

# A Happy New Year with the 2021 DIFC-LCIA Rules

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At the dawn of the New Year, following their adoption in November 2020, the revised DIFC-LCIA Rules of Arbitration (the **"2021 DIFC-LCIA Rules"**) have now entered into force with effect from 1<sup>st</sup> January 2021. Readers of this blog will recognise the DIFC-LCIA as the free zone sister organization of the London Court of Arbitration (LCIA) which is headquartered in the offshore Dubai International Financial Centre (DIFC) in the Emirate of Dubai, United Arab Emirates. Closely related to and taking guidance from the London-based LCIA, the DIFC-LCIA tends to follow any revisions to the LCIA Rules of Arbitration (the **"LCIA Rules"**): The 2021 DIFC-LCIA Rules are no exception and take after the recent revisions introduced to the recently adopted 2020 LCIA Rules (previously discussed on the blog here).

The 2021 DIFC-LCIA Rules introduce a number of important changes, which – in their majority – are intended to assist the effective and efficient conduct of an arbitration process within a DIFC-LCIA forum. Such changes include the introduction of a so-called "early determination" procedure, improvements to the existing consolidation mechanism, and the digitalisation of the arbitration process coupled with the adoption of enhanced confidentiality measures and the establishment of a new data protection regime. Other changes include the formalisation of the role played by administrative secretaries in DIFC-LCIA arbitration, the expedition of tribunal appointments, the clarification of the emergency arbitrator's powers, and enhanced transparency around the nationality

requirement and *ex parte* communications with the Registrar. In the following, we briefly discuss these and other changes for some initial guidance.

## **Early determination**

The 2021 DIFC-LCIA Rules allow summary treatment of claims, counterclaims, and defences by introducing a regime of early determination. More specifically, according to Article 22.1(viii) of the 2021 DIFC-LCIA Rules, a DIFC-LCIA tribunal has the power to *“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; and where appropriate to issue an order or award to that effect.”* This will facilitate an early disposal of vexatious cases that do not stand a reasonable chance of success, whether by reason of a tribunal’s manifest lack of jurisdiction or a manifest lack of merit.

## **Consolidation**

The 2021 DIFC-LCIA Rules allow for the submission of so-called composite Requests and Responses: These allow parties to file a single request for arbitration for a multi-party or multi-contract arbitration (involving more than one arbitration agreement), inviting, in turn, a composite Response (Articles 1.2 and 2.2, 2021 DIFC-LCIA Rules) albeit that it does not facilitate automatic consolidation (a subject that might benefit from closer scrutiny in a future revision of the existing rules).

In a related context, a new Article 22A introduces an enhanced consolidation regime which allows the consolidation of arbitrations that deal with related transactional disputes, there being no strict requirement for the identity of the parties and/or the underlying arbitration agreements. Consolidation is also facilitated upon express party agreement.

## **Digitalisation**

The 2021 DIFC-LCIA Rules introduce the use of technology across the arbitration

process, thus accommodating in particular requirements that have arisen from the currently pending pandemic. By way of example, the Request for Arbitration and the Response are now required to be submitted electronically, rather than in hard copy, (Articles 1.3 and 2.3) *“either by email or other electronic means including via any electronic filing system operated by the DIFC-LCIA Arbitration Centre”* (Article 4.1, 2021 DIFC-LCIA Rules). Further, written communications with respect to the arbitration must be delivered *“by email or any other electronic means of communication that provides a record of [...] transmission”* unless otherwise advised by the Registrar or the tribunal as the case may be (Article 4.2, 2021 DIFC-LCIA Rules).

Article 19.2 of the 2021 DIFC-LCIA Rules expressly authorises the remote conduct of hearings, stating that *“a hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form).”*

Finally, Article 26.2 of the 2021 DIFC-LCIA Rules allows an award to be signed electronically, with the electronic copy of the award prevailing over any inconsistent paper copy (Article 26.7, 2021 DIFC-LCIA Rules).

Taking account of the heightened use of digital communication under the 2021 DIFC-LCIA Rules, a new Article 30A introduces a set of powers and duties that require a DIFC-LCIA tribunal and the DIFC-LCIA to protect personal data by adopting information security measures as appropriate with respect to references pending before them.

## **Administrative secretaries**

The 2021 DIFC-LCIA Rules introduce a new Article 14A, which transposes in relevant part the provisions on tribunal secretaries contained in the LCIA Notes for Arbitrators into the Rules. Article 14A strictly prohibits delegation of the tribunal’s decision-making function to tribunal secretaries, the tribunal remaining responsible for any tasks performed by them (Article 14.8, 2021 DIFC-LCIA Rules), and makes the appointment of a tribunal secretary subject to party approval (Article 14.10, 2021 DIFC-LCIA Rules). Like arbitrators, administrative secretaries are under a standing disclosure obligation with respect to any conflicts of interest and must declare their availability to devote sufficient time to the reference (Articles 14.9

and 14.14, 2021 DIFC-LCIA Rules). Any change in the scope of the tribunal secretary's works or increase in his or her fees (ranging hourly between AED 370 and AED 860) must be approved by the parties (Article 14.11, 2021 DIFC-LCIA Rules). Importantly, the costs of the administrative secretary qualify as Arbitration Costs within the meaning of Article 28.1 of the 2021 DIFC-LCIA Rules (Article 14.13, 2021 DIFC-LCIA Rules) and are as such readily awardable to a winning party in the arbitration.

### **Expedited tribunal appointments**

The 2021 DIFC-LCIA Rules reduce the time within which the LCIA Court is to appoint a tribunal in the event of a respondent's failure to submit a Response: As a result, the LCIA Court must now appoint the tribunal promptly after 28 days – as opposed to 35 days under the old Rules – from the date of official registration of the reference (i.e., from receipt of the Request and the registration fee).

### **Nationality requirement**

Nationality has now been further defined to allow a more precise assessment of the nationality requirement in the appointment of arbitrators. By way of reminder, a sole arbitrator or a chair must not share the nationality of either of the parties where these are of different nationalities unless agreed otherwise by the parties in writing (Article 6.1, 2021 DIFC-LCIA Rules). Pursuant to Article 6.2 of the 2021 DIFC-LCIA Rules, nationality means a natural person's citizenship and a legal person's seat of incorporation or effective management; where these differ, the legal person is treated as a national of both.

### **Communication with the Registrar**

The strict prohibition to engage in unilateral communications with other stakeholders, in particular the tribunal members, the administrative secretary, and the administrative staff of the DIFC-LCIA, in the arbitration in the terms of Article 3.3 read together with Article 13.4 of the 2021 DIFC-LCIA Rules is relaxed in favour of *ex parte* communication with the DIFC-LCIA Registrar with respect to

*“administrative matters”* (Article 13.4, 2021 DIFC-LCIA Rules). This will allow less experienced parties to engage in unilateral conduct with the Registrar for, e.g., a better understanding of the operation of the 2021 DIFC-LCIA Rules.

## **Amendments to Request/ Response**

Under the 2021 DIFC-LCIA Rules, parties may now make amendments to the Request or the Response, as the case may be, with the permission of the LCIA Court prior to the constitution of the arbitral tribunal. Such amendments are expressly stated to be limited to the correction of *“any error in computation, any clerical or typographical error, any ambiguity or any mistake of a similar nature”* and are subject to the parties having been afforded *“a reasonable opportunity to state their views”* and to *“such terms as the LCIA Court may decide.”* (Articles 1.5 and 2.5, 2021 DIFC-LCIA Rules) Provided this provision is exercised to the letter, it is to be welcomed as no more than procedural commonsense, there being no benefit to wait until later in the arbitration process for any correction of clerical mistakes (especially such that could materially affect the nature or value of the arbitration and thus the choice of arbitrators).

## **Confidentiality**

In the interest of safeguarding the continued confidentiality of the arbitration process (and more specifically the deliberations of the tribunal, the arbitral award, and any material divulged in the arbitration), confidentiality undertakings are now imposed on all participants in the arbitration: arbitrators, administrative secretaries, party representatives, both fact and expert witnesses, and third-party service providers (Article 30, 2021 DIFC-LCIA Rules).

## **New time-limit for awards**

Article 15.10 of the 2021 DIFC-LCIA Rules seeks to expedite the issuance of awards, requiring a DIFC-LCIA tribunal to render an award *“as soon as reasonably possibly”* (replicating the old wording of Article 15.10), with an endeavour to do so *“no later than three months following the last submission from the parties”*

(additional new wording).

### **Tribunal's powers to expedite**

The 2021 DIFC-LCIA Rules confer a number of powers on a DIFC-LCIA tribunal to expedite the proceedings. This includes a power to limit or dispense with a party's written submissions, oral testimony or a hearing and to employ technology to promote the expeditious conduct of the proceedings, including the hearing (Article 14, 2021 DIFC-LCIA Rules). The tribunal is more generally empowered to "*make any procedural order it considers appropriate with regard to the fair, efficient and expeditious conduct of the arbitration.*" (Article 14.5, 2021 DIFC-LCIA Rules) Evidently, to the extent that any of these powers limit a party's right to be heard, they must be exercised with caution.

### **Emergency arbitrator's powers**

Under the 2021 DIFC-LCIA Rules, emergency arbitrators have been empowered to award costs, including legal costs, in the emergency arbitration proceedings, to revoke/vary/discharge any order they make, to issue additional orders, correct any clerical mistakes in any award rendered by the emergency arbitrator, and to render additional awards with respect to emergency relief previously overlooked (Article 9, 2021 DIFC-LCIA Rules).

### **Conclusion**

The 2021 DIFC-LCIA Rules further enhance the free zone arbitration regime on offer in the offshore DIFC. It is encouraging to see that the DIFC-LCIA continues to promote increased efficiency and flexibility in order to meet requirements for more effective dispute resolution. How the new Rules will fare over time remains to be seen. That said, with the advent of the new Rules at the very beginning of 2021, arbitration users in the UAE and in the Middle East more generally will, more likely than not, have a Happy New Year ahead!