

Client Alert

Update to LCIA Arbitration Rules takes effect

1st October, 2020

Contact

Tom Canning, Partner
+44 20.7615.3047
tcanning@milbank.com

Peter Edworthy, Senior Associate
+44 20.7615.3070
pedworthy@milbank.com

Alexandra Jefferies, Associate
+44 20.7615.3136
ajefferies@milbank.com

The LCIA's recent update to its Arbitration Rules has come into effect today (1 October 2020). As described in this briefing, the "*light touch*"¹ update is designed to increase the efficiency of LCIA arbitration and, whilst the changes were not prompted by the Covid-19 pandemic, they reflect developments that have emerged in response to changing working practices (including the preference for electronic communication and the greater use of virtual hearings).

The updates address certain anomalies that existed in the 2014 version of the Rules and they provide greater clarity in relation to the case management powers of tribunals including, importantly, to make early determinations in respect of meritless claims.

Technology

The 2020 update increases the prominence of electronic communication and the use of technology, which broadly reflects developing practice. Parties must now seek prior approval to use non-electronic means in relation to the submission of the Request for Arbitration and the Response,² and the transmission of an electronic award will now be standard practice, with the electronic version of the award now prevailing in the case of any inconsistency over the paper copy.³

Demand for virtual hearings was increasing before the impacts of Covid-19 were felt, however, the pandemic has obviously brought the issue into far clearer focus. The update to the Rules expressly caters for the use of new technologies beyond traditional videoconferencing and conference calls by providing that hearings may be conducted "*using other communications technology*".⁴

Composite Requests and consolidation

In response to party/practitioner feedback on the efficiency of starting LCIA arbitration proceedings involving separate disputes,⁵ the update to the Rules now permits parties to commence multiple

¹ As described by Paula Hodges QC, President of the LCIA, <https://www.lcia.org/lcia-rules-update-2020.aspx>.

² Article 4.1 of the Rules.

³ Ibid, Article 26.7.

⁴ Ibid, Article 19.2.

⁵ This was in light of the decision of the High Court in *A v B* [2017] EWHC 3417 (Comm) to the effect that the existing LCIA Rules did not allow multiple disputes under different contracts to be commenced under the same Request for Arbitration, which was at odds with the position under most other leading institutional rules.

arbitrations by filing a single composite Request for Arbitration “*whether against one or more Respondents and under one or more Arbitration Agreements*”.⁶ The Respondent can also serve a composite Response on receipt of such a Request.⁷ The claims will, however, remain separate proceedings, so consolidation would still need to be ordered by the LCIA Court or the tribunal in order for the disputes to be heard together.

In addition, whilst under the new Rules the consolidation of related arbitrations remains subject to the discretion of the tribunal or LCIA Court, the updates expand the circumstances where such consolidation may occur (and, therefore, will hopefully reduce the time and expense involved by avoiding unnecessary delay and repetition, as well as reducing the risk of inconsistent decisions).⁸ Most notably, the tribunal and the LCIA Court may now consolidate multiple arbitrations under the same or compatible arbitration agreements arising out of the same transaction or series of related transactions, even where the disputing parties are not identical. The tribunal can alternatively decide, in similar situations, that the arbitrations will be conducted concurrently with each other but with the same tribunal being appointed for both arbitrations.

Case management powers/Early Determination

The 2014 Rules already provided that arbitral tribunals “*shall have the widest discretion*” to discharge their case management duties, and this discretion is retained in the 2020 update.⁹ However, the updated Rules also set out additional express examples of the tribunal’s powers and in so doing, the LCIA has confirmed and clarified the broad scope of the tribunal’s discretion. For example, the tribunal may “*make any procedural order it considers appropriate with regard to the fair, efficient and expeditious conduct of the arbitration*”,¹⁰ including by:

- limiting the length of, or dispensing with, written statements;
- limiting written and oral witness testimony;
- using technology to increase the efficiency of arbitrations;
- deciding the stage at which, or order in which, issues are determined;
- dispensing with hearings; and/or
- setting or abridging periods of time for stages or steps to be taken.¹¹

While these powers were within the discretion of the tribunal before the 2020 update, it is hoped that by setting them out expressly, it will increase the frequency with which they are used.

Of particular note and importance is that the broad case management powers of arbitral tribunals now include an express power of “*Early Determination*” in order to encourage tribunals to dismiss meritless proceedings. In line with most other leading institutional rules, this clarification confirms that the tribunal may (on application by a party or on its own initiative) determine that any “*claim, defence, counterclaim, cross-claim, defence to counterclaim or defence to cross-claim is manifestly outside the jurisdiction of the Arbitral Tribunal, or is inadmissible or manifestly without merit*”,¹² and make an order to that effect.

Timings

The 2020 update aims to expedite LCIA arbitrations by reducing certain time periods.

⁶ Ibid, Article 1.2.

⁷ Ibid, Article 2.2.

⁸ Ibid, Article 22A.

⁹ Article 14.5 of the 2014 LCIA Arbitration Rules and article 14.2 of the Rules.

¹⁰ Article 14.5 of the Rules.

¹¹ Ibid, Article 14.6.

¹² Ibid, Article 22.1(viii).

From today, the LCIA Court must appoint the tribunal promptly after 28 days (instead of 35 days) from the Commencement Date, if no Response is received from the Respondent.¹³ The parties and tribunal must also now make contact within 21 days of receiving written notification of the tribunal's formation, as opposed to just being "*encouraged*" to do so.¹⁴ There is also a new obligation on tribunals to endeavour to make their final award no later than three months following final submissions from the parties.¹⁵

Formal role of tribunal secretaries

In recognition of the growing use of tribunal secretaries, the new Rules have added Article 14A which formally codifies the role and appointment of tribunal secretaries (and which had previously been contained in the LCIA Notes for Arbitrators).¹⁶

Article 14A includes provisions to the effect that:

- Tribunal secretaries may assist the tribunal, but the tribunal must not delegate its decision-making function to the secretary.
- The parties retain ultimate control over the use of tribunal secretaries, as their appointment and the tasks they carry out must be approved by the parties.
- Tribunal secretary candidates must also sign and provide the parties and tribunal with written declarations stating whether they know of any circumstances "*likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality or independence*" and whether they are "*ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the tasks*".¹⁷

Interim measures

There had been some expectation that the new Rules would contain significant updates in relation to the parties' ability to obtain interim relief from the court, in response to the 2016 decision of the High Court in *Gerald Metals SA v Timis* [2016] EWHC 2327 (Ch) (see our briefing [here](#)).

By way of quick reminder, the High Court held in that case that the English courts' power to grant interim relief in aid of arbitration (pursuant to s.44 of the Arbitration Act) was limited to cases of "*urgency*", which the Court considered to mean matters that were so urgent that the parties could not obtain adequate relief under the LCIA Rules (by way of the appointment of an emergency arbitrator or the expedited formation of the tribunal).

However, the new Rules only include minor clarifications (in Article 9.13 and Article 25.3) on this issue. The existing language has been amended to make it clear that parties can apply to the courts for interim relief "[n]otwithstanding Article 9B" and "*that the Arbitral Tribunal would have power to order [such interim relief] under Article 25.1*". It remains to be seen though whether this revised language will affect the English courts' approach to exercising their powers under s.44 of the Arbitration Act in circumstances where the tribunal (and/or LCIA Court) has not only the power but also sufficient time to grant appropriate relief.

Confidentiality and data protection

The new Rules reinforce the confidential nature of arbitration by introducing an obligation on the parties to seek an undertaking of confidentiality from all those that they involve in the arbitration.¹⁸ This will,

¹³ Ibid, Article 5.6.

¹⁴ Article 14.1 of the 2014 LCIA Arbitration Rules and Article 14.3 of the Rules.

¹⁵ Article 15.10 of the Rules.

¹⁶ At section 8.

¹⁷ Articles 14.9 and 14.10 of the Rules.

¹⁸ Article 30.1 of the Rules.

therefore, require parties to seek undertakings from any witnesses of fact, experts and/or service providers.

The 2020 update also adds provisions which expressly require the tribunal to address any data protection issues that arise during the arbitration.¹⁹ In particular, the tribunal must now consider whether to adopt (i) specific information security measures to protect information shared in the arbitration, and (ii) specific means to address the processing of personal data. The LCIA and the tribunal may issue binding directions in this regard.

¹⁹ Article 30A of the Rules.

Global Litigation Contacts

London | 10 Gresham Street, London EC2V 7JD

Tom Canning	tcanning@milbank.com	+44 20.7615.3047
William Charles	wcharles@milbank.com	+44 20.7615.3076
Charles Evans	cevans@milbank.com	+44 20.7615.3090
Julian Stait	jstait@milbank.com	+44 20.7615.3005
Mona Vaswani	mvaswani@milbank.com	+44 20.7615.3002

New York | 55 Hudson Yards, New York, NY 10001-2163

George S. Canellos <i>Global Head of Litigation</i>	gcanellos@milbank.com	+1 212.530.5792
Daniel Perry <i>Practice Group Leader</i>	dperry@milbank.com	+1 212.530.5083
Wayne M. Aaron	waaron@milbank.com	+1 212.530.5284
Antonia M. Apps	aapps@milbank.com	+1 212.530.5357
Thomas A. Arena	tarena@milbank.com	+1 212.530.5828
James G. Cavoli	jcavoli@milbank.com	+1 212.530.5172
Scott A. Edelman <i>Firm Chairman</i>	sedelman@milbank.com	+1 212.530.5149
Adam Fee	afee@milbank.com	+1 212.530.5101
Christopher J. Gaspar	cgaspar@milbank.com	+1 212.530.5019
David R. Gelfand	dgelfand@milbank.com	+1 212.530.5520
Robert C. Hora	rhora@milbank.com	+1 212.530.5170
Alexander Lees	alees@milbank.com	+1 212.530.5161
Grant Mainland	gmainland@milbank.com	+1 212.530.5251
Atara Miller	amiller@milbank.com	+1 212.530.5421
Sean M. Murphy	smurphy@milbank.com	+1 212.530.5688
Tawfiq S. Rangwala	trangwala@milbank.com	+1 212.530.5587
Stacey J. Rappaport	srappaport@milbank.com	+1 212.530.5347
Fiona A. Schaeffer	fschaeffer@milbank.com	+1 212.530.5651
Jed M. Schwartz	jschwartz@milbank.com	+1 212.530.5283
Alan J. Stone	astone@milbank.com	+1 212.530.5285
Errol B. Taylor	etaylor@milbank.com	+1 212.530.5545

Washington, DC | International Square Building, 1850 K Street, NW, Suite 1100, Washington, DC 20006

David S. Cohen	dcohen2@milbank.com	+1 202.835.7517
Andrew M. Leblanc	aleblanc@milbank.com	+1 202.835.7574
Michael D. Nolan	mnolan@milbank.com	+1 202.835.7524
Aaron L. Renenger	arenenger@milbank.com	+1 202.835.7505

Los Angeles | 2029 Century Park East, 33rd Floor Los Angeles, CA 90067-3019

Lauren N. Drake	ldrake@milbank.com	+1 424.386.4320
Gary N. Frischling	gfrischling@milbank.com	+1 424.386.4316
David I. Gindler	dgindler@milbank.com	+1 424.386.4313
Robert J. Liubicic	rliubicic@milbank.com	+1 424.386.4525
Alex G. Romain	aromain@milbank.com	+1 424.386.4374

Munich | Maximilianstraße 15, 80539 Munich

Ulrike Friese-Dormann	ufriese@milbank.com	+49 89.25559.3646
Peter Nussbaum	pnussbaum@milbank.com	+49 89.25559.3636
Alexander Rinne	arinne@milbank.com	+49 89.25559.3686
Christoph Rothenfusser	crothenfusser@milbank.com	+49 89.25559.3656

Litigation & Arbitration Group

Please feel free to discuss any aspects of this Client Alert with your regular Milbank contacts or any member of our Litigation & Arbitration Group.

This Client Alert is a source of general information for clients and friends of Milbank LLP. Its content should not be construed as legal advice, and readers should not act upon the information in this Client Alert without consulting counsel.

© 2020 Milbank LLP All rights reserved. Attorney Advertising.
Prior results do not guarantee a similar outcome.