



LCIA India: Will It Change the International Arbitration Scene in India?

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Recently, the London Court of International Arbitration (LCIA) established LCIA India. Although LCIA India bears the name of its parent body in London, one hopes it is intended to be an Indian institution, of course with the support of LCIA London. This is a welcome development for the international business community in general and India in particular, as it is hoped that LCIA India will maintain a very high international standard in its awards. This in turn will encourage the Indian courts to have confidence in the awards published under the aegis of this institution. In order to consider whether the LCIA Rules will be able to achieve this noble objective it is necessary to consider the background of international arbitration in India and the role of the Indian judiciary in relation to it.

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I. Cultural Background

In a sense, arbitration has existed in India for over 5000 years, albeit in a different form from that practised today. When serious community disputes arose, parties used to go before the community leaders known as the "Panchayat" (Village Council) who would appoint senior respected leaders from the community to hear the parties. The decision of the Panchayat would always be adhered to by all sides. In business history, when two commercial Indian parties fell out over a dispute, they went to a respected neutral person who would hear both sides and give his advice. This advice would also be respected and adhered to.

This tradition did not require the neutral person or persons to be unconnected with either party, nor that they should refrain from talking to one party in the absence of the other. The parties simply were required to put their trust in them. It was not uncommon for one or both parties to speak to the neutral person or persons without the presence of the other, or sometimes even get someone else to speak to them on their behalf. During their rule, the British sought to convert that formula into formal arbitration, but this move was not popular, so structured local arbitration as we understand it internationally was not the generally accepted norm in India, save in the large cities.

II. International Arbitration with its Seat in India

International arbitration is a relatively recent phenomenon in India. Until the late-1980s or early-1990s, the seat of almost all international arbitrations involving Indian parties was [page](#)

"657" London. During this period, these parties were almost exclusively state government parties. Because of the socialistic pattern of the Indian economy in those years, international trade was regulated mainly through state government channels.

During the 1970s, India was subject to a severe food deficit. The United States government had agreed to supply food grain to India under U.S. PL Law 480. This supply of food grain by the United States was on an FOB basis, so the Indian government had to charter every year a large number of ships to bring the grain cargo from the United States. The charterparties always included London arbitration clauses. This resulted in hundreds of international maritime arbitrations in London where either the Indian government or one of its state corporations was a party. Occasionally, there were also international arbitrations involving defence contracts and the purchase or sale of commodities.

During these years, Indian arbitrators or lawyers were not really involved in international arbitrations. Of those who did try to get involved, many had their fingers burnt by the tribunals. It must be said, to the credit of the English courts, that in those few cases the English court did not hesitate to intervene to undo any injustice done to the Indian parties by the international arbitration tribunals. The two classic cases which come to mind are *Steel Authority of India v. Hind Metals* ⁽¹⁾ and *Indian Oil Corp. v. Coastal Bermuda*. ⁽²⁾

In the *Steel Authority of India* case, the Indian party was represented at the London arbitration hearing by no less a person than Mr. Ashok Sen, who was at that time one of the leading members of the Indian Bar, and also served as a Minister for Law and Justice under three different Indian Prime Ministers. The tribunal's chairman was an eminent English Queen's Counsel. The award went against the Steel Authority, who then challenged it in the English court. The judge, Hobhouse, J., in remitting the award back to the tribunal, said in his judgment that "the function of any Tribunal, including an Arbitration Tribunal, is to separate the wheat from the chaff and to endeavor to arrive at a fair and just conclusion notwithstanding the lack of assistance they may be getting from one or more of the parties' representatives." ⁽³⁾ The reference to lack of assistance from parties' legal representatives was, of course, to Mr. Ashok Sen, the Indian counsel.

In the *Indian Oil* (IOC) case, Evans, J., whilst refusing to enforce a London international arbitration tribunal's award made by three eminent English QCs, said in his judgment: "I feel impelled by the evidence placed before me to conclude that there was a lamentable failure by IOC's representatives at the arbitration, collectively, to appreciate what the issues were." ⁽⁴⁾ The representatives of the IOC to whom the judge referred were Indian lawyers.

These two judgments compellingly indicate that, until the early-1990s, there was practically no legal expertise available in India in respect of international arbitrations.

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III. Change of Scene

In the mid to late-1980s, the Indian government recognized the large number of London maritime arbitrations in which Indian state corporations were involved. As a result, they attempted to insist in future contracts that New Delhi was to be the seat of arbitrations. This was strongly resisted by ship-owners, but economic compulsion often caused them to agree to Indian arbitration, with a compensatory increase in freight rate to cover any loss to them which resulted from agreeing that the arbitration seat was to be in India.

This meant that, whilst the non-Indian ship-owners had technically agreed to arbitration in India for charterparties, they invariably settled disputes because they had already obtained a compensatory cover by obtaining a higher freight rate in respect of any loss relating to delayed payment demurrage or 10% balance freight. Consequently, this attempt by the Indian government to insist on arbitration in India in all international government contracts was not at that time on any view a success.

IV. India's Open Door Trade Policy

The situation changed drastically in the early-1990s. By then the Soviet Union had collapsed. From that point on, the Indian government adopted an open door trade policy which completely revolutionized the Indian economy. Private Indian companies became free to trade directly with their foreign counterparts and to enter into joint ventures without the Indian government's intervention. There was for some time a tussle between the foreign parties and the Indian parties on the question of whether the arbitration agreements in contracts should have a seat in India or abroad. In the end, more and more foreign investors, seeing the economic opportunities, began to agree to arbitration in India in their contracts with Indian partners. With that, the Indian legal fraternity began to be involved in international arbitrations. Today, at least in the major Indian cities, there is first class legal knowledge and experience available for international arbitrations.

V. Indian Courts and International Arbitrations

The Indian courts have been subject to criticism for their attitude towards arbitration. Some elements of this criticism are fair, but the often-seen blanket dismissal of the Indian courts' attitude to arbitration is harsh. As can be seen from the above two cases, the English courts have never hesitated to set aside or remit awards where the courts found gross injustice, or that the arbitrators had simply not applied the proper law. The internationally criticized judgment of the Indian Supreme Court in *Venture Global Engineering v. Satyam Computers Services Ltd.*, ⁽⁵⁾ was decided on its own unusual facts and raised questions of illegality of the performance of the award in India. What the Supreme Court [page "659"](#) did in the *Satyam* case was to find a legal route to nullify the award where Indian law was intentionally disregarded. ⁽⁶⁾ It is therefore somewhat unfair to cite the *Satyam* judgment to criticize the Indian judiciary in a blanket manner insofar as its attitude to international arbitration is concerned.

The Indian courts' approach has to some extent been seasoned by the history of gross injustice suffered by Indian parties in international arbitrations. This injustice in some cases occurred because of the economic and political problems India has faced, notably its acute foreign exchange shortages, meaning that foreign travel was not easy for Indian nationals. As a result, many of these arbitration awards were produced by international arbitration tribunals against Indian parties as a result of poor legal representation. Sometimes, the foreign arbitrators, as a result of their unfamiliarity with Indian commercial culture, took an unfairly adverse view of the Indian parties' evidence.

Consequently, the only remedy for those Indian parties was to obtain justice from the Indian courts. This in turn required the Indian courts to carefully scrutinize the international arbitration awards whenever the Indian court's assistance was required to enforce them. It is necessary to recognize that international arbitration having a seat in India is a comparatively modern phenomenon and therefore the courts naturally feel inclined to keep an eye on it.

VI. Can LCIA's Rules Achieve its Goals?

London Court of International Arbitration (LCIA) India is not a branch of the LCIA London. It is hoped that in due course it will be an autonomous institution which conducts its activities in India. LCIA India has undoubtedly brought along with it the tried and tested experience of the LCIA, which is now recognized as one of the leading international arbitration institutions in the world. The LCIA India Rules have been modeled on the 1998 LCIA Arbitration Rules, but have tried to incorporate changes in points of detail, to reflect the interface with the Indian Arbitration and Conciliation Act 1996, as well as, to some extent, practice, prevalent culture, and law in India relating to international arbitration.

The LCIA India Rules include a number of new provisions aimed at expediting proceedings, which may provide a prototype for future rules published by the LCIA. Time will tell whether they pass the test of the Indian courts. Some of these concerns are discussed below and the author has suggested some changes for consideration when these Rules are reviewed.

Article 4(7) of the LCIA India Rules seeks to extend the power of the tribunal to extend time. What might cause some controversy in the wording of this particular Rule is the reference to the tribunal having powers to extend time "under the arbitration agreement." Such a term could well be held to be unlawful by the Indian courts. The [page "660"](#) same comments would apply to Article 5(7), which states that where the arbitration agreement provides that the chairman is to be nominated by the parties or their nominees, or any third party, it shall be treated for all purposes as a written agreement by the parties for the selection of a chairman by the LCIA Court.

This is because an arbitration tribunal is a creature of the contract between the parties, and takes its jurisdiction from the arbitration agreement. Recently the English Court of Appeal, in the case of *Hashwani v. Jivraj*,⁽⁷⁾ upheld the contention that arbitrators are providing a service to the parties under the contract and therefore

they are employees of the parties. For the tribunal, therefore, to have the ability to overcome the term in the arbitration agreement without the consent of the parties may well be held to be ultra vires of the arbitration agreement.

One of the new rules includes an express requirement that all prospective arbitrators confirm their ability to devote sufficient time to ensure the expeditious conduct of the arbitration (Article 5(3)(b)). However laudable that rule is, it has overlooked the possibility of sanctions for arbitrators who delay publishing their award after the conclusion of the hearing. It is a common complaint in India that judges and arbitrators delay publishing awards for a long period after the conclusion of the final hearing. I would suggest that when the Rules are next reviewed LCIA India will consider incorporating a Rule which requires the arbitrators to publish an award within, say, ninety days of the conclusion of the hearing, if not earlier.

Article 9, which deals with expedited formation of the tribunal, is a completely new article in the Indian context and should be welcomed. This article presupposes the requirement that an expeditiously formed tribunal will give an expeditious decision. Such decisions are not uncommon in England by maritime arbitration tribunals and the Commercial Court. In important commercial cases in the English Commercial Court, the judges are known to sit overnight when necessary to determine an issue where delay could have substantial financial consequences to the parties. London maritime arbitrations are also known for this. One can obtain an award in exceptional cases within a day or two. LCIA India might need to revisit the rules to provide such possibilities. That would make LCIA India an attractive body for international arbitrations. In many joint-venture and infrastructure construction cases parties might well require an urgent decision from an arbitration tribunal, particularly where delay in getting an issue resolved could have large financial implications.

Article 10 of the LCIA India Rules gives the power to the LCIA Court to revoke an arbitrator's appointment in the event that the arbitrator "does not conduct or participate in the arbitration proceedings with reasonable diligence, avoiding unnecessary delay or expense." Articles 5(6) and 5(7) provide for the power of appointment of presiding arbitrators to be exercised solely by the LCIA Court. This is an improvement over the existing Article 5(6) of the LCIA Rules, which forbid only one of the party-nominated arbitrators from being named as chairman by the LCIA Court. This has to be [page "661"](#) welcomed. However, an increasing issue of concern in international arbitrations is the conflict between arbitrators and parties, and the rules must make LCIA India's position very clear on that.

The LCIA India Rules need to provide that it would amount to misconduct on the part of any arbitrator to communicate directly or indirectly with either party without the consent of the other party. As Lord Steyn put it in *Lawal v. Northern Spirit* (at paragraph 22), ⁽⁸⁾ "[w]hat the public was content to accept many years ago is not necessarily acceptable in the world of today. The indispensable requirement of public confidence in the administration of justice requires higher standards today than was the case even a decade or two ago."

Similarly, any suspicion of apparent bias must be thwarted. In the case of *ASM Shipping Ltd. v. TTMI*,⁽⁹⁾ Morison, J. held that it was improper for a practising counsel, who had appeared as a counsel for the solicitors of one of the parties, to be a third arbitrator where the same solicitor was involved.

The amounts of money involved in international arbitrations are now enormous, and parties are therefore desperate to succeed in the arbitration at all costs. That in turn runs the risk of parties seeking to make the arbitration unfair. A strict requirement of non-communication between the parties and the arbitrators is therefore necessary and needs to be clearly spelt out in the Rules so that both the arbitrators and the parties are clearly aware of this requirement.

The use of Article 10 of the LCIA India Rules to remove an arbitrator suspected of corruption may not be all that easy because usually the corruption is never open and there is no direct evidence. The LCIA Court will therefore need to adopt a "see and feel" approach in such cases and not appoint an arbitrator where there is a feeling in the arbitration community that the particular arbitrator is not beyond reproach. If the LCIA Court can successfully handle this aspect and inculcate a self-regulatory spirit in the Indian arbitration community, the LCIA Court would then be said to have also contributed significantly to upholding India as a centre for international arbitration.

Article 12 is also novel. It deals with situations where a party-appointed arbitrator acts obstructively to delay the reference. In such a case under Article 12 it would now be open for the remaining two arbitrators, after giving appropriate notices under Article 12(1), to proceed with the reference in the absence of the third arbitrator. This is an important and welcome change, because many of us as practising arbitrators have experienced a co-arbitrator, appointed by one party, taking an obstructive attitude to a decision being made against their appointer.

One of the common complaints about international arbitration is the cost of the arbitration for the parties. Modern international arbitrations in the West more or less mirror court trials. This generates greater fees for the arbitrators and legal advisors, but for the [page "662"](#) parties it often proves to be very expensive. One important change which LCIA India should aim to bring about through its Rules is an end to the practice, common in Indian arbitration, of the arbitrators granting adjournments with ease. This should not be the case where international parties are involved. Parties often travel long distances at great expense, fully prepared for the hearing, only to find that the arbitrators have granted the opponents an adjournment.

On the issue of costs, LCIA India might at the next review of its rules wish to include a rule which would require LCIA India to consult with the parties with a view to appointing a third arbitrator who has the specific expertise required to determine the particular issues involved in the case. For example, if there are technical issues to be determined, LCIA India might consider appointing a chairman who will have the necessary technical expertise but who may not be a lawyer. This should prove beneficial to everyone involved in the

arbitration reference by minimizing costs.

Article 14(1)(ii) does impose upon the arbitrators a duty to adopt procedures that would avoid unnecessary delay or expense, but it is debatable whether this article on its own will be able to bring an end to the current practice amongst Indian arbitrators of readily granting adjournments.

Article 15, which sets out the procedure for pleadings and disclosure, fails to some extent, in my view, to provide for a warning from the tribunal, in the form of a final order or what is known as a peremptory order, to be given to the defaulting party to allow them a final opportunity to cure their defect. Article 15(8) as presently drafted appears to give the tribunal very wide powers without any provision for a final opportunity for the party. There is a risk that this could be misused by a tribunal. There may be good reasons why one party may have failed to file or overlooked filing its pleadings in time.

The author feels that Article 20 also requires revising with regard to witness testimony. In international arbitration, it is common for the tribunal not to insist on the witness giving evidence on oath. Sometimes local courts where the awards are to be enforced, such as the UAE courts, are known to take an adverse view where arbitration tribunals have allowed witnesses to give evidence without formally swearing on oath. If, in an express provision of the Rules, this were to be permissible, it would go some way towards dealing with this concern, even though the Indian Arbitration and Conciliation Act 1996 has provided that the arbitration tribunal shall not be bound by the Indian Evidence Act 1872.

Article 22(1)(f) is a welcome change. It gives the tribunal the power to correct obvious errors in the contract between the parties or in the arbitration agreement. Usually this is done by means of an application to the court to rectify the contract where there is an obvious error in the written document. For the tribunal to have this power would be an important cost-saving exercise. Whether or not such a rule can exist, as it might seem to contravene the principle that the arbitrators are creatures of contract and have to live within the terms of the contract, needs to be seen.

Article 23(4) incorporates to some extent the English principle of contracting out of the court's jurisdiction. Whilst this is laudable, it may not withstand section 9 of the Indian [page "663"](#) Arbitration and Conciliation Act 1996, which gives the court the power to intervene before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced.

Article 26(6), which relates to award of interest, also requires rewording because by the use of the words "without being bound by legal rates of interest imposed by the Court," the Rules would seem to suggest that the tribunal may disregard the law of the land.

Unlike the LCIA Rules, which provide for London as a default seat (in the absence of parties' agreement to the contrary), the LCIA India Rules do not provide for such a default seat. In the absence of parties' agreement of a seat, the seat would be determined by the LCIA Court, taking into account, inter alia, parties' proposals. Under the LCIA India Rules, the parties will have full freedom to choose

their own seat: London, New York, or any other place in the world. Significantly, Article 32(6) takes care of the effect of the Supreme Court judgment in the *Satyam* case and provides that where the place of arbitration is not in India, the relevant part of Part 1 of the Indian Arbitration and Conciliation Act 1996 is excluded. This is a very well conceived rule, and it makes challenging the award in court as a local Indian award difficult.

LCIA India has also produced a set of "Notes for Arbitrators," to provide guidance to arbitrators conducting arbitrations under the LCIA India Rules, on issues relating to independence, impartiality, confidentiality, and the management of time and costs.

VII. Conclusion

LCIA India has a golden opportunity to prove itself as a leading institution for international arbitrations in India, provided it is able to deal with some of the unwelcome traits which one often sees in India. One of those is the system of patronage which existed during the British rule, and which some parts of Indian society has not yet shaken off. For LCIA India to be truly respected, it is vital that it displays complete transparency in its working. It must adopt a strict merit-based approach towards the appointment of arbitrators, and court members must ensure that there is no development of a small inner circle monopolizing this task. Young potential arbitration practitioners and arbitrators must be encouraged.

It is disappointing that LCIA India will not have a separate court of arbitration of its own in India. Under the LCIA India Rules, the LCIA court in London will also serve as a substantive court for LCIA India and it is the LCIA Court in London who will be the final authority for the proper application of LCIA India Rules. It would have been better for LCIA India to have its own court made up of distinguished members from India and other countries. An LCIA Court in India itself would be better equipped with the knowledge and understanding of Indian law and culture and could therefore be trusted to take the correct decisions. Perhaps at the next stage of its development, LCIA India will consider establishing its own court.

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Economically, India is moving forward at a very fast pace and along with it, international arbitration is set to be a growth industry in India. Other international arbitration institutions might well feel inclined to follow suit and adopt the changes with which India is leading the way. LCIA India has taken the lead for this purpose in India. With all respect, it is a point which other international arbitration institutions might do well to keep in mind. *page "665"*

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- 1 [1984] 1 Lloyd's Rep. 405.
- 2 [1990] 2 Lloyd's Rep. 407.
- 3 *Supra* note 1.
- 4 *Supra* note 2.
- 5 C.A. No. 309 of 2008.
- 6 See the author's commentary on the *Satyam Computers'* case published in 25 J. Int'l Arb. 507 (2008).
- 7 [2010] EWCA Civ 712.
- 8 [2003] UKHL 35.
- 9 [2005] EWHC 2238 (Comm).

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