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LCIA'S NEW RULES: MODERNIZATION THROUGH ADHERENCE TO TRADITIONAL
PRINCIPLES OF ARBITRATION

By
Shohin Hodizoda-Vance*

I. INTRODUCTION

"This Chamber is to have all the virtues which the law lacks. It is to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peacemaker instead of a stirrer-up of strife."¹

The foregoing was used to describe the London Court of International Arbitration ("LCIA") upon its formation in 1892.² In an attempt to adhere to this description, the LCIA released a new set of rules on July 29, 2014, which took effect on October 1, 2014.³ The new rules are the first major change since 1998 and reflect the LCIA's attempt to effectively respond to recent developments in the field of arbitration.⁴ The updated rules include a mechanism for emergency arbitration,⁵ a new code of conduct for parties and their representatives,⁶ provisions addressing multi-party disputes,⁷ as well as a number of procedural changes that are designed to streamline and simplify the process.⁸ These changes come on the heels of new rules passed by other arbitral bodies, and indicate the LCIA's desire to remain competitive and current in relation to other international arbitral institutions.

This article will examine the substantive changes to the LCIA's rules, and analyze their effect on parties seeking an arbitral forum. First, Part II examines the new provision for Emergency Arbitration. Then, after comparing this new provision to similar

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¹ *History of the LCIA*, LCIA ARBITRATION AND ADR WORLDWIDE, <http://www.lcia.org/LCIA/history.aspx> (last visited Oct. 23, 2014).

² *Id.*

³ *London International Court of Arbitration Formally Adopts New Rules*, 29-8 MEALEY'S INTL. ARB. REP. 14 (2014).

⁴ See Kate Beioley, *The LCIA: New rules and new frontiers*, THE LAWYER, March 19, 2014 (discussing LCIA's passage of new rule and describing the new rules as an "evolution not revolution").

⁵ LONDON COURT OF INTERNATIONAL ARBITRATION, LCIA ARBITRATION RULES art. 9B (2014) [hereinafter "New LCIA Rules"].

⁶ *Id.* art. 18, Annex.

⁷ *Id.* art. 22.1.

⁸ See, e.g., *id.* arts. 2.1, 4.1, 5.6, 10.3, 15, 18.3, 28.4.

provisions in other arbitral institutions, explains what the changes mean. Part III examines the new Code of Conduct that legal representatives appearing before the LCIA are required to follow. Part IV examines the new provisions in the LCIA rules addressing multi-party disputes. Part V discusses some of the procedural changes that are designed to discourage dilatory tactics and encourage efficient conduct by the parties and the arbitrator.

II. PROVISIONS FOR EMERGENCY ARBITRATION AND INTERIM MEASURES

A. Emergency Arbitration: Context, History, and the LCIA's response

Because of its efficiency and flexibility, arbitration has become one of the most popular methods of solving international commercial disputes.⁹ Lower costs, neutrality of the forum, and enforceability of the award are just a few advantages to arbitration.¹⁰ Despite its popularity and practicality, a major shortcoming of arbitration has been the lack of an emergency arbitration mechanism in most international arbitral bodies.¹¹ Recognizing this weakness, in the past few years several major arbitral institutions have implemented new rules to address this issue.¹² In an apparent attempt to remain competitive in the international arbitration arena,¹³ the LCIA's new rules include an emergency arbitration provision.¹⁴

Although the LCIA's 1998 rules included an article addressing expedited formation of a tribunal, the provision was sparse on detail and lacked gravitas.¹⁵ Article 9 of the 1998 LCIA Rules simply stated that a party may apply for an expedited formation of the Arbitration Tribunal in cases of "exceptional emergency," and that "in

⁹ Erin Collins, Student Article, *Pre-Tribunal Emergency Relief in International Commercial Arbitration*, 10 LOY. U. CHI. INT'L L. REV. 105 (2012).

¹⁰ Peter J.W. Sherwin & Douglas C. Rennie, *Interim Relief Under International Arbitration Rules and Guidelines: A Comparative Analysis*, 20 AM. REV. INT'L ARB. 317, 320 (2009).

¹¹ Collins, *supra* note 9, at 116 (pointing to emergency relief as one of the few areas where "use of the traditional system could be more efficient and is more likely to produce the desired results.").

¹² *Id.* Some of the institutions that have addressed the issue are: The American Arbitration Association's International Center for Dispute Resolution (ICDR), The Singapore International Arbitration Centre (SIAC), The Stockholm Chamber of Commerce (SCC), and the International Chamber of Commerce International Court of Arbitration (ICC). *Id.* (noting the recent rule changes in various arbitral institutions).

¹³ Beioley, *supra* note 4.

¹⁴ New LCIA Rules, *supra* note 5, art. 9B.

¹⁵ LONDON COURT OF INTERNATIONAL ARBITRATION, LCIA ARBITRATION RULES art. 9 (1998) [hereinafter "1998 LCIA Rules"]; *See also* Sherwin & Rennie, *supra* note 10, at 362 (discussing lack of specificity in the expedited formation of a tribunal) and 324 (highlighting the problems inherent in broad language providing wide discretion for the formation of arbitral tribunals).

its complete discretion,” the LCIA court may abridge certain time limits.¹⁶ The provision did not include a timeline for the formation of a tribunal, and did little to convey a sense of urgency.¹⁷ Moreover, Article 9 can hardly be classified as a true emergency arbitration provision, as it only expeditiously formed the tribunal, rather than provided a mechanism for emergency relief.¹⁸ Indeed, minimal use of the procedure is likely attributable to its perceived lack of urgency.¹⁹

Without displacing the 1998 rule providing for the expedited formation of a tribunal, the new rules included an article providing for emergency arbitration.²⁰ Article 9B allows either party to an arbitration proceeding to apply for the appointment of a sole emergency arbitrator prior to the formation of the tribunal.²¹ Under this provision, a party may apply for the appointment of a sole emergency arbitrator, even if it applied for expedited formation of a tribunal.²² The emergency arbitrator must be appointed within three days of the receipt of application,²³ and must award relief within fourteen days of the appointment.²⁴ Following the appointment, the arbitrator may conduct the proceeding in any manner the arbitrator deems appropriate under the circumstances, and if necessary, may award emergency relief without a hearing.²⁵ Although the Emergency Arbitrator’s award is binding on the parties and has the same force as any award made by a full

¹⁶ 1998 LCIA Rules, *supra* note 15, art. 9.

¹⁷ *See id.*

¹⁸ *Id.*; *see also* Collins, *supra* note 9, at 110 (noting that although the rules provides some relief for parties seeking emergency relief, they do not provide for the appointment of an emergency arbitrator); *see also* Jason Fry, *The Emergency Arbitrator – Flawed Fashion or Sensible Solution?*, 7 Disp. Resol. Int’l 179, 182-183 (2013) (differentiating expedited formation of tribunal from emergency arbitration).

¹⁹ Robert Blackett, *United States: Can Your Emergency Wait 17 Days?*, MONDAQ BUSINESS BRIEFING, Oct. 11, 2014, available at, <http://www.mondaq.com/unitedstates/x/346136/Arbitration+Dispute+Resolution/Can+Your+Emergency+Wait+17+Days>. In 2012, it was reported that since the enactment of Article 9 in 1998, there had been 95 applications for expedited formation in a 14 year span. For an institution that handles about 300 cases a year, 95 applications represents a very small segment of the LCIA’s total caseload.

²⁰ New LCIA Rules, *supra* note 5, art. 9B.

²¹ *Id.* art. 9.4

²² *Id.*

²³ *Id.* art. 9.6

²⁴ *Id.* art. 9.8

²⁵ New LCIA Rules, *supra* note 5, art. 9.7

arbitral tribunal,²⁶ it is subject to modification or discharge by an Arbitral Tribunal upon the application of any party.²⁷

Emergency or expedited arbitration may become necessary in a number of situations. Parties who apply for emergency arbitration are often seeking an injunction, or some type of conservancy measure to protect their interests or property.²⁸ Emergency relief can also be necessary to ensure that a party does not deplete its funds, making it unable to pay an award if so ordered by an arbitral tribunal.²⁹ Prompt action is often needed in order to prevent a party from pursuing a course of action, which may result in irreparable harm to another party.³⁰

B. Analysis of the LCIA's Emergency Arbitration Provisions

Although the LCIA's emergency arbitration provision is comparable to similar provisions enacted by other international arbitral institutions, there are some distinctions.³¹ For instance, the timeline for the appointment of an emergency arbitrator is slightly shorter in several of the other institutions.³² Similarly, these institutions afford the emergency arbitrators less latitude, and promulgate stricter rules governing the conduct of the proceeding and rendition of awards.³³ Unlike the LCIA, several institutions also require the emergency arbitrator to set a schedule and hold a formal hearing before rendering a decision.³⁴

Despite these differences however, there are several similarities. Similar to the LCIA, the Stockholm Chamber of Commerce ("SCC") and the Singapore International Arbitration Centre ("SIAC") provide for both expedited arbitration and emergency

²⁶ New LCIA Rules, *supra* note 5, art. 9.9

²⁷ *Id.* art. 9.11

²⁸ *See* Fry, *supra* note 18, at 2.

²⁹ *Id.*

³⁰ *Id.*

³¹ *See generally* Collins, *supra* note 9 (comparing and contrasting emergency and interim provisions of arbitral institutions).

³² *See id.* at 110-115 The ICDR, the SIAC, and the SCC require appointment within a day, and the ICC requires appointment within two days.

³³ *See id.* The SCC and the ICC, for instance, have detailed rules that require the parties to submit specific information relating to the reason for the emergency application and the proposed conduct of the emergency application.

³⁴ *See id.* The ICDR, SIAC, and ICC, for example, require the Emergency Arbitrator to propose a schedule for the emergency proceedings. Furthermore, the SIAC requires the emergency arbitrator to hold a hearing before rendering an award.

arbitration.³⁵ The International Centre for dispute resolution (“ICDR”), the SIAC, the SCC, and the International Chamber of Commerce (“ICC”) also provide a mechanism for vacatur or modification of an award by the arbitral tribunal once it is formed.³⁶

Significantly, similar to the LCIA rules, other international institutions, such as the SCC, ICDR and the ICC, have also made it clear that the emergency provision is not intended to prevent a party from seeking urgent measures from a judicial authority.³⁷ This is a key feature of any emergency arbitration provision because it exhibits an understanding that despite the advantages of arbitration, it is not a panacea, and resorting to the courts may sometimes be necessary to receive effective emergency relief.³⁸ Because arbitrators generally lack coercive powers and lack authority over third parties, courts may be a more desirable avenue for obtaining such relief.³⁹

Furthermore, the LCIA’s emergency arbitration provision holds a key advantage over the ICC’s analogous provision. Whereas an ICC emergency arbitrator’s decision takes the form of an “order,” an LCIA emergency arbitrator’s decision is an “award.”⁴⁰ This is an important distinction because under the New York Convention, which is the mechanism for the enforcement of awards, only “awards” are enforceable.⁴¹ Therefore, presuming that the parties do not choose to have the award reviewed by the a full Arbitral Tribunal, the LCIA’s emergency arbitration should avoid any enforcement issues.

Notwithstanding the slight variations between the LCIA’s emergency arbitration provision and that of other arbitral institutions, the rule change has likely filled a chasm that could have served as a detractor for parties seeking the appropriate forum to adjudicate a dispute. Although the broad discretionary power granted to the Emergency Arbitrator to conduct the proceeding in any way the arbitrator deems appropriate may be seen as an unwelcome expansion of arbitral authority, the broad language provides arbitrators with flexibility to render an award quickly and effectively, which is often the intent of parties seeking emergency relief.

³⁵ See Collins, *supra* note 9, at 117-118.

³⁶ See *id.*, at 110-115.

³⁷ *Id.*, at 119-120.

³⁸ Sherwin & Rennie, *supra* note 10, at 322.

³⁹ *Id.* citing Karen Halverson Cross, *Arbitration as a Means of Resolving Sovereign Debt Disputes*, 17 AM. REV. INT’L ARB. 335, 371-72 (2008) (pointing to the advantages of resorting to a national court, including a court’s authority over non-parties to the arbitration); see also Collins, *supra* note 9, at 120.

⁴⁰ Blackett, *supra* note 19.

⁴¹ *Id.*

III. CODE OF CONDUCT GOVERNING PARTIES AND THEIR LEGAL REPRESENTATIVES

A. Development of Ethical Standards in Arbitration

As arbitration has grown in popularity, a major point of discussion in the arbitral community has centered on the necessity and viability of an ethical code of conduct for parties in arbitration, as well as their legal representatives.⁴² At its inception, the arbitral community was small and self-contained, thus diminishing the need for a formal code of ethics.⁴³ The profession was self-regulated and “informal peer pressure” from colleagues was an effective method for discouraging unethical behavior.⁴⁴ The practice is illustrated by the widespread use of, and adherence to, *lex mercatoria*, an unwritten law of merchants which emphasized fairness and good faith.⁴⁵ However, as arbitration has grown in popularity, so have the number of legal professionals involved in arbitration, rendering self-regulation and peer pressure an ineffective method of enforcing ethical standards.⁴⁶ Furthermore, as the inclusion of choice-of-law provisions in arbitration clauses has become more common, arbitration lawyers no longer feel bound by the ethical standards of *lex mercatoria*.⁴⁷

Because of these changes in the practice of international arbitration, many experts in the field have advocated for the enactment of stricter and more uniform codes of ethics.⁴⁸ However, international arbitration poses a unique challenge for the development of a code of ethics.⁴⁹ When regulating cross-border legal practice, the problem generally centers on whether the ethical standards of the attorney’s home state, or the ethical standards of the host state govern.⁵⁰ Therefore, although there is uncertainty regarding

⁴² See generally Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH J. INT’L L. 341 (2002) [hereinafter Rogers, *Developing a Code of Conduct for International Arbitration*] (discussing the need for ethical guidelines in arbitration); see also Catherine A. Rogers, *Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration*, 39 STAN J. INT’L L. 1 (2003) [hereinafter Rogers, *Constructing an Enforcement Regime for International Arbitration*].

⁴³ Rogers, *Developing a Code of Conduct for International Arbitration*, *supra* note 42, at 351-54.

⁴⁴ *Id.*, at 344.

⁴⁵ *Id.*, at 351.

⁴⁶ *Id.*, at 354-55.

⁴⁷ *Id.*, at 354.

⁴⁸ See Rogers, *Developing a Code of Conduct for International Arbitration*, *supra* note 42, at 354 (highlighting the need for a predictable and uniform means of regulating attorneys).

⁴⁹ *Id.*

⁵⁰ *Id.*, at 355-56.

which ethical standard applies, the existence of some type of standard is not in question in non-arbitral international proceedings.⁵¹ However, because international arbitral bodies are disassociated from any state, the problem is not regulatory competition, but rather a lack of regulation.⁵²

One possible solution to filling this chasm is including a choice of law provision in the arbitral agreement, identifying a specific ethical code that is to govern the proceedings.⁵³ Because many arbitral agreements specify the substantive national law that is to govern the dispute, incorporating a provision specifying an ethical standard appears to be a reasonable extension of the parties' power to choose the governing law.⁵⁴ Although this approach pays a great deal of deference to the concepts of party autonomy and freedom of contract, it presents a number of practical obstacles, the most significant of which is that national ethical guidelines were not written with arbitral proceedings in mind, thus, making them a poor substitute for ethical guidelines written specifically for arbitration.⁵⁵ Furthermore, because many arbitral clauses are inserted into much larger contracts without proper attention to detail, the drafter is unlikely to specify ethical standards, and is even less likely to provide for a mechanism to resolve a potential void in the chosen guidelines.⁵⁶

In 2004, the International Bar Association ("IBA") made the first widespread and concerted effort to recommend a uniform code of ethics in international arbitration.⁵⁷ Although the IBA Guidelines are well-reasoned and address many of the ethical challenges that exist in international arbitration, they only set forth ethical standards for arbitrators, not the legal representatives of parties.⁵⁸ Moreover, the guidelines are not binding on any arbitral body and serve merely as an advisory set of rules.⁵⁹ A survey of arbitral decisions from 2004 to 2009 found that the number of judgments that reference

⁵¹ Rogers, *Developing a Code of Conduct for International Arbitration*, *supra* note 42, at 355-56.

⁵² *Id.*, at 356-57.

⁵³ *Id.*, at 402.

⁵⁴ *Id.*, at 402-03.

⁵⁵ *Id.*, at 404.

⁵⁶ Rogers, *Developing a Code of Conduct for International Arbitration*, *supra* note 42, at 403 – 05.

⁵⁷ The IBA Conflicts of Interest Subcommittee, a Subcommittee of the IBA Arbitration Committee, *The IBA Guidelines on Conflict of Interest in International Arbitration: The First Five Years 2004-2009*; 4 DRI 5 (2009).

⁵⁸ *Id.*

⁵⁹ *Id.*

the guidelines was sparse.⁶⁰ In an attempt to enact ethical standards that are binding rather than advisory, the LCIA added provisions governing ethics, making it the first major institution to enact such a code.⁶¹

B. LCIA's Rules Governing Ethics

The LCIA's rules governing ethics are contained in a newly-added Annex and are made binding upon the parties by Article 18.⁶² Paragraph one of the Annex lays out the general contours of the guidelines, stating that the rules are designed to encourage proper conduct among the parties.⁶³ It also limits the reach of the rule by explaining that a legal representative's duty of loyalty to his or her client remains the primary consideration.⁶⁴ Furthermore, paragraph one makes it clear that the general guidelines of the Annex are pre-empted by "any mandatory laws, rules of law, professional rules or codes of conduct if and to the extent that any are shown to apply to a legal representative appearing in the arbitration."⁶⁵ This provision seemingly refers to mandatory ethical guidelines to which practitioners are bound in their home state, or the rules of the host state, violations of which can lead to disciplinary action in the same.

Paragraph two prohibits a legal representative from engaging in obstructive or dilatory tactics in bad faith.⁶⁶ Paragraph three prohibits a legal representative from knowingly making false statements,⁶⁷ and paragraph four and five prohibit a legal representative from presenting false evidence,⁶⁸ or concealing evidence which is ordered to be produced by the Tribunal.⁶⁹ Paragraph six prohibits a legal representative from

⁶⁰ The IBA Conflicts of Interest Subcommittee, a Subcommittee of the IBA Arbitration Committee, *supra* note 58, at 6-7 (citing to a 2006 survey found three court cases that referred to the IBA Guidelines). The article also notes, however, that since 2006, there has been a steady increase in the number of references to these guidelines.

⁶¹ Vasilis Pappas & George M. Vlavianos, *Canada: New LCIA Arbitration Rules Come Into Effect on October 1, 2014*, MONDAQ BUSINESS BRIEFING, Oct. 11, 2014, available at, <http://www.mondaq.com/canada/x/346056/International+Courts+Tribunals/New+LCIA+Arbitration+Rules+Come+into+Effect+on+October+1+2014>.

⁶² New LCIA Rules, *supra* note 5, art. 18, Annex.

⁶³ *Id.*, Annex ¶ 1.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*, Annex ¶ 2.

⁶⁷ New LCIA Rules, *supra* note 5, art. 18, Annex ¶ 3.

⁶⁸ *Id.*, Annex ¶ 4.

⁶⁹ *Id.*, Annex ¶ 5.

contacting any member of the Arbitral Tribunal or the LCIA court without making a written disclosure to all parties and all members of the Arbitral Tribunal.⁷⁰

Article 18 sets forth the process for determining whether a party has violated the guidelines and what sanctions the tribunal may impose on a violator.⁷¹ If a party files a complaint against another party's legal representative, the Arbitral Tribunal must grant the legal representative a "reasonable opportunity to answer the complaint" before rendering a judgment.⁷² If the Tribunal determines that a legal representative has violated the guidelines, it may issue a written reprimand, a written caution, or "any other measure necessary to fulfil with the arbitration the general duties required of the Arbitral Tribunal[.]"⁷³ Although the rule seems to give the tribunal a great deal of latitude in dealing with unethical behavior, the extent of a tribunal's willingness (or ability, for that matter) to impose a harsh punishment is unclear. Also of interest is the fact that Article 18 places a certain degree of responsibility on the parties involved in the arbitration, by requiring that they ensure that their respective legal representatives have agreed to comply with the guidelines.⁷⁴ However, the article does not mention any type of sanction or punishment for failing to ensure that a legal representative has agreed to comply with the ethical guidelines.⁷⁵

The guidelines are a positive first step toward addressing the ethical problems facing international arbitration. The strength of the guidelines is that they do not attempt to overregulate.⁷⁶ Understanding that their reach can often be longer than their grasp, the new rules do not promulgate regulations that the tribunal is powerless to enforce. The Annex concedes, for instance, that if a conflict arises between mandatory ethical standards to which an attorney is bound, and the LCIA's guidelines, the latter may not apply.⁷⁷ This is an important concession because it appears to demonstrate that the drafters understood the inherent limitations of an international arbitral body, and that any attempt by that international body to impose guidelines, which could require legal

⁷⁰ New LCIA Rules, *supra* note 5, art. 18, Annex ¶ 6.

⁷¹ *Id.*, art. 18.6.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*, art. 18.5.

⁷⁵ New LCIA Rules, *supra* note 5, art. 18.5.

⁷⁶ See generally e.g. Rogers, *Constructing an Enforcement Regime for International Arbitration*, *supra* note 42 (noting that while it is important for arbitral institutions to develop and promulgate ethical standards, a legal representative's home state retains an interest in regulating an attorney that must be recognized; also noting that a sanctions for a violation of any ethical provision may not necessarily be enforceable under the New York Convention).

⁷⁷ New LCIA Rules, *supra* note 5, Annex ¶ 1.

representatives to violate their home country's ethical standards, would be greeted with disdain from practitioners.⁷⁸

IV. MULTIPARTY DISPUTES

A. Consolidation of Arbitral Disputes

Due to its popularity as a dispute resolution mechanism, arbitral proceedings are becoming increasingly complex and may include numerous parties or several parallel proceedings.⁷⁹ The question of if, and when, an arbitral body should allow for, or require consolidation has become a hotly contested issue.⁸⁰ The threshold question posed by commentators is whether a tribunal should ever have the power to consolidate proceedings.⁸¹ Assuming that the answer is in the affirmative, the question becomes whether a tribunal should require consent from all parties before ordering consolidation, or whether the tribunal should be allowed to consolidate proceedings without consent in the interest of maintaining procedural efficiency.⁸² The answer to the latter question is deceptively elusive and raises both doctrinal and procedural issues.⁸³

From a doctrinal perspective, party autonomy has been a key feature of the Anglo-American legal system, especially in arbitration.⁸⁴ Indeed, arbitration is based on the idea of freedom of contract, which stems from party autonomy.⁸⁵ Compelling

⁷⁸ Rogers, *Constructing an Enforcement Regime for International Arbitration*, *supra* note 42, at 21-23.

⁷⁹ S. I. Strong, *Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Right or a Proper Equitable Measure?*, 31 VAND. J. TRANSNAT'L L. 915, 917-920 (1998).

⁸⁰ See Okuma Kazutake, *Party Autonomy In International Commercial Arbitration: Consolidation of Multiparty and Classwide Arbitration*, 9 ANN. SURV. INT'L & COMP. L. 189 (2003) ; see also Thomas J. Stepanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 IOWA L. REV. 473, 492-493 (1987) (identifying the ancillary issue of joinders and impleaders, which involves compelling a third party to join in the arbitral proceeding). Because these procedures involve compelling the appearance of a non-signatory party before a tribunal, they should be used sparingly and with particular discretion. Therefore, these mechanisms are not a widely accepted ways of dealing with multi-party disputes.

⁸¹ Kazutake, *supra* note 80, at 191.

⁸² *Id.*

⁸³ See Kazutake, *supra* note 80 (highlighting the divergent views on the appropriateness of arbitration); see also Stepanowich, *supra* note 80 (same).

⁸⁴ See generally Stepanowich, *supra* note 80, at 495, 525; see also Rogers, *Constructing an Enforcement Regime for International Arbitration*, *supra* note 42, at 14.

⁸⁵ *Id.*

consolidation of arbitral proceedings would seemingly violate that autonomy.⁸⁶ From a procedural perspective, the mechanism for achieving consolidation can also be problematic.⁸⁷ The coercive power of a tribunal is generally limited and an order consolidating proceedings may be difficult to enforce.⁸⁸ Therefore, effectuating enforcement may require intervention from the court system.⁸⁹

In turn, resorting to the courts raises a different set of concerns.⁹⁰ Not only can intervention by the courts be seen as “an impermissible intrusion into the domain of an [arbitral tribunal,]” but allowing such intrusion may defeat the purpose of arbitration.⁹¹ Parties arbitrate disputes because they see it as a more efficient and cost-effective way of settling disputes than going through the judicial system.⁹² Allowing a party to seek judicial intervention would seemingly detract from arbitration’s strength.⁹³

Despite these concerns, many jurisdictions have allowed for some type of consolidation of proceedings.⁹⁴ In the United States, for instance, most courts have prohibited consolidation of arbitral proceedings unless the parties agree.⁹⁵ Similarly, the French courts have been reluctant to allow for consolidation in the absence of a clear intent to do so.⁹⁶ The British courts have taken a more liberal approach, allowing for

⁸⁶ See generally Stepanowich, *supra* note 80, at 495, 525; see also Rogers, *Constructing an Enforcement Regime for International Arbitration*, *supra* note 42, at 14.

⁸⁷ See Stepanowich, *supra* note 80, at 509-510.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*, at 494.

⁹¹ *Id.*, at 494-495, 509 n.199 (citing *Louisiana Stadium & Exposition Dist. v. Huber, Hunt & Nichols, Inc.*, 349 So. 2d 491 (La. Ct. App. 1977) (noting that excessive judicial intervention impedes the purpose of arbitration)).

⁹² See, e.g., Stepanowich, *supra* note 80, at 474 (“The move toward arbitration has been stimulated by the perception that arbitration affords disputants a means of resolving disagreements more quickly and less expensively than litigation.”).

⁹³ See *id.*, at 494-495.

⁹⁴ See generally Kazutake, *supra* note 80 (examining how the courts in the United States, the United Kingdom, and France have allowed for consolidation).

⁹⁵ *Id.*, at 192-194. The notable exception to the general rule prohibiting consolidation without parties’ consent is the Second Circuit, which held in *Compania Espanola de Petroleos, S. A. v. Nereus Shipping, S. A.*, 527 F.2d 966 (2d Cir. 1975) that consolidation of arbitral proceedings without the express agreement of the parties involved was proper, because although no explicit provision for consolidation of proceedings between the parties was present, there were references to consolidation of proceedings in the respective agreements.

⁹⁶ See *id.* at 196-197.

consolidation of the proceedings despite the absence of an express agreement to do so.⁹⁷ In concluding that the proceedings may be consolidated, the court in *Erith Contractors Ltd v Costain Civil Engineering Ltd.* considered the background of the dispute and the intent of the parties.⁹⁸ The survey of these jurisdictions makes it clear that although there are nuanced differences in approach, jurisdictions have recognized the need to implement some type of mechanism for consolidating disputes.⁹⁹

B. The LCIA Rules Governing Multi-Party Disputes

The LCIA addresses consolidation of disputes in Articles 22.1(ix) and 22.1(x).¹⁰⁰ Article 22.1(ix) allows the LCIA Court to consolidate two or more arbitration proceedings if all the parties to the arbitration agree in writing.¹⁰¹ This provision is not very controversial, as it requires written consent from all the parties before compelling consolidation. However, Article 22.1(x) is slightly more contentious, as it may allow for consolidation of proceedings without the consent of the parties.¹⁰² Under this latter provision, the LCIA Court may order consolidation if a tribunal has not yet been formed for the other arbitration(s) – irrespective of whether the parties consent.¹⁰³ Although the Article is not explicit in when consolidation is appropriate, tribunals generally consolidate cases when there is a common agreement, or when the dispute arises from a common set of facts.¹⁰⁴ Also of note is that the new rules now recognize the concept of cross-claims,¹⁰⁵ which the old rules made no mention of.¹⁰⁶ In cases which involve more

⁹⁷ See Kazutake, *supra* note 80 at 198.

⁹⁸ See *id.* (citing *Erith Contractors Ltd v Costain Civil Engineering Ltd.*, [1994] ADR LJ 123 Official Referees His Honour Judge John Loyd Q.C., unreported; White & Case, 7 Int'l Arbitration Newsletter 1, 11 (Jan.1994)

⁹⁹ See Kazutake, *supra* note 80, at 213.

¹⁰⁰ New LCIA Rules, *supra* note 5, art. 22.1 (ix), 22.1 (x).

¹⁰¹ *Id.*, art. 22.1 (ix) (“to order, with the approval of the LCIA Court, the consolidation of the arbitration with one or more other arbitrations into a single arbitration subject to the LCIA Rules where all the parties to the arbitrations to be consolidated so agree in writing”).

¹⁰² *Id.*, art. 22.1 (x) (“to order, with the approval of the LCIA Court, the consolidation of the arbitration with one or more other arbitrations subject to the LCIA Rules commenced under the same arbitration agreement or any compatible arbitration agreement(s) between the same disputing parties, provided that no arbitral tribunal has yet been formed by the LCIA Court for such other arbitration(s) or, if already formed, that such tribunal(s) is(are) composed of the same arbitrators...”).

¹⁰³ *Id.*

¹⁰⁴ See Stepanowich, *supra* note 80, at 505 (“...consolidation is considered appropriate only in cases involving common issues and facts arising out of related transactions...”).

¹⁰⁵ See, e.g., New LCIA Rules, *supra* note 5, art. 15.3, 15.4, 15.5.

than one Respondent, a Respondent may assert a claim against another Respondent by way of a cross-claim.¹⁰⁷ The availability of this procedure is crucial in disputes involving multiple Respondents, because it allows all claims to be decided under a single proceeding.

The LCIA's rules are comparable to those of other international arbitral institutions, but with slight variations. For example, the ICC grants its tribunal more latitude in deciding when to consolidate arbitrations.¹⁰⁸ In addition to situations where both parties consent, the ICC allows consolidation when "the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible."¹⁰⁹ This grants significantly more power to the ICC Court/Tribunal than the LCIA's rules. Similarly, the SCC grants the Board the power to order consolidation upon the request of any of the parties.¹¹⁰ Although it requires the Board to consult with the parties and the tribunal, it does not place any procedural limitations on when the SCC may order consolidation.¹¹¹

The LCIA's rule changes should ensure that it remains competitive in relation to other international arbitral institutions. Although the new rules limit the situations in which proceedings may be consolidated, this constraint may not necessarily affect the LCIA adversely. Parties often do not wish to grant arbitrators sweeping powers to consolidate. Furthermore, practitioners are likely to respond positively to a provision requiring consent to consolidate once tribunals have been formed for all disputes in question.

V. PROCEDURAL RULE CHANGES

A. Improved Efficiency of the Arbitral Process

As mentioned previously, arbitration has become an increasingly popular way of settling international commercial disputes, in large part because of the perception that it is

¹⁰⁶ See 1998 LCIA Rules, *supra* note 15.

¹⁰⁷ *Black's Law Dictionary* (9th ed. 2009), available at Westlaw BLACKS.

¹⁰⁸ See International Court of Arbitration, International Chamber of Commerce, ICC Rules of Arbitration art. 10 (2012).

¹⁰⁹ *Id.*

¹¹⁰ Arbitration Institute of the Stockholm Chamber of Commerce, Stockholm Chamber of Commerce, Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce art. 9 (2010).

¹¹¹ *Id.*

more efficient and cost-effective than the judicial system.¹¹² To ensure that the growth in popularity is sustained, it is imperative that arbitral institutions continue to improve the process and make it more efficient. The new LCIA rules attempt to do that.

1. Encouraging efficient conduct by the parties

There are numerous procedural changes that encourage efficiency and modernity. Parties now may deliver communication to the LCIA electronically rather than in person or by mail.¹¹³ The time that a party has to file a response has also been shortened from 30 days to 28.¹¹⁴ If a party wishes to challenge the appointment of an arbitrator, they must do so within 14 days of the formation of the Tribunal, or within 14 days of becoming aware of the existence of grounds for a challenge.¹¹⁵ However, the time for constituting a tribunal has been increased from 30 days to 35 days.¹¹⁶ A claimant also now has the ability to have the Request for Arbitration serve as the Statement of the Case,¹¹⁷ and the respondent may elect to have the Response serve as the Statement of Defense, thereby eliminating the need for unnecessary and duplicative filings.¹¹⁸ Other possible disruptions are also addressed in the new rules. For example, any controversy regarding the sufficiency of a Request or Response will not delay the formation of a Tribunal.¹¹⁹ Similarly, the court may proceed with the formation of a tribunal, even if a “Request is incomplete, or the Response is missing, late or incomplete.”¹²⁰

¹¹² See Rogers, *Constructing an Enforcement Regime for International Arbitration*, *supra* note 42, 10-15 (discussing the reasons behind the popularity of international arbitration); see also Kazutake, *supra* note 80, at 190 (“Arbitration has...been recognized...as a useful and important device for resolving disputes.”).

¹¹³ New LCIA Rules, *supra* note 5, art. 1.2, 1.3, 2.2, 2.3, 4.1.

¹¹⁴ *Id.*, art. 2.1.

¹¹⁵ *Id.*, art. 10.3; compare with 1998 LCIA Rules, *supra* note 15, art. 10.4 (requiring challenge within 15 days of the formation of the tribunal or “after becoming aware of any circumstances [giving rise to a challenge,]” with no specific timeline given after becoming aware of the grounds for the challenge).

¹¹⁶ New LCIA Rules, *supra* note 5, art. 5.6.

¹¹⁷ *Id.*, art. 15.3.

¹¹⁸ *Id.* The respondent may also elect to have the Response serve as a Statement of cross-claim, which, as mentioned previously is a newly introduced concept.

¹¹⁹ *Id.*, art. 5.1.

¹²⁰ *Id.*

2. Discouraging Dilatory Tactics

A party's attempt to make changes to its legal representation as a dilatory tactic is also addressed in Article 18 of the new rules.¹²¹ If a party intends to make any changes or additions to its legal representation, it must first inform all other parties, the Tribunal and the LCIA Registrar.¹²² The Tribunal, in turn, must approve the change, and may withhold such approval if it determines that "the change could compromise the composition of the [] Tribunal or the finality of any award[.]"¹²³ Furthermore, the tribunal is expressly permitted to consider the parties' conduct when awarding costs.¹²⁴ Specifically, the tribunal may account for a party's lack of cooperation which may have led to undue delay or the incursion of unnecessary costs.¹²⁵

3. Encouraging efficient conduct by the Arbitrators

In addition to encouraging efficient conduct by the parties, the new rules also encourage the Tribunal to act more efficiently. An amendment to Article 5 requires arbitral candidates to provide the Registrar with a written declaration that they are "ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious conduct of the arbitration."¹²⁶ Article 15 has also been amended to require the arbitrators to make a final award "as soon as reasonably possible."¹²⁷

The new rules governing arbitrators' conduct seem to be designed to provide an effective response to the growing concern that despite its many advantages, arbitration has become an extremely prolonged process riddled with delay.¹²⁸ Some commentators have argued that incorporating final award deadlines into every procedure is the most effective response to this growing concern.¹²⁹ Under this system, once the arbitral

¹²¹ New LCIA Rules, *supra* note 5, art. 18.3, 18.4.

¹²² Rule 18.3. The LCIA Registrar heads the Secretariat in charge of the day-to-day administration of the LCIA's casework. See Organisation, About Us, LCIA Arbitration and ADR Worldwide, <http://www.lcia.org/LCIA/organisation.aspx> (last visited Oct. 23, 2014).

¹²³ New LCIA Rules, *supra* note 5, art. 18.4.

¹²⁴ *Id.*, art. 28.4.

¹²⁵ *Id.*, art. 28.4.

¹²⁶ *Id.*, art 5.4.

¹²⁷ *Id.*, art. 15.10.

¹²⁸ See Baiju S. Vassani & Kassi D. Tallent, *Proportional Autonomy: Addressing Delay in International Arbitration through a Deadline for the Rendering of Final Awards*, 2 Disp. Resol. Int'l. 255, 255-56 (2008) (discussing the endemic nature of delay in the arbitral process).

¹²⁹ *Id.*, at 258.

proceeding has commenced, the parties and the arbitrators must agree on a deadline for when a final award is made.¹³⁰ The IBA has also proposed a solution to the issue, albeit a much less rigid solution.¹³¹ Its rules require an arbitrator to devote the reasonable time and effort that the parties are “entitled to expect,” and that they conduct the proceedings with reasonable haste.¹³² The language and reach of the LCIA’s new rules closely resembles that of the IBA. Although the new rules do not require a firm deadline, , the cumulative effect of the new provisions should be to further discourage unnecessary delays that may result from an arbitrator’s inaction.

B. Improving Contact between the parties and the Tribunal

In an attempt to encourage cooperation and the speedy resolution of disputes, the new LCIA rules also have provisions requiring parties to communicate with each other.¹³³ The parties and the Tribunal are now required to make contact with each other within 21 days of the formation of the Tribunal.¹³⁴ The parties are also encouraged to “agree on a joint proposal for the conduct of their arbitration” with the input of the Tribunal.¹³⁵ Furthermore, the new rules require the parties to communicate directly with the Tribunal once it is formed, eliminating the Registrar as an intercessor.¹³⁶ The previous version required all communication between the parties and the arbitrators to be made through the Registrar prior to the formation of the Tribunal, but made no mention of the manner of communication after the formation of the Tribunal.¹³⁷ These new provisions should improve communication not only between the parties, but also between the parties and the tribunal, thus making the arbitral process more efficient.

¹³⁰ Baiju S. Vassani & Kassi D. Tallent, *supra* note 128, at 258.

¹³¹ *Id.*, at 257 n.7 (discussing Rule 2.2 and Rule 7 of the IBA’s Rules of Ethics for International Arbitrators).

¹³² *Id.*

¹³³ *See* New LCIA Rules, *supra* note 5, art. 14.1, 14.2, 13.1.

¹³⁴ *Id.*, art. 14.1; *compare with* 1998 LCIA Rules, *supra* note 15, art. 14.1 (“encouraging” parties and the tribunal to make contact, but not requiring that such contact be made).

¹³⁵ New LCIA Rules, *supra* note 5, art. 14.2.

¹³⁶ *Id.*, art. 13.1.

¹³⁷ 1998 LCIA Rules, *supra* note 15, art. 13.1.

C. Expansion of the Express Powers of the Tribunal

The new rules expand the power of the Tribunal by removing the ability of the parties to limit the Additional Powers granted to a Tribunal by Article 22.¹³⁸ This provision grants the Arbitral Tribunal a wide range of powers.¹³⁹ These powers include: the power to allow a party to supplement, modify or amend any documents;¹⁴⁰ the power to adjust time periods;¹⁴¹ the power to conduct its own investigations;¹⁴² and the power to request production of documents, including the power to compel a third party to produce documents.¹⁴³ Although the previous version of this rule allowed the parties to opt out of this provision, the new rule grants the Tribunal the Additional Powers regardless of any written agreement by the parties to the contrary.¹⁴⁴ Similarly, the parties can no longer curtail a tribunal's right to grant interim or conservancy measures.¹⁴⁵

The change to the Additional Powers raises an interesting and oft-debated question regarding the balance between freedom of contract, and the need to promote efficiency. Freedom of contract, which allows the parties to fashion an arbitration agreement in a manner that best suits their needs, is one of the basic tenets of arbitration.¹⁴⁶ Traditionally, parties have been allowed to fashion an arbitration agreement in such a way that would allow them to dictate the limits of an arbitrator or an arbitral tribunal.¹⁴⁷ Abolishing the right of a party to opt out of a provision may be seen by some as an attack on the parties' freedom of contract.¹⁴⁸ However, stripping an arbitrator of all power can make the arbitral process inefficient and slow, thus defeating one of the main objectives of arbitration – efficiency. The change is therefore likely to be received as a welcome rebalancing of power between the arbitrators and the parties.

¹³⁸ Compare New LCIA Rules, *supra* note 5, art. 22 (listing the additional powers of a tribunal, but not providing for a mechanism for the parties to agree to curb such powers), with 1998 LCIA Rules, *supra* note 15, art. 22.1 (“Unless the parties at any time agree otherwise in writing, the Arbitral Tribunal shall have [the Additional Powers]”).

¹³⁹ New LCIA Rules, *supra* note 5, art. 22.1.

¹⁴⁰ *Id.*, art. 22.1 (i).

¹⁴¹ *Id.*, art. 22.1 (ii).

¹⁴² *Id.*, art. 22.1(iii).

¹⁴³ *Id.*, art. 22.1(iv).

¹⁴⁴ New LCIA Rules, *supra* note 5, art. 22.1.

¹⁴⁵ Compare *id.* art. 25, with 1998 LCIA Rules, *supra* note 15, art. 25 (“The Arbitral Tribunal shall have the power [to grant interim or conservancy measures], unless otherwise agreed by the parties in writing...”).

¹⁴⁶ See Rogers, *Constructing an Enforcement Regime for International Arbitration*, *supra* note 42, at 14-15.

¹⁴⁷ *Id.*

¹⁴⁸ See *id.* (noting the revered status of party autonomy and the traditional importance of the doctrine).

VI. CONCLUSION

The LCIA's new rules attempt to address some of the biggest problems facing arbitration tribunals. By enacting provisions to address emergency arbitration and multi-party disputes, the drafters have demonstrated their commitment to ensuring that the LCIA is able to provide effective adjudication to an increasing number of complex disputes that require procedural flexibility. Meanwhile, the LCIA's enactment of ethical standards, basic though they are, reflects the LCIA's desire to maintain the integrity of the arbitral process in the institution. However, it is clear that although the LCIA was eager to address these issues, it did not attempt to supplant the basic principles of arbitration that have likely contributed to its success, such as party autonomy, and the relative informality of the process.

The LCIA's procedural changes reveal a steadfast commitment in the arbitral community to maximize efficiency and delay unnecessary delays. Despite its advantages, delay has become wide-spread in arbitration, and the cumulative effect of the numerous minor changes should maintain the Chambers promise: to be expeditious where the law is slow.¹⁴⁹

¹⁴⁹ *History of the LCIA*, *supra* note 1.