

Insights

2020 VISION: UPDATES TO THE LCIA ARBITRATION RULES

Aug 12, 2020

SUMMARY

The LCIA has released an update to the LCIA Arbitration Rules. The new rules will apply to arbitrations commenced on or after 1 October 2020, unless parties have expressly agreed that an earlier version of the LCIA Rules should apply.

The LCIA Rules were last updated in 2014 and this latest update is intended to ensure that the rules continue to reflect best practice and facilitate effective and streamlined arbitration.

The update was under discussion prior to the COVID-19 pandemic, but the timing of its release has allowed the LCIA to address a number of issues that have been brought into focus over the last few months including data protection, use of electronic communication and virtual hearings.

Here is a brief summary of the main changes introduced by the new rules.

Electronic communication: The new rules make it clear that email or other electronic means should be the primary method of communication. Article 4.2 provides that save with the prior written approval or direction of the Arbitral Tribunal, any written communication in relation to the arbitration shall be delivered by email or any other electronic means of communication that provides a record of its transmission. The primacy of electronic communication also extends to the delivery of the award. Article 26 now confirms that delivery of an award may also be made by electronic means.

Expedited proceedings and Early Determination: Efficiency in the conduct of arbitrations remains a key focus. Article 14 includes new provisions making it clear that the arbitral tribunal's power to make any order to considers appropriate for the efficient conduct of an arbitration included the making of procedural orders to expedite procedure. Options include:

- limiting the length or content of, or dispensing with, any written statement to be delivered under Article 15;
- limiting the written and oral testimony of any witness;

- employing technology to enhance the efficiency and expeditious conduct of the arbitration (including any hearing);
- deciding the stage of the arbitration at which any issue or issues shall be determined, and in what order;
- dispensing with a hearing.

Early Determination: The new rules now include explicit reference to Early Determination as one of the tools that the tribunal can use to expedite proceedings. A new provision in Article 22.1 (viii) gives the tribunal the power to determine that any claim, defence, counterclaim, cross-claim, defence to counterclaim or defence to cross-claim is manifestly outside the jurisdiction of the Arbitral Tribunal, or is inadmissible or manifestly without merit; and where appropriate to issue an order or award to that effect (an “Early Determination”).

This is a significant development. Historically one of the criticisms of arbitration has been the lack of an express provision (similar to a summary judgment procedure) to allow tribunals to deal with claims that are manifestly without merit. Whilst it could be argued that the tribunal has this power as part of its general case management powers, the introduction of an explicit provision giving the tribunal the power of Early Determination removes any doubt about this. The introduction of an express provision also brings the LCIA rules in line with the rules of other institutions, including the SIAC and the HKIAC, which offer an early dismissal procedure.

Tribunal Secretaries: In recent years, concerns have been expressed about the nature of the tasks to be performed by tribunal secretaries, with calls for greater transparency and regulation, something which we considered in our [Annual Arbitration Survey in 2015](#). New provisions in Article 14A address these concerns, making it clear that under no circumstances may an Arbitral Tribunal delegate its decision-making function to a tribunal secretary. The new provisions also provide that a tribunal may only obtain assistance from a tribunal secretary once the tribunal secretary has been approved by all parties and that approval process includes agreeing tasks that may be performed by the tribunal secretary.

Consolidation and concurrent conduct: The new rules broaden the powers of the LCIA court and the tribunal to order the consolidation of arbitrations arising out of the same transaction or series of related transactions and introduces new powers to order the concurrent conduct of arbitrations.

Composite Requests: The rules include a new provision in Article 1.2 that allows a claimant wishing to commence more than one arbitration to serve a composite Request. This is a welcome provision which addresses a gap in the 2014 LCIA Rules in relation to claims arising in multi-contract arbitrations something that was highlighted in the decision in *A v B* [2017] EWHC 3417 (Comm).

Virtual Hearings: Article 19 has been refined and expanded to accommodate the use of virtual hearings. Article 19.2 now provides that a hearing may take place in person, or virtually by

conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form). Whilst this provision very much reflects the changes to best practice necessitated by the COVID-19 pandemic, it will be interesting to see whether virtual hearings will become the “new normal” for the conduct of arbitration hearings in the years to come.

Compliance: The impact of legal and regulatory requirements, including sanctions, on arbitration is recognised in a new provision in the rules. Article 24 A provides that any dealings between a party and the LCIA will be subject to any requirements applicable to that party or the LCIA relating to bribery, corruption, terrorist financing, fraud, tax evasion, money laundering and/or economic or trade sanctions (“Prohibited Activity”), and the LCIA will deal with any party on the understanding that it is complying with all such requirements. The new provisions allow the LCIA to refuse to act on any instruction and/or accept or make any payment if the LCIA determines (in its sole discretion and without the need to state any reasons) that doing so may involve Prohibited Activity and the parties agree to provide the LCIA with any information and/or documents reasonably requested by the LCIA for the purpose of compliance with laws relating to Prohibited Activity.

Data protection: The rules include new provisions in Article 30 A addressing data protection and regulatory issues. Article 30.5 provides that the tribunal should consult with the parties at an early stage of the arbitration to consider whether it is appropriate to adopt any specific information security measures to protect the physical and electronic information shared in the arbitration.

Over the last few years there has been a huge focus on cybersecurity and specifically whether the arbitral community is doing enough to protect electronic data used in an arbitration against unauthorised access by third parties. Our [Annual Arbitration Survey in 2018](#) focused on cybersecurity and considered the role that arbitral institutions could and should take to deal with issues of data security. The introduction by the LCIA of a new rule requiring the tribunal to consult with the parties on information security measures is a welcome step in the right direction.

Schedule of Costs: The LCIA have also issued a new schedule of costs that will also take effect on 1 October 2020. The Registration Fee for commencing an arbitration increases from £1,750 to £1,950. The hourly rates charged by the LCIA Secretariat are increased as is the maximum hourly rate for arbitrators which increases from £450 to £500. The application fee for the appointment of an Emergency Arbitrator increases from £8,000 to £9,000 and the Emergency Arbitrator’s fee increases from £20,000 to £22,000. The new schedule of costs also includes provisions for tribunal secretaries and provides that an hourly rate in the range of £75 to £175 per hour would generally be considered reasonable for a tribunal secretary.

BCLP Comment

The latest rule changes are to be welcomed. They address gaps that existed in the 2014 rules with the introduction of express provisions for Composite Requests and Early Determination. They also

reflect the evolution of the arbitration process to deal with our increased reliance on electronic means of communication and the “new normal” of virtual arbitration hearings. The 2020 LCIA Rules should help the LCIA to retain its reputation as a one of the leading institutions for international

RELATED PRACTICE AREAS

- International Arbitration

MEET THE TEAM



George Burn

Co-Author, London

george.burn@bcplaw.com

[+44 \(0\) 20 3400 2615](tel:+442034002615)



Victoria Clark

Co-Author, London

victoria.clark@bcplaw.com

[+44 \(0\) 20 3400 3095](tel:+442034003095)

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be “Attorney Advertising” under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP’s principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.