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Head-to-Head: Comparing Three Arbitration Regimes for US Based Asset Managers

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The choice of arbitration institution can arise at any point in an investment cycle: from finalising initial agreements at fund or portfolio company level, or on an *ad hoc* basis when a dispute arises.

To help demystify some differences – this article sets out the key features of three commonly used international arbitration regimes that an asset manager should take into account when making such a choice.

We will compare the rules of:

- **The International Centre for Dispute Resolution (ICDR)** – the institution perhaps the most familiar to US-based asset managers. The ICDR was established in 1996 as a separate division of the American Arbitration Association to administer international cases. The ICDR has offices in New York, Singapore, Houston and Miami and can administer arbitrations in most jurisdictions worldwide. The latest rules (2021) are available here (the **ICDR Rules**);
- **The International Chamber of Commerce (ICC)** – established in 1919 and based in Paris, with offices in Hong Kong, Singapore, Sao Paulo, Abu Dhabi and New York. The latest rules (2021) are available here (the **ICC Rules**); and
- **The London Court of International Arbitration (LCIA)** – the LCIA is one of the oldest and most influential international arbitral institutions, established in 1892. The latest rules (2020) are available here (the **LCIA Rules**).

Key features of the ICDR, ICC and LCIA Rules

- **'Terms of Reference'** – a unique feature of the ICC compared with most other institutions, including both the ICDR and the LCIA, is that it requires 'Terms of Reference' to be drawn up at the beginning of the arbitration. The aim is to define the claims and issues in the arbitration. In our experience the stage does often help narrow issues and can aid early settlement. It can, however, be quite burdensome

to parties and does slow down the arbitration. The LCIA and ICDR do not have a similar requirement.

If speed of the proceeding is a paramount concern, dispense with the ICC and its extra process 'hurdle'. However, if you and your counterparty's claims are very far apart on the issues – focussing minds at an early stage is a significant advantage.

- **Fees** – arbitral institutions generally charge for both the administration of the dispute and for the work of the arbitral tribunal. The fee structures used differ between our institutions:
    - The LCIA charges both the arbitration costs and arbitrator's fees based on an hourly rate.
    - The ICC's fees and arbitrator's fees are based on the amount in dispute and the complexity of the matter.
    - The ICDR's fees are calculated based on the amount in dispute, but the arbitrator's fees are based on a daily/hourly rate; a combination of the fee structures used by the ICC and the LCIA.

The upshot for fee structure is that high claim values alone can rack up ICC fees significantly. If a dispute is legally or factually straightforward, but high value, it may make sense to opt for the LCIA over the ICC or ICDR. There is otherwise little difference in practice – fees will not be driven by structure but primarily by the complexity of your case.

- **Confidentiality** – one key difference between the different arbitral rules relates to confidentiality:
    - The LCIA has stringent confidentiality requirements, which require that the arbitral proceedings, material created for the purpose of those proceedings and the award are all to be kept confidential. That rule applies to both the disputing parties and the tribunal – even to certain third parties.
    - In contrast, the ICC Rules have no express confidentiality provisions, though the tribunal has the power to rule on confidentiality on request by a party. Arbitrations will typically be conducted on a confidential basis.
    - The ICDR Rules impose confidentiality requirements on the tribunal and the ICDR, but not on the parties.

If confidentiality by default is a priority – choose the LCIA.

- **Publication of awards** –

- The LCIA (in line with its stringent approach to confidentiality) does not publish its awards.
- The ICC generally publishes awards (although parties can object or require that the award be anonymized / pseudonymized).
- The ICDR can also publish anonymized versions of awards unless a party objects.

There may be circumstances where the ability to point to a published decision could be an important factor in choosing an institution: You may have high confidence in a favourable outcome. You may seek to refer to an open award as part of your 'comms' strategy. You may see related proceedings in the pipeline which could benefit from a published decision. If a level of transparency is the aim, the ICC or ICDR would be preferable to the LCIA.

- **Appeal** –
  - Under the ICC and LCIA rules, the parties generally waive their rights of appeal on a point of law. The arbitral award provides a final and binding resolution of the dispute between the parties, except for in exceptional circumstances (for example, an egregious error of process where one party was not given an opportunity to present their arguments).
  - In contrast, under the ICDR, the grounds for appeal are slightly wider. Parties can opt into appeal rules which provide for a process for the review of the award. Those grounds are (i) an error of law that is material and prejudicial; or (ii) a determination of fact that is clearly erroneous.

The availability of an appeal process could be an important factor in your decision. Much will depend on the likelihood of success in your claim. If you feel the dispute is clear-cut, limiting appeal options under the ICC or LCIA rules is the best course.

There is no one-size-fits-all or "correct" solution – and certain regimes will fit certain parties or situations better than others. If you are facing a decision and would like to speak to our experts with a wealth of experience in asset management disputes on either side of the pond, please get in touch with our International Arbitration professionals.

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