

Getting Value for Money from Arbitration - Part 2 of a 2-part series: International Arbitration

Author: Shai Wade, Partner, London

Author: Karen B. Ellison, Associate, London

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Introduction

One of the most important questions that parties should ask before concluding a contract is what should the "settlement of disputes" clause in our contract be? Which is preferable: a clause providing for international arbitration, through a body such as the LCIA or ICC,¹ or a clause referring any disputes to the national court? There are strong reasons in favour of each forum including, most compellingly, the enforceability of an Award or Judgment in the paying parties' country. However, costs are almost always an important factor.

This client alert explains recent changes made by the LCIA and ICC to their fee charging arrangements, the reasons for these changes and the practical effect of the different costs structures.

Arbitration Costs Rise

Recently both the LCIA and ICC arbitrations have seen an increase in costs.

LCIA

At the beginning of 2010, the LCIA increased the upper band for arbitrators fees by £50 to £400 per hour. This increase was introduced to ameliorate the impact of a weak pound and ensure that leading European arbitrators remain keen to accept LCIA appointments. The LCIA believes that the effect of the increase will not be significant because of the large number of European parties using the LCIA, who have benefitted from the strength of the euro against the pound. The LCIA also actively encourages arbitrators to adopt lower hourly rates in lower value or simple cases, and the LCIA Court does in practice exercise its power to disallow or lower high hourly rates and charges. The LCIA also actively controls the costs of tribunals by disallowing excessive charging by arbitrators.

ICC

The ICC's arbitration costs scale was revised upwards on 1 May 2010. Upon filing a Request for Arbitration, the claimant now makes a non-refundable payment of US\$3,000 (US\$2,500 previously).

The main portion of the costs in ICC Arbitration, the "Advance on Costs", has also risen. This Advance is determined on an ad valorem basis by reference to the value of the claim as well as the number of arbitrators. For example, in a claim for US\$2 million, where a three member tribunal is appointed, the parties will be required to pay

US\$213,747 by way of the Advance, compared with US\$199,805 prior to 1 May 2010. At the top end of the scale, the ICC has introduced two new costs brackets for claims between US\$100-500 million and those over US\$500 million.

The amount of the Advance can helpfully be calculated using the ICC's online costs calculator. Although the ICC is not bound by this calculator, our experience is that it provides a close estimate of the Advance, in most cases.

The reasons given for the ICC's increase include the exceptional and unforeseen instability experienced by the global economy since the ICC's last revision in January 2008. Because the ICC Court's revenue is received in US dollars, but its expenditure is largely in euros, the recent increases will mean the ICC Court is better placed to withstand developments or volatility in the financial markets and to maintain the quality of its service. The ICC also emphasises the balance to be struck between keeping business users' fees acceptable, while offering arbitrators remuneration commensurate to their work.

Which is cheaper: LCIA or ICC arbitration?

How, if at all, should the increase in arbitration costs influence your choice of dispute resolution forum?

The debate as to whether the ICC's ad valorem charging or the LCIA's hourly charging is preferable will likely never be resolved. The LCIA says that its practices provide an accurate reflection of the complexity of the case and the amount of time actually spent by the arbitrators and the LCIA personnel. This recognises that "*a very substantial monetary claim (and counterclaim) does not necessarily mean a technically or legally complex case.*"² On the other hand, the ICC's policy of returning unutilised fees should mean that parties to ICC arbitrations do not pay over the odds.

The Significant Difference...

The most significant difference between ICC and LCIA arbitrations is therefore the timing of payments to cover the tribunal's and arbitral bodies' costs. The LCIA's hourly rate model results in the parties being billed at regular intervals as the matter progresses. Cheaper or not, this gradual process is likely to have less of a short term impact on cash flow, even if, ultimately, the total amounts are said to be similar. By comparison, the ICC's 'costs up front' model means, in theory, the parties should have paid all of the arbitral costs up front, although the ICC remains able to request further payments as the matter progresses if the complexities of the case so require.

If cost saving is a priority, then one option is for the arbitration clause to provide for a sole arbitrator in low value cases. For example, the LCIA's default provision is that a sole arbitrator should be appointed, unless the amount or complexity of the case requires otherwise. In simple cases the parties are thus saved the fees of two arbitrators.

What about national courts, how do their costs compare to arbitrations? On the face of it, because no fees are charged by Judges and, for example, filing fees in the English Commercial Court range from £400 to £1,530, court

proceedings could be considered the cheap option. However, court proceedings are often more time consuming and consequently can be more expensive. Reasons vary from one location to the next, but local procedures (such as wide ranging discovery in the U.S.), the availability of two or more tiers of appeal and ancillary procedures can all result in greater time and money being spent in national Court proceedings.

However, the choice of jurisdiction clause should not just come down to costs. In "credit crunch" days enforcement is a vital factor. The location of your counterparty, and more importantly its assets, is perhaps the most important factor in deciding the most appropriate dispute resolution forum. In addition, procedures for enforcement of arbitration awards under the 1958 New York Convention are often regarded as more effective than enforcement of national court judgments. So, to conclude, as we began, your dispute resolution clause is well worth a good deal of time and consideration.

1. The LCIA and ICC are two of the most prominent arbitration institutions, but many others offer arbitration services including, for example, the Stockholm Chamber of Commerce (SCC), the Swiss Chambers of Commerce (The Swiss Rules), the Chartered Institute of Arbitrators (CI Arb), the International Centre for Dispute Resolution (ICDR), the Singapore International Arbitration Centre (SIAC) and many others.

2. <http://www.lcia.org/>

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