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International Arbitration Experts Discuss The New LCIA Rules

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Commentary

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Mealey's International Arbitration Report recently asked industry experts and leaders for their thoughts on what impact the new London Court of International Arbitration (LCIA) rules will have. We would like to thank the following individuals for sharing their thoughts on this important issue.

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Mealey's: The new LCIA arbitration rules took effect Oct. 1, 2020. What do you see as the most important changes to the LCIA arbitration rules and how do you believe those changes will affect arbitration proceedings?

Williams: The rule updates allow for a more efficient and flexible approach in a number of respects within the existing framework.

These changes will be beneficial to parties in disputes arising in complex and major international energy and infrastructure projects where different workscopes are often split between a number of contractors, and onshore and offshore parts, like large scale wind farms and pipeline projects, or the different contracts related to the construction and delivery of ships or vessels into service in the offshore energy sector. That is significant as users from the energy and resources sector accounted for 22% of LCIA arbitral referrals in 2019.

Parties may now file a composite request for arbitration to commence more than one arbitration, and likewise a composite response. These separate arbitrations may be consolidated later into a single arbitration. The existing powers of the tribunal and LCIA Court to consolidate arbitrations have been expanded to cover related contracts. If all the parties do not so agree, the tribunal and LCIA can order that arbitrations subject to the LCIA Rules and started under the same or compatible arbitration agreements either between the same disputing parties or arising out of the same transaction or series of related transactions may be consolidated. This power can be exercised by a tribunal prior to formation of the tribunal in the other arbitrations or where the same tribunal is constituted, and by the LCIA Court where no tribunal has yet been formed. Similarly, the tribunal may order arbitrations having the same tribunal to be conducted concurrently.

The LCIA reported an increase in the number of applications for consolidation in 2019, reflecting parties' desire for procedural efficiencies to deal with complexities of their disputes, so that trend seems set to continue and the updated rules provide additional valuable procedural options to the arbitral tool-kit.

Bates and Torres-Fowler: The latest update to the LCIA Arbitration Rules reflects a broader trend

among arbitral centers, including the ICC, SIAC, and ICDR, to bring the procedures in line with global practices and developments. These updates included, to name a few, revisions concerning the acceptance of virtual hearings (especially in light of the COVID-19 pandemic), improvements to the LCIA's consolidation rules, and new cybersecurity measures. These updates have been broadly welcomed by the arbitral community; however, most are unlikely to dramatically alter the way in which LCIA arbitration proceedings currently operate.

The one potential exception, and most interesting update in our view, is the LCIA's adoption of an express procedure that enables tribunals to render "Early Determinations" on certain claims prior to the arbitration hearing that are "manifestly without merit." Specifically, Article 22.1(viii) of the updated LCIA Rules empower tribunals:

[T]o determine that any claim, defense, counterclaim, cross-claim, defense to counterclaim or defence to cross-claim is 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.")

This authority is significant because, unlike U.S. and U.K. court proceedings which afford the parties the right to seek pre-trial dismissals (e.g., motions to dismiss and summary judgment), the early dismissal of claims in arbitration proceedings, as a matter of common practice, remains relatively uncommon. As a result, users sometimes complain that time and effort is wasted by forcing parties to defend against claims that clearly lack merit.

This is not, however, to suggest that LCIA Article 22.1(viii) is necessarily novel among arbitration rules. The ICDR, HKIAC, SIAC, SCC, and ICSID rules all afford arbitrators the right to dismiss claims prior to an arbitration hearing. Further, in 2017, the ICC issued a practice note that outlined arbitrators' authority to issue early determinations pursuant to their broader case management powers. Nevertheless, the LCIA's adoption of the "manifestly without merit" standard further cements the practice among the leading international arbitration centers and will inevitably cause parties to reexamine this often underutilized mechanism.

What remains to be seen is how narrowly tribunals will interpret the "manifestly without merit" standard and how often tribunals will exercise this authority. Arbitral tribunals have strong incentives to ensure they expeditiously and efficiently manage arbitration proceedings. However, arbitrators are also keen to protect their awards from challenge. Because the summary dismissal of a claim prior to a merits hearing may raise a question of whether a party was denied the ability to "present his case" (*see* Art. V(b) of New York Convention), arbitrators tend to be reluctant to grant summary dismissal. Nevertheless, the LCIA's express inclusion of the "manifestly without merit" standard aims to affirm the authority of the tribunal to make an Early Determination and may alter perceptions among arbitrators toward a greater acceptance of summary dismissal procedures in appropriate cases.

Vasani and Dingley: The stated aim of the 2020 update was to make the LCIA Rules "*even more streamlined and clear for arbitrators, mediators and parties alike*". That's clearly a very important change — and we would agree that the LCIA has succeeded in its aim. The amendments that have been made do facilitate increased procedural efficiency. What is interesting though is the differing ways in which these procedural efficiencies have been achieved.

Many are attributable to the express calling-out of Tribunal powers that many would agree were already implicit in the 2014 edition — for example: formalisation of the basis on which Tribunal secretaries may be engaged (Article 14A); the Tribunal's power to make any procedural order it wishes, including shortening timescales, limiting evidence, restricting pleadings and adopting the use of technology (Articles 14.5 & 14.6); and the Tribunal's corresponding power to control the written procedure (Article 15).

Others have been made through subtle amendments to bring existing provisions of the 2014 LCIA Rules in line with modern practice — like the removal of fax machine as an approved means of communication (electronic communications now being the default — Articles 4.1, 4.2 & 26.2); associated provisions reflecting data protection and cyber security (Article 30A); emphasis on compliance with anti-bribery and corruptions requirements; a target of a three-month period in which to render an Award (Article 15.10);

and the express ability to hold hearings either in-person or virtually (Article 19.2).

As these are more clarifications or refinements of the 2014 edition rather than wholesale amendments, it strikes us that, to a large extent, the 2020 edition is the product of "*evolution, not revolution*".

There are more substantive procedural updates than these, namely the ability for parties to commence multiple proceedings, whether against the same or different respondents, by filing a single, composite Request for Arbitration (Article 1.2); and for arbitrations which arise out of compatible arbitration agreements and "*the same transaction or series of related transactions*" to be consolidated (Articles 22.7(ii) & 28), thereby casting the net of consolidation far wider than was previously possible under the default position in the 2014 edition.

Perhaps the most striking amendment, however, is the express power now afforded to the Tribunal under Article 22.1(viii) to make an "Early Determination". The addition of this ability to summarily dismiss manifestly unmeritorious claims (and thus save time and cost) is notable as it seeks to remedy one of the bug-bears that clients — particularly financial institutions — have often had with arbitration as an alternative to the English courts. It also brings the LCIA Rules in line with institutions such as SIAC and HKIAC.

Like many organisations, the LCIA has tried to emerge leaner, fitter and more flexible from recent COVID-19 lock-downs. We think it's succeeded. It may be that, emboldened by this modernisation of the LCIA Rules and express new powers, we will now also see arbitrators who are correspondingly leaner, fitter and more flexible in how they handle proceedings going forward.

Dunleavy: The update came at a time when parties, arbitrators and counsel were grappling with the use of technology in arbitration, so there was a lot of interest in these changes. Virtual hearings by video and call were already permitted under the earlier LCIA Rules. Article 19.2 now provides that hearings may take place "virtually by conference call, videoconference or us-ing other communications technology". This change confirms the freedom to conduct virtual hearings on whatever platform suits best. The LCIA has also simplified procedures by establishing email, or other electronic communication, as the default form of communication. Parties are still free to communicate by other means so long as they have prior written approval or direction from an Arbitral Tribunal or Registrar.

In our experience, since the start of the pandemic, virtual hearings have often been shorter and more efficient than in-person hearings. The LCIA has increased this potential for efficiency by confirming in Article 19 that: "The Arbitral Tribunal may also limit the extent to which questions or issues are to be addressed" in hearings. Continuing the theme of modernisation, the new Article 30A is designed to ensure that personal data is processed lawfully and, where appropriate, specific security measures are in place to safeguard the information shared in the course of arbitration. The LCIA and the Arbitral Tribunal can issue binding directions on the parties addressing any information security or data protection issues identified.

The new Rules are welcome, particularly in the current virtual environment. While it is (hopefully) possible that current arbitration arrangements are temporary, the changes are anticipated to have long lasting effects. The LCIA summarises other notable changes in the new Rules in: Updates to the LCIA Arbitration Rules (2020).

Khripkova: One of the most important updates of the LCIA Rules is the inclusion of the additional power allowing an arbitral tribunal to make an "Early Determination" order or award upon the application of any party or upon its own initiative (Article 22(viii)). The LCIA followed the trend on permitting the early determination or summary dismissal set by SIAC and HKIAC. Now the arbitral tribunal is expressly empowered to determine that a "claim, defence, counterclaim, cross-claim, defence to counterclaim or defence to cross-claim" is either manifestly outside of its jurisdiction, inadmissible or manifestly without merit. However, the new provision provides no details as to how a "manifestly without merit" standard shall be interpreted. Nor establishes it the process and deadlines for filing and consideration of such applications that leaves the arbitral tribunal more discretion to adopt the procedure most *suitable to the circumstances of the case.* The introduction of the early dismissal mechanism is a welcome develop-

ment that will engage the arbitral tribunal into an early assessment of parties' positions and give more confidence to dismiss meritless claims or defences at the outset of proceedings. In turn, this will reduce costs for the parties and increase the efficiency of the arbitration proceedings.

Inclusion of Article 22(viii) along with the new Articles 14.5 and 14.6, which give the arbitral tribunal the "widest discretion" to restrict pleadings, limit evidence, employ technology, shorten timescales and dispense with a hearing, demonstrate the LCIA's pursuit of more efficient and expeditious conduct of arbitration.

Perepelynska: Many updates of the LCIA Rules aim to improve efficiency of the proceedings and thus to respond to the rising concerns of the arbitration users regarding time and costs of arbitration. Others deal with specific challenges caused by COVID-19 pandemic: the increased use of virtual hearings, the primacy of electronic communication with the LCIA and facilitation of electronically signed awards. And although these tools were used in practice before, the pandemic prompted many institutions, including LCIA to address them expressly to minimize the risks of challenge or non-enforcement of arbitral awards rendered in these unprecedented times. The state courts are yet to say their word in this respect, but the speed of the institutions' reaction is an interesting phenomena, demonstrating their readiness to adapt to the changing circumstances. This is important for further sustainability and legitimacy of the system. ■

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