

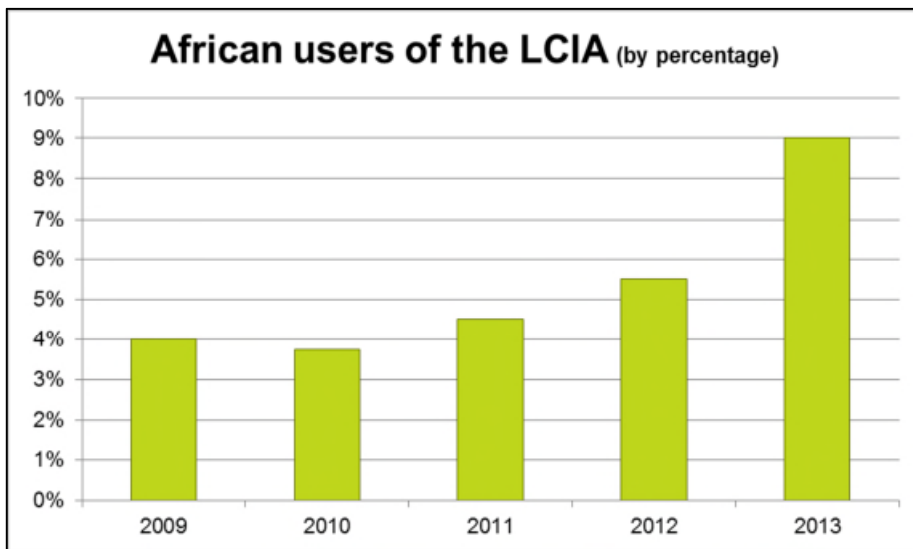
## The LCIA in Africa and its new Rules

### INTRODUCTION

On 1 October 2014, new LCIA Arbitration Rules will come into effect. Unless otherwise agreed by the parties, the new rules will apply to all LCIA arbitrations commenced after 1 October 2014. This is an important development, as the LCIA Arbitration Rules are a popular choice among African parties and investors for resolving their disputes and have been included in many existing contracts for projects and investments in Africa. The new rules are the result of a review by the LCIA in consultation with practitioners and users of arbitration to meet their developing needs. One of the key features of the new rules is that they seek to reduce the ability of reluctant parties to disrupt or delay the arbitral process.

### AFRICA AND THE LCIA

The increasing popularity of international arbitration for resolving Africa related disputes is shown by the steadily-increasing caseloads at LCIA. The LCIA also saw a significant increase in its African casework in 2013, with almost 1 in 10 cases involving African parties.



A similar trend was seen in the 2013 statistics released by the International Court of Arbitration of the International Chamber of Commerce ("ICC") which revealed that the proportion of ICC arbitrations from Africa and the Asia Pacific was at a five year high.

### IMPROVING ARBITRATION EFFICIENCY

Arbitration is attractive to many users because it is faster and more efficient than court proceedings in many jurisdictions due to having more flexible and streamlined procedures. The new LCIA Rules have made changes aimed at further improving the efficient conduct of arbitrations. In particular, the new rules increase transparency regarding timing of the Tribunal's deliberations and delivery of the award.

Some of the key changes aimed at improving efficiency include:

- requiring prospective Tribunal members to declare their readiness and ability to devote such time as may be necessary to the arbitration, which mirrors the existing requirement for prospective arbitrators under the ICC Rules to make a declaration of availability;
- expressly requiring the Tribunal to render its award as soon as reasonably possible after the last submission from the parties;



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- requiring the Tribunal to notify the parties of the time set aside for deliberations and the anticipated timetable for rendering the award;
  - encouraging early communication between the Tribunal and parties, by expressly providing that the parties and the Tribunal must make contact with each other within 21 days of the Tribunal's constitution;
  - facilitating the use of electronic documents by stating that the request and the response may be submitted in electronic form, and making a standard electronic form available on the LCIA's website;
  - changing the period for serving a response to 28 days from the date of commencement of the arbitration (rather than the date of service of the request for arbitration on the respondent) and changing the periods for submitting statements of case to a 28 day deadline (to increase the likelihood of a deadline falling on a business day); and
  - in accordance with established arbitration practice, stating that the Tribunal may take into account the conduct of a party in the arbitration when awarding costs (and in particular, where any failure to cooperate resulted in undue delay and unnecessary expense).

In order to avoid any disruption by a party tactically changing legal counsel late in the proceedings in an attempt to compromise the composition of the Tribunal, the new rules provide that if a party changes its legal representatives during the arbitral process, such a change must be notified to the Tribunal promptly and is subject to the Tribunal's approval (which may be withheld if such change may compromise the composition of the Tribunal or the finality of the award).

## **MULTI-PARTY ARBITRATIONS**

As the size and complexity of projects and transactions in Africa grows, so does the complexity of the disputes arising from those transactions. In recognition of the increasing number of multi-party and multi-contract disputes, the LCIA has updated its rules in relation to consolidation and joinder.

Under the old Rules, a respondent was only permitted to commence a counterclaim against the claimant. Accordingly, under the old Rules a respondent could not start a counterclaim against a co-respondent (such as a claim for contribution); this would have needed to be made in a separate arbitration, which may or may not have been possible to consolidate with the principal claim. Addressing this issue head-on, the new Rules allow for "cross-claims" – that is, a claim brought by a respondent against a co-respondent, as well as against the claimant.

The new Rules also contain provisions to enable the consolidation of two or more arbitrations into a single arbitration.

The Tribunal may order consolidation of two or more arbitrations so long as all the parties agree in writing. The Tribunal may also order consolidation where separate arbitrations have been started under the same agreement or any compatible arbitration agreements between the same disputing parties (provided that no Tribunal has yet been formed in the other proceedings, or, if formed, that Tribunal must be composed of the same arbitrators). The LCIA Court also has the power to consolidate separate arbitrations started between the same disputing parties under the same arbitration agreement, before formation of the Tribunal.

## **EMERGENCY ARBITRATOR PROVISIONS**

It can often be important for parties to major projects or transactions to be able to obtain urgent injunctive relief from an arbitral Tribunal. The LCIA has retained its procedure for expedited appointment of the Tribunal in such cases. In addition to expedited formation of the Tribunal, the new LCIA Rules have followed in the footsteps of other leading arbitral institutions (such as the ICC, Stockholm Chamber of Commerce and the International Centre for Dispute Resolution) by introducing an emergency arbitrator provision.

Under the new provisions, if a party requires urgent interim relief (such as an injunction) before the Tribunal is formed, that party may apply to the LCIA for the immediate appointment of a temporary sole arbitrator (an "emergency arbitrator"), who will conduct proceedings pending the formation of the Tribunal. If the application is granted, the LCIA will appoint an emergency arbitrator within three days of receiving the party's application.

An application for the appointment of an emergency arbitrator can only be made after the Request (in the case of an application by the claimant) or the Response (in the case of an application by the respondent) has been filed, and must be made on notice. The emergency arbitrator is not required to hold any hearing with the parties (whether in person, by telephone or otherwise) and may

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decide the claim for emergency relief on available documentation if deemed appropriate in the circumstances. The relief sought and/or obtained by a party from the emergency arbitrator is without prejudice to a party's right to apply to a state court or other legal authority for any interim measure, however, any such application made during emergency proceedings must be notified to the emergency arbitrator and the other parties.

The emergency arbitrator will decide the claim for emergency relief no later than 14 days after his or her appointment and his or her award relating to the emergency relief may then be reviewed by the subsequently-constituted Tribunal, which may confirm, vary, discharge or revoke it.

This new rule will not apply to arbitration agreements signed before 1 October 2014 unless the parties have expressly agreed that it will apply. Parties entering into arbitration agreements after 1 October 2014 may agree that the emergency arbitrator provisions do not apply. For example, where the courts at the seat of the arbitration have powers to grant urgent relief, including on an ex parte basis, before the formation of the Tribunal (such as in England) the parties may consider that it is more efficient and cost effective to rely on the Courts rather than the emergency arbitrator provisions.

## **ETHICAL GUIDELINES AND CONDUCT OF LEGAL REPRESENTATIVES**

A unique feature of the new LCIA Rules is the inclusion of ethical guidelines for parties' legal representatives in the Annex to the LCIA Rules. These guidelines apply to all arbitrations under the new rules and the parties are obliged to ensure that their representatives agreed to comply with them.

Due to the international nature of arbitration, Tribunal's often have lawyers from different jurisdictions appearing before them in a case. The guidelines will help to facilitate the application of a consistent set of ethical obligations to counsel from different jurisdictions, who may be subject to different professional duties. For many lawyers, the professional duties they have in the jurisdiction where they are admitted will be stricter than those set out in the ethical guidelines and where that is the case, the guidelines will not relieve the lawyer from his or her professional duties. However, the guidelines will provide the basic standard which all counsel must observe.

The guidelines prohibit the following conduct by legal counsel:

- engaging in activities intended to obstruct the arbitration, or jeopardise the finality of the award, including repeated unfounded challenges to an arbitrator's appointment or to the Tribunal's jurisdiction;
- knowingly making false statements, or procure, assist the preparation of, or rely on, false evidence;
- knowingly concealing or assisting in the concealment of any document ordered to be produced by the Tribunal; or
- making, or attempting to make, undisclosed unilateral contact with Tribunal members.

If a party's legal representative breaches these guidelines, the other party – or the Tribunal, on its own initiative – may make a complaint. If the complaint is upheld, the Tribunal has power to sanction the offending legal representative by:

- issuing a written reprimand;
- issuing a written caution as to the legal representative's conduct in the arbitration; or
- taking any other measure necessary to satisfy the tribunal's general duties to act fairly and impartially as between the parties and adopt procedures to avoid unnecessary delay or expense.

## **CONCLUSION**

The changes to the new Rules maintain the flexibility that makes arbitration popular with African parties and investors, while seeking to improve overall efficiency. They are a very positive development for arbitration and will be welcomed by many arbitration users. In light of the recent changes, we expect the LCIA Rules will continue to be a popular choice for resolving disputes in African related projects and transactions.

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## HOGAN LOVELLS' EXPERIENCE

Hogan Lovells has acted, and continues to act, in numerous LCIA arbitrations for different clients from a range of legal backgrounds. Our experience includes:

- Acting for the Nigerian affiliate of a European oil and gas major in two parallel LCIA arbitrations concerning the sale of a participating interest in Oil Mining leases in Deep Offshore Nigeria and the provision of interim services to producing oilfields during the handover period.
- Acting for two international banks in three complex multi-party arbitrations under the LCIA Rules and ICC Rules relating to secured commodities transactions in East Africa.
- Acting for a listed international brewer against another large multi-national in four arbitrations under the LCIA Rules and ICC Rules, and related injunction proceedings in the English Courts, concerning a joint venture dispute relating to the beer markets in Tanzania and Kenya.

If you have any questions or would like further information, please contact Nathan Searle (London) or Rashida Abdulai (London). The authors would like to thank Julian Harding-Richardson for his assistance with this article.

## LIVE WEBINAR

Hogan Lovells will be delivering a 60-minute webinar on the LCIA in Africa and its new Rules in October 2014. Please contact Fiona Ellis at [fiona.ellis@hoganlovells.com](mailto:fiona.ellis@hoganlovells.com) if you would like to register your interest in attending the webinar and receive further details.

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