International Arbitration Newsletter – The LCIA 2020 Update

In this edition of our International Arbitration Newsletter, Robert Scrivener considers the 2020 update to the LCIA Rules.

A. The LCIA 2020 Update

1. On 11 August 2020, the LCIA published[1] an updated set of arbitration rules (the "**Rules**"), due to come into effect on 1 October 2020. They also published an updated set of mediation rules but this, being an Arbitration Newsletter, will discuss only the arbitration amendments.
2. The updated Rules can be found here: https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx
3. The previous version of the LCIA Rules came into effect in October 2014 and certainly did nothing to harm the LCIA's reputation as a leading international arbitration centre. According to their most recent casework report[2] the LCIA had an "*outstanding year*" in 2019, having a "*record*" 406 cases referred, consisting of no less than 346 arbitrations on LCIA terms.
4. The 2020 amendments broadly reflect current trends in international arbitration, adding further to a tribunal's powers and making some important changes to the way in which arbitrations are to be conducted. There are also some more minor amendments and tweaks.[3]
5. Some of the key changes are as follows.

B. Starting the arbitration: the "Composite Request"

6. The first innovation comes early on in the rules, in the form of a new Article 1.2 being inserted.
7. Broadly, the amended Article 1.2 will allow a claimant to commence more than one arbitration in the same request for arbitration. The updated Rules call this a "*Composite Request*". They expressly state that a Composite Request can be made against more than one respondent and under more than one arbitration agreement.
8. However, when making use of the Composite Request procedure, the claimant must identify separately the monetary amount in dispute, the transactions concerned and the claim made against any other party. The Composite Request must also comply with Article 1.1 "*to the satisfaction of the LCIA Court*".
9. The amended Rule also states that each arbitration commenced by way of a Composite Request "*shall proceed separately and in accordance with the LCIA Rules, subject to the LCIA Court or the Arbitral Tribunal determining otherwise*". There is no general consolidation.
10. This is an amendment which will effectively undo the decision of the Commercial Court in *A v B* [2017] EWHC 3417 (Comm), where a party had used a single request for arbitration to commence claims under two separate sale contracts. Mr. Justice Phillips (as his Lordship then was) decided that Article 1 of the 2014 LCIA Rules required a separate request for each and every arbitration. The consequence was that a notice starting more than one arbitration was invalid and the tribunal lacked jurisdiction.
11. This somewhat technical reading of the 2014 Rules (which would not be the result in an ad hoc Arbitration Act reference[4]) will be reversed by the amended Article 1.2.
12. A consequential amendment is also made to Article 2.2 of the updated Rules, dealing with how a respondent is to respond to a Composite Request. They are, unsurprisingly, permitted to serve a "*Composite Response*" in any or all of the arbitrations. Like the claimant, they too must separately identify the estimated amount in dispute and transactions at issue. They must also separately identify the defences, counterclaims or cross-claims made

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against any other party to each arbitration.

C. Starting the arbitration: amendments to the request

13. A further amendment to the process of commencing the arbitration will be found in Article 1.5, which will allow the LCIA Court (prior to the appointment of the tribunal) to allow a claimant to "*supplement, modify or amend its Request to correct any error in computation, any clerical or typographical error, any ambiguity or any mistake of a similar nature*". The parties must be given a reasonable opportunity to express their views before any such permission is given, however, and permission can be given "*upon such terms as the LCIA Court may decide*".
14. A similar power is given to the LCIA Court as regards a respondent's response by way of an amended Article 2.5.
15. The broad intent of this new Rule is clear enough. It should offer a practicable way of correcting slips in the request and the response, though there will doubtless be debates about the exact scope of the words "*any mistake of a similar nature*" and the terms on which the LCIA Court should give permission to amend.

D. The people: tribunal secretaries

16. According to the LCIA's 2019 casework report[5] tribunal secretaries were appointed in 27 LCIA arbitrations that year. The 2018 casework report gave a similar figure for the previous year, too (28 appointments).
17. Despite the helpful assistance they can give to a tribunal, the role and use of tribunal secretaries / assistants is not without controversy, having given rise to dispute.[6] The LCIA had previously (in October 2017) felt the need to adopt changes to its "*Notes for Arbitrators*" so as to clarify the appropriate role for a secretary.[7]
18. The 2020 update to the Rules will include express provision for tribunal secretaries in a new Article 14A. These amendments allow a tribunal to "*obtain assistance from a tribunal secretary*" subject to the overriding requirement that "*Under no circumstances may an Arbitral Tribunal delegate its decision-making function*". Further safeguards are put in place by requiring candidates to be vetted before appointment (e.g. to ensure they are properly independent[8]) and, by way of Article 14.10, a tribunal can only use a secretary once "*approved by all parties*". Approval does not happen until, amongst other things, the parties have agreed to the particular person and "*the parties have agreed the tasks that may be carried out by the tribunal secretary*" (Article 14.10(i)). The secretary's role cannot be expanded unless the tribunal "*obtain prior agreement from all parties*" (Article 14.11). [9]
19. The amendments should, therefore, give the parties the final say on whether a secretary can be used and, if so, how. In turn, the amendments should act to minimise challenges arising out of a secretary's appointment.

E. Progressing the arbitration: the use of technology

20. The LCIA press release announcing the amended Rules was at pains to point out that although the update was being finalised "*as the Covid-19 pandemic took hold*" there was no "*change of direction or focus*" as a result. Nevertheless, the amendments to the Rules which deal with the use of technology are most timely.
21. From a practical perspective, a useful set of changes have been made to the way communications are meant to work, in the form of an amended Article 4.
22. The focus of these amendments is overwhelmingly on electronic communications[10] (unsurprisingly). Most notably, the amended Article 4.3 provides that, save where there is contrary agreement, and subject to any order by the tribunal, "*if delivery by electronic means has been regularly used in the parties' previous dealings, any written communication (including the Request and Response) may be delivered to a party by that electronic means and shall be treated as having been received by such party, subject to the LCIA Court or the Arbitral Tribunal being informed of any reason why the communication will not actually be received by such party including electronic delivery failure notification*".
23. This is a welcome amendment insofar as it expressly permits service by email, bringing the Rules in line with what is probably the practice already adopted by most parties anyway. Of particular interest, however, is the deeming provision ("*shall be treated as having been received…*"), even where "*the communication will not actually be*

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received". This is, presumably, aimed at trying to avoid the debates which can arise where service happens only by email and one party claims not to have received the relevant communication.[11] It will be interesting to see what impact (if any) this amendment has on challenges to awards on the grounds that a party was not given adequate notice.

24. Articles 4.4 – 4.6 also deal with the important question of how one works out when a document is served. In summary, the rules for electronic communications will be:
    - "*For the purpose of determining the commencement of any time limit*", and unless otherwise ordered by the tribunal (or LCIA Court), a communication shall be "*treated*" as having been received "*on the day it is transmitted*", by reference to the **recipient's** time zone.
    - "*For the purpose of determining compliance with a time limit*", and unless otherwise ordered by the tribunal (or LCIA Court), a communication shall be "*treated*" as having been made by a party "*if transmitted or delivered prior to or on the date of the expiration of the time limit*", determined by reference to the **sender's** time zone.
25. Turning next to a different theme of the new Rules, most arbitration practitioners will over the last few months have become more than familiar with the idea of holding virtual hearings. The amended Rules will firmly embed their use:
    - Article 9B (dealing with the Emergency Arbitrator procedure) is amended to include specific reference to the use of videoconferencing or similar technology.
    - There is a further nod to virtual hearings in a new Article 14.6, which will expressly mention that the tribunal's powers to make orders to conduct the proceedings in a "*fair, efficient and expeditious*" way includes the ability to employ "*technology to enhance the efficiency and expeditious conduct of the arbitration (including any hearing)*".
    - This is then elaborated on further in the amended Article 19.2, which will include express reference to a hearing taking place "*virtually*" by "*videoconference*" or "*other communications technology*".
26. Finally on the use of technology, Article 26.2 will be amended to allow awards to be signed electronically (subject to contrary agreement or order).

F. The tribunal's powers: "Early Determination"

27. One topic of frequent debate is how tribunals can quickly deal with unmeritorious claims and defences. At least in English law, tribunals do not (by default) have powers of summary judgment / strike out akin to those which courts have,[12] but this has not stopped (particularly maritime) tribunals coming up with fast and efficient ways of deciding issues through the effective and robust use of partial final awards.[13]
28. To remedy the perceived problems arising from the lack of a summary determination procedure, there is an increasing trend amongst international arbitration rules to include provision for the prompt determination of unmeritorious arguments. For instance:
    - The HKIAC 2018 administered arbitration rules introduced (by way of Article 43) an "*early determination*" procedure for deciding points which were (a) "*manifestly without merit*", (b) "*manifestly outside the arbitral tribunal's jurisdiction*" or (c) in circumstances where "*even if such points of law or fact are submitted by another party and are assumed to be correct, no award could be rendered in favour of that party*". This power only applies to arbitration agreements concluded after the 2018 version of the rules took effect (see Article 1.5(a)).
    - The 2016 SIAC rules, at Rule 29, include an "*early dismissal*" procedure where a claim or defence is "*manifestly without legal merit*" or "*manifestly outside the jurisdiction of the Tribunal*".
    - The 2017 ICC arbitration rules provide, at Article 22, that the tribunal "*shall make every effort to conduct the arbitration in an expeditious and cost-effective manner*". The ICC's "*Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration*"[14] states, at paragraph 75, that Article 22 permits a party to apply for an "*expeditious determination of one or more claims or defences, on grounds that such claims or defences are manifestly devoid of merit or fall manifestly outside the arbitral tribunal's jurisdiction…*". Articles 76 – 79

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then set out a procedure for determining such an application.

29. These rules all offer useful ways of ensuring that a party (usually a respondent that has no defence to a claim) is prevented from delaying the fateful day they are subject to an award. Despite the obvious utility of these powers, uptake amongst parties appears to be slow, and amongst tribunals it appears to be even slower.[15]
30. Consistent with developments elsewhere in the world, the 2020 update to the LCIA Rules will include provision for an "*Early Determination*" procedure, couched in similar terms to the rules of other institutions. Article 22.1(vii) will now provide that a tribunal can determine any claim, counterclaim, or defence thereto if it "*is manifestly outside the jurisdiction of the Arbitral Tribunal, or is inadmissible or manifestly without merit; and where appropriate…issue an order or award to that effect*".

G. The Tribunal's powers: consolidation and concurrency

31. The 2020 update will also clarify and amend a tribunal's powers when it comes to consolidation and concurrency of arbitrations.
32. The 2014 Rules already include provision for consolidation in Articles 22.1 and 22.6. The 2020 update will consolidate the tribunal's powers into a new Article 22A.
33. Article 22.7 (i) and (ii) of the 2020 Rules will restate what is already in Article 22.1 (ix) and (x) of the 2014 Rules.
34. But Article 22.7 (iii) will include new provision for ordering the concurrent conduct of two or more arbitrations where:
    - The arbitrations are subject to the LCIA rules and "*commenced under the same arbitration or any compatible arbitration agreement(s)*"; and
    - The arbitrations are between (a) either the same parties or (b) arising out of the same transaction or a series of related transactions.
35. The LCIA Court will also, before the tribunal has been formed in either arbitration, be given the power to order consolidation in certain circumstances by way of a new Article 22.8.

H. Conclusion

36. This is not intended to be a complete run through of all the amendments that will be made. We have not, for instance, touched on the amendments concerning money laundering and related activities (Article 24A "Compliance") or data protection (Article 30A). Nor have we considered the increase in the maximum hourly rate for arbitrators (up GBP 50 to GBP 500).
37. However, this quick run through hopefully demonstrates that these are, overall, an interesting set of updates and amendments, with some important changes. The exact scope and implications will be ironed out as the new Rules bed in, and it will be equally interesting to see how parties, tribunals and courts react to them.

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[1] https://www.lcia.org/lcia-rules-update-2020.aspx

[2] Available on the LCIA's website at https://www.lcia.org/LCIA/reports.aspx

[3] E.g. the Rules will favour the use of the term "counterclaim" in preference to the previous use of the term "cross claim". They will also use the term "authorised representative" rather than "legal representative".

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[4] See *Easybiz Investments v Sinograin* [2011] Lloyd's Rep. 688. Mr. Justice Hamblen (as his Lordship then was) found in the context of an arbitration clause making provision for London arbitration that a single notice commencing 10 separate arbitrations was valid.

[5] https://www.lcia.org/LCIA/reports.aspx

[6] The most well-known example probably being the set-aside proceedings in the long running Yukos dispute, where it was argued by Russia (amongst other things) that the tribunal had failed to conduct the arbitration properly by their use of an assistant. Closer to home, in *P v Q* [2017] EWHC 194 (Comm), Popplewell J. (as his Lordship then was) rejected an attempt to remove arbitrators under s.24 of the Arbitration Act on the grounds that they had improperly delegated their decision making role to a secretary. The judgment contains a helpful look at some of the key debates on this thorny issue. It also sets out some useful principles to be applied for when deciding whether the use of a secretary has overstepped the mark (see paragraph [70(1)] in particular).

[7] See https://www.lcia.org/News/lcia-implements-changes-to-tribunal-secretary-processes.aspx

[8] General Standard 5 of the IBA Guidelines on Conflicts of Interest in International Arbitration (2014) states that secretaries "*are bound by the same duty of independence and impartiality as arbitrators…*".

[9] There is provision for deemed agreement under Articles 14.10 and 14.11 by way of a party's failure to object within a reasonable time: see Article 14.12.

[10] Which must now provide a record of transmission, according to the amended Article 4.2.

[11] The problems which can arise where documents are served only by email are well-known: see, e.g., *The "Eastern Navigator"* [2005] EWHC 3020 (Comm) or *Sino Channel Asia Ltd. v Dana Shipping and Trading Pte Singapore* [2017] EWCA Civ 1703.

[12] See *Ali Shipping v Shipyard Trogir* [1999] 1WLR 314.

[13] See *The "Kostas Melas"* [1981] 1 Lloyd's Rep. 18.

[14] Available at https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration/

[15] SIAC have said that in 2019 that they received 8 applications under Rule 29, of which 3 were not allowed to proceed. Of the 5 that did, 1 application was granted, 2 were rejected and 2 were pending at the date of publication of their 2019 Annual Report. See p. 20 of the 2019 Annual Report at http://www.siac.org.sg/images/stories/articles/annual_report/SIAC%20Annual%20Report%202019%20(FINAL).pdf

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