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Energy and Resources Arbitration: What you need to know about the updated 2020 LCIA International Arbitration Rules

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The London Court of International Arbitration (the “LCIA”) has released an update to its international rules of arbitration (the “LCIA Rules”).[1] The updated LCIA Rules come into effect on 1 October 2020 and apply to arbitrations commenced from that date.[2] Use of LCIA arbitration continues to grow in the international energy and resources sectors so users will want to understand the nature and extent of these changes. In this note, we will consider the most significant updates to the LCIA Rules.

LCIA arbitration

The LCIA is one of the world’s leading international institutions for cross-border commercial dispute resolution across a range of sectors, including the energy and resources industries. The LCIA Rules provide a framework for the resolution of disputes by an arbitral tribunal in jurisdictions all around the world and under any system of law administered under the auspices of the LCIA.[3] The tribunal is formed of one or more members to be appointed by the LCIA Court.[4]

Parties must agree to use arbitration rather than national courts to resolve their disputes and generally do so by including a clause in their contracts referring any future disputes to arbitration pursuant to arbitration rules such as the LCIA Rules or they may also agree to do so once a dispute has arisen.[5] The types of dispute referred to LCIA arbitration are varied and cover all aspects of international commerce, but notably predominantly include banking and finance, energy and resources, transport and commodities.

The last decade has seen a number of international arbitral bodies periodically review their rules in line with current trends in international arbitration practice. The LCIA undertook a significant review of its rules leading to the 2014 LCIA Rules, which notably included a range of provisions aimed at encouraging speed and efficiency throughout the arbitral process.

Since then, the LCIA has continued to report robust growth in disputes referred for resolution under the LCIA Rules and has reported an outstanding year in 2019. [6] According to this report, the LCIA had a record number of 406 cases referred in 2019, including 346 under the LCIA Rules, with parties, generally international businesses, coming from 138 different countries. The LCIA has also reported an increase in the number of arbitrations referred to LCIA arbitration arising in the energy and resources sector in 2019 (22% of all cases).

The 2020 update is not a significant overhaul of the LCIA Rules, but enhances and clarifies certain procedural aspects, including the use of technology, and gives new powers to tribunals to promote the speed and efficiency

[1] www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx.
[2] Existing arbitrations continue under the rules currently in force on their commencement date.
[3] The LCIA also acts as appointing authority and administers arbitrations conducted pursuant to the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL Rules).
[4] Exceptionally more than three.
[5] See recommended clauses at www.lcia.org/Dispute_Resolution_Services/LCIA_Recommended_Clauses.aspx
[6] www.lcia.org/News/annual-casework-report-2019-the-lcia-records-its-highest-numbe.aspx.

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of the arbitral process driven both by recent case law in the English courts and developments in international arbitral practice. There are also some other minor refinements and reordering of the rules.

We will address the following key points: the use of electronic submissions and communications; composite Requests commencing more than one arbitration, and composite Responses; new powers of the tribunal to expedite the arbitral process; additional powers of the tribunal to order early determinations; the use of virtual hearings; multiparty arbitrations; the parties' representatives; the use of tribunal secretaries; signature and transmission of the award(s); and cybersecurity, data protection, and confidentiality.

Commencement of the arbitration(s)

Arbitration is commenced when a Claimant serves a written Request for Arbitration on the Registrar of the LCIA Court, and all other parties, together with a non-refundable registration fee.[7] The Request and Response are to set out the parties' respective cases and define the dispute referred to arbitration. There is no standard form document, but the Request must include certain specific information about the parties,[8] and particulars of their authorised representatives,[9] the arbitration agreement and the dispute, procedural matters including any party nomination of arbitrators, as set out under Article 1 of the LCIA Rules. Within 28 days, the Respondent then serves a Response which similarly must include certain specific information as set out under Article 2.

A new provision gives the LCIA Court power to allow supplements, modifications or amendments to the Request and Response to correct computational, clerical or typographical errors, any ambiguity or mistake of a similar nature after the commencement date up to the date the tribunal is appointed (Articles 1.5 and 2.5). It will be interesting how this is used in practice.

The LCIA Rules have been updated to allow the valid commencement of more than one arbitration by making a composite Request whether against one or more Respondents or under one or more arbitration agreements, as well as a composite Response.[10] Parties using composite submissions will need to identify separately the estimated monetary amount or value in dispute and the transactions in dispute in each arbitration, as well as the defences, counterclaims and cross-claims against any other party to each arbitration. Each arbitration is however separate, so the parties will need to pay the registration fee for each referral. Each arbitration will moreover proceed separately unless the LCIA Court or the tribunal determine otherwise (Article 1.2). This is a practical approach in the interest of efficiency thereby avoiding the need for parties to submit the same or very similar Requests and Responses (as well as supporting documents) to commence more than one arbitration.

The LCIA Rules have also been updated to give priority to the use of electronic communications over paper forms for submissions and communications with the LCIA Court. The Request and the Response are now to be submitted to the LCIA in electronic form, either by email or other electronic means, including by means of any electronic filing system operated by the LCIA. This practical update reflects the reality of modern business. However, if a party needs to submit documents by any alternative method, for instance if there is no agreed or designated email address for the parties in the contract notice provisions, then it must obtain prior approval from

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[7] The registration fee has been increased to £1,950. See the updated Schedule of Costs effective 1 October 2020, at www.lcia.org//Dispute_Resolution_Services/schedule-of-costs-lcia-arbitration-2020.aspx
[8] This now includes a party's nationality.
[9] Previously the LCIA Rules referred to legal representatives – this change is discussed further below.
[10] This addresses the issue that arose in A v B [2017] EWHC 3417 (Comm) where the English court held that a single request for arbitration covering disputes under two distinct contracts was not a valid commencement of the arbitration under the 2014 LCIA Rules and the tribunal therefore did not have jurisdiction.

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the LCIA Court and will need to do so in good time if it is running up against any limitations. (Articles 1.3, 2.3 and 4.1). The date of commencement of the arbitration is deemed to be the date when a Request (and all accompanying documents) is received electronically by the LCIA Registrar or actual receipt of the registration fee if later (Article 1.4).

The tribunal (a sole arbitrator unless the parties have agreed otherwise or the LCIA Court determines a three-member tribunal is appropriate) is appointed by the LCIA Court promptly after the delivery of the Response.[11] If no Response is received, the LCIA Court shall appoint the tribunal 28 days after the commencement date. This brings forward the appointment of the tribunal from 35 days in the 2014 LCIA Rules which may be helpful if a party is not participating in the process. The LCIA Court may allow a greater or lesser time period insofar as necessary.

Once the arbitration has started, priority is also given to email and other electronic communications throughout the arbitral process, unless otherwise agreed or directed by the tribunal or LCIA Court (Article 4.2). If parties have not designated or agreed email or electronic means of communication, and in the absence of an order of the tribunal, where they have regularly used electronic communications in their previous dealings, the LCIA Rules confirm that delivery of written communications may be made in the same way (Article 4.3). There are corresponding amendments necessary to clarify the provisions regarding time limits and deemed service by email or electronic means (Articles 4.4 - 4.5). An application for expedited arbitration or the appointment of an emergency arbitrator must now also be made electronically (Articles 9.2 and 9.5).

Conduct of the proceedings – the tribunal's power to expedite the proceedings and virtual hearing(s)

Article 14 of the LCIA Rules, which sets out the tribunal's general duties related to the conduct of the arbitration proceedings, has been reordered and expanded. Parties may agree on proposals for the conduct of the proceedings, but the tribunal has the widest discretion to determine the future conduct of the reference and procedure it considers appropriate with regard to the fair, efficient and expeditious conduct of the arbitration (having given the parties a reasonable opportunity to state their views) (Article 14.5).

Tribunals are expected to be proactive and decide on the conduct of proceedings so that disputes can be resolved speedily and with proportionate costs involved. Article 14 now includes a range of specific procedural orders which a tribunal may order with a view to expediting the procedure, such as limiting or dispensing with any written statement, or limiting written and oral testimony of any witnesses, and the use of technology to enhance the efficiency and expeditious conduct of the arbitration (including hearings) (Article 14.6).

The update of the LCIA Rules also provided a timely opportunity to reflect on best practices in the use of virtual hearings accelerated by the worldwide Coronavirus pandemic by refining and expanding provisions on the use of virtual hearings. The updates to the LCIA Rules further endorse the use of technology during the arbitral process by including alternatives to physical hearings.

The technology to conduct virtual hearings was already available, but arbitral proceedings were not typically conducted virtually. Hearing cases remotely with participants attending from all over the world when physical hearings were not possible due to 'lock downs' was a matter of expediency in order to ensure that arbitral proceedings could go ahead. This has in consequence provided users with a fast-track introduction to the use of virtual arbitration hearings.

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[11] Articles 5 - 8 set out detailed provisions on the formation of the tribunal.

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The form of hearings is clarified to include a hearing taking place "in person, or virtually by conference call, video conference or using other communications technology with participants in one or more geographical places (or in combined form)" (Article 19.2).[12] An emergency arbitrator, however, is not required to hold a hearing in person or by these alternative virtual means, but has the discretion to determine the conduct of the emergency proceedings as appropriate in the circumstances (Article 9.7).

Much has now been written and shared on the topic of virtual hearings and the available technology and how this experience is expected to shape users' expectations of the arbitral process going forward. New protocols and guidance have been issued by other major international arbitral bodies on the use of virtual arbitration hearings.[13] In short, the consensus appears to be that virtual hearings are here to stay as users have become familiar with the use of virtual arbitration hearings in practice. Technological advances will no doubt continue to make virtual hearings an attractive option to be considered whether as a complete alternative to physical hearings or as a hybrid solution promoting the efficiency of the arbitral process. However, users of international arbitration in certain parts of the world may still face technological and infrastructure challenges, and the arbitral process needs to be resilient against potential cyber-attacks (see below).

The wide discretion of the tribunal to decide on the arbitral procedure includes additional powers set out under Article 22 (on the application of any party or upon its own initiative). This now includes the ability to order early determination of any claim, defence, counterclaim, cross-claim, defence to counterclaim or defence to cross-claim which is manifestly outside the jurisdiction of the tribunal, or is inadmissible or manifestly without merit; and where appropriate to issue an order or award to that effect (Article 22.1(viii)). In line with other arbitral bodies, this additional power gives the tribunal the means to deal with the issue of parties pursuing claims which have no merit as a delaying tactic, so is again a further enhancement of the LCIA Rules in the interests of efficiency of the arbitral process.

Multiparty arbitrations (consolidation and concurrency)

The 2014 LCIA Rules already provided for greater efficiency by providing for consolidation of arbitrations and the conduct of two or more arbitrations concurrently in addition to the tribunal's power to effect joinder of third parties, but the extent of these powers was still somewhat limited notably in relation to multi-contract transactions unless the parties had provided for bespoke solutions in their arbitration clauses.

Provision for multiparty arbitrations is important. In 2019, 22% of arbitrations commenced pursuant to the LCIA Rules involved more than two parties, and 1% of arbitrations involved ten or more parties.[14] In 2019, 35 applications for consolidation were made in arbitrations administered pursuant to the LCIA Rules, of which 24 were granted (of which three were only partially granted), five were rejected and six remained undecided as at the end of 2019. The number of applications for consolidation was reported to have increased by over 50% compared with 2018.

The powers of the LCIA Court and tribunal to order consolidation or concurrent conduct of arbitration have been expanded in a new Article 22A to cover arbitrations arising under the same transactions or series of related transactions. The tribunal may consolidate an arbitration with one or more other arbitrations into a single arbitration subject to the LCIA Rules with all the parties' agreement in writing, and may decide to consolidate

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[12] The equivalent provision in the 2014 LCIA Rules referred to "video or telephone conference or in person (or a combination of all three)."
[13] Such as the International Chamber of Commerce and the London Maritime Arbitrators Association.
[14] See footnote 6 above LCIA's casework report for 2019. This was a slight drop compared with 2018.

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arbitrations commenced under the same arbitration agreements or compatible arbitration agreement(s) either between the same parties or arising under the same transactions or series of related transactions (provided the tribunal has not been formed for such other arbitrations or, if formed, is (are) composed of the same arbitrators) (Articles 22.7 (i) and (ii)). Similarly, the circumstances in which a tribunal may order concurrent arbitrations have been expanded. A tribunal 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 conducted concurrently where the same tribunal is constituted in respect of each arbitration (Article 22.7(iii)). The LCIA Court has similar powers (Article 22.8).

Consequently, the updated LCIA Rules may assist in consolidation of arbitrations or running concurrent arbitrations commenced in multi-contract transactions, not only where the same parties are in dispute, allowing greater scope for procedural efficiencies as well as cost effective arbitration. This is likely to be beneficial in the energy and construction sectors in which multi-contract transactions are common.

Authorised representatives and conduct 'Guidelines'

The 2014 LCIA Rules refer to parties' 'authorised legal representatives'. The updated LCIA Rules clarify that representation can be by legal or non-legally qualified persons properly reflecting the autonomy of the parties in the selection of their representatives. Articles 18.5 and 18.6 of the LCIA Rules now provide that parties may be represented in the arbitration by one or more authorised representatives reverting to the position under the 1998 LCIA Rules.

A unique feature of LCIA arbitration is the set of compulsory 'Guidelines' contained in an Annex to the LCIA Rules providing for the good and equal conduct of those representing parties. This Annex, introduced by the 2014 LCIA Rules, has been maintained, but the 'Guidelines' now apply to any authorised representatives appearing in the arbitration. It is recalled that the 'Guidelines' include prohibitions on: engaging the tribunal in ex parte communication, engaging in activities intended to obstruct the arbitration or to jeopardize the finality of the award[15], knowingly misleading the tribunal or the LCIA Court, or procuring false evidence or concealing evidence.

The tribunal has the express power to determine whether any of the guidelines have been violated and the discretion to sanction inappropriate conduct by a party's authorised representative, and to veto changes to parties' representation insofar as necessary to prevent a party from obstructing and delaying the proceedings.

The use of tribunal secretaries

The use of tribunal secretaries (often, but not necessarily junior lawyers) to support the work of a tribunal with certain tasks is not a new development in international arbitration, and can also save time and costs. A number of international arbitral bodies have already issued guidelines and training on best practice as regards the use of tribunal secretaries to avoid any potential problems regarding the delegation of tasks, for instance applications for removal of arbitrators or challenge of the award.[16] It is of course immutable that the tribunal's non-delegable

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[15] Including repeated challenges to an arbitrator's appointment or to the jurisdiction or authority of the tribunal where such challenges are known to be unfounded by that authorised representative.

[16] See P v Q [2017] EWHC 194 (Comm) on an unsuccessful challenge to remove the tribunal under s24 of the English Arbitration Act 1996 for failing to conduct proceedings properly based on alleged improper delegation of

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decision-making function is exercised by the tribunal members alone.[17] The LCIA also updated its Guidance Notes for Arbitrators in October 2017 setting out the LCIA's approach to tribunal secretaries (section 8).

The LCIA Rules now incorporate the guidance on the procedure for appointment and role of the tribunal secretary within a new Article 14A in the updated LCIA Rules in line with the Guidance Notes. A tribunal may obtain assistance from a tribunal secretary, but under no circumstances may delegate its decision-making function. All tasks carried out by a tribunal secretary shall be carried out on behalf of, and under the supervision of, the tribunal which remains responsible to ensure that all tasks are performed to the standard required by the LCIA Rules. If a tribunal wishes to use a tribunal secretary, this must be agreed with the parties in advance as well as the identity of the person to serve in this role and the specific tasks to be carried out by the secretary. The tribunal secretary also has express obligations in line with those of the tribunal as regards impartiality and independence. This will be a welcome codification of the LCIA's position on the role and remit of tribunal secretaries.

Award(s)

The tribunal may make one or more separate awards on different issues at different times which are final and binding on the parties (Article 26.1). The award will be made in writing and state the reasons for the tribunal's decision, unless the parties agree otherwise, and again adopting a modern approach, the LCIA Rules confirm that the award may be signed electronically or in counterpart copies (Article 26.2).[18] If there are three arbitrators, a majority award is binding but, failing a majority decision, the decision shall be made by the presiding arbitrator (Article 26.5).

Transmission of the award may be made by any electronic means, and a paper form will only be transmitted if so requested by any party or if transmission by electronic means to a party is not possible. This changes the previous position where a paper form was required, although it was permissible to transmit the award in addition by electronic means. Again priority is given to the electronic form so that the award in electronic form prevails over the paper form in case of any disparity (Article 26.7).

Cybersecurity, data protection, confidentiality

Parties often chose arbitration because of considerations of privacy and confidentiality. The LCIA provides that parties undertake to keep confidential all awards and all materials created for the purposes of the arbitration and documents not otherwise in the public domain. This confidentiality undertaking is extended to all those parties involved in the arbitration, including but not limited to any authorised representative, witness of fact, expert or service provider, as well as the tribunal, any tribunal secretary and any expert appointed by the tribunal (Articles 30.1 and 30.2). Cybersecurity and data protection are addressed in a new provision (Article 30A), including the tribunal's duties to consider the adoption of security measures to protect physical and electronic information in

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tribunal's functions to the secretary. The court upheld the LCIA's approach and decision on the arbitrator challenges (based on the 1998 LCIA Rules).

[17] As the judge in P v Q above stated: "*Care must be taken to ensure that the decision-making is indeed that of the tribunal members alone. The safest way to ensure that that is the case is for the secretary not to be tasked with anything which involves expressing a view on the substantive merits of an application or issue. If he is so tasked, there may arise a real danger of inappropriate influence over the decision-making process by the tribunal, which affects the latter's ability to reach an entirely independent minded judgment*" (paragraph 68).

[18] Parties contemplating enforcement proceedings should check that this form is acceptable in national courts where such proceedings will be commenced.

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the arbitration, processing of data produced or exchanged in the arbitration in light of legislation and directions addressing these issues. These should be welcome provisions given the current cybersecurity landscape, increasingly sophisticated and frequent cyber-attacks, and need for cybersecurity protection practices.

Conclusions

International arbitration must be modern and progressive in order to meet the needs of its users as well as to adapt to recent changes in the international arbitration landscape, and accommodate procedural options dealing with the complexities of international arbitration in a procedurally efficient and cost proportionate way.[19] Since its last revisions in 2014, the LCIA remains a popular forum for the determination of complex international arbitrations, including those in the energy and resources sectors, but the recent 2020 updates without drastically changing the LCIA process, again will ensure that the LCIA Rules are as current as the rules of other international arbitral bodies.

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[19] The Singapore International Arbitration Centre (SIAC) 2016 Rules are also under review.

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