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The New ADCCAC Arbitration Rules: Evolution or Revolution?

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A lot of positive commentary has been lavished out on the new Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC) Arbitration Rules, which entered into force with effect from 1st September 2013. It is, of course, difficult to deny that the new Rules are a huge improvement on the old ADCCAC Regulations, as they were called in their now outdated form. The new Rules read more like a modern set of international arbitration rules, giving proper consideration to now widely-adopted modern thinking on party representation, the sequence of procedural milestones in an arbitration, the notion of the severability of the arbitration agreement, the constitution of the tribunal and the independence and impartiality of its members, the tribunal's *kompetenz-kompetenz* and the tribunal's powers more generally, the modalities for the issuance and rectification of awards and the costs of the arbitration. No doubt, taking these improvements together, they amount to more than a mere evolution of the former ADCCAC Regulations and may arguably have revolutionary potential: Essentially, the old Regulations have been entirely re-written, the title of the new Regulations being the only reminiscence of their outdated predecessor.

This being said, there are some disappointing semantic inconsistencies and procedural shortcomings in the new set of Rules, which – given the time the new Rules have taken to gestate and the expertise that should have and no doubt will have been invested into their re-drafting – are almost unforgivable.

As regards semantics, any modern user of arbitration will inevitably ask the question why on earth the new ADCCAC Rules have preserved a title that contains an antiquated reference to "procedural regulations" rather than being referenced under the more common and modern term "arbitration rules". This discovery is so much the more surprising given that the Model Arbitration Clause set out at page 6 of the new Rules refers disputes to arbitration *"in accordance with the Rules of Arbitration of Abu Dhabi Commercial Conciliation & Arbitration Centre (ADCCAC)"*. Given that no such thing as the "Rules of Arbitration of Abu Dhabi Conciliation & Arbitration Centre" exist in practice (the new ADCCAC Rules officially being called the "ADCCAC Procedural Regulations of Arbitration" or the "Procedural Regulations of Arbitration of the Abu Dhabi Commercial Conciliation & Arbitration Centre"), the Model Arbitration Clause is, technically speaking, pathological. For the avoidance of doubt, the new Rules confusingly use "the Centre Rules" as a short form for the "ADCCAC Procedural Regulations of Arbitration" throughout, no reference to "Rules of Arbitration" being made anywhere in the new text. The use of the term "arbitration compromise" (possibly derived from the French "*compromis*") instead of "submission agreement" in the definitions section of the new Rules in order to refer to a submission to arbitration *ex post facto*, i.e. after a dispute has arisen, is equally little supportive of the promotion of plain English in

the practice of arbitration under the new Rules (*vide* Article 1 of the new Rules).

There is also no consistent use of the terms "Arbitration Tribunal" and "Arbitration Panel". Whereas in accordance with the definitions section (*vide* Article 1 of the new Rules) "Arbitration Panel" is the chosen term for reference to an arbitral tribunal, the new Rules occasionally refer to "Arbitration Tribunal" instead, there being no definition in the Rules of the term "Arbitration Tribunal" (even though capitalised). A good example of this semantic inconsistency is Article 28 on issuing Arbitration Awards, which indiscriminately refers to both "Arbitration Panel" (*vide* Article 28.3) and "Arbitration Tribunal" (*vide* Article 28.5). This Article also appears to use the terms *"president of the Arbitration Panel"* and *"Presiding Chairman of the Arbitration Tribunal"* interchangeably, no definition being provided of either.

As regards procedural substance, one has to welcome – despite its obvious semantic pathologies – the introduction of an ADCCAC Model Arbitration Clause. This being said, a modern user of arbitration will find it difficult to hide his/her disappointment at the limited scope of the Model Arbitration Clause, which rather than referring "any dispute arising from or in relation to this contract" to arbitration confines any such reference to the disputes in relation to the *"execution, interpretation or termination of this contract"*. This wording places an unwarranted restriction on the scope *ratione materiae* of the Model Arbitration Clause and hence of arbitrations under that Model Arbitration Clause more specifically.

Despite the generally modern thrust of the new ADCCAC Regulations, it is a source of great disappointment that they seek to preserve the very impractical concept of "pleading sessions" (*vide* Article 24 of the new Rules). The concept of pleading sessions is understood to continue the practice of "open sessions", which are the main mode of conducting proceedings before the UAE courts. It is to be hoped that modern practitioners under the Rules will interpret this Article to mean ordinary hearings within the meaning given to them in international arbitration practice.

A further source of confusion is the scope of application of the new Rules, which provides that *"[t]he parties may agree upon arbitration at the Centre [i.e. the ADCCAC] in accordance with any other procedural rules, and in this case, the Centre Rules [i.e. the ADCCAC Regulations of Arbitration] shall be complementary to those agreed between the Parties."* (*vide* Article 2.2 of the new Rules) Essentially, this Article appears to empower the ADCCAC to administer arbitral proceedings under any other set of arbitration rules chosen by the parties in an individual reference, which – in and of itself – is not uncommon in the wider world of institutional arbitration. This being said, it also appears to impose the concurrent application of the new ADCCAC Regulation, i.e. in parallel with the set of arbitration rules chosen by the parties. This causes unpredictable difficulties in the event that the Parties' chosen rules conflict with the provisions of the ADCCAC Regulations, raising the obvious question as to which set of rules is to prevail in the event of conflict. This being said, given their procedural detail, there would in any event seem to be little sense in the parallel application of the new ADCCAC Regulations and another set of institutional (or other) rules in one and the same arbitration proceeding.

As regards the language of the arbitration, in the event that there is disagreement between the tribunal members on the choice of language, the new Rules cryptically provide for the arbitration to be conducted in the Arabic language even if none of the members speaks Arabic. This may cause some unforeseen procedural difficulties and possibly discriminate against non-Arabic speakers in the future appointment as arbitrators in ADCCAC arbitrations.

Further, it is unfortunate that in particular in light of the recent Dubai Court of Cassation ruling on the limitations of reimbursable "costs of arbitration" within the meaning of the DIAC Arbitration Rules (*vide* my previous commentary of 23rd June 2013), the new Rules use the terms "arbitration costs" and "arbitration expenses" haphazardly and do not provide a definition of what type of costs it is that the Tribunal is ultimately empowered to award to a prevailing party (*vide* Articles 28(7) and 28(9) of the new Rules). This being said, the introduction of costs tables on arbitrator fees (*vide* Article 43 of the new Rules) is to be welcomed even though it remains uncertain from the wording of the Rules whether the administrative fees of the ADCCAC itself at the rate of 15% of the arbitrator fees are deductible from those fees or payable in addition (*vide* Article 38 of the new Rules).

To conclude on a more positive note, the Committee, which is defined as the *"body in the [ADCCAC] which is in charge of administering commercial arbitration cases"* (*vide* Article 1 of the new Rules), is empowered to rule on any procedural disputes prior to the constitution of the arbitration tribunal and subject to the tribunal's review once constituted (*vide* Article 34 of the new Rules). This will most probably ensure that a party's procedural manoeuvres to create delay prior to the constitution of the tribunal will remain of little avail. Further, the moderate registration fee of AED 1,000 for filing a claim (*vide* Article 36 of the new Rules) and the consideration as a *"loan"* of any substitute payment by a claiming party of the share of the advance on costs of a defaulting respondent (*vide* Article 39 of the new Rules) – thus giving credence to the respondent's contractual obligation to pay – will no doubt provide an incentive to make reference to arbitration under the new ADCCAC Rules.

By way of conclusion, whether revolution or evolution, the new ADCCAC Procedural Regulations of Arbitration mark a sea change on the arbitration landscape of the Emirate of Abu Dhabi and the UAE more generally. It is to be hoped that the semantic and procedural shortcomings discussed above will not affect the practice of arbitration under the new Rules.

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