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London Court of International Arbitration updated the LCIA Arbitration Rules

London Court of Arbitration (LCIA) is among the world's leading institutions for resolution of commercial disputes by arbitration. Alongside the ICC, SIAC and a few other institutions, it is frequently chosen as the institution to administer arbitration proceedings in cross-border disputes. It is not uncommon to see, for example, disputes under an M&A agreement between a U.S. party and a Nordic party submitted to arbitration under the LCIA Arbitration Rules, even if the governing law of the transaction is the domestic law of the Nordic country where the target company of such acquisition is incorporated.

In August 2020, LCIA announced that it has updated its Arbitration Rules and Mediation Rules which were last amended in 2014 and 2012, respectively. The revised rules take effect in October 2020. According to a message from LCIA to LCIA members, the aim of the updated rules is to "make the arbitral and mediation processes even more streamlined and clear for arbitrators, mediators and parties alike". The updated Rules take into account the rapid developments in the use of technology to facilitate arbitration proceedings, as well as bring clarifications in relation to the discretionary powers of the arbitral tribunal to manage cases. Briefly mentioned below are a few highlights of the revised LCIA Arbitration.

The LCIA Arbitration Rules were finalised during the Covid-19 pandemic, and while the pandemic was not the reason for the changes in the Rules, many of the changes adopted in the Rules are in line with the practices that have become prevalent during the pandemic, notably the fact that the updated Rules have increased the use of virtual hearings and have introduced the default rule in favor of using electronic communications, instead of paper filings. The new Arbitration Rules also provide for electronic signature of arbitral awards, subject to agreement otherwise of the parties or direction of the tribunal or LCIA court.

The revised Rules also contain a new provision regarding tribunal secretaries. The tribunal may only obtain the assistance of a secretary once the secretary has been approved by the parties. The new Rules make it clear that under no circumstances may the tribunal delegate its decision-making function to a tribunal secretary.

Among the case management powers of an arbitral tribunal, the revised LCIA Arbitration Rules explicitly give the tribunal the power to issue an "Early Determination" award, effectively dismissing a claim, defence, counterclaim, cross-claim, defence to counterclaim or defence to cross-claim as being manifestly outside the jurisdiction of the tribunal, or inadmissible or manifestly without merit. In addition to promoting efficient case management, some commentators have noted that this power of the arbitrators should enhance LCIA's position for handling finance disputes[1].

The updated LCIA Arbitration Rules also enable a claimant that seeks resolution of multiple disputes to issue a composite request to commence multiple arbitrations at the same time. Following such a request, the respondent may then file a composite response. Consolidation of the several proceedings may then be sought in accordance with the LCIA Arbitration Rules. The revised LCIA Arbitration Rules include expanded provisions enabling the tribunal (subject to the LCIA Court's approval) or the LCIA Court, to consolidate arbitration proceedings into a single proceeding.

Further, the revised LCIA Arbitration Rules provide that processing of personal data by the LCIA is subject to applicable data processing legislation.

M&A arbitration – when is an arbitrator not independent due to a conflict of interest?

The typical negotiated M&A transaction, whether structured as the purchase of shares of the target company or an acquisition of all or a part of its assets and business, is documented by a share or an asset acquisition agreement. In the acquisition agreement, the parties often agree to submit any disputes arising from the agreement to arbitration.

Arbitration is particularly suitable for resolving M&A disputes for a number of reasons.

Firstly, an M&A transaction can present many complex and specialised questions. As is well known, issues arising from an M&A transaction are not governed by a single statute or law. Instead, the M&A agreement is typically based on customary M&A contract practices which form the basis of the parties' rights and obligations, to the extent the parties' freedom of contract is not impacted by laws that also may have applicability, such as sale of goods law, company law, competition law, employment law etc. Adjudication of disputes arising from such transactions is most effectively done by persons fully conversant with M&A practices and norms in the relevant market, and arbitrators with an M&A background are often thought to fulfil these criteria better than judges in the court system who may not be equally specialised.

Secondly, parties to an M&A deal often expect their disputes to be settled quickly and finally – for example, a dispute over whether a party has breached its representations and warranties, or in the extreme cases whether a deal should be cancelled or rescinded, should be settled quickly so that the acquiror can continue the integration of the acquired business and the final costs of the acquisition do not remain unclear for several years.

Lastly, in an international M&A transaction, the transaction documents are most commonly in the English language, and it would be cumbersome and costly to translate all submissions to the local language as is often required by courts.

[1] See, e.g., Vanessa Naish and Rebecca Warder, Thomson Reuters Practical Law Arbitration Blog, August 14, 2020, *New LCIA Rules 2020: a measured "update" not a radical redraft*. Naish and Warder also note that this new wording is in line with the rules of other institutions, such as SIAC, HKIAC and ICC which already provide for early dismissal or summary judgment in their rules. With reference to finance disputes, Naish and Warder note that banks and financial institutions have historically chosen English court jurisdiction over arbitration for the ability to apply for summary judgment on debt claims, hence the revised LCIA Arbitration Rules should help position the LCIA as the go to institution to handle such disputes.

It goes without saying that in such specialised field there may be a scarcity of qualified arbitrators that meet these qualifications and who would be available to sit on a case when the need arises. For example, in the Nordic countries, when considering appointment of arbitrators, the parties often may look to a few prominent law professors, possible other "career arbitrators" and a handful of practicing lawyers who are known to have experience from M&A transactions and related disputes.

This all begs the question: With such emphasis on the qualifications and experience of an arbitrator, when is he or she disqualified from taking on the assignment due to his or her lack of independence or impartiality?

Under Section 9 of the Finnish Arbitration Act, an arbitrator shall be neutral and independent. A person invited to act as an arbitrator who has not declined the assignment must immediately disclose all facts that may jeopardize his neutrality or independence as an arbitrator that have not previously been brought to the parties' attention. The arbitrator also has a continuing duty to disclose such fact throughout the arbitration. Under Section 10 of the Act, an arbitrator must be declared as conflicted, if she would have been conflicted to handle such matter as a judge, as well as by reason of any such fact that tends to create a reason to doubt her neutrality and independence as an arbitrator. A party to an arbitration proceeding may seek a court judgment to declare the arbitration award invalid if an arbitrator was not independent and impartial as required by Section 10 of the Act and her conflict of interest was not timely resolved in the arbitration proceeding before the award was issued. The same applies if a party has received information regarding the conflict of interest of the arbitrator so late that it was not possible to initiate a demand for her disqualification prior to issuance of the arbitral award.

Arbitral institutions, of course, carry out their own checks to confirm that the arbitrator is independent and impartial at the beginning and throughout the arbitration proceeding. For example, the Finland Arbitration Institute (FAI) requires a statement from a prospective arbitrator disclosing any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence, and the parties are given an opportunity to comment on such statement[2]. The importance of disclosure has been highlighted by a decision of the Finnish Supreme Court that involved arbitration relating to the divestiture of several companies (KKO:2005:14). In that case, the Court held that the chairman of an arbitral tribunal was liable for damages arising from a chain of events that were triggered by the chairman's failure to disclose his legal assignments (consisting of legal opinions) from the respondent in the arbitration and from the bank that held 100% of the shares in the respondent[3].

But the question of what circumstances create a conflict for the arbitrator is not always easily answered. At one extreme, an arbitrator may be so biased that his relationship with one of the parties, if concealed, and subsequent conduct in the arbitration proceeding constitutes outright fraud that is a basis for an annulment of the award[4]. At the other end of the

[2] See Arbitrator's Guidelines for Proceedings Conducted Under the Arbitration Rules of the Finland Chamber of Commerce, 1 January 2020, Section 2.

[3] The chairman's failure to disclose such assignment resulted in the arbitral award being declared invalid. Consequently, the claimants started a new arbitration proceeding. This, in turn, necessitated a new arbitration proceeding and caused additional costs for the original claimants. The Supreme Court noted that if the chairman had disclosed his prior assignments from the respondent and its shareholder at the outset, his appointment could have been challenged and the invalidation of the arbitral award could have been avoided, and therefore there was a causal connection between the chairman's failure to disclose and the damages suffered by the claimants. The Court, taking into account the chairman's background as a law professor who should have understood that giving legal opinions to the shareholder of the respondent could create doubts as to his impartiality, also held that it was not shown that the damages were not caused by the chairman's negligence.

[4] See, e.g., Kimmo Mettälä and Matti S. Kurkela, *Bernard Tapie-tapaus ja fraus omnia corrumpit välitystuomion kumoamisperusteena* (case Bernard Tapie and *fraus omnia corrumpit* as the basis of annulment of an arbitral

spectrum, a mere indirect and/or remote relationship an arbitrator has with one of the parties does not automatically constitute a conflict disqualifying the arbitrator.

Between the extremes of outright fraud or obvious conflict and remote connections that do not cause a conflict, what guidance is there to assess whether an arbitrator is conflicted? Is the answer "you know it when you see it"? Not quite. Occasional court decisions from different jurisdictions give some guidance[5]. In addition, the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (2014) are a helpful tool to assess the situation as they represent the thinking of leading international arbitration practitioners, although not having the force of law in any individual jurisdiction[6]. The IBA Guidelines list a fairly large number of factual situations, classified in categories based on severity under a Red List, and Orange List and a Green List.

The Red List contains separate sub-lists for non-waivable and waivable situations – with regard to the latter, the waivable conflicts are only cleared by an express waiver by the parties. For example, significant financial interest of an arbitrator in one of the parties or the outcome of the case is on the non-waivable Red List, while any ownership of shares in one of the parties is on the waivable Red List.

Situations that are not as severe but need to be disclosed are on the Orange List – with the conflict being deemed cleared if the parties have not reacted after a certain period of disclosure having taken place. The Orange List is fairly long and includes, for example, a situation where the arbitrator has served as counsel for one of the parties in the past three years, or has within the past three years been appointed as arbitrator on two or more occasions by one of the parties.

award), Defensor Legis, N:o 3/2018, at p. 424 et seq, concerning the judgment of a Paris Court of Appeals that annulled an arbitral award (the awarded amount was in excess of €400 million) on the basis that one of the arbitrators had acted fraudulently. The fraud involved not disclosing the close relationship the arbitrator had with one of the parties (Mr. Bernard Tapie) and misusing his considerable experience from arbitral proceedings in a manner that marginalized the other two members of the arbitral tribunal.

[5] For example, on 15 December 2017 the Helsinki Court of Appeals issued its judgment in case HelHO:2017:15, where the issue was whether an arbitral award in favour of the claimant should be invalidated on the basis that the sole arbitrator had a conflict of interest when his daughter was employed as a lawyer by the law firm that represented the claimant. The Court concluded that the arbitrator was not conflicted and the award was not invalidated. When reaching this conclusion, the Court considered the facts that the daughter was employed in the employment law practice group of the law firm that had no involvement in the arbitration, the daughter was hired by the head of that practice group that had no knowledge of the arbitration, and that the daughter spent most of her time in the Stockholm office of the law firm when the arbitration was being handled by the Helsinki office. In another example of whether law firm relationships may taint the impartiality of an arbitrator, on 25 February 2020 the International Chamber of the Paris Court of Appeal gave five decisions all related to arbitral proceedings involving the Brazilian energy company Dommo Energia. Dommo had disputes with other Brazilian companies arising out of a joint operating agreement. Dommo initiated arbitration proceedings against some companies under the LCIA Rules, with arbitrations seated in Paris. The outcome of the proceedings involved five awards. Dommo started proceedings to set aside the awards on the basis that the tribunal had lacked independence and impartiality. In particular, it was claimed that the arbitrator appointed by the respondents did not disclose links between him and one of the respondents. This arbitrator had worked for a Saudi law firm that had an affiliation with a law firm that represented two shareholders of the respondent in other matters. This representation occurred two and a half years before the arbitration commenced. When Dommo had challenged the arbitrator at the commencement of proceedings, LCIA and rejected the challenge. The French Court of Appeals concluded that the ties between the arbitrator and one respondent were indirect, through another firm, and had ended two and a half years before the arbitration started. The Court came to the conclusion that these facts did not likely create a reasonable doubt about independence and impartiality, and the arbitral awards were not set aside. See the Debevoise Update, Arbitrator's Disclosure Requirements: First Insights from the International Chamber of the Paris Court of Appeal, 2 June 2020.

[6] Nevertheless, according to the introductory paragraph of the IBA Guidelines, arbitrators as well as parties and their counsel frequently consider the Guidelines when making decisions about prospective appointments, and arbitral institutions and courts often consult them when making decisions regarding arbitrator challenges.

The Green List, in turn, enumerates matters that do not need to be disclosed. As an example, the Green List includes a situation where a firm, in association or alliance with the arbitrator's law firm, renders services to one of the parties in an unrelated matter.

In conclusion, when the parties select arbitrators for M&A disputes, and when the arbitrators consider their own impartiality and independence, several factors need to be considered. Fortunately, many of the circumstances giving rise to concern over conflicts are covered by the IBA Guidelines, and some court cases in Finland and other jurisdictions also set parameters for things to watch for when considering impartiality and independence of the arbitrator.