTATIVES. CAN YOU SHARE WHY THESE WERE INTRODUCED? HAS THE LCIA RECEIVED MANY QUERIES FROM COUNSEL OR ARBITRATORS ON THE ANNEX AND HAS IT BEEN APPLIED (WITH ANY CONSEQUENCES) IN ONGOING PROCEEDINGS?

Regulating the conduct of counsel has been a topic of discussion amongst arbitration practitioners for many years now, particularly on how practitioners from different jurisdictions approach the arbitral process in different ways. The Annex was controversial because the LCIA was the first arbitral institution to seek to deal with this concern directly. Because of that, the LCIA was very careful about how the Annex was written, ensuring that it was written in very open terms, setting out key principles.

It is important to remember that the Annex is not about the LCIA policing or regulating conduct more broadly. The Annex merely sets out core guidelines for those representing a party in an LCIA arbitration and are to be used by the Tribunal to regulate an individual case. There would be very few people who, on reading the Annex, would disagree with the contents. It covers topics like not lying to the Tribunal, not concealing documents when ordered to produce them and not seeking to obstruct the arbitration.

I am particularly pleased that we haven't started to see counsel using the guidelines as a weapon to attack counsel from the other side (which would be slightly ironic given the aim of the Annex). But what I do think we have seen is greater clarity and transparency about what the parties and their lawyers are expecting out of the process. For example, the Annex will flush out different expectations about what the document production process will involve or whether parties are allowed unilateral contact with arbitrators. This stops confusion later down the line and improves the efficiency of the arbitral process more generally. The power of the Tribunal to refuse a change or addition to a party's legal team means that we are seeing more transparency from the outset from parties about the make-up of their full legal teams, including foreign law advisers and QCs.

At this stage we have not seen much in the way of Tribunal use of their powers to sanction counsel for their conduct. Ultimately, I hope we never do. The Annex's impact so far has been quite subtle but, I believe, pronounced. The simple nature of the obligations and the clear way they are set out force parties and their representatives to police themselves on a level playing field and that seems to be working well.

THE LCIA HAS RECENTLY RELEASED ANALYSIS OF THE COST AND DURATION OF AN LCIA ARBITRATION. WHAT PROMPTED YOU TO CARRY OUT THIS ANALYSIS AND WHAT DOES IT SHOW?

I am a great believer in transparency of information and I am also a great believer in what the LCIA offers. It was a natural step to try to share information about LCIA arbitrations with the general public so that people can make informed decisions about whether they want to include LCIA arbitration as their method of dispute resolution. We are a not for profit organisation so we are truly not focused on growth as a goal in itself. We want people to choose LCIA arbitration deliberately, based on the facts and because they believe we offer what they need. To do that, they need information.

“I 'M A GREAT BELIEVER IN THE VALUE OF HAVING EMERGENCY ARBITRATOR APPOINTMENT AS AN OPTION IN ARBITRAL RULES”

For many years now, the main criticisms of arbitration have been the costs involved and the time taken. I wanted to look into our cases and see how much the LCIA charged and the length of time it took to resolve the dispute (from Request to Award, including any stays). I then wanted to compare these statistics, where possible, to other institutions. In particular, the LCIA adopts a very different pricing structure for administering arbitrations than most other institutions - we charge an hourly rate rather than a sum based on the value in dispute - and I wanted to see whether that worked out cheaper or more expensive across different value disputes.

The analysis gives the mean and median length for arbitrations based on the sums in dispute, as well as the amount charged by the LCIA. I really hope that parties read it and realise that LCIA arbitration is not only respected and reliable; it is also efficient and reasonably priced.

The LCIA recently issued three Guidance Notes. What are they about and why were they introduced? If the guidance is necessary is there any suggestion the Rules aren't sufficiently detailed?

Two of these guidance notes have been produced to help parties to arbitral proceedings and arbitrators. The third focuses on emergency and expedited procedures.

“I WOULD ACTUALLY SAY THE THREE OF OUR BIGGEST CHALLENGES AT THE MOMENT ARE ONES OF PERCEPTION RATHER THAN REALITY”

They are intended to offer practical guidance and some “dos and don'ts” and are certainly not in response to any suggestion that the Rules lack detail. In the case of the emergency and expedited procedures, the guidance note includes some case studies for parties and counsel to understand the two processes a little more clearly. The introduction of our Emergency Arbitrator provisions has been a wonderful opportunity to get out there and talk about our Expedited process which has been in the Rules now for many years. It is amazing for me to realise quite a few practitioners thought the expedited process was new.

DO YOU THINK THAT THE LCIA CAN MAKE AS GOOD A JOB OF CHOOSING A TRIBUNAL AS PARTIES CAN?

The default for the LCIA Rules is that the LCIA will appoint the arbitrators. Yet in about 60% of appointments, arbitrators are party nominated, so some parties clearly prefer to have the option of choosing their own arbitrators. Experienced users of arbitration who use equally experienced law firms to represent them may be very effective at choosing the right arbitrator for their dispute. There may be certain specific industries where the parties will be better at knowing the right people to act as arbitrator than the LCIA.

However, I do believe that in lots of situations the LCIA can make as good a job of choosing a Tribunal and, dare I say it, sometimes a better job. When we appoint a full tribunal of three, I think we can ensure better availability and choose from a more diverse, yet equally skilled, list of potential candidates than even the most experienced law firms and clients. Clients can also be reassured that appointment by the LCIA does not mean that we won't listen to the parties' views and wishes about the arbitrators we choose. If the parties want us to consider certain characteristics and qualifications we will certainly do so.

THE INTRODUCTION OF THE EMERGENCY ARBITRATION PROVISION IS ONE OF THE MOST TALKED ABOUT NEW ADDITIONS TO THE LCIA RULES. HAS THE LCIA SEEN ANY REQUESTS FOR AN EMERGENCY ARBITRATOR YET? HOW DOES IT FIT WITH THE LCIA'S EXPEDITED PROCEDURE?

I'm a great believer in the value of having Emergency Arbitrator appointment as an option in arbitral rules. As yet, no, we haven't had any requests for an emergency arbitrator, but I don't think that lessens the value in the provisions being included. As I've already mentioned, including these has also
highlighted to lots of parties that we have a very useful expedited process for the appointment of the tribunal and I believe we will see an increasing number of applications for this over the coming years. For the right case, the two processes can be used in tandem, with an Emergency Arbitrator being appointed to proceed with requests for urgent relief while the Tribunal for the dispute is being appointed on an expedited basis. It really does offer the ultimate flexibility.

WHY WOULD YOU ADVISE PEOPLE TO CHOOSE INSTITUTIONAL ARBITRATION OVER AD HOC ARBITRATION?

My answer to this may come as a bit of a surprise: cost. I strongly believe an ad hoc arbitration will end up just costing more. In an institutional arbitration you will pay an additional cost for the administration of an arbitration by that institution. However, in both an institutional or ad hoc arbitration you have to pay for your arbitrators. An institution will usually have a cap or standard rate for its arbitrators which will be below that which the arbitrators would be paid in their usual legal practice, and is therefore often below what you would pay for your arbitrators in an ad hoc procedure. In addition, having an institution means more effective administration. An institution offers procedural handholding to both the parties and the Tribunal. Having someone there in the background checking on progress and monitoring the time spent by the arbitrators makes the process more controlled and efficient. There are none of these checks and balances in a true ad hoc process.

WHAT WOULD YOU SAY ARE THE LCIA'S BIGGEST CHALLENGES AT THE MOMENT?

I would actually say the three of our biggest challenges at the moment are ones of perception rather than reality.

First, there is a perception that Russian sanctions are affecting the LCIA. That is absolutely not the case. We have not yet had an actual problem with Russian sanctions and the evidence this year suggests strongly that Russian parties are continuing to choose LCIA arbitration to resolve their disputes.

“. .. WE APPOINT A FULL TRIBUNAL OF THREE, I THINK WE CAN ENSURE BETTER AVAILABILITY AND CHOOSE FROM A MORE DIVERSE, YET EQUALLY SKILLED, LIST OF POTENTIAL CANDIDATES”

The debate surrounding Investor State Dispute Settlement does not affect the LCIA directly as significantly as some institutions because the LCIA historically has not administered arbitrations under investment treaties, but the critical comments made about arbitration more generally do have an impact. Commentators who don't understand arbitration are blurring the boundaries between investment treaty arbitration and commercial arbitration and tainting commercial arbitration as a result. As a consequence, I do feel a social responsibility alongside a business imperative to get out there and talk about the merits of arbitration for resolving commercial disputes.

To some extent the LCIA faces a challenge having the word “London” in its name. For some parties from certain jurisdictions, this brings some negative perceptions that the LCIA is somehow very much an English institution which, as a consequence, can mean that it is suspected that the LCIA may offer a “home turf advantage” in the same way as the English court might be viewed with suspicion. Yet while this is on one hand a problem, it can also be a benefit. The English legal system is viewed by many as the benchmark against which others are measured, and for some parties, such as Russian parties, our perceived link to London goes in our favour. In reality, the picture is more nuanced than that.

FINALLY, WHAT ARE THE TOP THREE REASONS YOU WOULD GIVE TO A PARTY TO CHOOSE THE LCIA RULES IN THEIR ARBITRATION CLAUSE?

First must be our cost structure and second, our efficiency. I really hope that parties will read our analysis on cost and duration and see the value that LCIA arbitration brings to a dispute. Third must be that the LCIA is both London-based and International. We are an international arbitral institution, based in London and with that you get the best of being within a highly respected legal system, yet also a truly international organisation with an international outlook.

ABOUT THE AUTHORS

Jacomijn van Haersolte-van Hof has sat as arbitrator in cases under the ICC, LCIA and UNCITRAL rules, as well as those of the Netherlands Arbitration Institute (NAI). She has also acted as counsel and arbitrated cases at the Royal Dutch Grain and Feed Trade Association and the Institute of Transport and Maritime Arbitration, both based in the Netherlands. She is on the ICSID roster of arbitrators and is currently sitting on an ad hoc committee. She was also involved in setting up the arbitral process for the Claims Resolution Tribunal in Zurich, which analysed claims from Holocaust survivors over dormant accounts in Swiss banks.

She is a lecturer in international arbitration at VU University Amsterdam and a member of GAR's editorial board. Her 1992 PhD thesis on the application of the UNCITRAL rules by Iran-US Claims Tribunal was one of the first books to be published on the subject.

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