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ASA Secretariat
4, Boulevard du Théâtre, P.O.Box 5429, CH-1204 Geneva,
Tel.: ++41 22 310 74 30, Fax: ++41 22 310 37 31;
E-mail: info@arbitration-ch.org, www.arbitration-ch.org
Fondateur du Bulletin ASA
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Matthias Scherer

Correspondance
Merci d’adresser toute correspondance concernant la rédaction du Bulletin, non pas au secrétariat de l’ASA, mais à l’adresse suivante:

ASA Bulletin
Matthias Scherer
Rue de la Mairie 35, CP 6569, CH-1211 Genève 6
Tel: +41 22 319 87 00 – Fax: +41 22 319 87 60
Email: mscherer@lalive.ch
(For address changes please contact info@arbitration-ch.org/tel +41 22 310 74 30)
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Aims & Scope
Switzerland is generally regarded as one of the World’s leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world’s best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

The ASA Bulletin is the official quarterly journal of this prestigious association. Since its inception in 1983 the Bulletin has carved a unique niche with its focus on arbitration case law and practice worldwide as well as its judicious selection of scholarly and practical writing in the field. Its regular contents include:

– Articles
– Leading cases of the Swiss Federal Supreme Court
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– Arbitral awards and orders under various auspices including ICC, ICSID and the Swiss Chambers of Commerce ("Swiss Rules")
– Notices of publications and reviews

Each case and article is usually published in its original language with a comprehensive head note in English, French and German.

Books and Journals for Review
Books related to the topics discussed in the Bulletin may be sent for review to the Editor (Matthias SCHERER, LALIVE, P.O.Box 6569, 1211 Geneva 6, Switzerland).
Key features of the LCIA Arbitration Rules

LAURENCE PONTY*

A new version of the LCIA Rules (the Rules) entered into effect on 1 October 2014, following the global trend over the last few years whereby a number of institutional (or non institutional) arbitration rules have been subject to revision.¹

In the course of the five years preceding the launch of the new Rules, the LCIA Court’s drafting committee and, in particular, its sub-committee² engaged into in-depth reflection with the aim of improving both the contents and the drafting of the Rules where needed, while preserving the specificities which had so far ensured the success of LCIA arbitration.

In the conduct of the revision process, the drafting committee obviously took into account a number of comments made by users, practitioners and arbitrators, as well as the legal developments in the arbitration field over the last years and sought to anticipate growing and future concerns. At the same time, it had to meet the challenging task to avoid any distortion of the very nature of a successful set of Rules, mirroring many aspects of the sophisticated 1996 English Arbitration Act.

The aim of this article is not, however, to explain the rationale behind, and the process of the revision of the Rules, but rather to highlight its traditional and new features from a practical point of view.

For that purpose, it is proposed to comment on the most significant features of the Rules at the various stages of arbitral proceedings, namely (1) the phase preceding the formation of the tribunal; (2) the formation of the tribunal; (3) the conduct of the proceedings; and (4) the determination and allocation of the costs.

* Associate, LALIVE, Geneva.

¹ Including, the UNCITRAL Rules and the SCC Rules in 2010, the ICC Rules, the Swiss Rules and the CIETAC Rules in 2012, the HKIAC Rules, the SIAC Rules and the VIAC Rules in 2013.

² composed of (1) V.V.Veeder QC, Essex Court Chambers, London, Vice-President of the LCIA Court, (2) Mr James Castello, King & Spalding, Paris, former member of the LCIA Court and (3) Prof. Boris Karabelnikov, professor at the Moscow School of Social and Economic Sciences, former member of the LCIA Court. Prof. Karabelnikov’s contribution was particularly called for in light of the number of CIS related cases administered under the LCIA Rules.
1. The phase preceding the formation of the tribunal

At that stage, four features, in particular, worth being mentioned, namely (1) the delivery of the Request for Arbitration by the Claimant to the other parties; (2) the availability of electronic filing; (3) the default seat envisaged by the Rules; and (4) the new emergency arbitrator procedure.

1.1 Delivery of the Request for Arbitration by the Claimant to the other parties

Under Art. 1.1 (vi) of the 2014 Rules, it remains for the Claimant(s) to deliver the Request for Arbitration (the Request) to the other parties to the arbitration.

It should be noted that the terms “service” and “served” have been replaced by the neutral terms “delivery” and “delivered”, in order to avoid any confusion with the concept of “service”, which may be subject to specific formalities depending on the jurisdictions where the parties or their representatives are domiciled.

The new Rules not only require confirmation by the Claimant(s) that delivery to the Respondent(s) has been effected (with an indication of the means thereof), but also that the Claimant(s) provide documentary evidence of the same or, if it is demonstrated that actual delivery was impossible, sufficient information as to any other effective form of notification.

Although it has always been the LCIA’s Secretariat’s practice to invite parties to provide such a proof, in particular where the Respondent does not participate in the proceedings, the submission of evidence of delivery is being made an absolute requirement by the revised timeframe for the filing of the Response. Indeed, under the new version of the Rules, that timeframe no longer starts running from the service of the Request on the Respondent, but from the “Commencement Date”, i.e. the date of receipt of the Request by the Registrar. That new provision surely helps removing any uncertainty as to the starting date of the timeframe for the filing of the Response, but requires that at the same, it is ensured that the Request has been effectively delivered or notified to the Respondent, as now prescribed by Art. 1.1 (vi). In the absence of evidence of

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3 It should be reminded that pursuant to Art. 4.2 of the new Rules, “[u]nless otherwise ordered by the Arbitral Tribunal, if an address has been agreed or designated by a party for the purpose of receiving any communication in regard to the Arbitration Agreement or (in the absence of such agreement or designation) has been regularly used in the parties’ previous dealings, any written communication (including the Request and Response) may be delivered to such party at that address, and if so delivered, shall be treated as having been received by such party”.

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such effective delivery, the new provisions of Art. 2 allowing the LCIA Court to extend the timeframe for the filing of the Response should apply.

Generally speaking, the purpose of new Art. 1.1 (vi) is to ensure that the proceedings are effectively notified to all parties and to identify from the outset any communication difficulty, so as to address the issue as soon as possible and avoid any delays.

1.2 Electronic filing available

With a view to making further use of information technologies and speed up the proceedings where possible, the new Rules expressly allow the filing of the Request and the Response, with accompanying documents, by email only (i.e. without additional hard copy sets), as that was already accepted in practice by the LCIA’s Secretariat.4

Furthermore, the new Rules also allow the parties to file their Request or Response by way of the LCIA’s electronic forms available on line and to pay the registration fee on line as well.5 That service is also available for applications for the expedited formation of the tribunal, for the appointment of an emergency arbitrator or for the expedited appointment of a replacement arbitrator (Arts 9A, B and C).

Filing on line may be completed from the following webpage: http://onlinefiling.lcia.org/ and first requires the creation of a user account.

1.3 London, as the default seat

The rule providing that the seat of the arbitration by default6 should be London has been maintained and remains a unique feature of the Rules (Art. 16).

However, depending on the circumstances of the case and in light of the parties’ comments, the Rules contemplate that a more appropriate seat may be determined. Where the 1998 version of the Rules provided that it was for the LCIA Court to make such determination, the 2014 Rules provide that this now falls within the tribunal’s powers.7 Under the 1998 Rules, the LCIA Court determined only on a few occasions that a seat other

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4 See Arts 1.2 (Request) and 2.2 (Response).
5 See Arts 1.3 (Request) and 2.3 (Response).
6 i.e. in the absence of agreement between the parties as to the seat in the arbitration agreement or once the proceedings have commenced.
7 That option was previously retained in the 1985 version of the Rules.
than London should be retained.\(^8\) Therefore, under the 2014 Rules tribunals are not expected to be requested to make such a determination in a large number of cases.

Further, it has been clarified in the new version of Art. 16 that the law applicable to the seat of the arbitration shall be the law applicable not only to the arbitration, but also to the arbitration agreement, thus removing any uncertainty in that respect. In practice, this means that in a vast majority of LCIA arbitration cases, the 1996 English Arbitration Act will apply to both the proceedings and the arbitration agreement, insofar as the parties most of the time choose London as the seat of their arbitration and, failing an agreement, rarely contest London as the default seat.

Although, the Rules may be regarded as too London-centric in light of Art. 16 and have been criticised for that, the drafters have decided to opt for the security offered by English law, rather than for more internationalisation. They have, however, partly addressed the concern, by expressly providing that the default seat should not be taken into account by the LCIA Court in appointing arbitrators. The LCIA Court or, in practice, its President and Vice-Presidents, who come from various jurisdictions, may be trusted for carefully implementing that rule.

It should further be noted that English law being selected in a large majority of LCIA arbitrations as the law governing the merits of the dispute, this naturally triggers the parties to choose London as the seat of their arbitration. This is the parties’, not the LCIA’s choice and the provision for London as the default seat should be regarded more as a practical supplement, rather than a biased rule, the impact of which remains in any event limited.

1.4 Emergency arbitrator procedure available

The new Rules now provide for an emergency arbitrator procedure (at Art. 9B),\(^9\) the purpose of which is to allow a party to seek urgent interim or provisional measures before a temporary forum other than State courts. The Rules have been aligned in this respect with a number of other institutional arbitration rules.\(^10\)

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\(^8\) According to the LCIA’s Secretariat’s records, the LCIA Court made such determinations in 6 cases only, but all within the course of the last three years.

\(^9\) Applicable only to proceedings subject to an arbitration agreement entered into after 1 October 2014 (see Art. 9.14 of the 2014 Rules).

\(^10\) Including the SCC, the SIAC, the ICC and the Swiss Rules.
As a preliminary remark, this new procedure should be distinguished from that of Art. 9A, which provide for the expedited formation of the main tribunal in case of exceptional urgency and which already existed under the previous version of the Rules.  

Under the 2014 Rules, an application for the appointment of an emergency arbitrator is to be made to the LCIA Court, which shall assess on a prima facie basis whether there are sufficient grounds for emergency. Although Art. 9B (emergency arbitrator) pre-requires a situation of emergency, while Art. 9A (expedited formation) refers to “exceptional urgency”, it may be assumed that in practice the LCIA Court will not establish a clear-cut distinction between those two grounds. Thus, it may be expected that for assessing an Art. 9B application, the LCIA Court will inter alia apply the usual test as to whether the harm alleged by the applicant is likely to be repaired in a proper manner by subsequent monetary relief. 

If the application for the appointment of an emergency arbitrator is granted, the appointment is to be made by the LCIA Court within 3 days of the application and the emergency arbitrator is in principle required to render a decision within 14 days of his/her appointment. 

The 2014 Rules further provide that the decision of the emergency arbitrator may be rendered in the form of an award or by way of an order (Art. 9.8), which may subsequently be revised by the main tribunal (Art. 9.11). In light of those provisions, the question arises as to whether an emergency arbitrator may render a final decision. On the one hand, this seems unlikely since a decision made by an emergency arbitrator may be subject to subsequent revision by the main tribunal. On the other hand, the Rules provide that an award made by the emergency arbitrator shall (by operation of Arts 9.9 and 26.8) be final and binding on the parties. It is understood, however, that the wording of the Rules in this respect is flexible enough to contemplate both the options of final and interim decisions by an emergency arbitrator.

2. The formation of the tribunal

Four additional significant features may be identified at the stage of the formation of the tribunal, namely (1) the selection and appointment of the arbitrators by the LCIA Court, as a primary rule; (2) the nationality and availability requirements prescribed by the Rules; (3) the new provisions regulating the exchange of communications between co-arbitrators and

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11 This specific procedure is dealt with in more details below.
parties for the purpose of selecting a presiding arbitrator; and (4) the expedited procedures available for the formation of the tribunal and the appointment of replacement arbitrators.

2.1 Selection and appointment of the arbitrators by the LCIA Court, as a primary rule

Under the Rules, unless the parties have agreed on party nomination in the arbitration agreement or afterwards, the primary rule is the selection and appointment of a sole arbitrator by the LCIA Court.

The LCIA Court may however appoint a three-member tribunal if it deems it appropriate in light of the circumstances of the case. Under the new version of the Rules, it may even appoint more than 3 arbitrators in exceptional cases.

In 2013, over the 372 arbitrators appointed by the LCIA Court, 210 (about 56.5%) were nominated by the parties or the co-arbitrators and 162 (about 43.5%) by the LCIA Court. However, the balance between nominations by parties and co-arbitrators, on the one hand, and selections by the LCIA Court, on the other hand, generally reached a 50%-50% proportion in the course of the previous years.

When it falls to the LCIA Court to select the tribunal, the Court has regard to the features of the case, as well as any specific requirements of the parties, in order to identify suitable profiles in terms of qualifications, areas of expertise, languages spoken, cultural sensitivity, conduct of the proceedings (characterised by a firm or a light touch), applicable rates, etc…

Thus, when completing this exercise, the LCIA Court and, in particular, the President or the Vice-President to whom the file has been addressed, takes into account the law applicable to the dispute, the nature of the contract(s) between the parties and any specific sector or industry concerned, the language of the proceedings (or the language in which documents may be submitted), the amount in dispute, and may also consider other factors, such as the level of understanding of the procedure by the parties and/or their representatives, their cultural background, etc…

In assisting the LCIA Court with the selection of arbitrators, the LCIA’s Secretariat extensively relies on a large database of arbitrators, which is constantly updated and does in no way constitute a closed list of arbitrators.

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12 Those figures are based on the LCIA’s Registrar report 2013 (http://www.lcia.org//LCIA/reports.aspx).
In addition to the criteria described above and which may vary on a case by case basis, the Rules provide that the arbitrators must comply with the traditional duties of independence and impartiality, but also with additional requirements, which are specific to LCIA arbitration.

2.2 Specific nationality and availability requirements

Where parties are of different nationalities, Art. 6 excludes, as a rule, the appointment of a sole or presiding arbitrator of the same nationality as any of the parties.

In comparison with the approach adopted by other Rules, such as the ICC Rules which provide that nationality is only a factor that the ICC Court may consider when confirming or appointing arbitrators (Art. 13(1)), or the 2010 UNCITRAL Rules which provide that the appointing authority “shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties” (Art. 6.7), the LCIA Rules remain very restrictive in this respect.

Under Art. 6.1, the nationality restriction may nevertheless be waived in writing by the parties. Further, the rule has been slightly tempered in the new version. The 2014 version indeed expressly provides that the citizen of a State’s overseas territory shall be treated as a national of that territory and not of that State. Thus, a citizen of the British Virgin Islands should no longer be treated as a British citizen, as this was the LCIA’s practice under the 1998 version of the Rules.

Further, the 2014 Rules specifically provide for a new requirement, whereby candidate arbitrators are prescribed to declare, in addition to their declaration of independence and impartiality, that they are “ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration” (Art. 5.4).

It has not yet been finally determined by the LCIA how this new availability requirement shall be implemented in practice. The LCIA is exploring various options which may help assessing the availability of a candidate arbitrator, such as a declaration as to the number of active matters in which he/she is involved, as to his/her role in those matters and possibly as to more personal information on a case-by-case basis.
2.3 Regulation of exchange of communications between the parties and their nominees for the purpose of selecting a presiding arbitrator

Under the new Rules, ex parte communications remain prohibited. Nevertheless, for the purpose of selecting a presiding arbitrator, the Rules now expressly authorises communications between a nominee or a candidate arbitrator and any of the parties, as long as the candidate informs the LCIA’s Registrar of the same.

That provision enact to a great extent the existing LCIA’s practice, whereby the Secretariat has always ensured that a party be informed of any liaison between the opposing party and its nominee for the purpose of selecting a president suitable to that party.

It does above all achieve a compromise between the European and American approach in this respect and allows the implementation of different practices for the selection process of the presiding arbitrator, as long as that process remains transparent.

2.4 Expedited procedures available for the formation of the tribunal and the appointment of replacement arbitrators

As explained above, the procedure for the expedited formation of the tribunal is still available under the new Rules (Art. 9A). That option has not been replaced by the emergency arbitrator procedure, but may be used as an alternative procedure or even cumulate, in the course of a single arbitration, with that procedure.

Applications for the expedited formation of the tribunal are granted by the LCIA Court where, on a prima facie basis, there are sufficient grounds for exceptional urgency (such as imminent bankruptcy or the threat by one of the parties to dispose of common assets, and provided that the harm alleged by the applicant is not amenable to proper monetary compensation).

According to the LCIA’s statistics, nearly half of the applications for the expedited formation of the tribunal are granted by the LCIA Court.

If the application is granted, the LCIA Court may at the same time shorten the timeframe for the filing of the Response. According to the new Rules, the Court may also abridge any period of time under the arbitration agreement or other agreement of the parties (Art. 9.3), which it was not entitled to do under the 1998 Rules. In practice, this means that where the parties have agreed on specific timeframes for party nominations, the
expedited formation of the Tribunal may now be envisaged (whereas this was not practicable under the 1998 Rules).

This new provision may also have an impact, although limited, on the timing for an application for the expedited formation of the tribunal. Under the 1998 Rules, an application filed near the time of the Response, would be treated as moot to the extent that the LCIA Court would, in any event, appoint the tribunal as soon as practicable after the receipt of the Response or after the expiry of the deadline for the filing of the Response. Since an agreement as to a specific timeline for party nomination does no longer prevent the expedited formation of the tribunal and assuming that such timeline extends long after the filing of the Response, an Art. 9A application made near the time of the Response may make sense insofar as the LCIA Court decides to abridge that timeline.

Lastly, the new Rules provide for the expedited appointment of replacement arbitrators (Art. 9C), with the aim of limiting the adverse effect of the revocation of an arbitrator on the length of the proceedings.

3. The conduct of the proceedings

The conduct of LCIA arbitral proceedings are characterised by (1) the application of general requirements aiming at guaranteeing speed, cost-effectiveness, transparency and confidentiality; (2) a flexible procedure, supplemented by a tight default timetable; (3) specific rules relating to the conduct of multi-party and multi-contract proceedings; and (4) by innovative provisions directly regulating the conduct of the parties’ legal representatives.

3.1 General requirements aiming at guaranteeing speed, cost-effectiveness, transparency and confidentiality

The 2014 Rules not only require that the tribunal implement fair and efficient means for the final resolution of the dispute, but expeditious means as well (Art. 14.4).

Further, the parties which are traditionally required to ensure the fair, efficient and expeditious conduct of the arbitration, are also imposed by the new Rules to act in good faith (new Art. 14.5). In line with other rules, such as the Swiss Rules,14 or non binding guidelines, such as the 2010 IBA Rules on

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14 See Art. 15.7 of the Swiss Rules.
the Taking of Evidence in International Arbitration, the general duty of procedural good faith has thus been embedded in the LCIA Rules, therefore providing express ground for sanctions in case of violation of that duty.

Lastly, the confidentiality duty prescribed by Art. 30 has been reinforced under the new Rules to the extent that the parties may no longer waive the undertaking to keep the awards and documents of the proceedings confidential.

3.2 Flexible procedure, supplemented by a tight default timetable

Under Art. 14 of the Rules, the parties are encouraged to adapt the procedure to the specific needs of their arbitration and to agree on a specific timetable in consultation with the tribunal.

Ahead of a dispute, the parties may also agree on accelerated proceedings, for which the LCIA’s Secretariat may assist with the drafting of an abridged timetable compatible with the Rules.

However, to the extent that LCIA arbitrations usually conclude within a reasonable period of time, there is usually little need for an accelerated procedure.

This can be largely explained by the tight default timetable established at Art. 15 of the Rules, which applies where the parties have not reached an agreement as to a specific timetable. Under the 2014 Rules, this default timetable is even tighter since the timeframes of 30 days for written submissions have been aligned for practical reasons from calendar days to weeks and have, thus been replaced by 28 day timeframes.

Users are sometimes taken by surprise by the speed of LCIA proceedings. If the parties have not liaised with each other prior to the formation of the tribunal or shortly thereafter, or have not been in a position to do so (if, for instance, the Respondent has not participated in the

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15 See para. 3 of the Preamble of the 2010 IBA Rules on the Taking of Evidence in International Arbitration, which scope is limited by definition to the taking of evidence.

16 According to the LCIA’s statistics, over one third of the cases conclude within 12 months or less, around two thirds within 18 months or less and about 90% within two years (those figures do not take into account cases where the dispute was amicably settled or the claims withdrawn).

17 The timeframe for filing a Response was also reduced from 30 to 28 days (from the commencement of the arbitration).
arbitration\textsuperscript{18}, a Claimant will be required, pursuant to Art. 15, to submit its Statement of Case within 28 days of the formation of the tribunal,\textsuperscript{19} without the need for the tribunal to give any particular direction.\textsuperscript{20}

Furthermore, this timeframe more or less coincides with the expiry of the usual timeframe of 21 days granted by the LCIA Secretariat for the parties to lodge the initial advance on the arbitration costs, which usually starts running a few days after the appointment of the tribunal.\textsuperscript{21}

Since the tribunal may not proceed with the arbitration if the LCIA is not in requisite funds (Art. 24), it may not in principle give any directions before the initial deposit (or at least part of it) has been lodged. A Claimant may therefore end up filing its Statement of Case without having heard from the tribunal until that time.

The new Rules, however, now provide that the parties and the tribunal are “encouraged to make contact as soon as practicable but no later than 21 days from receipt of the Registrar’s written notification of the formation of the Arbitral Tribunal" (Art. 14.1). Users should therefore be advised to make use of this provision (together with paying their share of the initial deposit) as soon as possible in order to liaise with the tribunal and the other side (subject to its participation in the arbitration), at a very early stage of the proceedings.

It is worth mentioning a few other new provisions intended to ensure a better monitoring of the length of the proceedings. First, Art. 15.10 of the new Rules requires the tribunal to indicate to the parties and the LCIA’s Registrar the timing for the deliberations, if any, and for the final award. Secondly, the tribunal is now expressly entitled to discontinue proceedings where the parties have abandoned the arbitration, provided that the parties have been given sufficient opportunity to explain the position. (Art. 22.1 (xi)). That last provision enacts the LCIA tribunals’ previous practice, whereby arbitrators decided to terminate proceedings on the basis of lack of

\textsuperscript{18} Under the Rules, a party, which does not participate in the proceedings should nevertheless be always given sufficient opportunity to present its case, which often implies the extension of timeframes by the tribunal.

\textsuperscript{19} Unless its Request for Arbitration is treated as its Statement of Case, in which case it will have to submit a Statement of Reply (assuming a Response has been filed) within the same period of time.

\textsuperscript{20} The timeframe for the filing of the Statement of Case is, however, always indicated and drawn by the LCIA to the attention of the parties when they are notified of the appointment of the tribunal.

\textsuperscript{21} during which the Secretariat would have consulted the tribunal for fixing the amount of the advance.
want of prosecution, where each side stopped participating in proceedings and remained silent as to the status of the arbitration.

3.3 Specific rules relating to the conduct of multi-party and multi-contract proceedings

Among the powers of the tribunal, the 1998 Rules provide that the tribunal may order the joinder of a third party. Joinder may be ordered as long as the applicant and the third party to be joined agree in writing. In other words, the other party’s consent is not required, which is a feature unique to the Rules.

That rule has been maintained under the 2014 version and has only been slightly amended, now specifying that the written consent of the applicant and the third party must be made following the commencement of the arbitration or, if earlier, in the arbitration agreement (Art. 22.1 (viii)).

By contrast, while the 1998 Rules remained silent about consolidation of proceedings,22 the 2014 Rules now clearly and expressly provide for the conditions for such consolidation. Thus, under the new Rules, the tribunal may order, with the approval of the LCIA Court, the consolidation of an arbitration with one or more other arbitrations subject to the Rules, where:

(i) all the parties to the arbitrations to be consolidated agree in writing (new Art. 22.1 (ix)); or
(ii) the arbitrations to be consolidated have been commenced under the same arbitration agreement or any compatible arbitration agreement(s) between the same disputing parties and provided that no tribunal has yet been formed by the LCIA Court for the other arbitration(s) or, if already formed, that such tribunal(s) are composed of the same arbitrators (new Art. 22.1 (x)).

In addition, under the new Rules (Art. 22.6) the LCIA Court is granted the power to order consolidation of proceedings provided that:

(i) the parties have been given the opportunity to express their views,
(ii) the arbitrations are subject to the LCIA Rules and have been commenced under the same arbitration agreement between the same disputing parties, and that
(iii) no arbitral tribunal has yet been formed by the LCIA Court for any of the arbitrations to be consolidated.

22 Which did not prevent in practice the consolidation of LCIA arbitrations provided certain conditions were met.
Although the Rules remain silent about that alternative option, LCIA arbitrations may also be conducted and heard concurrently, as long as the parties agree and provided that the same tribunal has been appointed in all the proceedings.

3.4 Direct regulation of the parties’ legal representatives’ conduct

The new Rules have significantly innovated by including specific provisions on the conduct of the parties’ legal representatives. Those provisions can be found at Art. 18 and in Annex A of the Rules.

Annex A includes a list of conducts, such as obstructive behaviours, false statements and evidence or concealment of evidence, that parties’ representatives should avoid, failing which they may be subject to sanctions imposed by the tribunal pursuant to Art. 18.6. Those sanctions include written reprimands or written cautions as to the future conduct of the proceedings, but also any other appropriate measures, which could possibly include references to regulatory bodies.

Although the 2013 HKIAC Rules also offer tools to arbitrators to avoid disruptive behaviours,23 the 2014 LCIA Rules are the only institutional set of Rules, which provides for sophisticated self-regulation in respect of the conduct of the parties’ representatives, with the purpose of acting more as a deterrent than an offensive weapon.

The new Rules further specify that the parties’ legal representatives should appear by name before the tribunal and that proof of authority may be required by both the LCIA Court and the tribunal (new Arts. 18.1 and 18.2).

More importantly, new Art. 18 prescribes that any intended change to the parties’ legal representation should be notified promptly in writing to all other parties, the tribunal and the Registrar and that any such change is subject to the approval of the tribunal (Art. 18.3). In other words, should any such change be likely to compromise the composition of the tribunal or the finality of any award, the tribunal may withhold approval in light of a series of factors detailed in the Rules (Art. 18.4). The deadlock that that provision seeks to avoid is the so-called Slovenia problem,24 whereby a conflict of interest may arise where a party has retained counsel who is part of the same

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23 By operation of Arts 13.5 and 13.6 of the HKIAC Rules, a tribunal may exclude a party’s representative if this would disrupt the fair and expeditious conduct of the arbitration.

24 By reference to the ICSID Case No. ARB/0524 Hrvatska v. Slovenia.
chambers or the same firm, as one of the arbitrators, but failed to notify the tribunal and the other side in due course.

The new provisions regulating the conduct of the parties’ representatives have proved controversial and have triggered quite some debates. However, if the benefit which those provisions tend to procure seem quite obvious, it is too early to comment on any possible adverse effect that they may have in the future.

4. Determination and allocation of the costs

Lastly, when it comes to the calculation of the arbitration costs and the allocation of the costs, the Rules together with the LCIA’s Schedule of Costs (effective since 1 October 2014) provide for specific rules such as (1) the calculation of the arbitration costs on the basis of the time spent by the tribunal and the LCIA’s Secretariat; (2) the supervision and the determination of the costs by the LCIA Court and (3) specific rules governing the tribunal’s decision on the allocation of costs.

4.1 The time spent by the tribunal and the LCIA, as the basis for the calculation of the arbitration costs

In contrast to other Rules which provide for an ad valorem calculation of the tribunal’s remuneration and of the institution’s costs or for mixed or alternative basis, the costs of the arbitration in LCIA arbitration, which include both the arbitrators’ fees and expenses and the LCIA’s administrative charges, are largely based on time spent.

Thus, the arbitrators’ fees are calculated by reference to the work done and the hourly rate agreed by the arbitrators. In practice, arbitrators most of the time agree to apply the rate proposed by the LCIA Court at the stage of the formation of the tribunal, unless it has been agreed on a specific rate.

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25 If a distinction should certainly be made between the structure of Barristers’ Chambers (where Barristers are independent from each other) and of law firms, that difference is not necessarily perceived by users and even practitioners.
26 Such as the ICC Rules.
27 Such as the Swiss Rules, which provide for fixed fees plus a percentage of the amount in dispute.
28 Such as the HKIAC Rules, which allow the parties to opt either for the remuneration of the tribunal on an hourly basis or based on a schedule of fees, depending on the amount in dispute.
29 which is fixed in light of the amount in dispute and the complexity of the case.
direct between the parties and the tribunal. According to the LCIA’s Schedule of Costs, the arbitrators’ rate may not exceed £450 per hour and may be subject to revision in exceptional circumstances in the course of the proceedings.\(^{30}\)

The main portion of the LCIA’s administrative charges is also calculated on the basis of the time spent on the matter by the Secretariat’s staff and on hourly rates, which are detailed in the Schedule of Costs. In addition, the LCIA’s charges include the registration fee, which is a fixed and not refundable amount,\(^{31}\) as well as a sum equivalent to 5% of the tribunal’s fees.

### 4.2 Supervision and determination of the arbitration costs by the LCIA Court

The funding of the arbitration is monitored by the LCIA throughout the process by means of a series of provisions. First, as explained above, the tribunal is required by the Rules not to proceed with the arbitration and, in particular, not to issue an award if the LCIA is not in requisite funds (Arts 24 and 26.7 of the 2014 Rules).

Secondly, the advance on the arbitration costs is usually to be paid in successive tranches (Art. 24.1), so as to efficiently control and adapt the funding of the case. For the purpose of fixing those various deposits, the LCIA’s Secretariat liaises on a regular basis with the tribunal as to the amount of work done and the estimate amount of work still to be done to the next major milestone of the proceedings. The LCIA tends to fix an initial deposit, which is intended to cover the LCIA’s charges and the work done by the tribunal to the hearing, if any, as well as a subsequent deposit up to the final award. However, depending on the complexity of the case and the variety of interim steps which may be required (such as dealing with the bifurcation of the proceedings, with repeated applications for interim measures or with lengthy document production process), the LCIA may require the parties to lodge additional deposits.

Thirdly, where a party fails to pay its share of the deposits, the other side may be requested to make a substitute payment on its behalf (Art. 24.4 of the 2014 Rules). Further, if a claiming or cross-claiming party fails to pay its share of the deposit, the claim or cross-claim may be treated as withdrawn

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\(^{30}\) See Section 2 (i) of the Schedule of Costs.

\(^{31}\) Amounting to £1’750 plus VAT if applicable, according to Section 1(i) of the Schedule of Costs.
by the tribunal by way of sanction, but may however be reinstatement should payment be made subsequently (Art. 24.6 of the 2014 Rules).

At the end of the proceedings, the LCIA Court determines the costs of the arbitration on the basis of a dossier prepared for that purpose by the LCIA’s Secretariat. The Court must be satisfied that the costs are reasonable and comply with the Schedule of Costs. Otherwise, the LCIA shall liaise with the arbitrators with a view to limiting their fees or expenses.

The amount of the arbitration costs, as determined by the Court is communicated to the tribunal when finalising its award and must be specified in the award.

4.3 Specific rules governing the tribunal’s decision on costs

Under the 2014 Rules, the rule remains that the tribunal should make its decision as to the allocation of costs (including both the arbitration and legal and other costs) on the general principle that costs should reflect the parties’ relative success and failure in the proceedings (the “costs follow the event” rule), unless the tribunal founds that this rule is not appropriate in light of the circumstances (Art. 28.4 of the 2014 Rules).

The Rules contemplate that the parties may agree on a different rule. However, the new Rules now require that such an agreement be confirmed in writing after the commencement of the arbitration (Art. 28.5 of the 2014 Rules). This new provision is in line with the 1996 English Arbitration Act. However, it is uncertain whether it is valid under other national laws.

It should be further noted that the new Rules expressly authorise the tribunal to take into account the conduct of the parties in the arbitration, or in other words, to apply costs sanctions if the parties have acted in bad faith and/or obstructed the smooth and timely conduct of the proceedings (Art. 28.4 of the 2014 Rules).

Lastly, the Rules require that any decision on costs must be made with reasons (Art. 28.4 of the 2014 Rules).

Although the LCIA Rules have aligned in some respect with other arbitration rules, they do remain characterised by a number of existing or innovative specificities. It will, in particular, be interesting to follow how the LCIA tribunals’ and the LCIA Court’s practice adapts to those latter features.
Laurence PONTY, *Key features of the LCIA Arbitration Rules*

**Summary**

The aim of this article is to present the key features of the LCIA Rules, as revised in 2014, with a practical highlight on the most significant existing and new specificities of the Rules, at each phase of the arbitral proceedings.
Submission of Manuscripts

Manuscripts and related correspondence should be sent to the Editor. At the time the manuscript is submitted, written assurance must be given that the article has not been published, submitted, or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within eight to twelve weeks. Manuscripts may be drafted in German, French, Italian or English. They should be submitted by e-mail to the Editor (mscherer@lalive.ch) and may range from 3,000 to 8,000 words, together with a summary of the contents in English language (max. 1/2 page). The author should submit biographical data, including his or her current affiliation.

Aims & Scope

Switzerland is generally regarded as one of the World’s leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world’s best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

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