

The new LCIA rules – worth the wait?

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*Akin Gump's London-based head of arbitration **Justin Williams** and counsel **James Glaysher** consider the updated version of the LCIA's arbitration rules which come into force on 1 October.*

The avowed aim of the new LCIA Rules is to make the arbitral process “even more streamlined and clear”. Underlying this is continued pressure from users to reduce the time and cost of arbitration, and healthy competition between institutions to try to meet those demands while protecting the integrity of the process. How successful are the new rules in achieving those ends?

Expediting proceedings

The previous version of the LCIA Rules issued in 2014 gave arbitrators a general power to make any procedural order they considered appropriate with regard to the fair, efficient and expeditious conduct of the arbitration. But while this general power enabled tribunals to order specific steps to expedite proceedings in an appropriate case, the rules did not identify what those steps might be. There has therefore been a perception that arbitrators may be more inclined to make such orders if the rules expressly stated that the general power includes making orders to expedite the procedure and specified examples of potential steps to that end.

The new LCIA Rules do just that. A non-exclusive list of eight measures is provided, which includes limiting the length of, or dispensing with, any written statements; limiting the written and oral testimony of any witness; deciding the stage of the arbitration at which any issue or issues shall be determined; dispensing with a hearing; and abridging any period of time (articles 14.5 and 14.6).

The LCIA's approach contrasts with that of the ICC. In 2017, the ICC introduced its Expedited Procedure Rules, which apply automatically to disputes under US\$2 million or where the parties agree, albeit the tribunal retains significant discretion as to what measures should apply. The LCIA model instead leaves the decision on whether there should be expedition and what measures should be adopted entirely to the tribunal.

The LCIA's approach ensures that the procedures are tailored to the specific circumstances of the dispute, whereas the ICC's approach provides some greater certainty at the time of contract as to whether expedition will apply if a dispute arises.

The new LCIA Rules do not expressly require tribunals to consider whether they should exercise their power to order expedition or any of the eight specified measures. Users that wish to increase the likelihood of expedition might consider including such a requirement in their arbitration agreements.

Early determination

It has long been a complaint of users that weak claims or weak defences in practice are often not disposed of at an early stage in the arbitration. This contrasts with the availability of summary determination in litigation in many jurisdictions, with the time and cost saving that involves. This may be especially important in certain transactions such as loan agreements.

Again, the general powers of arbitrators under the 2014 LCIA Rules enabled them to make early determinations and to issue orders or awards accordingly, but this was rarely done – and indeed was rarely done under other arbitral rules. No doubt part of the reason has been a concern by arbitrators to ensure procedural fairness and that each side has a proper opportunity to present its case such that awards are not challenged. However, where appropriate it is clearly right that claims and defences that are manifestly without merit should be determined at an early stage. The same applies to questions of jurisdiction.

Other arbitral institutions have sought to encourage tribunals to do so by expressly stating in their rules that such a power exists, notably the SCC (article 39), the HKIAC (article 43) and SIAC (rule 29).

The new LCIA Rules follow their lead and include an express power for early determination of claims or defences that are manifestly outside the jurisdiction of the tribunal, or are inadmissible or manifestly without merit (article 22.1(viii)).

This power is one of the specified eight measures for expedition (described above), but is available regardless of whether expedition is appropriate.

Again, the new LCIA Rules do not expressly require tribunals to consider whether they should order early determination, so if thought appropriate users might consider including such a requirement in their arbitration agreements.

Consolidation

The new LCIA Rules broaden the power of tribunals and the LCIA Court to order consolidation or concurrent conduct of arbitrations, and so increase efficiency and reduce costs (articles 22.7(ii)-(iii) and 22.8(ii)).

But it is notable, however, that even broader powers are available under the HKIAC Rules. Therefore, while the new LCIA Rules permit consolidation or concurrent conduct only if no tribunal has yet been constituted in the other arbitration(s) or if the composition of the tribunals is the same, no such restriction applies for consolidation under the HKIAC Rules.

Parties therefore might consider introducing a broader consolidation mechanism in their arbitration agreements.

Tribunal secretaries

The new LCIA Rules follow the lead of the SCC by introducing protections concerning the function of the tribunal secretary. The tribunal may not delegate its decision-making function to the secretary (article 14.8), and party approval is required of the secretary and the tasks they are to perform (article 14.10). These are useful protections both for the parties and the tribunal.

Data protection and information security

International arbitration is especially exposed to data protection and cybersecurity issues, with large volumes of confidential, sensitive and personal data frequently being held and transmitted across borders. It is critical to the integrity of the process and to protect arbitrators, parties, counsel and others that appropriate measures are taken to address that risk and to comply with regulation. The new LCIA Rules require tribunals at an early stage to consider whether it is appropriate to adopt any specific information security measures and any means to address the processing of personal data; and provide that tribunals may issue binding directions addressing such measures (article 30A).

The LCIA is the first of the main arbitral institutions to include such a requirement, and it is an important development. In complying with the new requirement, arbitrators and users may wish to consider the measures suggested in the 2020 Cybersecurity Protocol.

Important and timely

One omission from the 2020 LCIA Rules is the absence of measures specifically to encourage settlement. For example, the “Interactive Arbitration Rules” released in 2019 by the Japan Commercial Arbitration Association require the tribunal to communicate its preliminary views during the proceedings.

Nevertheless, the new LCIA Rules contain important and timely measures both to promote time and cost efficiency and to protect the integrity of the process.