

Seconded To The LCIA: The View From Here

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Two months ago I commenced a five-month secondment with the London Court of International Arbitration (LCIA), a change of scene from my usual post at Herbert Smith Freehills LLP in London where I am a New York-qualified associate working on both commercial and investment arbitration matters. While in many ways the secondment has so far gone as I had expected and I am conscious of the privileged access I have as a secondee, I did not anticipate the barrage of curiosity and questions from colleagues, friends, clients, and arbitration-related service providers wanting to know about my experience “taking a look behind the curtain.” There is definitely a desire amongst users to know more about the functioning of this institution, and I am happy to oblige to the extent that I am able, not least as it still feels like my secondment has only just begun!

This post will give some insight into my experience and observations as a secondee, focussing on my role as Counsel working with the Registrar, Sarah Lancaster, to administer cases, and my work with the Director General, Jacomijn van Haersolte-van Hof or “Jackie”, to assist her with wider strategic and business development objectives.

The Secretariat and Casework

As Counsel, I have my own caseload which I look after. Probably the most fundamental function of this role is facilitating the appointment of tribunals. In this regard, I liaise directly with the President or a Vice President of the LCIA Court to

obtain his or her guidance regarding arbitral candidates. Once the President or a particular Vice President has assisted with the appointment of a tribunal, we try to continue liaising with that individual as regards any other queries or issues that may arise during the life of that particular case.

Where the parties have nominated arbitrators and the nominees have selected the third and presiding arbitrator, the arbitral appointment process is usually quite straightforward, subject to the LCIA Court's approval of the nominees and the need to address any disclosures. However, where it is the LCIA Court appointing a tribunal, it is not inconceivable that I will trade various emails with the President or Vice President before the tribunal is appointed. Unlike other arbitral institutions, which I understand have formal meetings to discuss arbitral appointments, the LCIA's process is done on a case-by-case basis, and is therefore fluid and efficient.

Following the appointment of a tribunal, I monitor the case to ensure deadlines are met and the proceedings are progressing at a good pace, providing support to the tribunal and parties as needed. What this entails precisely depends on the needs and wishes of the parties and the tribunal, and the circumstances of each case. LCIA case administration is structured yet highly flexible and thus no two cases, nor the LCIA's administration of them, are the same.

At any given time, there are approximately half a dozen Counsel on the Casework team. The Casework team is also comprised of Case Administrators, of which there are currently three, who monitor the financial aspects of a case, for example to ensure that the LCIA is in funds and that arbitrators are getting paid. There is also a team of accountants who monitor the LCIA's incomings and outgoings and deal with VAT issues, among other things.

Counsel and Case Administrators are all supervised by and report to the Registrar, Sarah, who also has her own caseload in addition to her responsibilities as head of the Secretariat. The Casework team has a standing meeting at 3pm every day, during which Counsel and Case Administrators meet with Sarah to discuss the urgent items of the day and to review draft correspondence and documents, for example the first letter to parties which is sent just after a Request for Arbitration is received, and the form of appointment officially appointing a tribunal and the notice of appointment informing the parties of such appointment.

At present, over 725 cases are being administered by the LCIA. A vast majority of

these cases, i.e. more than 70%, are arbitrations under the LCIA Arbitration Rules, with the remaining caseload being divided across *ad hoc* arbitrations administered by the LCIA, mediations under the LCIA Mediation Rules 2012, arbitrations where the LCIA is the appointing authority only, and cases where the LCIA is acting as a fundholder only.

With respect to any “top tips” or nuggets of wisdom I would wish to impart to practitioners, the following is a short list of the standout points I have picked up so far:

- If you are going to apply for an expedited procedure pursuant to Articles 9A-C of the 2014 Rules (or Article 9 of the 1998 Rules), call the Secretariat ahead of time to give a heads-up so that a Counsel and the LCIA Court can be lined up and be ready to deal with the application. Calling ahead will also enable the LCIA to check that the application is properly prepared with all the necessary information to avoid any delays.
- Under the LCIA Rules there is no automatic right for parties to nominate arbitrators; however, in practice the LCIA is happy for the parties to agree to party nomination.
- Save for hard copies of the Request for Arbitration and Response, which the LCIA will send to the Tribunal once appointed, it is fine, and indeed preferable, for parties to send all other filings in electronic format, either by email or by memory stick or CD-rom.
- When using the LCIA Online Filing system, choose either to upload a pre-prepared Request / Response (and not fill out the online filing form) or to fill out the online filing form (and not upload a pre-prepared application or pleading). Some parties do both, which complicates the filing process.

I would also encourage users to review the LCIA Guidance Notes which have just been published.

The Director General and Wider Strategic Issues

In addition to my work as Counsel in the Casework team, I have also had the privilege of working with the Director General, Jackie, regarding the LCIA’s wider strategic and business development objectives. Most of my involvement in this regard has considered the role of the LCIA as an institution and related challenges and responsibilities, and has included attending and reporting on Jackie’s presentations on the same at the Worshipful Company of Arbitrators Annual Master’s Lecture and WilmerHale’s Scholar-in-Residence Seminar 2015.

Below I set out an overview of the challenges, both internal (arbitrators, costs and duration, and legal secretaries) and external (the TTIP debate and the effect, if any, of sanctions on the arbitral process), which Jackie is currently grappling with. I will also briefly touch on Jackie's goal to increase the use of technology as a means to interact with users.

Internal challenges

Arbitrators

Given the integral role the LCIA plays in appointing arbitrators, it should come as no surprise that the appointment and diversity of arbitrators are at the fore.

As mentioned above, the LCIA Court has the sole power to select and appoint arbitrators, however in practice the LCIA Court and the Secretariat are happy to, and do, defer to parties' nominations. In fact, 50% of all arbitrators are selected by the parties, leaving the other 50% of arbitrators to be selected by the LCIA Court. Thus, the diversity and availability of arbitrators are challenges the LCIA shares with the parties, and in particular, parties' counsel who are often the ones proposing and selecting arbitrators.

Increasing the diversity of arbitrators – not only for the sake of diversity which is a goal in itself but also to ensure a healthy and sustainable pool of quality arbitrators – is key. However, diversity is a diverse concept, and includes diversity of gender, age and experience, and culture. While a quota system is not the goal, arbitral institutions can and should (i) be transparent about appointments, (ii) seek to steer the composition of tribunals, and (iii) use conferences as a means to educate potential arbitrators and counsel. But other stakeholders, including parties and counsel, and nominated arbitrators who are charged with choosing a third and presiding arbitrator, have a role to play too.

Costs and duration

Arbitration's cornerstone objectives of being time and cost effective are still of key concern to users, however whether they are in fact being achieved is a topic of broad debate in the arbitration community.

One way in which the LCIA considers it can control costs is through its system of remunerating arbitrators on an hourly basis, as opposed to charging an ad valorem of the amount in dispute as some other institutions do. Charging by the amount of

time spent on a matter is transparent and enables parties to predict and track costs easily, and experience and statistics show that in most cases arbitrator fees are lower when calculated by this method.

While institutions play their part as facilitator, ultimately the conduct of the proceedings is a matter for parties, counsel and tribunals. If counsel and parties control the process, they not only can control costs but also the duration of proceedings.

Legal secretaries

The use of legal secretaries by tribunals is an increasingly debated topic, particularly given that there is no uniform role played by secretaries and there is often little transparency regarding secretaries' actual involvement. The main point for all involved is that there needs to be clarity as to what the particular secretary's role will be so that parties and counsel know what process they are getting themselves into. It is not about passing judgment, but rather facilitating a discussion and enhancing good practice.

At a minimum, legal secretaries should be governed by the same standards of impartiality and independence as arbitrators. The LCIA's policy is to permit a tribunal to use a secretary if all the parties agree to it. However, this still leaves open the question of what to do if the parties do not agree on the use of a secretary yet the tribunal still wishes to use one.

External challenges

The TTIP debate

The debate regarding the Transatlantic Trade and Investment Partnership (TTIP), while it is not necessarily going to have a direct effect on the LCIA's caseload, nevertheless is relevant to the LCIA because the debate has been an assault on the legitimacy of international arbitration more generally. The system of international arbitration as we know it is under threat. Accordingly, it is critical that the LCIA, together with other arbitral institutions, engage in the TTIP and other similar debates.

Sanctions

Sanctions, imposed mainly by the US, have been around for several years. However, the recent sectoral and asset freeze sanctions issued against Russia by

the EU have prompted a discussion around the effect, if any, on the administration of international arbitration cases by arbitral institutions based in the EU, including the LCIA.

In short, the EU sanctions do not result in a substantial change in the administration of arbitral proceedings. Arbitral proceedings which fall within the EU sanctions are subject to internal compliance mechanisms requiring arbitral institutions to ensure they have systems in places which are sanctions compliant and are acceptable to both the regulatory authorities administering the sanctions and the banks handling the moneys relating to such proceedings. This results in a few additional administrative steps, however the sanctions do not affect the arbitration procedure as such.

A red herring in this regard is the notion that simply changing the seat and/or the institution of an arbitration, for example outside the EU, will be a way around the sanction. However, where a sanction bites because of the substance of the dispute, the dispute will be affected by the sanction irrespective of where the arbitration is seated, which arbitration institution is administering the proceedings, which laws are applicable to the dispute, and where any award is likely to be enforced.

Increased use of technology

On 30 April of this year, the LCIA launched its twitter account, @LCIAnews, and a week later launched its new website. These initiatives are part of an effort to harness technology to engage and interact with users on a more regular, real-time basis. If you have not already, please follow and bookmark these.

Conclusion

This is just the tip of the iceberg in terms of the invaluable experience and insights I am gaining as a secondee to the LCIA. I very much look forward to the next three months of my secondment and would encourage anyone in private practice who has the opportunity to spend some time at an institution to do so without hesitation.