Revised LCIA Arbitration Rules

The London Court of International Arbitration (LCIA) has released a revision of its arbitration rules. The last revision of the LCIA Rules was in 2014. The revised LCIA Rules are effective from 1 October 2020 and apply to arbitration proceedings commenced after that date (the "Revised Rules"). The Revised Rules can be found here.

These revisions cover a wide range of issues and include a number of new provisions that address issues that are not addressed in other leading arbitral rules. Among other things, the Revised Rules address the use of technology and remote hearings; confidentiality; compliance concerns relating to issues such as corruption, money laundering, and economic sanctions, data protection and security; conduct of party representatives; and the nationality of parties and arbitrators, as well as clarifying issues related to multi-party and multi-contract arbitration. These changes reflect the LCIA's efforts to promote innovation and greater efficiency in international arbitration proceedings.

The LCIA has also revised its Schedule of Arbitration Costs, as well as its Mediation Rules and Schedule of Mediation Costs, all effective as of 1 October 2020. In the revised Schedule of Arbitration Costs, the LCIA has increased the maximum hourly rate for arbitrators (from £450 to £500) and the LCIA Secretariat, which the LCIA has explained is intended to better reflect "the demands of users in certain cases involving complex and significant disputes."[1]

Section I below discusses some of the more notable revisions to the LCIA Rules in detail, and Section II briefly summarizes a number of additional revisions.

I. NOTABLE REVISIONS TO THE LCIA RULES

The Use of Technology and Conducting Hearings "Virtually"

The Revised Rules expressly address some of the issues that have arisen as the result of the COVID-19 pandemic and reaffirm the tribunal's power to hold hearings remotely.

The Revised Rules now provide expressly that tribunals can use "technology to enhance the efficiency and expeditious conduct of the arbitration (including any hearing)" (Article 14.6(iii)). The rules also now provide that the parties and the tribunal shall make contact as soon as practicable "whether by a hearing in person or virtually" and that a hearing may be conducted "virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form)" (Articles 14.3 and 19.2). This bolsters the references to the use of video and telephone conferences for the conduct of hearings in Article 19.2 of the 2014 LCIA Rules.[2]

In addition, the Revised Rules provide in Articles 1.3, 2.3, and 4.1 that the default approach for the transmission of submissions and accompanying documents is "email or other electronic means including via any electronic filing system operated by the LCIA" and previous references to personal delivery, registered postal or courier service and facsimile

[1] LCIA, Updates to the LCIA Arbitration Rules and the LCIA Mediation Rules (2020).
[2] The 2014 LCIA Rules provided in Article 19.2 that "[t]he Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing, including its date, form […]," and that, "[a]s to form, a hearing may take place by video or telephone conference or in person (or a combination of all three)".

have been deleted. The Registrar also communicates with the parties and the tribunal by email or by other electronic means (Article 4.2).

Article 26.2 also has been revised to now provide that the tribunal should sign awards electronically unless otherwise agreed by the parties or directed by the tribunal or the LCIA Court. Article 26.7 further clarifies that the award will be transmitted to the parties electronically and that, if there is a disparity between the electronic and paper form of an award, the electronic form will prevail (under the 2014 LCIA Rules, the paper form prevailed). Despite the provisions for electronically signed awards in the Revised Rules, parties and tribunals should carefully assess the situation in any potential enforcement forum. In some jurisdictions, awards may need to be signed in "wet ink" in order to meet local "in writing" requirements.

Data Protection and Security

The Revised Rules introduce a new provision (Article 30A) entitled "Data Protection" to address data protection and privacy laws, including the European Union's General Data Protection Regulation (GDPR), which came into force in 2018. Despite the potential significance of data protection and security issues for arbitration, and the attention those issues have received,[3] the LCIA is the first major arbitral institution to include provisions on these topics in its rules.

Article 30.4 provides that "[a]ny processing of personal data by the LCIA is subject to applicable data protection legislation." The provision also refers to the data protection notice on the LCIA website, which, among other things, indicates that that that the LCIA is a "data controller" for the purposes of processing of personal data and sets out the basis on which personal information is collected and processed by the LCIA.

Article 30.5 provides that the tribunal shall consult with the parties and, where appropriate, with the LCIA, as to whether to adopt (i) any specific information security measures to protect the physical and electronic information shared in the arbitration and (ii) any means to address the processing of personal data produced or exchanged in the arbitration in light of the applicable data protection or equivalent legislation.

Finally, Article 30.6 provides that any directions addressing information security and data protection issued by the tribunal and the LCIA shall be binding on the parties and, in the case of those issued by the LCIA, on the members of the tribunal, subject to the mandatory provisions of any applicable law or rules of law.

Multi-Party and Multi-Contract Arbitrations

The 2014 Rules listed the tribunal's power to consolidate two or more arbitrations into a single proceeding in Article 22.1, among other additional powers of the tribunal, and the LCIA Court's power to do so in Article 22.6. The Revised Rules move both provisions into a separate and new provision entitled "Power to Order Consolidation/Concurrent Conduct of Arbitrations" (Article 22A).

[3] *See*, *e.g.*, AAA-ICDR Best Practices Guide for Maintaining Cybersecurity and Privacy; IBA Cybersecurity Guidelines; ICCA-IBA Roadmap to Data Protection in International Arbitration (February 2020 Consultation Draft); ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration.

Article 22A maintains the overall approach in the previous rules, which permits tribunals to order consolidation where (i) the parties have agreed in writing, or (ii) the requirements of the LCIA Rules for consolidation without the parties' written consent have been met. However, the Revised Rules introduce two notable changes.

First, Article 22.8(i) now expressly allows the LCIA Court – and not only the tribunal – to consolidate where the parties agree in writing to do so. Second, the Revised Rules now use a broader standard for consolidation in the absence of the parties' written consent.

In particular, the Revised Rules now allow for consolidation not only where the different proceedings are based on "same arbitration agreement or any compatible arbitration agreement(s)" concluded between "the same disputing parties" (as provided under the 2014 LCIA Rules), but also where they arise out "of the same transaction or series of related transactions" (Article 22.7(ii) (addressing the tribunal's authority); Article 22.8(ii) (addressing the LCIA Court's authority)). The additional language allows consolidation in cases where the disputing parties are not the same, but provided that (i) the dispute relates to the same transactions or a series of related transactions; (ii) it is based on either the same arbitration agreement or compatible arbitration agreements; and (iii) no tribunal has yet been formed by the LCIA Court for the arbitration(s) to be added into an existing one or, if already formed, that all tribunals are composed of the same arbitrators.[4] The revised language is similar to the approach taken in other arbitration rules.[5]

Article 22.7(iii) further expressly provides that tribunals can conduct multiple proceedings on a concurrent basis without consolidating the proceedings. If the same tribunal is constituted in two or more arbitrations 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," the tribunal can conduct concurrent proceedings. While this provision is new in the Revised Rules, it confirms existing LCIA practice.[6]

The Revised Rules also contain a new provision addressing "composite Request" and "composite Response." Article 1.2 now allows the claimant(s) "to commence more than one arbitration under the LCIA Rules (whether against one or more Respondents and under one or more Arbitration Agreements)" by means of a single Request. Upon receiving a composite Request, the respondent(s) may serve a composite Response (Article 2.2). This change appears to address a 2017 ruling by the English Commercial Court which determined that, under the 2014 LCIA Rules, a claimant was not allowed to file a single Request against the same respondent under two arbitration agreements.[7]

[4] The LCIA Court can consolidate when "no arbitral tribunal has yet been formed by the LCIA Court for any of the arbitrations to be consolidated" (Article 22.8(ii)).
[5] *See*, *e.g.*, 2018 HKIAC Rules, Article 28.1(c); 2017 SCC Rules, Article 15(1)(iii); 2016 SIAC Rules, Rule 8.7(c).
[6] LCIA Notes for Arbitrators, Section 6.3.
[7] *A v B*, [2017] EWHC 3417 (Comm).

Nationality for the Purposes of Appointing Sole or Presiding Arbitrators

Article 6.1 of the LCIA Rules provides that, when the parties are of different nationalities, a sole or presiding arbitrator cannot have the same nationality as any of the parties, unless the parties agree otherwise.[8]

As revised, Article 6.2 now expressly defines the "nationality" of both natural and legal persons for the purposes of Article 6.1. The nationality of a natural person is defined as "citizenship, whether acquired by birth or naturalisation or other requirements of the nation concerned" (Article 6.2). This definition appears to be in line with the approach the LCIA Court has taken in challenges to sole or presiding arbitrators based on the nationality requirements of Article 6.1. In those challenge decisions, the LCIA Court has rejected challenges based on cultural or professional ties to a country rather than on nationality.[9]

Article 6.2 defines the nationality of legal persons as "the jurisdiction in which it is incorporated and has its seat of effective management." This definition is broad as it provides that, if a company is incorporated in one jurisdiction and has its seat of effective management in another jurisdiction, that company will be considered to hold both nationalities (Article 6.2).

As noted above, the new nationality definitions are specifically intended to apply "for the purposes of Article 6.1," i.e. the determination of a possible conflict between the nationality of the parties and the sole/presiding arbitrator. It remains to be seen whether, despite this express limitation in the scope of application of the definitions of nationality in Article 6.2, parties will argue that these definitions should also apply to other issues where nationality may be relevant.

Party Representation and Conduct of "Authorised Representatives"

The 2014 LCIA Rules introduced "General Guidelines for the Parties' Legal Representatives" in the Annex to the Rules, and also referred to in Articles 13 and 18. Among other things, these rules require the tribunal's approval for a party to change representatives during an arbitration[10] and also require the parties to ensure that their representatives have agreed to comply with the general guidelines annexed to the LCIA Rules which require the parties' representatives to observe "good and equal conduct" and, among other things, not to take any action that unfairly obstructs the arbitration, knowingly make false statements, rely on false evidence, or conceal documents.[11] The LCIA was the first major institution to include such provisions, and they remain a distinctive feature of the LCIA Rules.

In these rules (and elsewhere), the 2014 Rules used the phrase "legal representative," which potentially created an ambiguity as to whether these rules applied only to legally qualified

[8] Parties are required to indicate their nationalities in the Request (Article 1.1(i)) and the Response (Article 2.1(i)). Article 6.1 now also now provides that the parties must inform the Registrar and all other parties of their nationalities upon the Registrar's request.
[9] *See* LCIA Reference No. 111996, 22 April 2013, at paras. 12-16; LCIA Reference No. 122073, 6 July 2012, at paras. 24-33.
[10] Article 18.3 is intended to reduce the risk that a party's unilateral introduction of a new representative could compromise the composition of the tribunal or the finality of the award.
[11] Where the tribunal determines that there has been misconduct by a party's authorized representative, the tribunal has the authority to order sanctions in the form of a written reprimand, a written caution or to take "any other measure necessary" to fulfil the tribunal's general duties (Article 18.6).

representatives. The Revised Rules address this ambiguity by replacing "legal representative" with "authorised representative."

In addition, Article 13.4 has been revised to expressly recognize that an authorised representative can "have unilateral contact with the LCIA Registrar regarding administrative matters," but otherwise there can be no unilateral contact between authorised representatives and any member of the tribunal following the tribunal's formation.

Confidentiality

The Revised Rules broaden the existing provisions addressing confidentiality. Under Article 30.1 of the 2014 LCIA Rules, only the parties were required to undertake as a general principle to keep confidential "all awards in the arbitration," "all materials in the arbitration," and "all other documents produced by another party in the proceedings not otherwise in the public domain." Article 30.1 now requires the parties to seek "the same undertaking of confidentiality from all those that it involves in the arbitration, including but not limited to any authorised representative, witness of fact, expert or service provider." Similarly, Article 30.2 now provides that the undertaking of confidentiality of Article 30.1 shall also apply to the tribunal, any tribunal secretary, and any expert appointed by the tribunal.

Moreover, Article 30.2 now expressly extends to the tribunal secretary the duty to keep the deliberations of the tribunal confidential.[12]

Compliance

The Revised Rules introduce a new provision entitled "Compliance" (Article 24A) to address requirements applicable to dealings between a party and the LCIA relating to a "Prohibited Activity," defined as "bribery, corruption, terrorist financing, fraud, tax evasion, money laundering and/or economic or trade sanctions." The LCIA is the first major arbitral institution to include provisions on compliance in its rules.

Pursuant to Article 24.9, when the parties agree to submit their dispute to arbitration under the LCIA Rules, they accept that any dealings between each of them and the LCIA shall be subject to any requirements (*i.e.,* laws, regulations or other legal duty) in relation to a Prohibited Activity. Article 24.10 makes clear that, at its own discretion and without having to provide an explanation, the LCIA Court may refuse to act or to receive/make payments if it determines that doing so would involve a Prohibited Activity, entail a breach of law or any legal duty or, otherwise, expose the LCIA to enforcement actions or censure from any a competent authority.

Article 24.11 requires parties to provide the LCIA with all information and/or documents reasonably requested by it for compliance purposes in relation to a Prohibited Activity. It also provides that the LCIA reserves its right to take any action it deems appropriate to comply with any applicable obligations relating to Prohibited Activities, "including disclosure of any information and documents to courts, law enforcement agencies or regulatory authorities."

[12] The new provision is consistent with the LCIA's previous guidance. The LCIA Notes for Arbitrators state that a tribunal should only obtain assistance from a tribunal secretary once, among other things, the parties agree that the duty to keep the tribunal's deliberations confidential also applies, *mutatis mutandis*, to the tribunal secretary. *See* LCIA Notes for Arbitrators, para. 74(b).

Law applicable to the interpretation of the LCIA Rules and jurisdiction of English courts in disputes against the LCIA

The Revised Rules introduce novel provisions on the law applicable to the interpretation of the rules and the forum for disputes against the institution. These provisions represent distinctive features of the LCIA Rules compared to other major arbitration rules.[13]

The Revised Rules contain a new provision in Article 16 (the article which addresses the seat of arbitration, place of hearing, and applicable law) stating that the rules shall be interpreted in accordance with the laws of England and Wales (Article 16.5). It will be interesting to see how parties and tribunals approach the interpretation of this provision, and whether there will be arguments about its implementation in cases where, for example, the applicable procedural law is not English law.

In addition, Article 31, entitled "Limitation of Liability and Jurisdiction Clause," now provides that certain disputes that arise out of or in connection with LCIA arbitration, should be resolved by the courts of England and Wales (Article 31.3). Article 31 covers disputes between a party to an arbitration under or in accordance with the LCIA Rules and the LCIA, the LCIA Court, the LCIA Board, the Registrar, any arbitrator, any emergency arbitrator, any tribunal secretary and/or any expert to the tribunal, and may also potentially apply to other disputes, such as issues concerning the return of advances on costs after the conclusion of an arbitration.[14]

II. OTHER REVISIONS TO THE LCIA RULES

There are a number of other revisions to the LCIA Rules, including some other new provisions that appear to be unique to the LCIA, and which are briefly summarized below.

- **Supplementation, modification or amendment of claims before the constitution of the tribunal (Articles 1.5 and 2.5)**: The Revised Rules expressly provide that the LCIA Court can allow parties to modify or amend Requests or Responses before the constitution of the tribunal. However, the scope of the modification or amendment is restricted to "correct[ing] any error in computation, any clerical or typographical error, any ambiguity or any mistake of a similar nature."

- **Emergency arbitrator (Article 9B)**: The Revised Rules confer additional express powers on an emergency arbitrator, including the power to hold several part-hearings to determine the amount of legal costs and allocate legal costs between the parties, and to confirm, vary, discharge or revoke any of his or her orders.

- **Tribunal secretary (Article 14A)**: The Revised Rules include a new provision entitled "Tribunal Secretary", which expressly provides, *inter alia*, that (i) tribunals may not delegate decision-making functions to tribunal secretaries, (ii) tribunal secretaries shall

[13] Most other rules do not expressly address the interpretation of or the law applicable to the rules. The HKIAC Rules state in Article 2.1 that the HKIAC "shall have the power to interpret all provisions of [the] Rules," and that the tribunal has the similar authority in regard to the rules related to its powers and duties.
[14] Article 31.1 limits the liability of the LCIA, the LCIA Court, LCIA Board, the Registrar, arbitrators, emergency arbitrators, tribunal secretaries, and tribunal-appointed experts to cases of acts and omissions in connection with an arbitration where (i) the act or omission is shown by a party to constitute conscious and deliberate wrongdoing to that party, or (ii) to the extent that this rule is "shown to be prohibited by any applicable law."

provide a written declaration on their impartiality or independence, and (iii) tribunal secretaries may charge an hourly fee.[15]

- **Early Determination (Articles 14.6(vi) and 22.1(viii))**: The Revised Rules now expressly empower the tribunal to declare that a "claim, defence, counterclaim, cross-claim, defence to counterclaim or defence to cross-claim" is outside of its jurisdiction, is inadmissible or lacks merit, provided that the lack of jurisdiction, admissibility or merit is manifest (Article 22.1(viii)).

- **Advance payment for costs (Article 24)**: Under the 2014 Rules, the LCIA would hold payments made by the parties "in trust under English law" (Article 24.2). Article 24 has been revised to provide that the LCIA will not act as a trustee. Further, Article 24.4 now states that the LCIA will make reasonable attempts to contact the parties to arrange the refund of any excess in the advance payment of costs and that a party's failure to respond to such attempts may lead to a waiver of its right to claim the refund.

- **Tribunal's power to make corrections to the award when the parties' request for correction is unjustified (Article 27.1)**: Unlike the previous version of the rules, which only authorized the tribunal to issue an addendum to the award correcting clerical errors or ambiguities if the request for correction was justified, the Revised Rules also allow the tribunal to issue an addendum to the award to deal with unjustified requests. Such an addendum may deal with the costs of the arbitration and legal costs incurred in connection with the request for correction.

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For a more detailed discussion of the LCIA Rules, and how they will apply in practice, see *Arbitrating under the 2020 LCIA Rules* (Wolters Kluwer, forthcoming), co-authored by Prof. Maxi Scherer, as well as the discussion of the LCIA Rules in "International Commercial Arbitration" in *The Law of Transnational Business Transactions* (Thomson Reuters, 2020), by Steven Finizio. WilmerHale's client alert on the 2014 LCIA Rules is available here.

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[15] These new provisions relating to tribunal secretaries are similar to the LCIA Notes for Arbitrators published in 2017. However, these new provisions do not include all of guidance related to the role of secretaries found in the LCIA Notes for Arbitrators. For example, unlike the Revised Rules, the LCIA Notes for Arbitrators contain a list of activities that the tribunal may propose to the parties to be carried out by a tribunal secretary. *See* LCIA Notes for Arbitrators, Section 8. For further details on the hourly fees of tribunal secretaries, *see* Schedule of Arbitration Costs (effective 1 October 2020), Section 6.