

Arbitration Update 2021

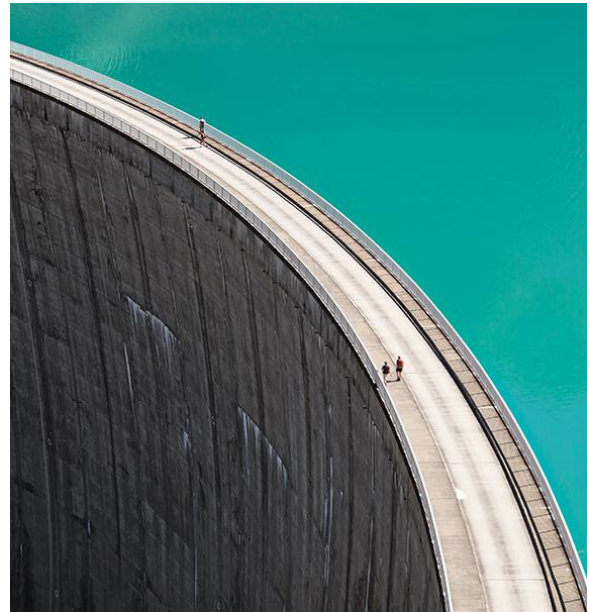
Written by International Construction Team

The last year or two has seen changes in arbitration rules and procedures, caused in no small part by the COVID-19 pandemic. There are new LCIA, DIFC-LCIA and ICC arbitration rules. The Seoul Protocol on Video Conferencing in International Arbitration is being regularly used and the Africa Arbitration Academy Protocol on Virtual Hearings has been issued. There have also been revisions to the IBA Rules on Taking Evidence in International Arbitration. This short update looks at the key take-aways from these changes.

LCIA Arbitration and Mediation Rules and the DIFC-LCIA Rules

The LCIA revised its Arbitration and Mediation Rules on 1 October 2020. This was a general updating of the Rules, which also addressed modern practices as a result of the COVID-19 pandemic. The LCIA explained the most notable changes to the Rules as follows:¹

- "Additional tools allowing arbitrators to expedite proceedings, including by introducing an explicit reference to the possibility of early dismissal determination;
- refinement and expansion of the provisions accommodating the use of virtual hearings, also supporting arbitrations taking place in the new normal;
- confirming the primacy of electronic communication with the LCIA and in the arbitration, as well as confirming the facilitation of electronically signed awards;
- inclusion of explicit provisions addressing the role of tribunal secretaries;
- broadening of LCIA Court and Tribunal power to order consolidation and concurrent conduct of arbitrations;
- explicit consideration of data protection and regulatory issues."



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The arbitral tribunal is given the power under Article 22.1 (viii) to summarily dispose of unfounded claims and defences that manifestly lack merit at a preliminary stage of an arbitration. Such powers are not new and can be found in other rules, including the ICC Expedited Procedure, the 2017 Arbitration Rules of the Stockholm Chamber of Commerce, and the 2016 Arbitration Rules of the Singapore International Arbitration Centre. The ICC 30 October 2017 Note to the Parties and Arbitral Tribunal on the Conduct of Arbitrations also stated that:

"applications for expeditious determination of manifestly unmeritorious claims or defences may be dealt with within the broad scope of Article 22 [of the ICC Arbitration Rules]".

Historically, in England, there was doubt whether an arbitral tribunal possessed the power to give summary judgment because of the requirement for due process. However, in the case of *Travis Coal Restructured Holdings LLC v Essar Global Fund Limited* (formerly known as *Essar Global Limited*),² the English High

¹ <https://www.lcia.org/lcia-rules-update-2020.aspx>

² [2014] EWHC 2510 (Comm)



Court expressly stated that summary judgment does not "necessarily amount to a denial of due process".³ Blair J found that the arbitration procedure was conducted "in an expeditious and cost-effective manner," that the tribunal "gave each party a fair opportunity to present its case" and that "the procedure fell within [the arbitration clause]". Blair J therefore concluded there was not a "realistic prospect of showing that the Tribunal exceeded its powers in the procedure."⁴

In the wake of the changes made to the LCIA Rules, the DIFC-LCIA Arbitration Centre in Dubai updated their Arbitration Rules on 1 January 2021 to mirror the changes made to the LCIA's Arbitration Rules.

ICC Arbitration Rules

The new ICC Arbitration Rules came into force on 1 January 2021. The changes are relatively minor and intended to reflect current practice and add clarification.

Like the LCIA Rules, the new ICC Arbitration Rules promote virtual hearings. A hearing must be held if requested by any of the parties, but the arbitral tribunal may decide whether that hearing should be conducted with physical attendance or remotely by videoconference, telephone or other appropriate means of communication (Article 26(1)).

The ICC Arbitration Rules also allow for the giving of an additional award. This now permits the arbitrator to issue a further award where the arbitral tribunal has omitted to decide something which has been referred to it (Article 36(3)). This brings the ICC Arbitration Rules in line with normal international practice.

One significant deletion made to the 2017 ICC Arbitration Rules relates to the Emergency Arbitrator Provisions. Under the 2017 ICC Rules the Emergency Arbitrator Provisions did not apply when the parties had agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures. It was therefore thought that the Emergency Arbitrator Provisions would not apply to a FIDIC Contract which included a DAB, as the procedural rules for the DAB gave it the power to order provisional relief such as interim or conservatory measures. The new ICC Arbitration Rules

now permit a reference to the Emergency Arbitrator even if the contract contains a DAB provision that allows the DAB to order interim remedies.

Other changes include:

- a new option for a party to request joinder of an additional party after the confirmation or appointment of any arbitrator. The additional party must accept the constitution of the arbitral tribunal and agree the Terms of Reference where applicable. In deciding whether to permit the joinder, the arbitral tribunal must take account of all relevant circumstances, including the timing of the request, the jurisdiction of the arbitral tribunal and any conflicts of interest (Article 7(5));
- a broader power to consolidate of arbitrations (Article 10);
- requirement that parties disclose any third-party funding (Article 11.7);
- a power allowing the ICC Court to appoint each member of the arbitral tribunal in "exceptional circumstances" (Article 12(9)); and
- an increase to \$3 million in the amount covered by the Expedited Procedure Rules (Appendix VI Article 1(2) and Article 30(2)).

IBA Rules on the Taking of Evidence in International Arbitration

The IBA adopted a revised set of Rules on the Taking of Evidence in International Arbitration on 17 December 2020. The purpose of these Rules is to fill gaps within the institutional rules regarding the conduct of the proceedings.

The new IBA Rules include a definition of 'Remote Hearing' which is described as a hearing in whole or in part conducted using teleconference, videoconference or similar technology. Article 8 deals with evidentiary hearings, including remote hearings. Where a Remote Hearing is ordered then the arbitral tribunal and the parties are required to establish a protocol for that hearing which should deal with:

- (a) the technology to be used;

³ Ibid at [44]

⁴ Ibid at [50]



- (b) advance testing of the technology or training in use of the technology;
- (c) the starting and ending times considering, in particular, the time zones in which participants will be located;
- (d) how Documents may be placed before a witness or the Arbitral Tribunal; and
- (e) measures to ensure that witnesses giving oral testimony are not improperly influenced or distracted.

The other amendments are relatively minor but include issues of cybersecurity (Article 2(2)(e)), responding to objections to produce documents (Article 3 (5)), rules on translating documents disclosed and submitted to the arbitral tribunal (Article 3(12)), and dealing with new factual matters or developments in witness statements and expert report (Article 4(6) and Article 5(3)).

The Seoul Protocol on Video Conferencing in International Arbitration

The Seoul Protocol on Video Conferencing was not a result of the COVID-19 pandemic but as a result of developments in technology. In 2018 a survey conducted by White and Case showed that 43 % of people answering used videoconferencing in arbitrations frequently and 89 % said that it should be used more often. The Seoul Protocol was introduced in November 2018. The key features of the Seoul Protocol are:

(a) A requirement for due process:

The videoconference will be terminated if the arbitral tribunal deems the videoconference so unsatisfactory that it is unfair to either party (Article 1.7).

There are provisions relating to the prevention of coaching of witnesses offscreen (Article 3.1). However, a witness may have with them interpreters, paralegals to assist with the documents and representatives from each party's legal team on a watching brief.

there is a requirement for transparency by requiring that all documents that will be referred to by a witness be clearly identified and made available to the witness (Article 4.1).

(b) A requirement for confidentiality and security.

- There are provisions relating to possible security breaches and a requirement for the parties to use their best efforts to ensure security (Article 2.1 and 2.2).
- There are provisions relating to the identification of witnesses and participants (Article 3.1)
- There are prohibitions on recording the arbitration without the leave of the arbitral tribunal (Article 8)

(c) Back-up plans and testing

- There are provisions for testing the video-conference equipment at least twice (Article 6.1)
- There is a requirement for the parties to advise of any backup plans in case of communication or technological breakdowns (Article 9.4)

Africa Arbitration Academy Protocol on Virtual Hearings

The Africa Arbitration Academy Protocol on Virtual Hearings covers the same matters as the Seoul Protocol but is more comprehensive. For example, the Africa Protocol includes specific requirements for participants to mute when not speaking (Article 5.3) and for allocating time to housekeeping matters and unexpected events (Article 3.2.6).

