Kluwer Arbitration Blog

The LCIA's New Guidance Notes – An (uneasy) Exercise in Relative Normativity

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Background

At the end of June 2015, the London Court of International Arbitration issued three new guidance notes to accompany its 2014 arbitration rules. The guidance notes, entitled: "Notes for Parties", "Notes for Arbitrators", and "Notes on Emergency Procedures" are available on the institution's website.

In issuing the guidance notes, the LCIA has followed in the footsteps of its subsidiary – LCIA India – which issued its "Notes for Arbitrators" to supplement its own arbitration rules published in 2010. In addition, other institutions such as SIAC, HKIAC and the ICC have also published similar guidance notes as early as 2006. For example, SIAC has issued "Practice Notes" on specific questions such as arbitrators' fees, or appointment of arbitrators and, more recently, general practice notes for SIAC-rules and UNCITRAL-rules arbitrations. Likewise, last year HKIAC released guidance notes on challenges to arbitrators. In 2012, the ICC revised its own notes on the appointment, duties and remuneration of administrative secretaries.

Contents and purpose

For the most part, the contents of the LCIA's guidance notes are not surprising. In some places, the notes simply paraphrase the arbitration rules, or provide information already available on the LCIA's website, or in the numerous secondary sources now available on LCIA arbitration (including our book: *ARBITRATING UNDER THE 2014 LCIA RULES: A USER'S GUIDE, Scherer, Richman, Gerbay, Kluwer Wolters (2015)*). The notes will nonetheless serve as useful point of reference for those users (either counsel or arbitrators) who are new to LCIA arbitration. For instance, the Notes for Parties contain a description of the different steps for filing a Request for Arbitration or a Response at the LCIA, and of the process by which the institution selects arbitrators in the absence of party nominations.

The notes are also useful because they offer information on new provisions introduced by the 2014 rules, including on party-representatives and on the emergency arbitrator. Of note, the Notes on Emergency Procedures include "case studies" illustrating what grounds may or may not satisfy the threshold of "exceptional urgency" for the expedited formation of arbitral tribunals. Ultimately, the notes will, no doubt, permit to curtail the number of queries addressed by users to the Secretariat, allowing the secretariat to focus on its core activity: the administration of cases.

But in some respects the Notes can be said to "add" to the LCIA rules because they identify "best practices" for parties and arbitrators to follow. For example, the Notes for Arbitrators encourage tribunals to engage actively with case management and for these purposes to establish a "clear timetable" for the arbitration, including for the publication of the award. The Notes also stress the legitimate expectation of parties to receive a "well reasoned and enforceable award". They also provide that arbitrators should "avoid putting themselves in a position where conflicts will arise during the course of the proceedings" (wording inspired from the 2010 LCIA India Notes for Arbitrators). The Notes also confirm that it is preferable for arbitrators to keep the institution's secretariat fully informed of developments in the proceedings and to provide a short update to the Secretariat following any procedural hearing where a procedural order is not forthcoming.

Legal nature and effect?

But most interesting to this author is perhaps the statement found at Section 1.2 of each of the three Notes, by which the LCIA took great care to indicate that the Notes did not create any binding obligations on its users but merely offered guidance.

The statement in question specifies that each Note (1) "[does not] *supplant or interpret the LCIA Rules";* (2) *"is by no means intended to provide an exhaustive list of 'best practices' in the conduct of arbitration"*; and (3) merely *"highlights points for parties to consider in the conduct of LCIA arbitrations"*.

Other institutions have described the nature and/or effect of their respective guidance notes in various ways. For example, on the opposite side of the normative spectrum, the HKIAC Practice Note on the Challenge of an Arbitrator (2014) is stated to "*govern a challenge to an arbitrator* […] *in arbitrations administered by HKIAC* […]" (emphasis added). These notes also constitute the so-called "*Challenge Rules"* referred to the in HKIAC arbitration rules. Similarly, the SIAC Practice Note for Administered Cases (2014), provides that the Note "*shall govern the appointment of arbitrators and the financial management of* [SIAC arbitrations]", and that *"an arbitration shall be administered by SIAC in accordance with this Practice Note* […] " (emphasis added).

Somewhere in the middle of this normative spectrum, the ICC Note on Administrative Secretaries is stated to set out *"the policy and practice"* of the ICC Court and Secretariat (which may suggest a non-binding character of the note), but the note is also said to "*appl*[y] *with respect to any Administrative Secretary appointed on or after 1 August 2012"* (a wording that could be taken to suggest a higher degree of normativity than a mere "*practice*" or "*policy*"). It would be interesting to know what the precise considerations behind each of these institutions' choices of words and approaches were.

What are we to make of those guidance notes that fall short of offering legally binding principles applicable to the parties and arbitrators? To the extent that they contain "normative" statements (in the sense of an indication of how arbitration proceedings should be run) rather than mere "descriptions" of what usually happens in practice, these notes could be said to create "soft law". The expression "soft law" is generally taken to refer to norms that cannot be enforced through public force, either (1) because their content is too vague or (2) because the instrument by which they are 'expressed' lacks the ability to confer on the norm a legally binding character (see Gabrielle Kauffmann-Kohler, *"Soft Law In International Arbitration: Codification and Normativity*", Journal of International Disputes Settlement (2010), pp. 1-17). The expression "soft law" therefore suggests that the norm in question is somehow a "weaker "or "lesser" norm.

In our case, parts of guidance or policy notes issued by institutions could arguably fall into that second category of soft law as, in substance, some of the principles they enunciate are relatively precise and it is only the instrument which is said to lack binding character. Other examples of instruments arguably setting out soft law principles in international arbitration include the IBA Guidelines on Conflicts of Interests, the IBA Rules on the Taking of Evidence, the IBA Guidelines for Drafting International Arbitration Clauses, the UNCITRAL Notes on Organizing Arbitral Proceedings, and even the ICC Techniques for Controlling Time and Costs in Arbitration.

In the second category of soft law -where the instrument containing the norm lacks the ability to confer upon it binding character- the soft law norm may be said, in positivistic terms, to fail to achieve status of a 'legal' norm, or to fail to 'exist as a legal norm'. It may be part of the *lex ferenda*, but fail to reach the normative threshold of the *lex lata*.

However, this "soft law" tag only takes us so far in understanding the precise effects of best practice or soft law instruments in international arbitration. From a legal realism standpoint, the soft law / hard law dichotomy is not particularly helpful because it does not account for the fact that, in reality, certain soft law norms, or best practices, are commonly complied with despite their lack of enforceability (think, the rule that a disclosure is warranted if an arbitrator has received two or more appointments by one of the parties within the past three years). In fact, the actual "efficacy" of certain soft law norms or best practices may well be on a par with the efficacy of certain rarely applied *lex lata* norms. To paraphrase Gabrielle Kaufmann Kohler, in practice, soft law or not, no reasonable arbitrator would make a decision on a non-obvious disclosure issue without consulting the IBA Guidelines on Conflicts of Interests (G. Kauffmann-Kohler, "*Soft Law In International Arbitration: Codification and Normativity*", p. 14). When it decides challenge decisions, the LCIA Court itself often refers to the IBA guidelines. Admittedly, whenever it does so, the Court takes great care to underline that it is not bound by such guidelines, but it remains that in recent times virtually all challenge decisions by the LCIA Court have referred to the guidelines in one way or the other. Going forward it will be interesting to see whether the LCIA Court also refers to any of the Guidance Notes when making decisions on challenges. More generally, it would be interesting to assess the extent to which arbitral institutions rely upon their various guidance notes when making decisions under their respective rules, whether this is on arbitration costs, appointment and removal or arbitrators, emergency procedures and so on.

The reasons for arbitration users enforcing certain best practices or soft law norms are not always clear. For some they may include *inter alia* a sense of respect for, or fear from, the authority enacting the norm, social conformism, convenience, need for predictability etc. (for a broader discussion of this point see Alexandre Flückiger, Why Do We Obey Soft Law? (2009). REDISCOVERING PUBLIC LAW AND PUBLIC ADMINISTRATION IN COMPARATIVE POLICY ANALYSIS: A TRIBUTE TO PETER KNOEPFEL, Stéphane Nahrath, Frédéric Varone, eds., pp. 45-62, 2009). But whatever the reason for compliance, for the legal realist, the overall efficacy of a norm (as may be measured by the degree of compliance by its recipients) is somewhat more relevant than its formal legal or non-legal nature. In that respect, a problem with the expression "soft law" is that it undermines the actual significance of certain soft law norms by over emphasizing their "non-legal nature". This emphasis which looks to the source and nature of the norm (or its "pedigree"), rather than to its efficacy can sometimes look somewhat artificial.

Now, whether or not the development and codification of soft law by arbitral institutions and other organisations like the IBA or UNCITRAL is necessarily good thing is a different question. While more rules (albeit of softer character) may arguably contribute to the increased sophistication and

predictability of international arbitration practice, the crystallisation or solidification of best practices may also be seen to work against the flexibility of the arbitral process (William W. Park, "The Procedural Soft Law Of International Arbitration: Non-Governmental Instruments", (2006) in PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION, L. Mistelis & J. Lew eds.). But the answer to this last question lies beyond the scope of this blog entry.

This entry was posted on Tuesday, September 1st, 2015 at 11:26 am and is filed under Arbitral Tribunal, Arbitration, IBA Guidelines on Conflicts of Interest, LCIA Arbitration, LCIA Guidance Notes for Arbitrators
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