

# LCIA ARBITRATION

A GUIDE TO THE LONDON COURT OF INTERNATIONAL ARBITRATION

## INTRODUCTION

The London Court of International Arbitration (the "LCIA") was established in 1892 and has for some time been one of the world's leading international institutions for commercial dispute resolution. The LCIA administers arbitrations by applying the LCIA Arbitration Rules ("LCIA Rules"), which to all types of arbitrable disputes. The LCIA Rules were recently revised and the updated rules became effective on 1 October 2020.

The headquarters of the LCIA is based in London but it is predominately an international institution: non-UK businesses accounted for more than 80% of the parties involved in all LCIA arbitrations commenced in 2019 and this guide has been prepared mainly to assist non - UK parties.

The LCIA's caseload has seen continued and significant growth in recent years and it now handles almost 400 new cases a year. The parties involved are from Europe, North America, Asia Pacific, the Middle East and Africa<sup>1</sup>. Indeed, in 2019, the parties in LCIA Rules arbitrations came from over 130 different countries.

The most common type of agreements referred to the LCIA concern loan or similar agreements and the LCIA's caseload continues to be dominated by disputes in the banking and finance sector.

## THE LCIA COURT AND THE SECRETARIAT

LCIA arbitrations are administered and supervised by the LCIA Court and the LCIA Secretariat.

The LCIA Court is the part of the LCIA that officially carries out various functions under the LCIA Rules. The LCIA Court's principal function is to confirm the appointment of arbitrators nominated by the parties or by identifying suitable arbitrators itself. The arbitrator or arbitrators then acts as the Arbitral Tribunal to deal with the dispute.

The LCIA Secretariat is headed by the Registrar and is responsible for the day-to-day administration of the cases.

## THE ARBITRATION PROCESS

We set out below an overview of the basic procedural stages in an LCIA arbitration. It should be stressed that the following is a guide only to the typical process and that there is a considerable flexibility to the LCIA procedural rules. For example, once formed, the Arbitral Tribunal has the power to increase or reduce time limits contained in the LCIA Rules or even those agreed by the parties in their arbitration clause.

## INITIAL STAGES: STARTING THE ARBITRATION

The party bringing the arbitration ("the Claimant") starts the arbitration by sending a written request for arbitration (the "Request") to the Registrar of the LCIA Court (the "Registrar") and serving copies on the other party (the "Respondent").

The Request should contain a brief statement describing the nature of the dispute and the claims of the by the Claimant. Where the arbitrator(s) are to be nominated by the parties, the Request should also specify the Claimant's choice of arbitrator, although it is the LCIA Court that ultimately appoints the arbitrator(s). The Claimant should also enclose the contractual documentation relating to the arbitration and pay the non-refundable registration fee - currently £1,950.

The arbitration is 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"), if the LCIA has also received the registration fee.

### Within 28 Days of the Commencement Date

Within 28 days of the Commencement Date, the Respondent should send to the LCIA, and serve on the Claimant, a Response confirming or denying all or part of the claims made by the Claimant and, where appropriate, nominating an arbitrator. If the Respondent has any counterclaim to make it must give notice of the counterclaim in its response.

## APPOINTMENT OF ARBITRAL TRIBUNAL

The LCIA Court will appoint the Arbitral Tribunal as soon as practicable after service of the Response. Unless the parties have agreed otherwise or the LCIA Court decides that the circumstances mean that a three member Arbitral Tribunal is appropriate, then only arbitrator will be appointed as the Arbitral Tribunal.

In either event, the LCIA Court will ordinarily confirm the appointment of the arbitrator(s) within approximately 10 working days of the Response.

### Within 21 days of receipt of written notification from Registrar of formation of Arbitral Tribunal

As soon as practicable but no later than 21 days from receipt of the Registrar's written notification of the formation of the Arbitral Tribunal, the parties and the Arbitral Tribunal have to make contact (whether by a hearing in person or virtually by conference call, videoconference or using other communications technology or exchange of correspondence). The parties may agree on joint proposals for the conduct of their arbitration for consideration by the Arbitral Tribunal and, after giving the parties a reasonable opportunity to state their views, the Arbitral Tribunal may, in accordance with the LCIA Rules, make any procedural order it considers appropriate with regard to the fair, efficient and expeditious conduct of the arbitration.

The Arbitral Tribunal has the right to decide the stage at which any part of the dispute is decided, the order that questions in the dispute are dealt with and the arbitral procedure for each stage. The Arbitral Tribunal can make any procedural order required to expedite the arbitration procedure. However, in practice most LCIA arbitrations will involve the following steps:

1. Statements of case
2. Documentary evidence
3. Witness and expert evidence
4. Hearing

## (1) STATEMENTS OF CASE

### Within 28 days of receipt of written notification from Registrar of formation of Arbitral Tribunal

Within 28 days of receiving written notification from the Registrar of the formation of the Arbitral Tribunal the Claimant should send the Registrar its detailed Statement of Case, setting out the facts and any contentions of law it relies on, together with the orders sought unless they have been referred to in its Request. The Claimant has to provide with its Statement of Case copies of all essential [the main??] documents on which it relies.

### Within 28 days of receipt of the Statement of Case

The Respondent then has 28 further days to provide its Statement of Defence admitting or denying the Claimant's claim and setting out in sufficient detail the facts and contentions of law on which it relies. The Statement of Defence has to be accompanied by copies of the essential [main??] documents on which the Respondent relies unless they have already been provided in the arbitration. If the Respondent has a counterclaim, it will also at this stage prepare and file its detailed Statement of Case setting out the facts and any contentions of law relied on in support of the counterclaim.

### Within 28 days of receipt of the Statement of Defence

The Claimant will then submit a Reply setting out its response to the Statement of Defence and including a Defence to Counterclaim. If there is a counterclaim, the Respondent will then have a further 28 days in which to prepare and serve the final pleading, which is the response to the defence to the counterclaim (the "Reply to Defence to Counterclaim").

## (2) DOCUMENTARY EVIDENCE

All statements of case must be accompanied by documents on which the party relies but the Arbitral Tribunal may lay down a procedure for further documentary disclosure at the first procedural hearing. The Arbitral Tribunal has the power to order any party to provide any documents or copies of documents in their possession, custody, or power that the Arbitral Tribunal decides to be relevant.

If necessary, a party can make an application to the Arbitral Tribunal for an order requiring additional documents to be disclosed ("Requests for Documents"). The Arbitral Tribunal is most unlikely to require an English law style disclosure process where all relevant documents are disclosed. However, an international approach is often to instead follow or be guided by the IBA Rules on the Taking of Evidence in International Arbitration and to make and respond to any Requests for Documents in the form of a list setting out the reasons for requesting disclosure of documents and the reasons for refusing to do that so that the Arbitral Tribunal can make a decision about this.

### (3) WITNESS AND EXPERT EVIDENCE

If a party wishes to rely on witness evidence to support its case, then it should inform the Arbitral Tribunal. Unless the Arbitral Tribunal otherwise orders, the witness evidence will take the form of a signed statement or similar document. The parties are permitted to interview witnesses "...for the purpose of presenting his or her testimony in written form or producing such person as an oral witness at any hearing" (providing that is in compliance with any mandatory provision of any applicable law, rules of law and any order of the Arbitral Tribunal)

The Arbitral Tribunal retains broad discretion to decide the time, manner or form for exchange of the parties' witness evidence that it considers appropriate or, indeed, to refuse or limit witness evidence.

The Arbitral Tribunal and any party may request that a witness should attend a hearing for the purpose of cross-examination. If the Arbitral Tribunal orders a party that there should be the attendance of that witness and the witness refuses or fails to attend without good reason, then the Arbitral Tribunal may decide on the value of that witness' written testimony or exclude all or any part of it as it considers appropriate in the circumstances.

The question of the use of expert evidence will usually be discussed at the first procedural hearing and the Arbitral Tribunal may order that the parties identify the discipline of the expert evidence it intends to use and the areas of the dispute to which this evidence will relate.

### (4) THE HEARING

In person hearings can be held in any convenient location as determined by the Arbitral Tribunal in consultation with the parties or remotely, or by a mixture of in person and remote attendance. The Arbitral Tribunal may decide not to have an oral hearing in order to expedite the proceedings.

Any hearing will be in private unless the parties agree otherwise. The conduct and procedure at the hearing will be entirely within the Arbitral Tribunal's discretion. The parties are entitled to be represented by one or more authorised representatives.

## THE AWARD

The Arbitral Tribunal will ordinarily aim to issue its decision ("the Award") within three months after the final submission. Where the dispute is settled, and if the parties jointly so request, the Arbitral Tribunal may set out the settlement in an enforceable Award called a Consent Award. All Awards are final and binding on the parties with only very limited possibilities of appeal to the law courts.

## ENFORCEMENT

An Award will often require one party to pay money to the other party. If, the losing party does not pay, the winning party will need to enforce the Award in order to obtain payment. If a winning party needs to carry out enforcement action in another country to obtain assets that the losing party is keeping in that country, it is usually easier to do so with an Award than with a court judgment. Enforcing a court judgment in another country depends on the particular arrangements agreed between the countries involved, such as the comprehensive arrangements within the European Union. By contrast, almost every country is a signatory to an international agreement (the New York Convention) by which they have agreed to recognise awards made by arbitrators and help to enforce them. This is one of the reasons for the popularity of arbitration to deal with disputes.



## COSTS

The LCIA costs are not calculated according to the amount of money in dispute but are instead structured around hourly rates for the arbitrators and LCIA staff involved. LCIA arbitration costs include the following are current figures (as at October 2020):

- The initial non-refundable registration fee of £1,950 payable when filing the Request;
- Time spent by the Registrar and LCIA administration staff at £165 to £280 per hour;
- The Arbitral Tribunal's fees, ordinarily at between £350 to £450 per hour per arbitrator;
- The reasonable expenses of the Secretariat and the Tribunal; and
- The LCIA overheads fee for administering the arbitration being 5% of the Arbitral Tribunal's fees.

The LCIA Court may require the parties to make interim payments in advance on account of the above costs in order to proceed with the arbitration. Where the parties have paid these and the arbitration is withdrawn or settled before completion, any remaining credit will be refunded to the parties.

The Arbitral Tribunal has the power to apportion both the costs of the arbitration and the legal costs of the parties when making its Award. In many cases the unsuccessful party will be required to pay the LCIA's costs and a substantial proportion of the successful party's legal costs.

## DURATION

It is particularly difficult to provide general guidance about how long the arbitration will take to finish. Much will depend upon the nature of the individual dispute and factors such as the level of co-operation between the parties.

Nonetheless it can be seen from the above summary that the initial stages of appointing the Arbitral Tribunal and pleading the issues in dispute can be completed within a period of approximately 3 months from the filing of the Request. If this momentum is maintained it should prove possible in the majority of cases to complete the arbitration within a period of 12 to 18 months. If the matters in dispute are appropriate for an expedited procedure (in part or in full) the arbitration may be concluded within a period of 6 to 12 months.

## DISTINGUISHING FEATURES

London remains a popular seat for international arbitrations, which is attributable to its status as a major financial centre and world trade market, the popularity of English law as a governing law for commercial contracts and the non-interventionist approach of the English courts. Guiding principles about the English court's approach are contained in the Arbitration Act 1996 ("the 1996 Act"), including that an English court will not intervene in any arbitration except to the limited extent permitted by the 1996 Act, which is designed to support the arbitral process.

The LCIA Rules provide for a relatively low level of direct supervision by the LCIA Court compared to, for example, the ICC Court. This keeps down the cost of LCIA-administered arbitrations.

The most recent revisions to the LCIA Rules, effective 1 October 2020, make electronic transmission of documents the standard position (unless the use of paper had been approved or ordered) and include express provision for Arbitral Tribunals to order virtual hearings. The revised rules also clarify and expressly confirm the powers of the Arbitral Tribunal, including:

- Power to grant certain interim measures, including by way of a quick formation of the Arbitral Tribunal or appointment of an Emergency Arbitrator. In addition, the LCIA Rules permit a party to apply to the English Court for interim measures before the Arbitral Tribunal has been formed. A common interim measure prevents the disposal of assets that are involved in an arbitration until the arbitration has finished.
- Case management powers to reduce delay, including shortening timescales, limiting the written and oral testimony of any witness, restricting pleadings, determining a particular issue early in the arbitration and adopting technology. These wide powers will enable an expedited procedure to be designed for the particular arbitration if required.
- Dealing with multi-party arbitrations and giving the Arbitral Tribunal power to order consolidation or concurrent conduct of arbitrations.
- Allowing an Award at an early stage of the arbitration where the claims are clearly without merit, including claims brought in breach of an applicable limitation period (the legal end date for claims), thus helping to bring down the time and cost of arbitration in appropriate cases.

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