

LCIA India: New Arbitration Rules Signal a New Start for Institutional Commercial Arbitration in India

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On April 16-17, 2010, LCIA India introduced its new arbitration rules (the New Rules). The New Rules¹ were unveiled at a conference held at the Taj Mahal Palace & Tower Hotel in Mumbai, which commemorated the establishment of LCIA India as a new center for commercial arbitration in New Delhi one year earlier. The opening of LCIA India and unveiling of the New Rules enhance the likelihood that institutional commercial arbitration will gain a stronger foothold in India and elsewhere in South Asia.

LCIA India

LCIA India was established in April 2009, as the London Court of International Arbitration's (LCIA) first independent office outside of London. At its launch, the LCIA's Director General, Adrian Winstanley, noted that the LCIA saw India, an emerging global economic power, as a great source of demand for effective international dispute resolution.² While acknowledging the "sometimes controversial arbitration-related decisions of the superior Indian Courts," Mr. Winstanley said that the LCIA also saw India as developing into an increasingly arbitration-friendly jurisdiction.³ According to Mr. Winstanley, LCIA India was created with the goal of offering in India all of the services offered by the LCIA in the United Kingdom.⁴ At the launch, the Indian government and judicial figures echoed these sentiments. The Chief Justice of India, the Honorable K.G. Balakrishnan, noted that "the availability of effective dispute-resolution mechanisms is a pre-condition for attracting investors as well as maintaining the confidence of parties involved in commercial transactions."⁵ Mr. Balakrishnan also acknowledged existing problems relating to the process of arbitration in the country, but remarked that arbitral institutions such as the LCIA could improve the arbitral process, given that such institutions "offer parties the option of adopting internationally recognised arbitral rules as well as the experienced personnel and infrastructure required for conducting arbitration proceedings."⁶

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The New Rules

The New Rules offer the advantages of international dispute resolution under the existing and well-established LCIA Rules and procedures, while at the same time, complementing the existing Indian legal and arbitral regime, including the Indian Arbitration and Conciliation Act of 1996 (the 1996 Act). While based largely on the existing LCIA Rules, the New Rules also introduced certain innovations. Those innovations include: (1) provisions that expressly set forth the obligations of the parties and tribunal to ensure fairness and expediency in the arbitration, as well as create a means of enforcing those obligations; and (2) provisions that grant greater power to the LCIA Court (the Court) to ensure that all interested parties adhere to the letter and spirit of the New Rules.

Obligations of the Parties and the Tribunal

Article 14 of the New Rules articulates the obligation of the parties to take the steps necessary to ensure that arbitrations conducted under the auspices of LCIA India be handled with speed and efficiency—a directive that is *not* specifically included in the LCIA Rules. Specifically, Article 14.2 states that:

At all times the parties shall do everything necessary for the fair, efficient and expeditious conduct of the arbitration including complying without delay with any determination of the Arbitral Tribunal and the LCIA Court as to procedural or evidential matters or with any order or directions of the Arbitral Tribunal and the LCIA court.

Other provisions echo this theme and further enhance this obligation. Article 5.3(b) requires prospective arbitrators to "confirm [their] ability to devote sufficient time to ensure the expeditious conduct of the arbitration" before they are appointed. Thus, the New Rules make clear that only those arbitrators who will endeavor to make certain that the arbitration process is handled with expediency will be selected to participate in such proceedings. The provision appears to address concerns that the appointment of arbitrators previously caused some of the problems in the system. Ajay Thomas, the registrar of LCIA India, had noted earlier that a flaw in the *ad hoc* arbitration system in the country is the

predominance of retired judges, bureaucrats and technocrats sitting as arbitrators who, though most have competency and integrity of the highest order, have sometime been found lacking in will (and sometimes the relevant skills) to conduct arbitrations expeditiously.⁷

The New Rules create another, and more concrete, means of addressing delays that are brought about by party intransigence or other dilatory tactics. Article 28.4(b) of the New Rules provides the arbitrators with broad power to award costs and fees, and gives the tribunal to base that award on more than just success on the merits. The tribunal may order costs to take account of the parties' "conduct and cooperation during the arbitration and any undue delays or unnecessary expense caused by or attributable to a party or its representatives." Thus, even a party who ultimately

prevails in a dispute risks being responsible for certain costs, should his or her conduct, or that of counsel, be a source of delay or disruption during the proceedings.

Power of the LCIA Court

In addition to placing a greater burden on the parties and arbitrators to take steps to promote efficient and expeditious handling of arbitrations, the New Rules provide the Court with greater authority to ensure a fair, neutral, and workable arbitral process. Article 5.6 provides that, where the Arbitral Tribunal consists of three members, the Chairman shall "*in all cases*" be selected by the Court (emphasis added). Article 5.7 provides that, even where the relevant arbitration agreement purportedly gives the parties, their nominees, or a third party power to nominate the Chairman, the Court nevertheless has the power to make the selection. In such case, the Agreement shall be treated as "a written agreement by the parties for the selection of the Chairman by the LCIA Court." These provisions place squarely within the Court's hand the ability to make certain that oversight of the arbitration is entrusted to an individual who will make certain that the proper management of the proceeding is paramount.

The Court retains key veto and removal powers with respect to its appointments, which have been enhanced. Article 5.5 states that, while the Court gives "due regard for any particular method or criteria of selection agreed in writing by the parties . . .", the Court "alone is empowered to appoint arbitrators." (This provision is also found in the LCIA Rules.) Echoing that language, Article 7.1 notes that an agreement by the parties to appoint an arbitrator will only be treated as an agreement to nominate the arbitrator. Also, consistent with and expanding upon the broad oversight powers, pursuant to Article 10.3, the LCIA Court has the power to remove an arbitrator if he or she "does not possess the qualifications agreed by the parties."

The New Rules deviate from the LCIA Rules with regard to the seat of the arbitration. Unlike the LCIA Rules, which makes London the default seat of arbitration when parties cannot reach an agreement on a seat, neither New Delhi, nor any other city, has been made the default seat under the New Rules. Instead, pursuant to Article 16.1, where the parties fail to specify the seat of their arbitration, the seat "shall determined by the LCIA Court in view of all the circumstances, and taking into account the written statements made by the parties. . ." Thus, this provision increases flexibility in the management and conduct of the proceedings, allowing a seat to be chosen that best reflects the nature of the dispute and the parties, while being mindful of the parties' stated views on the matter.

Finally, Article 32.6 of the Rules provides that, where the place of arbitration is not in India, Part I of the 1996 Act is excluded. Part I of the 1996 Act confers broad powers on the Indian courts to order interim measures, appoint and remove arbitrators, and to hear challenges to arbitral awards. These powers have given rise to criticism and, at times, have been a source of dissatisfaction among parties. Notably, in the case of arbitrations held outside of India, this Part is excluded even if the parties fail to stipulate to such exclusion in the arbitration agreement.

Conclusion

The opening of LCIA India and the introduction of the New Rules should be significant steps forward for commercial arbitration in India. Not only does the presence of LCIA India provide the advantages identified by Justice Balakrishnan in his opening remarks, but the innovations included in the New Rules specifically address many of the broader concerns that have been raised about arbitration in India. Backed by the experience, insight and energy of a well-known and highly regarded arbitral institution, and with the benefit of an innovative set of rules designed to make the arbitral process even more effective, LCIA India is a welcome addition to the arbitration landscape, and should play a valuable role in commercial dispute resolution in India and beyond.

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¹ At the April 16–17 launch, LCIA India also rolled out its Mediation Rules, and its "Notes for Arbitrators," which were published "with a view to facilitating the diligent and timely conduct of arbitral proceedings." The New Rules, Mediation Rules and Notes for Arbitrators are all available on LCIA India's website, available at: <http://www.lcia-india.org>. All of the Rules are in effect from April 17, 2010.

² Adrian Winstanley, Director General LCIA, Address at the LCIA India Establishment Celebration: The Road to LCIA India (April 18, 2009), available at http://www.lcia.org/INDIA_folder/LCIAaddress.pdf.

³ *Id.*

⁴ *Id.*

⁵ Honorable Shri K.G. Balakrishnan, Chief Justice of India, Address at the LCIA India Establishment Celebration (April 18, 2009), available at http://www.lcia-india.org/News_Launch.aspx.

⁶ *Id.*

⁷ Ajay Thomas, *Light at the End of the Tunnel*, 2010 Asia-Pacific Arb. Rev. 1, available at: <http://www.globalarbitrationreview.com/reviews/23/sections/83/chapters/852/light-end-tunnel/>.