HERBERT SMITH FREEHILLS

INSIDE ARBITRATION: THE NEW LCIA RULES 2020: REFRESHING THE LCIA'S APPROACH?

Global
Legal Briefings

The London Court of International Arbitration (LCIA) has announced changes to its rules which will come into force on 1st October 2020.

The revisions to the LCIA Rules have been couched in terms of an "update" rather than a wholescale rewrite. Nonetheless, some changes of note have been made. The new Rules allow for the commencement of multiple arbitrations in a "composite Request" and expand the circumstances in which consolidation may be available. They also confirm the wide discretion of the Tribunal in all aspects of arbitral procedure, including the ability to order Early Determination of claims or counterclaims for being manifestly without legal merit. In addition, the revision seeks to codify within the Rules themselves the LCIA's approach to Tribunal secretaries (previously contained within a Guidance Note to arbitrators) and to address some slight quirks introduced by the 2014 rule revision. More generally, it feels as though a red pen has been taken to extraneous clause fragments and phraseology and a more "Plain English" drafting style to the whole set of Rules has been introduced. This modernisation also extends to the way the LCIA operates, with a move to the use of electronic submission and communication as the default. We also see a recognition of the reality of current practice, with express drafting included to allow the Tribunal discretion to order a virtual hearing, or a combination of remote and in person attendance.

BREADTH OF TRIBUNAL DISCRETION

There have been some fairly substantial changes to Articles 14 (Conduct of Proceedings) and 22 (Additional Powers) of the Rules. On one view, these are not changes per se, but rather a confirmation of powers that arbitrators have always had under the LCIA's Rules but which, through lack of express inclusion within the Rules themselves, arbitrators have been reluctant to exercise.

In terms of Article 14, this is certainly a sustainable position. The new Rules have moved around the existing provisions in Article 14, moving up the general duties of the Tribunal from old 14.6 to the beginning of the Article at new 14.1, but leaving them unchanged. New Article 14.2 mirrors old 14.7 in making it clear that the Arbitral Tribunal shall have the widest discretion to discharge these general duties and is, again, unchanged. What follows at new 14.5 and 14.6 seeks to clarify (but not necessarily limit) what this "widest discretion" entails in terms of procedure, including shortening timescales, limiting evidence, restricting pleadings, and adopting technology. Few would disagree that these fall within the existing parameters of arbitrator discretion, exercisable in pursuit of efficient and expeditious conduct. These wide powers would enable a bespoke expedited procedure if required. This all sits well with the changes in Article 15 of the Rules which confirm the Tribunal's overall control of the written procedure, its extent and timescales.

Whether the changes to Article 22 also fall within that same confirmatory category will very much depend on your view of how far Tribunal discretion extends in terms of summary dismissal. The provisions at Article 22 (viii) allow for a tribunal 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").

Other institutions (eg SIAC, HKIAC) have already provided for summary dismissal or early determination in their rules or confirmed (ICC) that such a power exists in a practice note. It was therefore a very obvious addition for the LCIA in any rule change, particularly given the rising use of the LCIA Rules by financial institutions who have historically chosen English court jurisdiction over arbitration for the ability to apply for summary judgment.

COMPOSITE REQUESTS AND RESPONSES

The English court's decision in *A v B* [2017] EWHC 3417 (Comm) (21 December 2017) confirmed that the LCIA Rules 2014 did not permit a party to commence a single arbitration in respect of disputes under multiple contracts. Rather, parties instead needed to issue multiple separate Requests for Arbitration and then seek to have the separate arbitrations consolidated.

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multiple arbitrations were taking place under the same arbitration agreement or under compatible agreements with the same parties, consolidation had to be provided for in free-hand drafting in the arbitration clause itself.

THOUGHTS ON THE NEW LCIA RULES

The LCIA 2020 rule change will likely be viewed with approval by the arbitral community. These are a refreshed and modernised set of rules that have retained their essential LCIA flavour.

What do I mean by that? Well, the LCIA has always taken a "less is more" approach to its rules unless there is a compelling reason for greater regulation, an innovation that is beneficial to its users, or a need to clarify existing provisions.

This is a difficult balance to strike but one that these rules seem, by and large, to deliver. The LCIA has clearly decided that it will aid users if its rules contain more detail regarding the procedural techniques that fall within the Tribunal's discretion – particularly in terms of limiting pleadings and evidence, utilising technology and ordering virtual hearings, and for Early Determination. This should increase flexibility, and hopefully encourage arbitrators to use the full remit of their discretion to bring about greater efficiency through a procedure better tailored to individual disputes. There has also been careful thought given to the new provisions of consolidation. These introduce a much wider scope for consolidation, but without adding levels of complexity. Practitioners and users alike will also appreciate the efforts that have been taken to use "plain English" wherever possible.

The 2020 rule change introduces a new Article 22A called "Power to Order Consolidation/Concurrent Conduct of Arbitrations". Much of the language here is unchanged, providing for both the Arbitral Tribunal and the LCIA to order consolidation in certain circumstances. However, the tweaks and additions that have been made have changed the LCIA's approach quite considerably. 22.7(ii) now allows for the Tribunal to consolidate arbitrations under compatible arbitration agreements between the same disputing parties or arising out of the same transaction or series of related transactions. Being able to argue that arbitration agreements are compatible and arising out of the same transaction or related transactions opens up opportunities for consolidation in a far wider set of circumstances. This expansion has also been applied to the powers of the LCIA Court under Article 22.8(ii) to consolidate prior to the appointment of a tribunal in similar circumstances. Also new is Article 22.7(iii) which provides for a tribunal to conduct arbitrations concurrently in similar circumstances and where the same arbitral tribunal is constituted in respect of each arbitration. In practice, this is likely to occur where parties have already agreed to concurrent arbitrations in their contract or where it is standard market practice in the relevant industry.

These apparently small alterations provide for a far more modern and flexible provision that will be very useful, particularly alongside the new provision for composite Requests.

For now, there are a few question marks that will be answered over time with the benefit of practical experience. The introduction of a "Composite Request" – by which multiple arbitrations can be commenced – is novel. Other arbitral institutions allow for the commencement of a single arbitration in respect of multiple disputes. The LCIA's approach arguably responds first and foremost to challenges in the LCIA's fee structure, rather than providing something which users want or expect. As with all such changes, we shall have to see how it works in practice and whether consolidation by the LCIA following the issue of a Composite Request is more of a formality than a hurdle.

I also recognise the challenge faced by the LCIA in deciding whether, and how, to address the 2016 case of Gerald Metals. The LCIA's light touch amendments were perhaps the only sensible option, but they do still leave open the question of when English court-ordered interim relief will be available to support arbitrations under the LCIA Rules. Guidance on the interaction between the new Rules and the Arbitration Act can only come from the Court – and it will take time for jurisprudence to confirm whether these small changes have brought about any clarity.

TRIBUNAL SECRETARIES

Arbitration moves very quickly as a practice area. Since the last LCIA rule change in 2014 it has become standard practice for the role of tribunal secretary to be formalised and placed on a similar footing to arbitrators in terms of conflicts, independence and impartiality. The LCIA responded to that shift in practice by providing some quite detailed guidance in 2017 in its Guidance Note to Arbitrators. However, the rule refresh was an obvious chance to put that guidance on a more formal footing.

The LCIA's approach to tribunal secretaries came under some scrutiny in the case of *P v Q and others* [2017] EWHC 194 (Comm). *P v Q* involved an application to remove an entire tribunal under s24 of the English Arbitration Act on the basis of alleged "over-delegation" of their duties to their secretary. The Court's decision was based on a review of the Act and, importantly, the LCIA Rules 1998. The decision gave judicial backing to the LCIA's approach in that case, and provides judicial support to the LCIA Court's decision-making process on arbitrator challenges.

Given this support, particularly following the LCIA's updated approach in its 2017 Guidance, it is not surprising to see that the new Article 14A is not “new” per se, but rather formalises LCIA current practice within the Rules. The provision makes it clear that parties have to agree to the use of tribunal secretaries and that tribunal members must not delegate decision-making powers. There is also clarity about the need for tribunal secretaries to disclose any conflicts of interest and also that the obligation of confidentiality under Article 30 applies to any tribunal secretary.

“AUTHORISED REPRESENTATIVES” AND THE ANNEX ON CONDUCT

The introduction of the LCIA’s Annex on Counsel Conduct in the 2014 Rules was an extremely innovative move and remains so. It is noteworthy that there have been no efforts to remove or limit the Annex in the 2020 Rules revision. This shows continued confidence from the LCIA in its approach to this issue.

What has been addressed in this latest revision is a change that was introduced in 2014 and caused considerable discussion. In Article 18 of the 1998 LCIA Rules it was clear that a party could be represented by legal practitioners or by any other representative, whether legally qualified or not. However, in 2014 that language shifted to “one or more authorised legal representatives”. It was not clear at the time whether the LCIA had intentionally restricted party representation in LCIA arbitration to lawyers only. The rule change in 2020 has reverted to clarifying that representation can be legal or non-legal, but that, legal or non-legal, the Annex on Conduct still applies.

REFRESHING AND MODERNISING

The 2014 amendments introduced some important new concepts into the LCIA Rules. But they also introduced a few quirks that needed to be rectified. Moreover, the bedrock of the 1998 rules was largely unchanged, meaning that some of the turns of phrase have started to seem a little archaic.

The 2020 update is exactly that. A red pen has been taken to unnecessary additional words and to spare sub-clauses throughout. The fax machine has been removed from the equation and the Rules now require that the Request and Response be submitted electronically unless prior written approval is given by the LCIA Registrar. The default throughout is that correspondence will be be through electronic means unless the LCIA Court or the Tribunal direct otherwise (under Article 4). This modernisation also extends to the process of signing and distributing awards, with Article 26.2 now permitting an award to be signed electronically and/or in counterpart and assembled into a single instrument unless the parties agree or the Tribunal or LCIA Court directs otherwise. We also see a recognition of the reality of current practice, particularly during the COVID-19 pandemic, with express drafting included in Article 19 to allow the Tribunal discretion to order a virtual hearing, or a combination of remote and in person attendance. In doing so, the LCIA has chosen to “future-proof” its Rules with the use of the term “other communications technology” to allow for remote hearings technology to continue to evolve over time.

THE CHALLENGE OF ADDRESSING *GERALD METALS*

It had been widely anticipated that the revised Rules would address the 2016 case of *Gerald Metals SA v The Trustees of the Timis Trust and others* [2016] EWHC 2327. *Gerald Metals* was about the availability of court-ordered interim relief in support of arbitration. The English court found that the test of "urgency" under s44(3) of the English Arbitration Act 1996 (the "Act") would not be satisfied unless:

- the matter was so urgent that there was insufficient time to form an expedited tribunal or appoint an emergency arbitrator; or
- an expedited tribunal or emergency arbitrator could not exercise the necessary powers.

Leggatt J held that if an expedited tribunal could be constituted or an emergency arbitrator appointed within the relevant timeframe, and the expedited tribunal or emergency arbitrator could practically exercise the necessary powers, the test of "urgency" under s 44(5) of the Act will not be satisfied and the court will not have power to grant urgent relief.

Whether and how to deal with this case in the Rules has been much discussed at Tylney Hall and, no doubt, by the LCIA drafting committee. Article 9B of the Rules clearly states that the availability of an emergency arbitrator shall not prejudice any party's right to apply to a state court or other legal authority for any interim or conservatory measures before the formation of the Arbitral Tribunal; and it shall not be treated as an alternative to or substitute for the exercise of such right.

Leggatt J dealt with this provision in his judgment. He found that, while the Rules make it clear that Article 9B is not intended to prevent a party from exercising a right to apply to the court (for example under section 44 of the Arbitration Act), this does not prevent the powers of the court from being limited as a result of the existence of Article 9B.

The LCIA has taken a light touch in its changes to the Rules to address the case. In particular, it has made some small alterations to old Article 9.12 (now Article 9.13) and to Article 25.3 (relating to interim relief before an arbitral tribunal rather than before an emergency arbitrator specifically) to simplify the language and to confirm the availability of court-ordered interim relief in certain circumstances. However, the relatively limited changes demonstrate the challenge this case poses for any arbitral institution. The institution can attempt more clearly to signpost how its rules should be interpreted, but it remains up to the court to decide how it applies or construes the Act alongside those rules. s44 provides for the court's discretion in this area – not for the institution. While the changes are welcome, their impact remains uncertain and will depend entirely on how the Court approaches the interaction between the new LCIA Rules and the Act on this point.

GETTING TO GRIPS WITH THE CHANGES: RESOURCES TO HELP YOU

The LCIA Rules 2020 are more of a refresh than a fundamental revision. However, it can still be challenging as a user to get to grips with what the changes will mean for you or to see how they compare with other similar institutions.

To help our clients, Herbert Smith Freehills' Global Arbitration Team has produced an updated Step by Step Guide to Arbitration under the LCIA Rules 2020 and an interactive PDF table which compare the rules of key arbitral institutions and the UNCITRAL Rules. To receive an electronic copy of these documents, please contact arbitration.info@hsf.com.

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KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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