Kluwer Arbitration Blog

Why arbitrate at the Astana International Financial Centre?

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A focus on the AIFC Arbitration and Mediation Rules 2018 and improvement to enforcement of arbitral awards in Kazakhstan

Introduction to the AIFC

The Astana International Financial Centre (**AIFC**) is a financial hub in Kazakhstan that came into operation this year. The purpose of the AIFC is to establish itself as a key centre for financial services in Central Asia, with a view to diversifying the Kazakh economy and provide a platform to achieve Kazakhstan's aim of becoming one of the top 30 developed countries by 2050.[1)] The AIFC also seeks to capitalise on the Belt and Road initiative and support the finance needs of the Kazakh economy, which is undergoing significant change, as a result of the continued privatisation of State assets in Kazakhstan.

In a previous blog post, I reported on the establishment of the AIFC, its legal framework and its dispute resolution bodies. In short, the AIFC is like a "country within a country", which has an independent judiciary separate from the Kazakh courts, the AIFC Court, which consists of distinguished common law judges and applies English law to disputes that come before it. In addition to the AIFC Court, the AIFC has an international arbitration centre, the procedural rules of which will be considered in this blog post.

AIFC Rules

Leading arbitral institutions, particularly in recent years, have strived to enhance the user experience, by making real efforts to distinguish themselves from each other, through constant innovations in their procedural rules, which have resulted in tangible improvements, such as the strengthening of ethics in the practice of international arbitration, increased awareness of the need for and encouragement of better cost and time efficiency,[2)] and the establishment of emergency arbitrator procedures.

The International Arbitration Centre of the AIFC is no exception to this trend. Despite being a young arbitral institution, which began operations this year, it has announced state-of-the-art rules for its administered arbitrations (**Rules**), which came into force on 1 January 2018.

Key features of the Rules

The Rules are broadly similar in content and structure to those of the leading arbitral institutions such as the rules of the LCIA and the HKIAC, in that they contain the standard elements that would be expected in procedural rules, such as procedures to be followed for the commencement of arbitration and the appointment of arbitrators, as well as procedures for seeking interim or emergency relief and procedures by which proceedings can be consolidated and additional parties joined to arbitral proceedings. However, there are some notable provisions in the Rules, as follows.

- **Overriding Objective –** Article 2 states that the purpose of the overriding objective of the Rules is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense. It is interesting to see the use of terminology perhaps more familiar to those users of the Civil Procedure Rules in the English Courts. It is also worth noting that the language of Article 2 draws from section 33 of the English Arbitration Act 1996, which differs slightly in that it expressly imposes a general duty to the tribunal. It will be interesting to see whether Article 2 will have any utility, and if it is relied on, how it will be interpreted, as such a statement is capable of varied interpretation by tribunals. Although Article 2 of the Rules appears, on its wording, to be less stringent than the "duty" imposed under section 33 of the English Arbitration Act, it is unlikely to make any difference in practice because the overriding objective in Article 2 is clearly well intended and reflects a standard that should be maintained in arbitral practice.
- **Joinder and Consolidation –** Article 6 contains provisions on joinder and consolidation, which makes the Rules suitable for disputes involving multiple contracts. Articles 6.8 and 6.9 are specifically aimed at arbitrations involving multiple contracts. However, Articles 6.8 and 6.9 do not make clear whether arbitrations involving multiple contracts should be commenced in: (i) a single Request for Arbitration or (ii) in separate Requests of Arbitration and later consolidated.[3)]
- **Independence of Arbitrators –** Article 9 requires arbitrators to be independent and impartial. There is also a requirement for prompt disclosure, throughout the life of an arbitration, of any circumstances giving rise to justifiable doubts as to an arbitrator's independence or impartiality. The Rules do not prescribe or give guidance on these circumstances. The author has experience of cases where the parties challenged the appointment of an arbitrator on the basis of potential conflicts of their affiliated firms, rather than conflicts individual to the arbitrator. Whilst the IBA Guidelines on Conflicts of Interest in International Arbitration have become accepted good practice in the field of international arbitration, it would be interesting to see if the Centre provides more guidance how this Article may be applied, like the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration,(paragraphs 15 to 26) and the KCAB which provides guidance on this topic in its ethics for arbitrators.
- **Amended and Supplemented Statement of Case –** Article 13.8 permits a party to submit an amended or supplemented Statement of Case, so long as the party's amended case falls within the relevant arbitration agreement and before the closure of proceedings. The Rules give the tribunal the power to refuse to accept an amendment or supplement to a Statement of Case if it would be contrary to the overriding objective. Although the overriding objective is broad in scope, it arguably restricts the tribunal's case management powers, so far as Statements of Case are concerned. This provision contrasts with equivalent provisions in other institution's rules; for example, under Article 22 of LCIA International Arbitration Rules (2014), any amendment or supplement to a Statement of Case is subject to an application being made to the tribunal, which is given broad discretion on whether to grant that request, taking into account any duty similar to the overriding objective under the law of the seat.
- **Representatives –** Article 17 permits any authorized person, not just legal practitioners, to represent a party. In this regard, there is no harmonization in the rules of the leading arbitral institutions. For example, Rule 23 of the SIAC International Arbitration Rules (2016) is similar

and permits non-lawyers to represent parties but the LCIA International Arbitration Rules (2014), by default, in Article 18, requires legal representatives. Practically speaking, it is likely that most parties in international arbitration under the Rules will choose to be represented by lawyers.

- **Tribunal appointed Experts –** Article 21 permits the Tribunal to appoint experts to provide an opinion to the tribunal on any expert issue. Similar provisions are found in the rules of leading arbitral institutions, notable Article 26 of the SIAC International Arbitration Rules (2016) and Article 21 of the LCIA International Arbitration Rules (2014). However, Article 21 does not make clear how the fees and expenses of such expert would be paid. In practice, this is likely to be decided by the direction of the tribunal, exercising its broad case management powers, and agreement is likely to be reached during party consultation, but the lack of an express provision addressing that issue may prolong the party consultation and require the tribunal to give more detailed reasons for deciding how costs should be paid in the interim.
- **Sanctions for Default and Waiver –** Article 22 grants the tribunal the power to draw appropriate inferences in circumstances where a party fails to comply with the Rules or any procedural order. The Rules could have gone further by giving the tribunal more wide ranging powers to encourage parties' compliance with the Rules and procedural directions.[4)]
- **Early Determination –** Article 25 provides that a party may apply to the tribunal for the early determination of an issue of fact or law by an abbreviated procedure. This is available where: (i) the claim or defence has no real prospect of success; or (ii) the claim or defence is manifestly outside the jurisdiction of the tribunal. This addresses a common concern of lack of speed in international arbitration. This is similar to Rule 29 of the SIAC International Arbitration Rules (2016). However, there are two notable differences. Firstly, Article 25 of the Rules does not require the tribunal to issue a reasoned order or award within 60 days of the application, which is the position under the SIAC Rules (Article 29.4). Instead, Article 25 confers more flexibility and permits the tribunal to fix the expedited procedure in the form it deems appropriate, with no express time limit for a decision under this procedure. Secondly, the wording of Article 25 arguably suggests that it is a summary judgment procedure, as a claim or defence can be dismissed if there is "*no real prospect of success*". On the other hand, Rule 29 of SIAC Arbitration Rules (2016) imposes a higher standard by allowing early dismissal, where a claim or defence is "*manifestly without legal merit*" or "*manifestly outside the jurisdiction of the tribunal*". It will be interesting to see how Article 25 is used and interpreted.
- **Release and Replace of Arbitrators –** Article 11 provides that an arbitrator is released from the terms of his or her appointment and ceases to be a member of the tribunal when he or she delivers a notice of resignation to the Registrar. The arbitrator does not have to wait for confirmation by the Centre and the wording suggests that the resignation will be effective immediately,[5)] and there are no provisions on whether and how much the released arbitrator would be paid.[6)] It is worth noting that Article 11.1(4) provides an additional ground for releasing an arbitrator – if the arbitrator is unable or fails to perform his or her functions as an arbitrator. It is not made express who will make this determination – the Centre and/or the other members of the tribunal (if there is more than one arbitrator). A similar provision exists under the SIAC International Rules (2016), Rule 17.3, which makes clear that the procedure for challenge and replacement of an arbitrator applies. In practice, although it remains to be seen whether it will actually be the case, it is likely that the challenge procedure under Article 10 would be followed where the ground for releasing an arbitrator is on the basis of failure to perform his or her functions.

Why would the Parties choose to arbitrate under these AIFC Rules?

There is one noteworthy feature of the Rules, which make them a particularly attractive choice for commercial parties that desire a swift resolution of disputes and parties with interests in Kazakhstan.

Enforceability of orders and arbitral awards made easier in Kazakhstan

Under Article 24.4, a party may, with the permission of the tribunal, request from the AIFC Court of First Instance (an independent court within the AIFC, which consists of distinguished common law judges) an order enforcing the Tribunal's order for interim relief or an Award. This is particularly useful where the enforcement action needs to be carried out in Kazakhstan. AIFC Court decisions are to be enforced in Kazakhstan like decisions of the national courts of Kazakhstan. Whilst Kazakhstan is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) and the European Convention on International Commercial Arbitration (1961), neither Conventions have been ratified,[7)] which has resulted in some views that foreign arbitral awards are only enforceable in Kazakhstan on a reciprocal basis. This risk is not present where enforcement is made through the AIFC Court. It is also worth noting that the AIFC shall recognise an award issued in an arbitration under the Rules, even in circumstances where the seat is not the AIFC; in other words, a London seated arbitration under the Rules would still be enforceable through the AFIC Court.[8)]

Concluding remarks

As explained above, there are parts of the Rules which could benefit from further innovation and clarity. However, there is no doubt that these Rules, in their current form, reflect many of the more recent developments in other institutional arbitration rules. It is particularly worth noting that these Rules make it easier for awards to be enforced in Kazakhstan, the largest economy in Central Asia, with vast natural resources and growing international trade. For this reason alone, the Rules have already positioned itself to resolve disputes relating to this significant and dynamic economy. Together with the AIFC Court, it will be interesting to see how the Centre develops over time and the role it plays in resolving disputes in the CIS.

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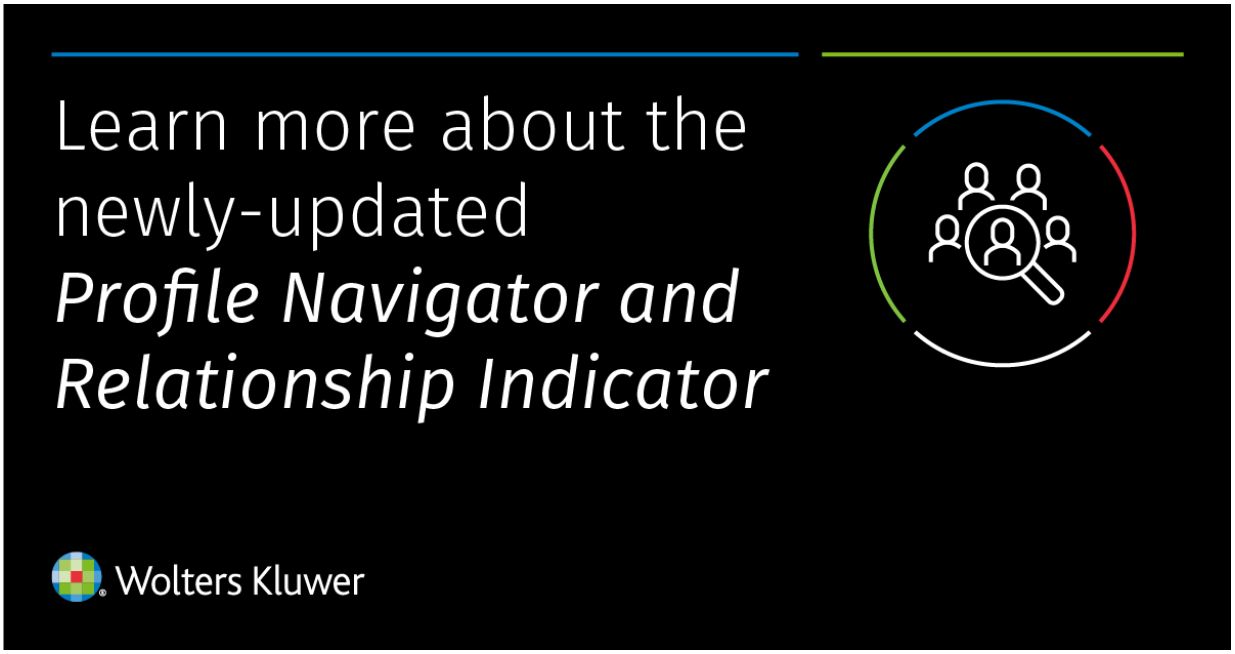

References

?1 "100 Concrete Steps", News Release, Embassy of Kazakhstan in the UK. See also here.

?2 Many leading arbitral institutions publish comparative studies in relation to costs incurred in institutionally administered arbitrations.

?3 In comparison, see Rule 6 of the SIAC Rules 2016, which is more detailed.

?4 See LCIA International Arbitration Rules (2014), Article 18.6.

?5 In contrast, see Article 10.1 of the LCIA International Arbitration Rules (2014).

?6 In contrast, see Article 10.6 of the LCIA International Arbitration Rules (2014).

?7 Kazakhstan has acceded to the New York Convention

?8 Regulation 45(1) of the AIFC Arbitration Regulations 2017 which states that: "*An arbitral award, irrespective of the State or jurisdiction in which it was made, shall be recognised as binding within the AIFC…*"

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