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# **How Effective is LCIA's Bite on Arbitration in India?**

by  
**Anthony Edwards**

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## 1. ARBITRATION PROCEEDINGS IN INDIA

India's arbitration dispute-resolution forum is renowned for its sluggish procedure. Many practitioners blame the schedules of counsel and arbitrators because many of India's commercial arbitrations are conducted by tribunals dominated by members of the judiciary, including High Court judges, counsel and retired judges. Often arbitration hearings, whether interlocutory, preliminary, substantive or otherwise, are arranged to fit around High Court proceedings. These hearings are then often adjourned because over-committed counsel and/or arbitrators become unavailable through unexpected and pressing court demands. These unnecessary delays are further compounded when there is a three-person tribunal.

India's arbitration proceedings are similar to High Court litigation with its entrenched and inherent delays; they are also often ad hoc and make no reference to institutional rules, with consequent further delay. Thus there are plenty of opportunities for recalcitrant respondents to prolong proceedings. These difficulties emasculate the very principles which a successful arbitral forum requires.

## 2. LCIA INDIA

### *Introduction*

At the Taj Mahal Palace in Mumbai on April 18, 2010 the London Court of International Arbitration in India ("LCIA India") based in New Delhi introduced its new set of rules and arbitrator's notes which interface with India's Arbitration Act 1996 and High Court judgments.

The LCIA India Arbitration Rules ("the Rules") and Notes for Arbitrators ("the Notes") comprise respectively 32 articles and 41 notes. The Rules and Notes deal with all the usual issues of impartiality, independence and fairness, all of which feature in LCIA's existing rules. However, the new Rules are designed in particular to: (a) expedite proceedings; and (b) provide sanctions for unnecessary delay. These two rudimentary pillars are the cornerstones of the Rules. India's arbitration fraternity have welcomed the Rules with the hope that they will have real teeth to coerce parties and tribunal alike to conduct proceedings expeditiously, efficiently and without unnecessary delay.

### *The Rules*

The foundation of these pillars can be found in rr.5, 9, 10, 14, 15 and 28. Articles 5, 14.1(ii) and 14.2 are the jewels in the crown, in particular art.5.3(b) which calls upon arbitrators to confirm, before their appointment, that they can devote sufficient time to ensure the expeditious conduct of the arbitration:

- "5.3: Before appointment by the LCIA Court, each Arbitrator shall: ...
- (b) confirm his ability to devote sufficient time to ensure the expeditious conduct of the arbitration.
- 14.1: The Arbitral Tribunal has a duty at all times: ...
- (ii) to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide an efficient means for the final resolution of the parties' dispute.

14.2: At all times the parties shall do everything necessary for the fair, efficient expeditious conduct of the arbitration including complying without delay with any determination of the Arbitral Tribunal and the LCIA Court as to procedural or evidential matters, or with any order or directions of the Arbitral Tribunal and the LCIA Court.”

Article 15 is valuable to the arbitral process should the parties be unable to agree a timetable. It provides a default position setting out a timetable for service of pleadings. Furthermore art.15.7 imposes a duty upon the arbitrator to proceed in the manner agreed in writing by the parties pursuant to its duty under art.14:

“As soon as practicable following receipt of the Statements specified in this Article, the Arbitral Tribunal shall proceed in such manner as has been agreed in writing by the parties or pursuant to its authority under the LCIA India Rules and in accordance with its duty in Article 14.”

The teeth of arts 5, 14 and 15 lie in arts 10.1 and 10.2 whereby the parties agree that LCIA India may upon application remove arbitrators who act without reasonable diligence:

“If either ... (b) any arbitrator ... refuses, or becomes unable or unfit to act, ... the LCIA Court may revoke that arbitrator’s appointment and appoint another arbitrator.

If any arbitrator acts in deliberate violation of the Arbitration Agreement (including the LCIA India Rules) or ... does not conduct or participate in the arbitration proceedings with reasonable diligence, avoiding unnecessary delay or expense, that arbitrator may be considered unfit to act in the opinion of the LCIA Court.”

When there is a matter of urgency art.9 allows a party to apply to LCIA India to expedite the formation of a tribunal:

“In exceptional urgency, on or after the commencement of the arbitration, any party may apply to the LCIA Court for the expedited formation of the Arbitral Tribunal, including the appointment of any replacement arbitrator under Articles 10 and 11 of the LCIA India Rules.”

Of course delay to the arbitral process is the main weapon in the armoury of the respondent. Accordingly LCIA India has ensured through the Rules that such tactics will not be tolerated. It expressly assists arbitrators by permitting them, pursuant to art.28.4(b), to award costs on the basis of the parties’ conduct. In particular, in cases of undue or unnecessary delay caused by adjournments, extensions and the like:

“Unless the parties otherwise agree in writing, or unless in the particular circumstances of the case this approach is inappropriate, the Arbitral Tribunal shall make its orders on both arbitration and legal costs on the general principle that costs should reflect:

- ...
- (a) ...
- (b) their conduct and cooperation during the arbitration and any undue delays or unnecessary expense caused by or attributable to a party or its representatives.”

### *Notes for Arbitrators*

The Notes are not intended to supplement the Rules nor to be an exhaustive list of best practice in the conduct of arbitration. They highlight broad principles for guiding tribunals in the conduct of proceedings with a view to facilitating their diligent and timely conduct. They are not, as expressly stated by para.41, to be considered as advice to arbitrators and the like.

Paragraphs 12 and 13 reiterate the importance of the arbitrator's commitment to the process:

“It is of course, essential that an arbitrator should be impartial and independent of the parties, but that his diary commitments should permit him to undertake and to fulfil his mandate without delay. Before appointment, therefore, all arbitrators will also be required to confirm their ability to devote sufficient time to the proceedings, over an appropriate timeframe, including drafting the award.”

Furthermore para. 16 encourages tribunals to hold early case management conferences with parties with a view to securing a realistic procedural timetable:

“The tribunal should, therefore, consider whether it would be beneficial to hold an early procedural conference with the parties, whether in person or by telephone or video conference, with a view to agreeing a time table for the proceedings, or, if it cannot be agreed, to setting such a time table, which should be realistic and reasonable both to the parties and to the tribunal.”

Paragraph 19 encourages arbitrators not to adjourn hearings: “the tribunal should only adjourn a hearing where there is good reason for doing so”. What constitutes a good reason may vary from arbitrator to arbitrator.

### **3. SUMMARY**

When the Rules were officially introduced to India the arbitration fraternity, lawyers, judges and industrialists, greeted them with the welcome they deserved. In my view the Rules and Notes provide a regulatory framework with real teeth to deal effectively with recalcitrant respondents, over-committed representatives and arbitrators alike. Whether the judiciary support these Rules is another matter; however representatives of the judiciary at the conference expressed their support.

As an aside, it will be interesting to see whether other institutional bodies adopt these Rules and Notes or whether there is a revival of the existing LCIA rules.