

## International Insight: The 2020 Updates to the LCIA Arbitration Rules

On 1 October 2020, the London Court of International Arbitration (“LCIA”) released updates to the [LCIA Arbitration Rules](#) (the “2020 Rules”) to account for evolving best practices since the LCIA’s previous update in 2014 (the “2014 Rules”).

The 2020 Rules came into force as of 1 October 2020 and apply to all LCIA-administered arbitrations commenced thereafter irrespective of the date of execution of the arbitration agreement, unless the arbitration agreement itself provides otherwise.<sup>1</sup> The focus of the 2020 Rules is to accommodate the increasing use of electronic submissions and remote hearings in international arbitration as well as other modernisations in arbitral practice.

This alert highlights four salient features of the 2020 Rules:

- Accommodating the use of technology in arbitration
- Broadening and clarifying the powers of the arbitral tribunal, including with respect to early determination of manifestly baseless claims or defences, organisation of proceedings, and tribunal secretaries
- Measures to ensure compliance with requirements applicable to any party to the arbitration and with data protection legislation
- Revisions to the Schedule of Arbitration Costs

This alert also touches upon the likely ensuing changes to the 2016 DIFC-LCIA Arbitration Rules.

### 1. Accommodating the use of technology in arbitration

Even prior to the COVID-19 pandemic, international arbitration users recognised the increasing need for efficiency, and to that extent the use of technology, as an important factor in the conduct of arbitration proceedings. As a result of the pandemic, the use of technology has rapidly come into sharp focus. The 2020 Rules address this growing need for the use of technology by expressly reaffirming the arbitral tribunal’s power to conduct hearings remotely.

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<sup>1</sup> Article 1.4 of the 2020 Rules provides that “[t]he arbitration shall be treated as having commenced for all purposes on the date upon which the Request (including all accompanying documents) is received electronically by the Registrar (the ‘Commencement Date’), provided that the LCIA has received the registration fee. Where the registration fee is received subsequently the Commencement Date will be the date of the LCIA’s actual receipt of the registration fee”.

Article 14.1 of the 2020 Rules (Article 14.4 in the 2014 Rules) imposes a duty on the arbitral tribunal to avoid “unnecessary delay and expense, so as to provide a fair, efficient and expeditious means”<sup>2</sup> to resolve disputes. To discharge this duty effectively, new Article 14.6(iii) of the 2020 Rules expressly empowers the arbitral tribunal to use “technology to enhance the efficiency and expeditious conduct of the arbitration (including any hearing)”.<sup>3</sup> Similarly, Article 19.2 of the 2020 Rules grants the arbitral tribunal discretion to conduct hearings “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)”.<sup>4</sup> Even with respect to the award, the 2020 Rules allow for electronic signature, and issuance of the award by electronic means to the parties, thereby further seeking to reduce delay and costs.<sup>5</sup> The 2020 Rules also provide that, by default, all written communications between the parties, the arbitral tribunal and the LCIA be delivered by electronic means.<sup>6</sup>

These provisions allow the arbitral tribunal to minimise the physical presence of the parties or the arbitral tribunal in any geographical location, furthering speed and efficiency in the conduct of arbitral proceedings. By increasing the use of remote hearings and online communications, the provisions are also in line with recent efforts – such as the Campaign for Greener Arbitrations – to make arbitrations more environmentally friendly.

## 2. Broadening and clarifying powers of the arbitral tribunal

The 2020 Rules expressly clarify powers which arbitral tribunals have previously assumed as part of their “widest discretion”<sup>7</sup> to conduct proceedings, and confer additional powers for the efficient conduct of proceedings. Noteworthy among these provisions are those concerning the arbitral tribunal’s power to make an “Early Determination”, powers relating to the organisation of proceedings, and powers to appoint tribunal secretaries.

### Early Determination

First, Article 22.1(viii) of the 2020 Rules empowers the arbitral tribunal, “upon the application of any party or [...] upon its own initiative”, “to determine that any claim, defence, counterclaim, cross-claim, defence to counterclaim or defence to cross-claim is

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<sup>2</sup> Article 14.1(ii) of the 2020 Rules.

<sup>3</sup> Article 14.6(iii) of the 2020 Rules.

<sup>4</sup> Article 19.2 of the 2020 Rules.

<sup>5</sup> Articles 26.2 and 26.7 of the 2020 Rules.

<sup>6</sup> Article 4.2 of the 2020 Rules.

<sup>7</sup> Article 14.2 of the 2020 Rules. *See also* Article 14.2 of the 2014 Rules.

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’)”.<sup>8</sup> Arbitral tribunals constituted under the 2020 Rules will therefore have authority to deal with frivolous claims or defences expeditiously either by way of a procedural order or by way of an arbitral award, depending upon the content of the decision. For instance, if an application for early determination is rejected, the arbitral tribunal would likely do so in a procedural order, without prejudice to the arbitral tribunal’s power to revisit that interim decision later in the proceedings, upon full review of the merits of the claim, and finally dispose of it in the award (which remains subject to the post-award remedies available to the aggrieved party under the applicable *lex arbitri*). Conversely, if the arbitral tribunal were to uphold such an application, thereby resulting in the final disposition of the claim at the early determination stage, it would likely do so by way of an award. This flexibility will ensure that applications made under the new early determination provisions are dealt with in an efficient and cost-effective way. In order to ensure compliance with due process, however, the arbitral tribunal’s power under these new provisions remains subject to the arbitral tribunal affording the parties “a reasonable opportunity to state their views”.<sup>9</sup> This leaves open the questions of what a “reasonable opportunity” entails and how arbitral tribunals may interpret the standard for “manifestly without merit” – questions that will ultimately decide the efficacy of this provision.

Similar efforts have been made by other leading arbitral institutions. For example, on 25 October 2017, the International Court of Arbitration of the International Chamber of Commerce (the “ICC”) published a Practice Note observing that Article 22 of the 2017 ICC Arbitration Rules allows a party to “apply to the tribunal for the expeditious determination of one or more manifestly unmeritorious claims or defences”.<sup>10</sup> Other notable examples include the 2018 Administered Arbitration Rules of the Hong Kong International Arbitration Centre (Article 43) and the 2016 Arbitration Rules of the Singapore International Arbitration Centre (Rule 29). Yet, how arbitral tribunals address requests for early determination while ensuring due process obligations, and whether such requests present increased enforcement issues, remain to be seen.

### Organisation of Proceedings

Second, Article 22A of the 2020 Rules broadens the arbitral tribunal’s power to order consolidation of parallel arbitrations and expressly empowers the arbitral tribunal to order the concurrent conduct of parallel proceedings. Under the 2014 Rules, absent

<sup>8</sup> Article 22.1(viii) of the 2020 Rules.

<sup>9</sup> Article 22.1 of the 2020 Rules.

<sup>10</sup> Note to Parties and Arbitral Tribunals on the Conduct of Arbitration under the ICC Rules of Arbitration, ¶¶ 74-79, available at <<https://iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf>> last visited on 14 October 2020.

parties' consent, consolidation could only be ordered in respect of parallel arbitrations pending "between the same disputing parties" provided that the arbitrations had been instituted under the same or compatible arbitration agreement(s), and either no tribunal in the second proceedings had been constituted, or that the tribunals in both proceedings were composed of the same arbitrator(s).<sup>11</sup> Article 22A of the 2020 Rules now provides that the arbitral tribunal may consolidate parallel arbitrations or order the concurrent conduct of proceedings "*either between the same disputing parties or arising out of the same transaction or series of related transactions*".<sup>12</sup>

In addition, Article 1.2 of the 2020 Rules permits the claimant to file a "composite Request" for Arbitration, i.e., a single Request for the commencement of two or more arbitrations. This presents a change following the decision of the English High Court in *A v B [2017] EWHC 3417*, in which it was held that under the 2014 Rules, a claimant could not file one request in respect of two different arbitration agreements.

### Tribunal Secretaries

Third, the appointment of tribunal secretaries is a common feature in international arbitration but has been the cause of significant debate, particularly with respect to the tasks that the arbitral tribunal can delegate to tribunal secretaries. Most notably, in *Vale S.A. v. BSG Resources Limited*, the respondent party had sought to challenge the LCIA tribunal based upon the tribunal's allegedly improper delegation of tasks to the tribunal secretary.<sup>13</sup>

In principle, the appointment of a tribunal secretary is designed to increase efficiency of the proceedings and to reduce costs. Recognising this, new Article 14A provides for the possibility for the arbitral tribunal to appoint a tribunal secretary, with the approval of the parties, while ensuring compliance with the standards of fairness and impartiality envisaged by the 2020 Rules. Indeed, it makes clear that all tasks conducted by the tribunal secretary shall be supervised by the arbitral tribunal with which the final responsibility remains, and that the arbitral tribunal shall not delegate its decision-making function. The express provision is a novel attempt to strike a balance between

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<sup>11</sup> Article 22.1(x) of the 2014 Rules.

<sup>12</sup> Article 22.7(ii) of the 2020 Rules (emphasis added). Compare this approach with the more narrow approach taken by the ICC in the 2021 ICC Arbitration Rules, Article 10(c) of which allows the ICC Court (as opposed to the LCIA arbitral tribunal) to consolidate parallel arbitrations "between the same parties" provided that, among others, "the disputes in the arbitrations arise in connection with the *same legal relationship*" (emphasis added).

<sup>13</sup> See Decision on Challenge to the Full Tribunal (First Challenge Decision) dated August 4, 2016 available at <[https://jsumundi.com/en/document/decision/en-vale-s-a-v-bsg-resources-limited-decision-on-challenge-to-full-tribunal-first-challenge-decision-thursday-4th-august-2016#decision\\_6814](https://jsumundi.com/en/document/decision/en-vale-s-a-v-bsg-resources-limited-decision-on-challenge-to-full-tribunal-first-challenge-decision-thursday-4th-august-2016#decision_6814)> last visited on 14 October 2020.

the concerns raised by arbitration users and the benefits of the efficiencies gained through the use of tribunal secretaries.

### 3. Measures to ensure compliance with requirements applicable to a party to the arbitration and with data protection legislation

Another interesting facet of the 2020 Rules is provisions aimed at ensuring compliance with requirements applicable to a party to the arbitration relating to sanctions, anti-money laundering, anti-bribery and corruption, as well as with data protection legislation. The LCIA is the first major arbitral institution to adopt provisions on these issues.

Specifically, new Article 24A of the 2020 Rules empowers the LCIA to refuse to act on any instruction involving “bribery, corruption, terrorist financing, fraud, tax evasion, money laundering and/or economic or trade sanctions”<sup>14</sup> or, more generally, the “breach [of] any law, regulation, or other legal duty which applies to it”.<sup>15</sup> Also included is a power for the Tribunal to request compliance-related documents from the parties, and to disclose those same documents to regulators and other law enforcement bodies. With several instances of money-laundering in arbitration having come to the fore in recent times and the proliferation of economic sanctions, including secondary sanctions, the 2020 Rules empower the LCIA to ensure the safety of the proceedings from illegal activity.

Further, Article 30 and Article 30A protect the confidentiality of the parties and their personal data. Under the 2014 Rules, the confidentiality obligation only expressly applied to the parties. However, Article 30 of the 2020 Rules broadens the obligation to include every person involved in the arbitration including “any authorised representative, witness of fact, expert or service provider”<sup>16</sup> as well as “the Arbitral Tribunal, any tribunal secretary and any expert to the Arbitral Tribunal”.<sup>17</sup>

In a first attempt of this kind, the 2020 Rules subject the processing of personal data by the LCIA to the applicable data protection legislation. Article 30A also expressly empowers the arbitral tribunal to adopt information security measures as well as “any means to address the processing of personal data produced or exchanged in the arbitration”.<sup>18</sup> Thus, the provision in the 2020 Rules protects sensitive data by allowing the adoption of standards “reasonable in the circumstances of the case” in light of the increased cybersecurity risks of recent times. For example, the new provisions enable

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<sup>14</sup> Article 24.9 of the 2020 Rules.

<sup>15</sup> Article 24.10 of the 2020 Rules.

<sup>16</sup> Article 30.1 of the 2020 Rules.

<sup>17</sup> Article 30.2 of the 2020 Rules.

<sup>18</sup> Article 30A of the 2020 Rules.

an arbitral tribunal to adopt the ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration.<sup>19</sup>

#### 4. Revision to the Schedule of Arbitration Costs

The 2020 Rules also come with a revised [Schedule of Costs](#). The LCIA continues to charge costs on an hourly basis as has been its practice, but the maximum hourly rate of arbitral fees has been increased from GBP 450 to GBP 500. This increase has been introduced with the caveat that “the supervision of the LCIA Court ensures that in each individual case, the rate will be set commensurate with the particular circumstances of the case and not lead to an automatic increase in all cases”.<sup>20</sup> The revised Schedule of Costs also envisages a relatively minor increase in the administrative charges of the LCIA, including a GBP 200 increase in the registration fees of the request for arbitration from GBP 1750 to GBP 1950, as well as a relatively small increase in the hourly rates of the LCIA Secretariat – which as the LCIA explains “accommodates demands of users in complex cases”.<sup>21</sup>

#### Anticipated amendments to the 2016 DIFC-LCIA Arbitration Rules

The DIFC-LCIA is in essence a joint venture between the Dubai International Financial Centre (the “DIFC”) Arbitration Institute (the “DAI”) and the LCIA based in the DIFC. The DIFC is an offshore independent common law jurisdiction located in Dubai, United Arab Emirates, and is based on the English common law framework. In November 2015, the DAI and the LCIA entered into agreements relating to the management and administration of DIFC-LCIA arbitrations. On 1 October 2016, the DIFC-LCIA published its amended set of rules (the “2016 DIFC-LCIA Rules”) “substantially mirroring” the 2014 Rules.

With the publication of the 2020 Rules, the DIFC-LCIA plans to update the 2016 DIFC-LCIA Rules, substantially mirroring the changes made in the 2020 Rules. The update to the 2016 DIFC-LCIA Rules is expected to be implemented on 1 January 2021.

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<sup>19</sup> ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration (2020 Edition) *available at* <[https://www.arbitration-icca.org/publications/ICCA\\_Report\\_N6.html](https://www.arbitration-icca.org/publications/ICCA_Report_N6.html)> last visited 14 October 2020.

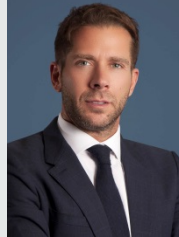
<sup>20</sup> LCIA, Updates to the LCIA Arbitration Rules and the LCIA Mediation Rules (2020), *available at* <<https://www.lcia.org/lcia-rules-update-2020.aspx>> last visited 14 October 2020.

<sup>21</sup> LCIA, Updates to the LCIA Arbitration Rules and the LCIA Mediation Rules (2020), *available at* <<https://www.lcia.org/lcia-rules-update-2020.aspx>> last visited 14 October 2020.

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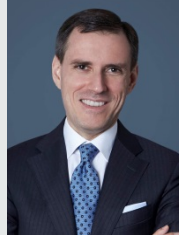
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