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Improving International Dispute Resolution: Leading Arbitral Institutions Update and Innovate

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Over the past few months two leading international arbitration institutions have updated their arbitration rules and added some innovative provisions, as did other leading arbitral institutions over the past few years.

In June, the new rules of the International Centre for Dispute Resolution ("ICDR") of the American Arbitration Association came into force ("2014 ICDR Rules") and on October 1, the new rules of the London Court of International Arbitration ("LCIA"), came into force ("2014 LCIA Rules").

The two institutions' respective amendments aim to modernize their rules and increase their focus on making their arbitrations less costly and more efficient.

The amendments generally follow the revisions to the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules in 2010 (http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf), the arbitration rules of the International Chamber of Commerce ("ICC") in 2012 (http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf), and the Hong Kong International Arbitration Centre ("HKIAC") Administered Arbitration Rules in 2013 (http://www.hkiac.org/en/arbitration/arbitration-rules-guidelines/hkiac-administered-arbitration-rules-2013), while maintaining the particularities that set each of the institutions apart.

Main changes in 2014 ICDR Rules

First, the 2014 ICDR Rules (https://www.icdr.org/icdr/ShowProperty?nodeId=/UCM/ADRSTAGE2020868&revision=latestreleased) include "Expedited Procedures" that automatically apply to cases valued at USD $250,000 or less, limit oral hearings to one day and impose a 30 day deadline for the final award. Parties can agree to apply the Expedited Procedures in arbitrations with larger claims.

Second, the 2014 ICDR Rules emphasize the use of mediation. Parties can agree to mediate at any stage of the proceedings in accordance with the ICDR's International Mediation Rules (Article 5). The mediation can run concurrently with the arbitration, with a separately appointed mediator.

Third, a noteworthy addition in the 2014 ICDR Rules is an express exclusion of American-style court litigation procedures. Article 21(10) states that "[d]epositions, interrogatories, and requests to admit as developed for use in U.S. court procedures generally are not appropriate procedures

for obtaining information in an arbitration under these Rules." The message is one that Canadian litigation counsel might be wise to heed when acting in arbitrations, whether international or Canadian, and whether administered or *ad hoc*.

Fourth, in keeping with developments in other international arbitration rules, the 2014 ICDR Rules provide for joinder (Article 7) and consolidation (Article 8). The 2014 ICDR Rules, however, provide for the innovative "consolidation arbitrator", who has the power to consolidate two or more arbitrations pending with the ICDR or AAA into a single arbitration. In ICC Arbitration, it is the ICC Court (which is not actually a "court") that handles these functions.

Fifth, in line with the ICDR arbitrator appointment methodology, the 2014 ICDR Rules, for the first time, expressly address and explain the ICDR's list-based method of appointing arbitrators (Article 12(6)).

Main Changes in 2014 LCIA Rules

Perhaps the most notable – and arguably, controversial – addition to the 2014 LCIA Rules (http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx) is the inclusion of guidelines for the conduct of party representatives (i.e. counsel) in LCIA Arbitrations ("Guidelines"). The Guidelines provide, in part, that counsel should not (i) engage in activities intended unfairly to obstruct the arbitration or to jeopardise the finality of the award; (ii) knowingly make any false statements; and, (iii) knowingly procure or assist in the preparation of or rely upon any false evidence.

If counsel violate the Guidelines, the arbitral tribunal can order (i) a written reprimand; (ii) a written caution regarding future conduct; and (iii) any other measure necessary to ensure the fulfillment of their general duties to act fairly and impartially, and to provide a fair, efficient and expeditious means for resolving the parties' dispute (Article 18.6). Additionally, arbitrators now have the express power to take into account the parties' conduct in awarding costs, including "any non-co-operation resulting in undue delay and unnecessary expense" (Article 28.4).

A second notable amendment is the option to file a Request for Arbitration and a Response on standard electronic forms available on the LCIA's website (Article 1.3 and 2.3). The forms will likely encourage shorter filings and help avoid the repetition that can occur in subsequent pleadings.

Third, in order to promote the more expeditious rendering of final awards, the arbitral tribunal is required to "set aside adequate time for deliberations" and "make its final award as soon as reasonably possible" and "in accordance with a timetable notified to the parties and the [LCIA] Registrar" (Article 15.10).

Fourth, similar to other updated arbitration rules, the 2014 LCIA Rules provide that parties can apply for the appointment of an emergency arbitrator for urgent interim relief (Article 9B). This was an innovation of the ICDR a few years ago. Unlike most other arbitration rules, however, the LCIA provides that in the case of exceptional urgency, parties can also apply for the expedited formation of the arbitral tribunal (Article 9A).

Fifth, in the face of inconclusive international case law, the 2014 LCIA Rules provide that the law applicable to the arbitration agreement is the law of the seat of the arbitration (Article 16.4). This provision makes clear that an arbitration agreement may have a different governing law than the rest of the contract. (The HKIAC implemented a similar provision this fall as well.)

Plethora of New Rules

These amendments are highlights of the changes to the ICDR's and LCIA's rules. They are part of a growing trend of arbitral institutions updating their rules to innovate and keep up with the latest developments and issues in international arbitration.

With each institution's revision, there seems to be less that differentiates each institution, at least "on paper". However, there are differences in the provisions of each institution's rules that may be significant as a practical matter in particular circumstances. Also there are differences in the approaches, level and quality of service, method of selecting and compensating arbitrators, and fees and costs. In order maximize the advantages of international arbitration for your client, when drafting arbitration agreements it is important to ascertain the differences between these rules to assess which rules are most appropriate.

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