

Dispute Resolution Hotline

September 10, 2020

REVISED ARBITRATION RULES OF LCIA: NEW-AGE ARBITRATION

The London Court of International Arbitration ("LCIA") recently revised its arbitration rules on August 11, 2020 ("LCIA 2020 Rules"). The new rules supersede the erstwhile rules of 2014 ("LCIA 2014") and will come into effect from October 1, 2020. The revisions are timely, as some of them cater to the present pandemic and will assist the parties in expediting the arbitral proceedings.

We have set out below some of the notable changes pertaining to the key changes in LCIA 2020 Rules:

- i. Usage of technology;
- ii. Consolidation of proceedings;
- iii. Interpretation of LCIA Rules as per English law;
- iv. Emergency Arbitration;
- v. Addressing Data Protection
- vi. Compliance: Role of LCIA in Prohibited Activities;
- vii. Role of Tribunal Secretary;
- viii. Early determination;
- ix. Revamping the Route for Determination of Nationality of Parties
- x. Advance Payment and LCIA Schedule of Costs

We are glad to have comments and inputs from leading arbitrators, practitioners and LCIA Court members around the world on the implications of the LCIA Rules 2020.

Referring to the recent amendments to the LCIA Rules 2020, **Gabrielle Nater-Bass, Partner, Homburger and Member of the LCIA Court** points out that "*The recent changes to the LCIA Rules reflect a light touch amendment to make the rules clearer and in line with recent developments in international arbitration. The changes reflect the practical insights gained from the extensive experience of LCIA tribunals over the years and also seek to address several topical issues such as compliance and data protection. The amendment has also introduced updated provisions on electronic communications and virtual hearings, thus striving towards environmentally sustainable procedures. Without changing the essential characteristic of the LCIA Rules, the amendment brings further greater clarity on several important issues such as early determination, consolidation and the role of tribunal secretaries.*"

KEY FEATURES:

A. Use of Technology

As we struggle with the challenges posed by COVID-19, the LCIA has imbibed the 'new normal' into its set of governing rules.

- The Request for Arbitration,¹ and the Response,² (including all accompanying documents) are now to be submitted to the Registrar in electronic form.
- All communications between the parties and the tribunal are also required to be done by electronic means.³
- The communications can be undertaken in any other mode subject to prior approval of the Registrar, acting on the behalf of LCIA or the arbitral tribunal, but electronic means have been listed as the default mode.⁴
- Further, the LCIA 2020 Rules clarify that the hearing can take place in person, or virtually by conference call, videoconference or using other communications technology with participants on one or more geographical places.⁵

This emphasis on virtual hearings have been necessitated due to the pandemic and to encourage the parties to expedite the arbitral process. **May Tai, Managing Partner of Asia offices of Herbert Smith Freehills** welcomes the new rules and states "*I am delighted to see the 2020 LCIA Rules put so much emphasis on technology. The Rules reflect arbitration as it is today – no more fax machines, electronic correspondence by default, and express provision for awards to be signed electronically. The new Rules also give tribunals express power to order virtual hearings – no doubt prompted by COVID but indicating that arbitration's 'new normal' is here to stay. These changes are practical, cost effective, and important in helping to reduce arbitration's environmental impact. I welcome them and hope to see other institutions follow suit.*"

B. Consolidation of Arbitration

A standard practice of composite request for arbitration recognised under various other institutional rules has been

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modified to effect that a Claimant wishing to commence more than one arbitration (whether against one or more Respondents and under one or more Arbitration Agreements) may serve a composite Request in respect of all such arbitrations. In such a composite request, a Claimant is required to identify separately the estimated monetary value in dispute, transaction/s at issue and the claim advanced by the Claimant in each arbitration. Such arbitrations shall proceed separately subject to the LCIA Court or a tribunal ordering for consolidation and is not an automatic process. Similar amendments have been made and a party is entitled to file a composite Response.⁶

Although the LCIA 2014 Rules did provide for the scope of consolidation of two or more arbitrations,⁷ the LCIA 2020 Rules bring key changes which widen the scope for consolidation of arbitrations. Now, LCIA, besides the arbitral tribunal, has the power to consolidate arbitrations before appointment of the arbitral tribunal. Secondly, where parties have not agreed in writing for such consolidation, the LCIA or the tribunal can order for consolidation if,⁸

- the arbitration has been commenced under the same arbitration agreement or any compatible arbitration agreement/s, and
- either the arbitration agreement exists between the same disputing parties or the disputes have arisen out of the same transaction or series of related transactions.

The LCIA 2014 did not provide the scope for consolidation of arbitrations on the basis of transactions entered into between the parties.

C. LCIA Rules to be interpreted according to English law

Under the LCIA 2014 as well as the LCIA 2020 Rules, the law applicable to the Arbitration Agreement and the arbitration is the law applicable at the seat of the arbitration. The seat is designated as London (England) if there is no agreement on the contrary or if the tribunal orders for designation of a different seat of arbitration.

However, the LCIA 2020 Rules provide for an additional stipulation on the manner of interpretation of its articles. **Prof. Dr. Maxi Scherer, of Wilmer Cutler Pickering Hale and Dorr LLP and Queen Mary University of London and a member of the LCIA Court**, states that *Article 16 (the provision which addresses the seat of arbitration, place of hearing, and applicable law) now includes a new provision (Article 16.5) stating that the LCIA Rules "shall be interpreted in accordance with the laws of England." This is notwithstanding the fact that, according to Article 16.4 "the law applicable to the Arbitration Agreement and the arbitration shall be the law applicable at the seat of the arbitration, unless and to the extent that the parties have agreed in writing on the application of other laws or rules of law and such agreement is not prohibited by the law applicable at the arbitral seat."*

She further notes *"Article 16.5 is unique in its kind and I am not aware of other arbitral rules that have implemented a similar provision."* She adds: *"It will be interesting to see how parties and tribunals approach the interpretation of, and interplay between, Articles 16.4 and 16.5. One might foresee arguments about their implementation in cases where the seat of the arbitration is not in England and/or where the parties have chosen a specific law to govern their arbitration agreement which is not English law."*

For example, in an arbitration governed by LCIA Rules, a tribunal seated in Singapore will also be obliged to interpret the LCIA Rules in accordance with the English laws. In addition, the LCIA Rules now also provides that disputes that arise out of or in connection with LCIA arbitration are to be resolved by the courts of England and Wales.⁹ An obligation to interpret the LCIA Rules in accordance with the English Rules irrespective of a designated seat has the potential to stir up a debate on the dispensability of this article. In case of non-compliance of such obligation, the addition is also likely to disturb the enforcement of arbitral award in countries, especially England.

D. Emergency Arbitration:

Under the LCIA 2020 Rules, an Emergency Arbitrator may determine the amount of the Legal Costs relating to the emergency proceedings and the proportions in which the parties shall bear the Legal Costs and the Arbitration Costs of the emergency proceedings.¹⁰ Under LCIA 2014, such determination of the amount and proportion of cost borne during the Emergency Arbitration was decided by the arbitral tribunal.

Additionally, the LCIA 2020 Rules allows the emergency arbitrator to revisit the emergency arbitration award prior to the constitution of the regular tribunal. In particular, the emergency arbitrator on its own motion, or upon application by a party can confirm, vary, discharge or revoke, in whole or in part, its earlier orders and/or issue an additional order.¹¹

E. Addressing Data Protection

Any processing of personal data by the LCIA is now subject to applicable data protection legislation. With the European Union's General Data Protection Regulation (GDPR) coming into force in 2018, LCIA is the first arbitral institution to absorb the principles of data protection in the Rules. Introduction of such provisions is timely post the issuance of Report by ICCA-IBA Task Force on guidelines and applicability of data protection in international arbitration. **Melanie Van Leeuwen, Partner, Derains and Gharavi and Co-Chair of the ICCA-IBA Joint Task Force on Data Protection in International Arbitration Proceedings** notes that *"While several arbitration institutes have provided their users and arbitrators with guidance on information security and data protection, the LCIA is the first institute to provide for this increasingly important topic in its arbitration rules. Article 30A of the 2020 LCIA Rules draws attention to these issues, obliges arbitrators and parties to consider the issues at an early stage of the arbitration, and gives arbitrators and the institute the legitimacy to provide binding directions. The Taskforce welcomes this important development."*

Under the LCIA 2020 Rules, the LCIA and a tribunal may issue directions on information security or data protection. After due consultation with the parties or the LCIA, a tribunal can also adopt (a) any specific information security measures to protect the physical and electronic information shared in the arbitration; and (b) any means to address the processing of personal data produced or exchanged in the arbitration in light of applicable data protection or equivalent legislation.

F. Compliance – Role of LCIA in 'Prohibited Activities'

The LCIA 2020 Rules now provide that any dealing between a party and the LCIA will be subject to any requirements

relating to bribery, corruption, terrorist financing, fraud, tax evasion, money laundering and/or economic or trade sanctions ("Prohibited Activity"). The LCIA may take any action to comply with any applicable obligations relating to Prohibited Activity. Such actions can be in the nature of disclosure of any information to courts, law enforcement agencies or regulatory authorities.

G. Addressing the Role of Tribunal Secretary

The LCIA 2020 Rules now contain express provisions governing the role of tribunal secretaries. Earlier, 2017 LCIA Guidance Notes for Arbitrators helped ascertain the role of tribunal secretaries in an arbitration. With the incorporation of Article 14A into the LCIA 2020 Rules, the process of approval¹² and appointment of a tribunal secretary, its role and involvement (in particular, decision making functions cannot be delegated to a tribunal secretary)¹³ in the arbitration proceedings have been envisaged as a binding provision. The LCIA 2020 Rules also mandate a disclosure from the tribunal secretaries as to their independence and ability to devote time in the case.¹⁴

H. Early Determination

Under the LCIA 2020 Rules, an explicit reference has been made to the power of the tribunal to order for an early dismissal by a tribunal. A tribunal can determine any claim, defence, counterclaim, cross-claim, defence to counterclaim or defence to cross-claim to be manifestly outside the jurisdiction of the tribunal or is inadmissible or manifestly without merit and issue an order or award to that effect.¹⁵

I. Revamping the Route for Determination of Nationality of Parties

The LCIA 2020 Rules have set out a detailed framework for determination of nationality of the parties to an arbitration governed by the LCIA Rules. Nationality of the parties is a critical factor in the appointment of arbitrators in that a sole arbitrator or a presiding arbitrator cannot have the same nationality as that of any party subject to an agreement between the parties.¹⁶

Unlike LCIA 2014s, LCIA 2020 Rules explain the process of determination of nationality both in case of a natural person and in case of a legal person. As far as a natural person is concerned, nationality under the LCIA Rules means citizenship, acquired by birth or naturalisation or other relevant requirements. In case of a legal person, it is noteworthy that a party may have multiple nationalities under the LCIA Rules. For a legal person, nationality has been defined as the jurisdiction in which it is incorporated and has its seat of effective management. A legal person that is incorporated and has its seat of effective management in different jurisdictions shall be treated as a national of both jurisdictions.

Interestingly, Article 6 of the LCIA 2020 Rules also carry a peculiar addition to its articles relating to Nationality of Parties. Article 6.2, *inter alia*, reads as,

"The nationality of a party that is a legal person shall be treated as including the nationalities of its controlling shareholders or interests."

The above clause is likely to elicit interest from the arbitration community as the clause potentially colours grey the process for determination of nationality of an entity which has its controlling shareholding in different jurisdictions.

J. Advance Payment of Costs

Under the 2014 Rules, the LCIA held payments made by the parties 'in trust under English law'. This has been overhauled to provide that the advance payment for costs shall be the property of the LCIA to be disbursed or otherwise applied in accordance with the rules. Further, Article 24.4 now states that a party's failure to respond to attempts by LCIA to refund any excess payment amount may lead to a waiver of its right to claim the refund.

K. LCIA's Schedule of Costs

The LCIA's Schedule of Costs has also been updated to increasing the maximum hourly rate to be charged by arbitrators to J500 from the J450. While leading to an obvious increase of costs as a burden, this increase is albeit likely to attract experienced and qualified arbitrators to resolve complex and high value commercial disputes.

CONCLUSION:

Overall, the revisions to the LCIA 2014 are praise worthy as it factors in the issues faced by the parties to the arbitration in the present pandemic, and also upgrades the rules in line with the amendments to the other institutional rules. The guidance on compliance and data protection are unique and have not been addressed by other arbitral institutions. However, the revisions do leave a grey area as to how the LCIA 2020 Rules are to be interpreted as per English law, in a case which has no nexus with English law.

— Alipak Banerjee, Payel Chatterjee & Vyapak Desai
You can direct your queries or comments to the authors

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¹ Article 1.3, LCIA Arbitration Rules, 2020.

² Article 2.3, LCIA Arbitration Rules, 2020.

³ Except with the prior approval or direction of the arbitral tribunal, Article 4.2, LCIA Arbitration Rules, 2020

⁴ Article 4.1 and 4.2, LCIA Arbitration Rules, 2020.

⁵ Article 19.2, LCIA Arbitration Rules, 2020.

⁶ Article 2.2, LCIA Arbitration Rules, 2020.

⁷ Article 22.1, LCIA Arbitration Rules, 2014.

⁸ Article 22.8, LCIA Arbitration Rules, 2020

⁹ Article 31, LCIA Arbitration Rules, 2020.

¹⁰ Article 9.10, LCIA Arbitration Rules, 2020.

¹¹ Article 9.12 (i), LCIA Arbitration Rules, 2020.

¹² Article 14.10, LCIA Arbitration Rules, 2020.

¹³ Article 14.8, LCIA Arbitration Rules, 2020.

¹⁴ Article 14.9, LCIA Arbitration Rules, 2020.

¹⁵ Article 22.1(viii), LCIA Arbitration Rules, 2020.

¹⁶ Article 6.1, LCIA Arbitration Rules, 2020

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