

International Arbitration Alert

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Updated LCIA Arbitration Rules (2020) issued

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The London Court of International Arbitration (LCIA) has issued updated arbitration rules (the “2020 Rules”). These include some important changes, many of which are designed to address users’ concern to improve time and cost-efficiency:

- Express powers to enable arbitrators to expedite cases.
- An express power for arbitrators to make an early determination of claims/defenses that are manifestly outside their jurisdiction, or inadmissible or manifestly without merit.
- Broadening powers to order consolidation and concurrent conduct of arbitrations.
- Facilitation of virtual hearings.
- Clarification of the role of tribunal secretaries.
- Provisions addressing data protection and information security.

The 2020 Rules will come into force from October 1, 2020, and will apply to any arbitration commenced under the auspices of the LCIA on or after this date.

The new Rules, in the LCIA’s own words, aim to make the arbitral processes “even more streamlined and clear” for arbitrators and parties alike.

1. Case Management Powers Enabling Expedition

The 2020 Rules expressly provide that the arbitral tribunal (the “Tribunal”) has power to make any procedural order with a view to expediting the arbitration (after giving the parties a reasonable opportunity to state their views), and sets out specific steps that may be ordered to that end, including (i) limiting the length of, or dispensing with, any written pleadings, (ii) limiting the written and oral testimony of any witness, (iii) determining a particular issue early in the arbitration, (iv) dispensing with a hearing, and (v) abridging any time period for a particular procedural step (Articles 14.5 to 14.6). Tribunals had the general power to make such orders under the previous iteration of the LCIA Rules, but this was not expressly stated and there was a concern that as a result expedition was sometimes not ordered when it may have been appropriate. The intent is that the express reference in the new iteration of the Rules will change that, and so bring down the time and cost of arbitration in appropriate cases.

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2. Early Dismissal Determination

The Tribunal now has the express power, upon the application of any party or upon its own initiative, to determine that any claim, defense, counterclaim or cross-claim is manifestly without merit, and where appropriate issue an order or award to that effect (Article 22.1(viii)). Although Tribunals enjoyed broad case management powers under the previous iteration of the Rules, in practice they very infrequently adopted summary disposition procedures. This may have been for fear of the award being challenged on the basis of a party not having had the chance to present its case fully. But whatever the reason, it is a common complaint of users that, in practice, early determination of weak claims/defenses is seldom available. The express reference to summary determination in the 2020 Rules is intended to change that, and so again bring down the time and cost of arbitration in appropriate cases.

3. Consolidation

Tribunals now have broader powers to order consolidation or concurrent conduct of arbitrations. They may order that two or more arbitrations, subject to the LCIA Rules, and commenced under the same arbitration agreement or any compatible arbitration agreement(s) and **either** between the same disputing parties **or** arising out of the same transaction or series of related transactions, shall be consolidated or conducted concurrently where the same arbitral tribunal is constituted in respect of each arbitration (Article 22.7(ii)-(iii)).

This enhances the previous provisions dealing with consolidation, which did not provide for “arising out of the same transaction or series of related transactions” as an alternative necessary criterion to the arbitrations being between the same disputing parties.

It remains the case that an arbitration may be also consolidated with one or more other arbitrations subject to the LCIA Rules where all the parties to the arbitrations to be consolidated so agree in writing (Articles 22.7(i) and 22.8(i)).

These enhanced powers of consolidation are consistent with improving efficiency and reducing cost.

4. The Use of Virtual Hearings

Reflecting the increased prevalence of the use of virtual technology in the COVID-19 era, the 2020 Rules slightly expand the description of the format by which hearings are permitted to take place, namely “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)” (Article 19.2). Further, in an effort to assuage any fears of the effect on enforcement, the 2020 Rules now provide that if any hearing or deliberation takes place otherwise than in person (in whole or in part), the arbitration shall nonetheless be treated for all purposes as an arbitration conducted at the arbitral seat and any order or award as having been made at that seat (Article 16.3).

Whilst born of the current pandemic, these provisions may assist with efficiency in a post-pandemic world.

5. Tribunal Secretaries

The 2020 Rules now specify that a Tribunal may obtain assistance from a tribunal secretary, but that under no circumstances may the Tribunal delegate its decision-making function to that secretary (Article 14.8). A Tribunal may only obtain assistance from a secretary once he/she and the tasks to be performed have been approved by all parties (Article 14.10).

The role of tribunal secretaries, in particular their role in the Tribunal's substantive decision-making processes, has been a source of controversy for a number of years in international arbitration, so these efforts to define the boundaries of what a secretary can and cannot do, coupled with increased transparency in respect of the parties, are surely to be welcomed.

6. Data Protection and Information Security

In a groundbreaking move, the 2020 Rules now explicitly address data protection considerations and information security measures (Article 30A). The Tribunal is required at an early stage to consider, in consultation with the parties and if necessary the LCIA, if it is appropriate to adopt (i) any specific information security measures to protect both the physical and electronic information shared in the arbitration, as well as (ii) any means to address the processing of personal data produced or exchanged in the arbitration in light of applicable data protection legislation. The Tribunal (and the LCIA) may now issue directions addressing such measures which will be binding on the parties (and the Tribunal).

The LCIA is the first institution of the main arbitral institutions to include such a provision in its rules. Cybersecurity is becoming of an ever more central importance for parties and Tribunals alike, and the LCIA's recognition of the issue and practical approach to it in Article 30A is welcome.

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