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Client Alert

If you have questions or would like additional information on the material covered in this Alert, please contact one of the authors:

Abu Shohid
Counsel, London
+44 (0)20 3116 3581
ashohid@reedsmith.com

Gordon F. Bell
Partner, London
+44 (0)20 3116 3765
gbell@reedsmith.com

…or the Reed Smith lawyer with whom you regularly work.

The Draft LCIA Arbitration Rules 2014 – changes to watch out for: a quick reference guide

The London Court of International Arbitration (LCIA) recently published for consideration the Final Draft of its proposed new Arbitration Rules to replace the 1998 Rules. A copy of the Final Draft can be found at: http://www.lcia.org//media/download.aspx?MediaId=336.

The proposed changes bring the LCIA Rules into line with the revisions and updates to the arbitration rules that other international arbitral institutions, such as the ICC, have implemented in recent years.

There is a particular emphasis on promoting procedural efficiency, improving the conduct of the parties (and their lawyers) and the better handling of complex commercial disputes. This has led to changes which both widen and narrow the powers of the arbitrators, together with the introduction of new and robust provisions affecting the rights and obligations of the parties. In addition, there have been a number of clarifications to some of the pre-existing provisions of the 1998 Rules.

The proposed changes remain to be finalised following the LCIA European Users' Council Symposium on 9 May 2014 (and indeed some of the changes may or may not actually filter through in the form currently proposed). However, the below table provides a quick reference guide to prepare users who have become accustomed over the last 15 years or so to applying the 1998 Rules for some of the more significant proposed changes in order to avoid being caught out when the new Rules come into effect.

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Energy & Natural Resources

London ENR Partners

Rashpaul Bahia
+44 (0)20 3116 2966
rbahia@reedsmith.com

Gordon F. Bell
+44 (0)20 3116 3765
gbell@reedsmith.com

Chris Borg
+44 (0)20 3116 3650
cborg@reedsmith.com

Claude Brown
+44 (0)20 3116 3662
cbrown@reedsmith.com

Peter Cassidy
+44 (0)20 3116 3697
pcassidy@reedsmith.com

Richard A. Ceeney
+44 (0)20 3116 2863
rceeney@reedsmith.com

Paul M. Dillon
+44 (0)20 3116 2893
pdillon@reedsmith.com

Kyri Evagora
+44 (0)20 3116 2914
kevagora@reedsmith.com

Siân Fellows
+44 (0)20 3116 2809
sfellows@reedsmith.com

Lynne Freeman
+44 (0)20 3116 2926
lfreeman@reedsmith.com

Diane Galloway
+44 (0)20 3116 2934
dgalloway@reedsmith.com

Brett Hillis
+44 (0)20 3116 2992
bhillis@reedsmith.com

Robert Parson
+44 (0)20 3116 3514
rparson@reedsmith.com

Vassia Payiataki
+44 (0)20 3116 3517
vpayiataki@reedsmith.com

Nicholas Rock
+44 (0)20 3116 3685
nrock@reedsmith.com

Vincent Rowan
+44 (0)20 3116 3772
vrowan@reedsmith.com

Paul Skeet
+44 (0)20 3116 3583
pskeet@reedsmith.com

Richard Swinburn
+44 (0)20 3116 3604
rswinburn@reedsmith.com

Peter Zaman
+44 (0)20 3116 3686
pzaman@reedsmith.com

Procedural Efficiency		
Articles 1.2, 1.3, 2.2, 2.3 and 4.3	Use of technology	Requests for Arbitration and Responses may now be submitted by email (to an agreed or designated address) and the use of standard electronic forms for Requests for Arbitration and Responses (made available on the LCIA website) is encouraged.
Articles 2 and 15	Timings shortened	The Response is now due after 28 days of the Commencement Date rather than 30 days (as provided for in Article 15.3 of the 1998 Rules). "Commencement Date" is a new term, and refers to the date the Registrar receives the Request for Arbitration. The time for service of all written submissions has also been reduced from 30 to 28 days.
Article 4.2	Deemed service	In order to facilitate progress of the reference, in the absence of an agreed address for the purpose of receiving communications, one which has been regularly used by the Parties in previous dealings may be used to deliver any written communication (including the Request and Response).
Article 5.1	Avoiding impediments to formation of Tribunal	In order to facilitate progress of the arbitration, no controversy relating to sufficiency of the Request and Response shall be an impediment to the formation of Tribunal by the LCIA Court.
Article 5.4	New declaration of commitment	The declarations to be provided by arbitrators as to independence and impartiality shall now include a statement as to whether the arbitrator is "ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious conduct of the arbitration".
Article 5.6	Increase in time to constitute Tribunal	The period has been increased from 30 days to 35 days from the Commencement Date.
Articles 14.1 and 14.2	Early Case Management	The Tribunal and the Parties are encouraged to make contact within 21 days after notification that the Tribunal has been constituted to consider the future conduct of the proceedings. They are also encouraged to make joint proposals for the conduct of the arbitration in consultation with the Tribunal.
Articles 15.2 and 15.3	Request for Arbitration, Statement of Case and accompanying documents	The Claimant is expressly entitled to elect to have its Request for Arbitration treated as its Statement of Case, in which case it must set out in sufficient detail the relevant facts and legal submissions on which it relies together with the relief claimed. Similarly, the Respondent may elect to have its Response treated as its Statement of Defence. Importantly, the requirement in Article 15.6 of the 1998 Rules that "All Statements … shall be accompanied by copies … of all essential documents on which the party concerned relies and which have not previously been submitted by any party …" has been removed. This is likely to have a significant impact on the smooth running of the reference and result in more disclosure applications.
Article 15.10	Delivery of Final Award	Following Final Submissions, the Tribunal must seek to publish the award "as soon as reasonably possible" and notify the Parties and the Registrar of a timetable, including time to be set aside for deliberations which should take place as soon as possible. This should provide more certainty and transparency, and focus the Tribunal's mind to the tasks at hand.

Default Seat and Arbitration Agreement		
Preamble	Definition of Arbitration Agreement	"Arbitration Agreement" is now a defined term which incorporates both the Arbitration Agreement itself and the LCIA Rules (together with the Annex and the Schedule of Costs).
Article 16.2	Default Seat	In the absence of agreement between the Parties, the default seat is London. Article 16.2 has been amended to clarify that, where the default seat applies, it will do so up to the formation of the Tribunal at which point the Tribunal may order a different seat of arbitration if it considers it more appropriate, after consulting the Parties. The default seat shall not be considered as a relevant circumstance by the LCIA Court in appointing arbitrators.
Article 16.4	Law of Arbitration Agreement	Unless the Parties provide otherwise, the law of the Arbitration Agreement and the arbitration shall be that of the "seat" of the arbitration.
Article 32.3	Protection of validity of Arbitration Agreement	This is a new provision designed to protect the validity of the Arbitration Agreement and expressly provides that, if part of the Arbitration Agreement is struck out by a Court or a Tribunal, that should not necessarily invalidate any award, arbitral appointment or any other part of the Arbitration Agreement.

Formation of Tribunal		
Article 5.8	Tribunal of more than three	The LCIA Court may appoint a Tribunal of more than three arbitrators in exceptional circumstances.
Article 7.3	Unilateral nomination of sole arbitrator	In the absence of written agreement to the contrary, a Party may not nominate a sole arbitrator or a presiding arbitrator (chairman) unilaterally.
Article 10.1	Revocation and challenges	The previous provisions have been expanded to provide that the LCIA Court may revoke an arbitrator's appointment "upon its own initiative, at the written request of all other members of the Arbitral Tribunal or upon a written challenge by any party" in certain defined circumstances (including a failure to conduct the arbitration with reasonable efficiency, diligence and industry).
Article 10.3	Time within which to challenge arbitrator	A Party wishing to challenge an arbitrator must now do so within 14 days of the constitution of the Tribunal or as soon as the Party becomes aware of the ground giving rise to the challenge.

Emergency Relief and early formation of Tribunal		
Article 9B	Emergency Arbitrator pre- formation of Tribunal	Similar to the ICC (and SIAC and HKIAC) Rules, albeit less extensively, a Party may apply to the Registrar in exceptional circumstances for the appointment of an Emergency Arbitrator, on a temporary basis. The Emergency Arbitrator is to be appointed by the LCIA Court within three days of a request by a Party and will always be a sole arbitrator. The Emergency Arbitrator then has 20 days to make a Decision with or without a hearing, by way of an Order or Award but, in all cases, reasons should be given. The Decision lapses 21 days after notification of the appointment of the Tribunal unless confirmed by the Tribunal. The costs of the procedure fall under the "arbitration costs" to be paid out of the deposits by the Parties. Article 9B is an alternative to the pre-existing ability to apply for the expedited formation of the Tribunal (now referred to as "emergency" or "urgent" formation under Article 9A) and there is some debate as to whether it is necessary to have both mechanisms.

Tribunal's powers		
Article 12.1	Majority power to proceed without minority	The power of the majority Tribunal to continue and proceed to an award in the absence of the minority may still be exercised provided that written notice of refusal or failure is given to the LCIA Court, the Parties and the absent arbitrator and subject to the written approval of the LCIA Court.
Article 21.1	Tribunal-appointed experts	The ability to avoid the appointment of Tribunal-appointed experts has been removed, though the Tribunal's ability to appoint such experts should only be exercised "after consultation with the parties".
Article 22.1(iv)	Inspection	The Tribunal's powers to order inspection have been widened to include "any documents, goods, samples…" in addition to "any property, site or thing under its control and relating to the subject matter of the arbitration available for inspection by the Arbitral Tribunal, any other party, its expert or any expert to the Arbitral Tribunal".
-	Express power to correct contract removed	Express power to correct contract removed Art 22.1(g) of the 1998 Rules empowered the Tribunal "to order the correction of any contract between the parties or the Arbitration Agreement, but only to the extent required to rectify any mistake which the Arbitral Tribunal determines to be common to the parties and then only if and to the extent to which the law(s) or rules of law applicable to the contract or Arbitration Agreement permit such correction". This express power of the Tribunal is not contained in the new Rules.

Articles 22.1(ix) and 22.1(x)	Consolidation	As with the ICC Rules and other institutional Rules, a Tribunal is now expressly empowered to order the consolidation of arbitrations where: • The Parties have agreed to this in writing and it is approved by the LCIA Court • With the approval of the LCIA Court, where one or more arbitrations subject to the LCIA Rules are commenced under the same arbitration agreement or any compatible arbitration agreements between the sane disputing parties, provided that no Tribunal has yet been formed for such other arbitrations, or if already formed that such Tribunal is composed of the same arbitrators
Article 24.3	Deposits	Tribunals may now proceed with the arbitration, in exceptional cases, even if adequate funds have not been received.
Article 26.1	Clarification as to Awards at different times	It has been clarified that the Tribunal may make different awards during the course of the arbitration, each of which shall take effect as an "award".
Article 28	Costs	The Tribunal "shall not be required to apply the rates or procedures for assessing such costs practiced by any state court or other legal authority". More guidance is also provided as to the factors to be taken into account by the Tribunal when assessing costs. For example a Tribunal may now make issues based costs awards that reflect the relative success and failure in the award or arbitration or under different issues. Furthermore, a Tribunal may also take into account a parties' conduct in the arbitration, *"including any co-operation in facilitating the proceedings as to time and costs and any non-co-operation resulting in undue delay and unnecessary expense"*.

Conduct of Parties and Legal Representatives		
Article 18.1	Legal representation	A Party may be represented by one or more "authorised legal representatives appearing by name". On the face of it, this seems to suggest that such representation would be personal to the individual lawyer involved and not their respective firms, and will no doubt be the subject of further clarification.
Articles 18.3 and 18.4	Change of legal representation	Designed to afford the Tribunal more control and avoid conflicts, a change of legal representatives must be notified to the other Party, the Registrar and Tribunal, but importantly it must also be approved by the Tribunal. The Tribunal may withhold its approval if the change compromises the composition of the Tribunal or the finality of the award.

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Annex	General guideline for legal representatives	A new Annex will provide one of the more novel changes, designed to encourage good conduct by legal representatives. Broadly based on the IBA Guidelines but in less extensive terms, the proposed Annex includes obligations on legal representatives: • Not to engage in activities intended unfairly to obstruct the arbitration or to jeopardise the finality of the award • Not to pursue "unfounded" challenges to the Tribunal • Not to knowingly make false statements to the Tribunal • Not to procure or assist in the preparation or rely on any false evidence presented to the Tribunal • Not to conceal documents ordered by the Tribunal • Not to contact with the Tribunal unilaterally without disclosure to all Parties, the Tribunal and the Registrar The Annex will no doubt be the subject of further debate and it remains to be seen in what form it will finally evolve.
Article 18.5	Parties to ensure compliance by legal representative	Each Party is to ensure that its legal representative has agreed to comply with the Annex as a condition of appearing by name before the Tribunal.
Article 18.6	Sanctions for breach of conduct rules	The Tribunal may impose sanctions directly on the legal representative if it determines that the legal representative has violated the Guidelines in Annex A, including a written reprimand and, as currently drafted, possibly a reference to the relevant regulatory or professional body (although this remains open for discussion).
Article 13.4	No unilateral contact	It is now in express terms that unilateral contact with the Tribunal or the LCIA Court exercising any function in relation to the arbitration (but not including the Registrar) is prohibited, unless disclosed in writing to the other Party, the Tribunal and (if appropriate) the Registrar.
Article 28.4	Conduct and award of costs	The Tribunal will no doubt readily utilise its express power to take the Parties' conduct (e.g. which causes undue delay or unnecessary expense) into account when awarding costs.