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DIAC Arbitration Rule Revamp Will Help Venue Compete

By **Ben Williams and Kateryna Frolova** (April 5, 2022, 4:57 PM EDT)

London. Paris. Singapore. Dubai?

Ben Williams

The Middle East emirate may not have traditionally enjoyed the same reputation as a hub for international arbitration as other established tribunals, but the Dubai International Arbitration Centre, or DIAC, recently unveiled sweeping new reforms to try to change that perception.

The DIAC arbitration rules, which were published March 2 and went into effect March 21, attempt to align the center with more established international arbitration seats.

Kateryna Frolova

Dubai signaled its ambitions last year when, on Sept. 20, 2021, it issued Decree No. 34, which abolished two of its arbitral institutions, including the Dubai International Financial Centre-London Court of International Arbitration. Building from this, the 2022 rules supplant the previous procedures, published in 2007, and govern all requests for arbitration submitted after March 21, 2022, irrespective of the date of the underlying agreement to arbitrate, unless the parties agree otherwise.

Keeping the Pace

The new rules are designed to streamline existing DIAC arbitration procedures and to position the DIAC as a competitive alternative to other arbitral institutions. For instance, in keeping with the experience of many courts and tribunals during the COVID-19 pandemic, the new regime embraces the options for technology, including remote hearings.

The 2022 rules, in Article 26.1, enable tribunals to choose whether to conduct proceedings in person or virtually.

The parties are also no longer required to submit pleadings and notifications in hard copy: Article 3.1 provides that all notifications and communications "shall be made in writing by email or in accordance with the terms of use of any electronic case management system implemented by [DIAC]." The DIAC may request a party to provide documents in hard copy format, but only if it deems necessary.

The reference to the electronic case management system suggests that the DIAC is in the process of implementing the system; it is, however, not currently live.

In addition to virtual hearings, another important development in the last five years has been the increasing role of third-party funding in disputes.

The 2007 rules did not contain any provision pertaining to third-party funding so the updated rules, for the first time, expressly recognize the use of third-party funding in DIAC arbitrations; Article 22 requires a party that has entered into a third-party funding arrangement to promptly disclose the fact to the other parties and to the DIAC.

That party must identify the third-party funder and disclose whether or not the funder has committed to an adverse costs liability; the existence of any third-party adverse costs liability may be taken into account by the tribunal when apportioning costs.

Arbitration Court

Decree No. 34 established the Arbitration Court — similar to the LCIA Court — which is the DIAC's administrative body that performs various functions under, and oversees the implementation of, the new rules. The Arbitration Court replaced the executive committee, which had an analogous function under the 2007 DIAC rules.

The Arbitration Court is empowered to determine certain applications that the parties make before an arbitral tribunal is formed. This includes applications for preliminary objections concerning the agreement to arbitrate — its existence, validity, consolidation and joinder — that are discussed below.

The establishment of the Arbitration Court serves to enhance the DIAC's governance. However, the court is comprised of just nine members, making it five times smaller than its LCIA counterpart. The LCIA Court consists of up to 35 members — although its current membership stands at 43 members.

It is worth noting that the Arbitration Court, as part of its role in applying the core objective of the new rules, is empowered by the rules to report misconduct of party representatives to relevant supervising authorities, professional bodies, or the party who appointed the party representative in question.

The mechanism for reporting misconduct is set out in Article 17.5 of the new rules. In this respect, the new rules have gone beyond the LCIA or International Chamber of Commerce rules, which have no equivalent reporting mechanism.

It remains to be seen how the Arbitration Court will: (1) handle its workload and whether it will increase its member count in due course, and (2) exercise its misconduct reporting powers in practice.

Good Housekeeping

The 2022 rules also bring in a selection of changes intended to provide further confidence in the DIAC as well as practical tweaks to help cases progress more smoothly.

For example, parties can still agree in writing on the seat of arbitration under the 2022 rules. However, the 2007 rules only specified Dubai as the default seat of arbitration. Now, in the absence of such an agreement, the default seat of the arbitration shall be the DIFC.[1]

The change was likely intended to provide greater comfort to potential parties to international

arbitration because the DIFC is a common law jurisdiction based in large part on the laws of England and Wales, which will be more familiar to contracting parties than the laws of the United Arab Emirates.

The 2022 rules expressly provide that DIAC tribunals will have the power to rule on their own jurisdiction, including on any objections made with respect to the validity the agreement to arbitrate.[2]

Article 7.5 of the 2022 rules provides that a party's right to change its legal representatives is subject to the tribunal's approval of the proposed replacement. The purpose of Article 7.5 is purportedly to discourage parties from tactically replacing its representatives to try and delay proceedings.

The tribunal must have regard to the potential for conflicts of interest resulting from the proposed change, when determining whether to approve the change or not. This is a relatively controversial addition to the 2022 rules, in part because Article 7.5 is at odds with the parties' right to choose its legal representative, which is expressed in Article 7.1 of the new rules.

There is no equivalent provision in the arbitration rules of other institutions, except perhaps Article 17(2) of the ICC arbitration rules. The ICC rules empower tribunals to "take any measure necessary to avoid a conflict of interest of an arbitrator" arising from a change of legal representative, including the exclusion of legal representatives from participating in the proceedings — in whole or in part.

But there is one key distinction between the DIAC and ICC provisions: The ICC rules do not enable the tribunal to intervene before the legal representatives are changed over. The tribunal constituted under ICC rules cannot prevent a party from changing its representative; it can only take action afterward.

By contrast, a DIAC tribunal technically can withhold approval of the party representative replacement and prevent the change of legal counsel altogether, meaning that the DIAC provision is unique in this regard.

In any event, it remains to be seen how Article 7.5 will work in practice and whether any tribunals will exercise their powers and reject proposed party representative replacements and in what circumstances.

Case Management

Consolidation is also now a factor. A claimant can now submit a single request for arbitration regarding multiple claims arising out of more than one agreement to arbitrate.

The Arbitration Court may also consolidate two or more arbitrations into a single proceeding if the parties agree to consolidate, or if one of the following conditions is satisfied: (1) the claims are made under the same agreement to arbitrate; or (2) the arbitrations involve the same parties and the agreements to arbitrate are compatible.[3] Tribunals are also empowered to consolidate proceedings once they have been appointed.[4]

The 2007 rules contained no consolidation provisions.

Likewise, Article 9 of the 2022 rules permits joinder of new parties — claimants or respondents — to proceedings, if all parties have consented to the joinder, or if the Arbitration Court or the tribunal are satisfied that the party to be joined is a party to the arbitration agreement.

The Arbitration Court is empowered to determine joinder applications prior to the appointment of the tribunal; once constituted, the tribunal determines the joinder applications. The 2007 rules contained no joinder provisions.

Expedited Proceedings

Unlike the 2007 rules, the 2022 rules contain provisions on expedited proceedings. Expedited proceedings provisions will apply to agreements to arbitrate entered into after March 21[5] where: (1) the sum of the claims and counterclaims does not exceed 1 million dirhams — approximately $272,257 — unless otherwise agreed; (2) the parties agree to expedite the proceedings; or (3) the DIAC determines the case to be "of exceptional urgency."[6]

The DIAC threshold of $272,000 is significantly lower than the threshold prescribed by Appendix VI to the 2021 ICC rules of $3 million.

The 2022 rules do not prescribe the expedited procedure, opting instead to empower the tribunal to determine the appropriate procedure to be adopted for each individual case after consulting with the parties. The provisions however do impose a time limit of three months in which the tribunal must issue the final award.

Getting to the Appoint

The 2022 rules have introduced an alternative process for appointing a sole arbitrator.[7] The process applies if the parties: (1) failed to nominate a sole arbitrator; (2) have not stipulated any mechanism of appointment; and (3) notified the DIAC of their agreement to the alternative appointment process.

Under the alternative process, the DIAC will communicate a list of three candidates for the sole arbitrator position. The parties may each add three additional candidates to the list. Within seven days of receiving the list from the DIAC, each party must rank the candidates in order of preference. The candidates will be invited to serve as arbitrator in the order that reflects the parties' mutual preference.

The same process applies to the appointment of a chairperson, where the co-arbitrators fail to nominate a chairperson within the specified time limit.

The 2007 rules did not provide an alternative appointment process.

Appendix II of the 2022 rules contains provisions on interim measures and the appointment of the emergency arbitrator.

Article 1 of Appendix II provides that the tribunal may "upon an application by a party, order interim measures on terms that it considers appropriate in the circumstances," including, but not limited to measures that (1) maintain or restore the status quo; (2) take action that would prevent current/imminent harm or prejudice the arbitral process itself; or (3) provide a means of preventing the dissipation of assets out of which a subsequent award may be satisfied.

This list of interim measures largely reflects Article 21 of the UAE Federal Arbitration Law. Article 1 of Appendix II is a departure from Article 31 of the 2007 rules, which empowered a tribunal to issue any provisional orders or take interim measures that it deemed necessary.

Article 2 of Appendix II sets out the procedure for appointing emergency arbitrators. The 2007 rules contained no such provisions.

Article 3 of Appendix II contains provisions that enable a party to commence a conciliation by submitting an application to the DIAC.

The conciliation provision gives the conciliator absolute discretion to determine the procedure of the conciliation process; however, Article 3.11 requires the conciliator to conclude the conciliation proceedings within two months from the date of the transmission of the case file by the DIAC to the conciliator.

The 2022 rules expressly require the conciliator to facilitate the preparation of a formal settlement agreement in the event that the parties agree to settle the dispute. If the conciliation fails, the conciliation proceeds will terminate without prejudice to the merits of the case.

Finally, the 2022 rules expressly provide that the costs of the arbitration include "the fees of the legal representatives and any expenses incurred by those representatives," as well as registration fees, DIAC administrative fees and the fees of the tribunal.[8]

The 2022 rules also contain an appendix, Appendix I, that expands on the DIAC's powers to fix: (1) advances on the costs of the arbitration; and (2) the tribunal fees. The 2022 rules empower the tribunal to make decisions on the costs of the arbitration, including issuing an award solely on costs.[9]

The new rules are a significant step taken in the direction of aligning the DIAC with other arbitral institutions, making the DIAC a competitive alternative hub for arbitration in the region. The 2022 rules also lessen the uncertainty caused by the sudden abolition of the DIFC-LCIA in September 2021.

DIFC-LCIA

On March 28, the DIAC and LCIA announced that they reached an agreement on the terms of the LCIA's administration of existing DIFC-LCIA cases — i.e., cases which were commenced on or before 20 March 2022.

All arbitrations and dispute resolution proceedings, whose arbitration agreements refer to the DIFC-LCIA, which were commenced on or after March 21 will be registered by the DIAC and administered by its administrative body, unless otherwise agreed by the parties.

This agreement between the DIAC and LCIA brings much-needed certainty to parties, whose DIFC-LCIA arbitration proceedings were in stuck in limbo between institutions following Decree No. 34.

Ben Williams is a partner and Kateryna Frolova is an associate at King & Spalding LLP.

[1] Article 20.

[2] Article 6.1.

[3] Article 8.2.

[4] Article 8.5.

[5] Article 2.4

[6] Article 32.

[7] Article 13.

[8] Article 36.1.

[9] Article 36.2.