CHAPTER 3

Key Reasons for Choosing LCIA Arbitration

I. INTRODUCTION

At the contract-drafting stage or, if the relevant contract is silent, once a dispute has arisen, parties are confronted with the decision as to their choice of dispute resolution mechanism (e.g., litigation, arbitration, other forms of ADR or a combination thereof).[1] 1

When they choose institutional arbitration, the parties have to select an arbitration institution to administer their case. A few decades ago the choice was simpler because the number of arbitral institutions was limited. However, over the past decades the number of institutions has increased dramatically.[2] In China alone, it is said that there are now over 180 arbitral institutions.[3] In Latvia, a much smaller country, there are over 200 institutions.[4] 2

1. For an overview of this question, see Chapter 4 (Drafting Clauses).
2. In this sense see: B. Goldman, *Les Conflits de Lois dans l'Arbitrage International de Droit Privé*, in *Collected Courses of the Hague Academy of International Law* 352 (vol. 109, Martinus Nijhoff Publishers / Brill Academic 1963); P. Lalive, *Problèmes Relatifs à l'Arbitrage International Commercial*, in *Collected Courses of the Hague Academy of International Law* 664 (vol. 120, Martinus Nijhoff Publishers / Brill Academic 1967); W.K. Slate, *International Arbitration: Do Institutions Make a Difference?*, 31 Wake Forest L. Rev. 41, 50 (1996); H. Smit, *The Future of International Commercial Arbitration: A Single Transnational Institution*, 25 Colum. J. Transnatl L. 9, 12 (1986); T, Landau, *The Effect of the New English Arbitration Act on Institutional Arbitration*, 13(4) J. Intl Arb. 113, 114 (1996); G. Guillaume, *The Future of International Judicial Institutions*, 44 Intl & Comp. L. Q. 848, 862 (1995); M. Moser & F. Yeoh, *Choosing an Arbitral Institution Arbitration*, 2 The In-House Perspective 18, 18 (2006); A.V. Schlaepfer & A.M. Petti, *Institutional versus Ad Hoc Arbitration*, in *International Arbitration in Switzerland – A Handbook for Practitioners* 13 (E. Geisinger & N. Voser eds, Kluwer Law International 2013); J.M. Alcántara, *An International Panel of Maritime Arbitrators?*, 11 J. Intl Arb. 117, 117 (1994).
3. A survey of the Chinese State Council's Legal Affairs Office numbered 185 such institutions. The Survey is reported in M.J. Moser & Y. Jianlong, *CIETAC and Its Work – An Interview with Vice Chairman Yu Jianlong*, 24 J. Intl Arb. 555, 556 (2007).
4. I. Kačevska, *Latvia*, in *The European, Middle Eastern and African Arbitration Review* (Global Arbitration Review 2014).

3 Of course, many institutions have a limited international caseload. Some regional institutions seem to be established primarily with the aim of 'enhancing the status of the city or region in question as a centre for commerce rather than addressing any real business need'.[5] It is not surprising therefore that only few institutions have achieved universal recognition.[6] The LCIA is routinely considered to be part of this rather exclusive club of arbitral institutions having achieved global acceptability – alongside the ICC and the ICDR.[7]

4 But why is this so? Why should users of arbitration opt for the LCIA? These are the questions which this chapter seeks to answer.

II. EXPERIENCE

5 The LCIA traces its origins back to the end of the 19th century. It is not uncommon for the institution to be referred to as the world's oldest arbitral institution.[8] Its current 2014 Rules are the product of a long evolution, starting with the 1981 Arbitration Rules, and going through three successive revisions in 1985, 1998 and most recently in 2014. Each revision has permitted the accommodation of new best practices in the field of international arbitration. Perhaps more importantly, each revision takes account of the lessons learned by the institution itself in its administration of hundreds upon hundreds of international arbitration cases. The 2014 Rules therefore offer a 'tried-and-tested' set of procedural rules, applied by an organization which experience of casework administration is matched by very few other arbitral institutions.[9]

5. *The Freshfields Guide to Arbitration Clauses in International Contracts* 62 (J. Paulsson & N. Rawding eds, 3rd ed., Kluwer Law International 2010).
6. In the words of a former President of the LCIA Court, Jan Paulsson: '[m]y observations of the world of arbitration lead me to believe that many if not most arbitral institutions are empty edifices waiting for someone to bother to dismantle them'. J. Paulsson, *Moral Hazard in International Dispute Resolution, Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair University of Miami School of Law on 29 April 2010*, 8 Transnatl Disp. Mgt 19-20 (2011).
7. According to the 'Freshfields Guide to Arbitration Clauses in International Contracts' the three arbitration institutions with the 'most genuinely international vocation' are the International Court of Arbitration of the ICC, the AAA/ICDR and the LCIA. *The Freshfields Guide to Arbitration Clauses in International Contracts*, 62. Similarly, Gary Born lists amongst the 'leading' institutions the ICC, the AAA/ICDR, the LCIA and ICSID. G. Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* 46 (4th ed., Kluwer Law International 2013).
8. See Turner & Mohtashami, *A Guide to the LCIA Arbitration Rules* 1: '[…] oldest continuously established international arbitration institution in the world'. See also, S. Nesbitt, *London Court of International Arbitration (LCIA) Arbitration Rules, 1998*, in *Concise International Arbitration* 401 (L.A Mistelis ed., Kluwer Law International 2010). To be precise, however, while the institution was indeed established in 1892, its activities remained somewhat limited (in particular in comparison to that of the ICC) until the mid-1970s. The institution's rebirth really occurred in between the 1970s and the mid-1980s.
9. For an overview of the key changes to the 2014 Rules, see Chapter 2.

III. RELIABILITY OF ITS DECISIONS ON APPOINTMENT OF ARBITRATORS

A second strength of the LCIA resides in the unique quality and consistency of its appointments. As discussed elsewhere in this book, the LCIA's system for selecting arbitrators in the absence of party nominations is centralized, in the sense that decisions are made by the LCIA Court with the support of the Secretariat without any need to refer the matter to an external body such as a national committee.[10] A clear benefit is that the LCIA's appointments are uniform in terms of their quality. In the authors' experience, arbitrators appointed by the LCIA are usually very well-suited for the disputes entrusted to them, and 'bad surprises' are rare. Naturally, a drawback of such a centralized system is that it can limit the institution's geographical reach, making it, on occasion, more challenging for the LCIA to identify good candidates from some of the more exotic jurisdictions than it would be for the ICC, or arguably for a smaller institution based in the region concerned.[11] 6

IV. COST-EFFECTIVENESS

The dissatisfaction of a significant portion of arbitration's users about costs is well documented.[12] In this context, one of the key benefits of LCIA arbitration is that it remains relatively competitive both in respect of its own administrative charges, and of the arbitrators' fees. 7

As discussed in Chapter 19 of this book, the LCIA applies an hourly rate system for determining the fees of arbitrators, meaning that the fees payable to the arbitrators depend on the time actually spent by them on the matter.[13] In effect, this means that the fees of the arbitrators in an LCIA arbitration will be proportional to the complexity of the claims. In turn, this implies that high-value disputes will often result in lower fees than under an *ad valorem* system. On the other hand, a very small dispute will be likely to yield higher fees than under an *ad valorem* system (because a small dispute may still require a significant amount of work from the arbitrators). 8

Overall, it is these authors' experience that the LCIA offers a cost-effective system including for relatively modest disputes. This is confirmed by the results of a review recently conducted by the institution as to the average cost of LCIA arbitrations between 2007 and 2009.[14] 9

10. See Chapter 9 (Formation of the Arbitral Tribunal), at para. 38.
11. This being said, even when the institution needs to identify a candidate from such lesser known jurisdictions, it can rely on its large and geographically diverse Court for assistance.
12. Pricewaterhouse Coopers – Queen Mary University, *International Arbitration Survey 2013 (Corporate Choices in International Arbitration: Industry Perspectives)* (Queen Mary, University of London 2013).
13. Arbitrators are to charge an hourly rate within the maximum of GBP 450. See Chapter 19 (Costs and Deposits).
14. The review concerns the costs of the arbitration, that is to say the fees and expenses of arbitrators and the administrative charges of the LCIA (excluding therefore the parties' own legal and other costs). The figures were originally in GBP. Figures shown in this publication are calculated at the exchange rate applicable on the date the award was rendered.

Table 3.1 Average Cost of LCIA Arbitrations (2007-2009)

	Under USD 1 Million (Sum in Issue)	*USD 1-10 Million*	*USD 10-50 Million*	*Over USD 50 Million*
Sole arbitrator	USD 25,282	USD 68,976	USD 86,261	USD 169,625
Three member Tribunal	USD 62,146	USD 164,941	USD 254,906	USD 575,068

10 The cost effectiveness of LCIA arbitration for more modest disputes owes a lot to the institution's approach to the determination of costs (which is discussed in some detail in Chapter 19 below).[15] A particular feature of the LCIA in this respect is that the Secretariat employs alongside its Counsels 'casework administrators' who deal exclusively with questions relating to costs. One of their functions is to scrutinize the fees and expenses of arbitrators.[16]

11 The LCIA's own administrative charges, which are also based principally on hourly rates,[17] are equally competitive. The LCIA's overheads being comparatively modest, the institution is able to adopt a flexible attitude to its own administrative fees.[18] The (rarely publicly acknowledged) reason for this is that, as the LCIA is an entirely independent not-for-profit organization,[19] it does not bear the same pressure to generate revenues that some other arbitration centres face in order to finance the activities of the wider chambers of commerce to which they belong.[20]

V. RELATIVE SPEED

12 When it comes to the settlement of international commercial disputes, speed for the sake of speed is not always enviable. However, the criticisms of many users of

15. See Chapter 19 (Costs and Deposits), at paras. 10 and 23.
16. In practice, arbitrators are invited by the Secretariat's casework administrators to submit 'fee notes' setting out the number of hours spent by them on a matter. These fee notes (described in more detail in Chapter 19) are then carefully scrutinized by the Secretariat before they are submitted for approval to the LCIA Court under Article 28 of the Rules. In the not-so-rare situation where the number of hours charged by an arbitrator appears to be out of line, the institution will engage with the arbitrator concerned, often resulting in a reduction of the fees charged. In one exceptional case, where the parties had settled their dispute before the substantive hearing and the sole arbitrator's work had remained limited (i.e., drafting of a first procedural order, short telephone conference and some exchange of correspondence with the parties), the arbitrator agreed to a 50% reduction of the fees proposed in his initial fee note.
17. They include, in addition, a non-refundable registration fee as well as a sum equivalent to 5% of the fees of the Tribunal.
18. In some exceptional cases, the LCIA has been known to waive its administrative fees (e.g., when a party withdraws a claim very shortly after having filed a Request for Arbitration). Likewise, despite applying an hourly rate, the institution does not charge for all work carried out by the Secretariat's staff. In particular, it will not normally charge for the task of reading routine correspondence. Instead the institution will charge for the work spent on the more tangible tasks such as appointing arbitrators, or communicating with the parties.
19. The LCIA has been independent from the London Chamber since the middle of the 1980s.
20. The same being true of ICDR. See the website of the ICDR, https://www.icdr.org/icdr.

international arbitration about delays can hardly be ignored.[21] Some institutions have taken steps in curbing such delays. For example, the ICC now systematically requests its arbitrators, prior to appointment, to sign a statement of availability (and to advise the institution of the number of cases in which they are involved both as arbitrator and counsel).[22] The LCIA has now followed in the ICC's footsteps, as it now requests its arbitrators to confirm their availability prior to appointment.[23] In addition, certain traditional features of LCIA arbitration make the average duration of proceedings comparatively short.

These features include: **13**

- The fact that most decisions of the LCIA Court are made by its President alone, or by a single Vice President, without having to convene physical meetings of the Court.[24]
- The lack of mandatory terms of reference.[25]
- Lack of mandatory scrutiny of arbitral awards.[26]
- Default timetable of Article 15 of the Rules, with only three rounds of submissions.[27]

As a result, about half of LCIA arbitrations under the 1998 Rules would reach a final award in 12 months or less from the filing of the Request for Arbitration, and approximately 75% of cases reach a final award in 18 months or less.[28] Of course, some **14**

21. Pricewaterhouse Coopers – Queen Mary University, Inter*national Arbitration Survey 2013 (Corporate Choices in International Arbitration: Industry Perspectives)* (Queen Mary, University of London 2013).
22. ICC Rules (2012), Article 11.
23. See Chapter 9 (Formation of the Arbitral Tribunal), at paras. 2, 28 and 38.
24. This means that certain decisions (e.g., appointments) can be made within a matter of hours.
25. Arbitrators are encouraged to engage with the parties early on with a view to agreeing on the basic procedural framework governing the arbitration (most often in a first Procedural Order), but there is no requirement for these to take the form of Terms of Reference or for them to be approved by the LCIA Court.
26. While, as a matter of fact, most LCIA awards are the object of a rapid review by the Secretariat (see discussions in Chapter 20 below), the LCIA Court itself is not required to scrutinize them. In practice, this means that many awards can be dispatched by the LCIA within a couple of days of the Tribunal finishing the drafting.
27. Unless otherwise agreed by the parties or directed by the Tribunal, the written phase of the proceedings follows the timetable set out at Article 15 of the Rules. This speedy timetable contemplates the filing of only three submissions: a Statement of Claim (due within 28 days of the notice of appointment), a Defence and a Reply (each due within 28 days of the previous submission).
28. Survey, conducted by the LCIA in 2011, of over 100 cases having reached a final award on the merits. The review excluded all cases which did not reach a final award, e.g., cases withdrawn as a result of settlement or otherwise. See also, Website of the London Court of International Arbitration (LCIA), http://www.lcia.org, under 'Frequently Asked Questions' ('How long does the average LCIA arbitration last?').

LCIA arbitrations occasionally last significantly longer.[29] In these authors' experience, this compares favourably to the LCIA's competition.

15 As discussed in Chapter 2 above, some of the changes implemented in the 2014 Rules also aim at shortening the overall duration of LCIA arbitrations. This includes, for example, the shortened deadlines for the filing of the Response to the Request for Arbitration, for challenges or for requests for corrections of awards.[30] This includes, also, expressly imposing on Arbitral Tribunals a duty to provide an 'expeditious' resolution of the dispute, requiring that they make contact with the parties no later than 21 days after the constitution of the Tribunal,[31] and requiring that the award be rendered 'as soon as reasonably possible' and providing for a timetable for the making of the award.[32]

VI. A 'LIGHT TOUCH' TO CASE ADMINISTRATION?

16 It is conventionally assumed that the LCIA adopts a so-called 'light touch' approach to case administration – meaning that the institution intervenes in the proceedings more sporadically than some of the other institutions.[33] It has indeed been argued that '[t]he LCIA is less "institutionalized" and interventionist than the ICC',[34] or that the LCIA's approach to case administration is 'more fluid and expeditious'.[35] However, the LCIA's 'hands off' approach appears to be a little overstated. In fact, during the phase that precedes the constitution of the Arbitral Tribunal, the institution is very active, by any standard. Likewise, the institution is by no means unconcerned with the proceedings once the Tribunal has been appointed. For example, outside observers may be surprised to learn that members of the LCIA's Secretariat read all correspondence exchanged by the parties and the arbitrators (albeit cursively), that is to say all emails, letters and faxes exchanged by the parties and the Tribunal.[36] This is not the practice of some other commercial arbitral institutions. Despite this, the institution does seek to

29. For instance, the longest dispute identified in the 2011 review conducted by the LCIA lasted 4.5 years.
30. LCIA Rules (2014), Articles 2, 10.3 and 27.1, respectively.
31. LCIA Rules (2014), Articles 14.1 and 14.2.
32. LCIA Rules (2014), Article 15.10.
33. '[…] the LCIA applies a relatively light touch to its casework administration […] it endeavours to intervene only as and when necessary, which will depend to some extent upon the relative sophistication and experience of the parties, their lawyers and the tribunal'. A. Winstanley, *Review of the London Court of International Arbitration*, in *International Commercial Arbitration Practice: 21st Century Perspectives* 3 (H. Grigera Naón ed., LexisNexis 2010).
34. J.D.M. Lew, L.A. Mistelis & J. Davies, *LCIA Rules*, in *Practitioner's Handbook on International Commercial Arbitration* §18.20 (F.-B. Weigand ed., Oxford University Press 2009). In the words of another author '[t]he LCIA Rules distinguish themselves from those of other international arbitral institutions chiefly by the emphasis they place on party autonomy […]'. Nesbitt, *London Court of International Arbitration (LCIA) Arbitration Rules, 1998*, 401.
35. A. Winstanley & P. Capper, *The London Court of International Arbitration (LCIA)*, in *Arbitration World* 154 (4th ed., Patrick Heneghan et al. eds, Sweet & Maxwell 2012).
36. Members of the LCIA Secretariat would also normally 'skim through' all submissions made by the parties (including Statements of Claims, Defence and Reply), but not normally witness statements or expert reports.

intervene only as and when it feels that there is a need to ensure the enforceability of any future award, the celerity of the proceedings and the application of what the institution considers as mandatory provisions of its rules.[37] One may wonder whether the actual users of arbitration really favour a 'light touch' approach to casework. A recent empirical survey on international arbitration suggests that a majority of in-house counsel actually prefer an institution with a 'hands-on' approach.[38]

VII. A LONDON-CENTRIC INSTITUTION?

Criticisms have sometimes been levelled at the LCIA for being Anglo-centric.[39] It is true 17
that the default seat of London (Article 16.1) and the traditional three rounds of written submissions (Article 15) resonate better with English litigators than with their foreign counterparts. Likewise, a majority of arbitrators appointed in LCIA arbitrations remain British nationals.[40] But for the rest, the institution is better summed up by its international character than by its British heritage. For example, the composition of the LCIA Court is thoroughly cosmopolitan.[41] The caseload of the institution is equally international as demonstrated by the nationalities of the parties.[42] In fact, while the institution's caseload is admittedly smaller than that of other institutions like the ICDR or CIETAC, the proportion of truly international cases it administers is quite simply only surpassed by the ICC. A 'typical' LCIA arbitration, if there is such a thing, is an arbitration between two non-English parties arising out of an international commercial transaction which, more often than not, bears no connection to England.

37. These are arguably very limited. They include, *inter alia*, the provisions of Article 5.9 (the LCIA Court alone may appoint arbitrators), the prohibition of *ex parte* communications (under Article 13.3), the LCIA's issuing awards to the parties (Article 26.7), and the Schedule of Costs (and the powers of the LCIA Court under Articles 24 and 28).
38. Pricewaterhouse Coopers – Queen Mary University, *International Arbitration Survey 2013 (Corporate Choices in International Arbitration: Industry Perspectives)* (Queen Mary, University of London 2013).
39. Turner & Mohtashami, *A Guide to the LCIA Arbitration Rules* 4.
40. In 2013, of the 372 individuals appointed as arbitrators, 234 or 62.9% were UK nationals. *Registrar's Report (2013)*, at 4. This is largely attributable to the fact that the governing law of contracts submitted to LCIA arbitration remains by and large English law.
41. At the time of writing the nationalities represented on the Court were: Australia, Brazil, Canada, Chile, China, Colombia, France, Germany, Ghana, India, Ireland, Japan, Korea, Lebanon, Mauritius, Mexico, New Zealand, Netherlands, Singapore, Spain, Switzerland, UK, USA, with only 5 UK nationals (including individuals with dual nationalities).
42. In 2013, over 81% of parties to LCIA Arbitration were not from the UK. *Registrar's Report (2013)*, at 2.