

LCIA Notes on Emergency Procedures

These guidance notes reference the LCIA Rules (2014). In line with the LCIA Rules (2020) updated guidance notes and other related resources will be available from the LCIA website in due course.

Section 1	INTRODUCTION
Section 2	THE EMERGENCY PROCEDURES AVAILABLE
Section 3	EXPEDITED FORMATION OF THE TRIBUNAL
Section 3.1	What is expedited formation of the Tribunal?
Section 3.2	How do I apply for expedited formation of the Tribunal?
Section 3.3	What happens next?
Section 4	APPOINTMENT OF AN EMERGENCY ARBITRATOR
Section 4.1	What is an Emergency Arbitrator?
Section 4.2	How do I apply for an Emergency Arbitrator?
Section 4.3	What happens next?
Section 4.4	Who will the LCIA appoint as Emergency Arbitrator?
Section 4.5	Decision of the Emergency Arbitrator
Section 5	EXPEDITED APPOINTMENT OF A REPLACEMENT ARBITRATOR
Section 5.1	What is expedited appointment of a Replacement Arbitrator?
Section 5.2	How to apply for expedited appointment of a Replacement Arbitrator
Section 5.3	What happens next?
Section 6	CASE STUDIES
Section 7	IMPORTANT NOTE

1. INTRODUCTION

1. The purpose of this note is to provide guidance to parties, and to their representatives, on the emergency procedures available under the LCIA Rules – namely, the provisions regarding expedited formation of the Arbitral Tribunal (or expedited appointment of a replacement arbitrator) and the Emergency Arbitrator procedure.

2. This note is by no means intended to provide an exhaustive guide to the emergency procedures, nor does it supplant or interpret the LCIA Rules. Rather, the note highlights points for parties to consider in preparing an application under these emergency procedures.

3. Members of the LCIA Secretariat are always available to assist parties with any points of procedure relating to the LCIA Rules, although we cannot engage in any unilateral written correspondence or conversations with parties about matters of substance. Our full contact details, and further information about the services we offer, can be found on our website, www.lcia.org.

4. If you have any questions about this note or the emergency procedures offered by the LCIA, please email casework@lcia.org.

2. THE EMERGENCY PROCEDURES AVAILABLE

5. The LCIA Arbitration Rules presently in force are the LCIA Arbitration Rules 2014, which came into effect on 1 October 2014 (the 2014 Rules). They replaced the LCIA Rules effective 1 January 1998 (the 1998 Rules), although the 1998 Rules continue to apply to arbitrations that were commenced before 1 October 2014, as well as to arbitrations where the parties' agreement expressly refers to the LCIA Rules 1998 or, for example, to "the LCIA Rules in force as at the date of the

agreement" (where that date was before 1 October 2014).

6. The 2014 Rules, like the 1998 Rules, includes a procedure for the expedited formation of the Arbitral Tribunal or for the expedited appointment of a replacement arbitrator. This process provides for an accelerated appointment of a permanent (rather than a temporary) tribunal, or a replacement arbitrator, in an appropriate case of exceptional urgency. That Arbitral Tribunal may then, of course, consider any application that a party wishes to make as to the conduct of the arbitration or for a particular order or award.

7. In addition, the 2014 Rules introduce a new Emergency Arbitrator procedure, which is contained in Article 9B of the Rules. Although the 2014 Rules apply to all arbitrations commenced on or after 1 October 2014 (regardless of the date of the arbitration agreement), the Emergency Arbitrator procedure applies only to arbitration agreements concluded on or after 1 October 2014. Parties may, however, opt in or opt out of the Emergency Arbitrator provisions.

8. The Emergency Arbitrator procedure envisages the appointment of a temporary sole arbitrator to conduct emergency proceedings (to address a claim for emergency relief) pending the formation of the Arbitral Tribunal.

9. The standard for invoking the two different emergency procedures contained in the Rules is not identical. Once we have received a number of applications under the Emergency Arbitrator procedure, we will be able to provide guidance about how the standard has been applied in practice. In the meantime, we include in this note examples of cases in which applications were brought for the expedited formation of the Arbitral Tribunal under the 1998 Rules, which provide relevant guidance as to the type of grounds that might support a successful application.

10. Further information about LCIA arbitration and which Rules apply (and, therefore, what emergency procedure might be available) can be found in Notes for Parties, which is available at www.lcia.org.

3. EXPEDITED FORMATION OF THE TRIBUNAL

3.1 What is expedited formation of the Tribunal?

11. The provisions on expedited formation of the Tribunal are contained in Article 9 of the 1998 Rules and Article 9A of the 2014 Rules.

12. In the normal course, and unless the parties' arbitration agreement provides otherwise, the LCIA Court will only take steps to appoint the Arbitral Tribunal once a Response to the Request for Arbitration has been filed, or the period prescribed in Article 2 for the filing of a Response has expired (see further Notes for Parties).

13. In cases where there is such exceptional urgency that a party requires immediate appointment of an Arbitral Tribunal, a Claimant or a Respondent may apply to the LCIA Court, at the same time as, or after, the filing of the Request, for the constitution of the Arbitral Tribunal on an expedited (i.e. urgent) basis.

14. If the LCIA Court accepts the applicant's contention that there is exceptional urgency, it will appoint an Arbitral Tribunal as expeditiously as possible, taking into account any procedure that might have been agreed by the parties (for example, agreement as to party nomination). When deciding the application, the LCIA Court may also abridge the time for service of any Response or for nomination of an arbitrator.

15. The Arbitral Tribunal that the LCIA Court appoints at this time is the same tribunal that will decide all issues that arise during the arbitration and, as such, is a permanent rather than a temporary/emergency tribunal.

3.2 How do I apply for expedited formation of the Tribunal?

16. A party may apply for expedited formation at the time of filing a Request for Arbitration, or at any time before the appointment of the Arbitral Tribunal. An application may be made by any Claimant or Respondent.

17. The application should be made to the Registrar in writing, preferably by electronic means (to casework@lcia.org, or online at onlinefiling.lcia.org), and delivered or notified to all other parties to the arbitration.

18. The application must set out in detail the specific grounds for exceptional urgency requiring the expedited formation of the Arbitral Tribunal and should be accompanied by a copy of the Request for Arbitration (if made by a Claimant) or a copy of the Response (if made by a Respondent).

19. There is no prescribed standard as to what the LCIA Court considers amounts to exceptional urgency; each case is considered on its own merits. In order to assist parties, the case studies in this note provide examples of circumstances that have, and of circumstances that have not, been considered by the Court to satisfy the threshold of exceptional urgency.

20. We recommend that the applicant provides to the LCIA secretariat full contact details for all parties to the arbitration, and for their representatives, if these are not already contained in the Request or Response accompanying the application.

21. We also strongly recommend that the applicant provides to the LCIA secretariat advance notice of the intended filing of an application for expedited formation, as this will enable us to ensure that it is addressed without delay when made.

22. There is no additional fee payable at the time of filing an application for expedited formation; instead, the LCIA's administrative charges will be calculated in the usual way under paragraph 1 of the Schedule of Costs.

3.3 What happens next?

23. As soon as possible after receipt, the LCIA secretariat will refer the application to a senior member of the LCIA Court, together with any comments already received from the other parties to the arbitration.

24. The senior member of the LCIA Court will, in accordance with the Rules, determine the application as expeditiously as possible in the circumstances, but will usually allow the non-applicant party/parties an opportunity to comment before making a decision. The senior member of the LCIA Court may, however, proceed to decide the application without doing so or notwithstanding that the non-applicant party/parties have not responded to a request to provide comments.

25. If the LCIA Court decides to grant the application, it will then proceed to appoint the Arbitral Tribunal and, in this context, may abridge the time for service of any Response or for nomination of any arbitrator (taking in account any procedure agreed by the parties).

26. Under the 2014 Rules, the power of the LCIA Court extends to curtailing any express time limits in the arbitration agreement or other agreement of the parties; for example, if the parties' agreement expressly provides that each shall have 14 days to nominate an arbitrator, the LCIA Court may abridge this time. Under the 1998 Rules, however, the LCIA Court only has the power to curtail time limits contained in the Rules, such that it cannot, for example, curtail any express time limit for nomination contained in the parties' arbitration agreement.

27. The LCIA Court is not required to give reasons for its decision on expedited formation.

4. APPOINTMENT OF AN EMERGENCY ARBITRATOR

4.1 What is an Emergency Arbitrator?

28. An Emergency Arbitrator is a temporary sole arbitrator appointed solely to address an urgent application pending formation of the Arbitral Tribunal. As such, and as distinct from an Arbitral Tribunal appointed pursuant to an application for expedited formation, an Emergency Arbitrator does not remain to determine the merits of the underlying dispute.

29. In many jurisdictions, local courts have procedures for granting interim or conservatory measures in support of an arbitration before an Arbitral Tribunal is appointed. In some jurisdictions, however, they may not. Moreover, where parties have agreed to resolve their dispute by arbitration, they may prefer to make such an application within the arbitration. Therefore, the Emergency Arbitrator provisions, while not prejudicing a party's right to seek interim relief from any available court, allow parties to commence emergency proceedings within the framework of their arbitration.

30. As stated above, the Emergency Arbitrator procedure is only available in arbitrations under the 2014 Rules and not in arbitrations under the 1998 Rules (unless the parties have opted in).

31. The provisions on expedited formation and Emergency Arbitrator in the 2014 Rules are not mutually exclusive – meaning that a party might, in an appropriate case, decide to make an application for both expedited formation of the Arbitral Tribunal and, in the interim, for the appointment of an Emergency Arbitrator.

4.2 How do I apply for an Emergency Arbitrator?

32. A party may make an application at the time of filing a Request for Arbitration, or at any time before the formation of the Arbitral Tribunal. An application may be made by any Claimant or Respondent.

33. The application should be made to the Registrar in writing, preferably by electronic means (to casework@lcia.org, or online at onlinefiling.lcia.org), and delivered or notified to all other parties to the arbitration.

34. A party must include in its application: (a) the specific grounds for requiring, as an emergency, the appointment of an Emergency Arbitrator; (b) the specific claim, with reasons, for emergency relief; and (c) all relevant documentation, including the Request (if made by the Claimant) or the Response (if made by the Respondent).

35. The applicant must also provide written confirmation that it has paid, or is paying, the Special Fee of £28,000 (plus VAT if applicable). In accordance with Article 9.5 of the 2014 Rules, without receipt of the Special Fee, the application will be dismissed by the LCIA Court.

36. As with an application for expedited formation, we strongly recommend that the applicant provides to the LCIA secretariat advance notice of the intended filing of an application for the appointment of an Emergency Arbitrator.

37. It is also important that the applicant ensures that it has provided to the LCIA secretariat full contact details for all parties to the arbitration, and for their representatives.

4.3 What happens next?

38. The LCIA Court will determine the application as soon as possible in the circumstances. As with expedited formation, the LCIA Court may give a responding party an opportunity to comment before deciding the application, but is not required to do so. The LCIA Court is also not required to give reasons for its decision.

39. If the application is granted, the LCIA Court will appoint an Emergency Arbitrator within three days of the Registrar's receipt of the application (or as soon as possible thereafter).

40. If the LCIA Court declines to grant the request for the appointment of an Emergency Arbitrator, £20,000 of the Special Fee shall be treated as a deposit lodged by that party in accordance with Article 24 of the Rules.

4.4 Who will the LCIA appoint as Emergency Arbitrator?

41. Our Notes for Parties (available at www.lcia.org) set out the process the LCIA follows when appointing an Arbitral Tribunal in a standard arbitration under the LCIA Rules.

42. The process for appointing an Emergency Arbitrator would include many of the same steps, albeit condensed into a much shorter timeframe.

43. In selecting a candidate to sit as Emergency Arbitrator, the LCIA would be particularly mindful of the candidate's experience and of his/her availability to deal expeditiously with the particular claim for emergency relief.

4.5 Decision of the Emergency Arbitrator

44. Once appointed, the Emergency Arbitrator is obliged to make a decision on the claim for emergency relief as soon as possible and by no later than 14 days from appointment (unless this deadline is extended by agreement of the parties or, in exceptional circumstances, by the LCIA Court).

45. The Emergency Arbitrator has the power to make any award or order that the Arbitral Tribunal could make under the parties' arbitration agreement or the Rules and may decide to adjourn any claim for emergency relief to the Arbitral Tribunal yet to be formed.

46. There is no prescribed procedure for the emergency proceedings. Rather, the Emergency Arbitrator will conduct the proceedings in the manner he/she considers appropriate, having taken account of the nature of the emergency proceedings, the need to afford each party (if possible) an opportunity to be consulted on the claim for relief, the claim and reasons for emergency relief, and any submissions by the parties.

47. Parties should note that the Emergency Arbitrator is not required to hold any hearings and may decide the claim for emergency relief on a documents only basis.

48. The Rules do not prescribe a substantive standard for the Emergency Arbitrator to apply in reaching his decision. They do provide, however, that the Emergency Arbitrator must make his order or award in writing and provide reasons. If a party has a preference for a particular form (for example, because of enforcement considerations), it should express this to the Emergency Arbitrator. In addition, Emergency Arbitrators are encouraged to ask the parties which form they would prefer.

49. Further, in setting the procedure, and in making a decision, the Emergency Arbitrator will have regard to all other standards and laws that apply in the context of the particular arbitration.

50. Any order or award made may subsequently be varied, discharged or revoked by the Arbitral Tribunal, once appointed. In addition, the Arbitral Tribunal will address the costs of the emergency proceedings.

5. EXPEDITED APPOINTMENT OF A REPLACEMENT ARBITRATOR

5.1 What is expedited appointment of a Replacement Arbitrator?

51. In some cases, it is necessary to replace an arbitrator before an arbitration has concluded. This might be the result of, for example, ill-health, an arbitrator resigning as the result of an intervening conflict, or an arbitrator being removed following a successful challenge by a party.

52. In such a case, and where there is some exceptional urgency, a party may apply to the LCIA Court for the appointment of the replacement arbitrator to be expedited.

5.2 How to apply for expedited appointment of a Replacement Arbitrator

53. Any application for the expedited appointment of a replacement arbitrator should be made to the Registrar in writing, preferably by electronic means (to casework@lcia.org, or online at onlinefiling.lcia.org), and delivered or notified to all other parties to the arbitration.

54. A party must include in its application the specific grounds for exceptional urgency requiring the expedited appointment of the replacement arbitrator.

55. As with an application for expedited formation, we recommend that the applicant provide to the LCIA secretariat advance notice of the intended application.

5.3 What happens next?

56. The steps that follow an application for expedited replacement of an arbitrator are the same as for an application for expedited formation of the Arbitral Tribunal, discussed above.

6. CASE STUDIES

Case study no. 1

The parties' dispute arose out of alleged early unlawful termination of an agreement for the distribution of TV rights.

The Claimant applied for expedited formation of the Tribunal in its Request for Arbitration, under Article 9 of the 1998 Rules, arguing that: (a) service under the agreements would cease in 27 days (when the disputed notice of termination took effect), resulting in millions of the Claimant's customers no longer receiving the Respondent's live programming, which would immediately impact the Claimant's reputation and customer relations; and (b) if the Respondent failed to honour the exclusivity obligations, competitors would be able to obtain access to the programmes that the agreement guaranteed would be exclusive to the Claimant.

The LCIA Court considered there was exceptional urgency and granted the application.

The parties' arbitration agreement provided for a three-member Arbitral Tribunal, with party nomination. Further, the agreement provided a time limit of 14 days for the parties' nominees to agree on the third and presiding arbitrator.

- The three-member Tribunal was appointed within 12 days of the application having been made, the following steps having been taken:
- the Claimant filed its application and nominated an arbitrator on a Thursday afternoon;
- on Friday, the LCIA Court invited comments from the Respondent by 4pm on Monday;
- the LCIA Court granted the application on Tuesday and directed the Respondent to nominate and file any Response by Friday, which the Respondent did;
- on Friday, the LCIA wrote to the parties nominees with background to the case and to ascertain their availability, independence and impartiality; on the following Monday, having heard from the nominees, the LCIA Court invited the nominees to select the third and presiding arbitrator, which they did the same day;
- the LCIA then wrote to that candidate to ascertain his availability, independence and impartiality and, having done so, was able to appoint the Arbitral Tribunal on the Tuesday.

The parties settled their dispute a short time later.

Case study no. 2

The parties' dispute arose out of a consortium agreement.

The Claimant alleged that the Respondent had committed certain breaches of the agreement and that, in light of the dispute between the parties, the Respondent had unlawfully invoked two bank guarantees against the Claimant.

The Claimant had obtained a temporary injunction from the Courts in which the relevant bank was located, to prevent the bank from making payment of the guarantees. The injunction was, however, due to expire in 5 days' time.

The Claimant filed with the LCIA an application for interim measures under Article 25 (to restrain the Respondent from invoking the guarantees) at the same time as its application under Article 9 of the 1998 Rules.

In support of its Article 9 application, the Claimant relied on the imminent expiry of the temporary court injunction and asserted that it required an Arbitral Tribunal in place as a matter of urgency to determine its application under Article 25.

The LCIA Court decided there was exceptional urgency and granted the Article 9 application.

The parties' agreement provided for a sole arbitrator to be appointed by the LCIA Court.

The sole arbitrator was appointed within 5 days of the application, the following steps having been taken:

- the Claimant made its application in its Request for Arbitration on a Thursday;
- on the same Thursday, the LCIA Court invited comments from the Respondent by 3pm on Monday;
- on Monday, after expiry of the deadline for response, the LCIA Court granted the application;
- late on Monday, after liaising with the LCIA Court, the secretariat approached a candidate for appointment as sole arbitrator;
- having received confirmation of the candidate's availability, independence and impartiality, the LCIA Court appointed the sole arbitrator on the Tuesday and informed the parties of his appointment the same day.

The Claimant subsequently withdrew its application for interim relief and stated that it instead wished to press for a speedy hearing for all of the issues to be resolved at once.

Case study no. 3

The parties' dispute arose out of a contract for the sale of metal, pursuant to which the Respondent had agreed to provide an interest-free credit line to the Claimant for more than US\$50 million.

The Claimant stated that it had requested payment of US\$5 million under the line of credit, but that the Respondent had refused, stating that the line of credit was an advance payment mechanism, which had already been fully implemented in respect of each delivery. The Claimant's position was that the line of credit was, in effect, a source of funds that could readily be tapped at the Claimant's discretion.

In bringing an application under Article 9 of the 1998 Rules, the Claimant emphasised that it was reliant on the Respondent as its primary source of revenue to carry out its business and would therefore suffer significant damage while unable to access funds through the letter of credit.

The Claimant filed its application on a Wednesday, and the LCIA Court promptly invited comments from the Respondent by 4pm the next day.

The Respondent argued that the grounds raised by the Claimant did not amount to exceptional urgency, stating that the Claimant has not sought any interim relief and that the Claimant's assertion that it might suffer interim financial harm (pending a final award) was no different from many cases in which a party brought a claim seeking damages. The Respondent also disagreed with the Claimant's interpretation of the contract.

The LCIA Court rejected the application that same Thursday.

Case study no. 4

The parties' dispute arose out of a loan agreement, whereby the Claimant agreed to provide the Respondent with temporary repayable interest-free monetary loan, for a total amount of around US\$10m. The Claimant's stated that the Respondent had failed to re-pay the loan by the contractual deadline. It therefore sought reimbursement and interest.

The Claimant applied for expedited formation of the Arbitral Tribunal under Article 9 of the 1998 Rules on the grounds that the Respondent owed the Claimant a significant sum and that such money had been owed for a significant time.

The Claimant filed its application on a Friday. The LCIA informed the parties that the application had been rejected on the Tuesday.

7. IMPORTANT NOTE

57. The LCIA is a neutral and independent arbitral institution, providing administrative services only, and neither practices law, nor renders legal services. Neither parties, nor legal representatives, nor arbitrators should, therefore, interpret, or rely upon, these notes as any form of legal advice. Rather, these notes are drafted only with a view to explaining the emergency procedures available in LCIA arbitration to those unfamiliar with our Rules and practices.

Issue date: 29 June 2015