

Kluwer Arbitration Blog

Nudging Better Arbitrations? An Introduction to the Revised 2021 Delos Rules of Arbitration

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Delos Dispute Resolution (*Delos*) has introduced its first significant update to the Delos Rules of Arbitration (the **2021 Delos Rules**) which entered into force on 1 November 2021. The new rules range from including new provisions which align with other major arbitral institutions, for example on joinder and consolidation, to more radical innovations such as the introduction of a “Compliance Failure Notice” and new provisions encouraging settlement.

The Delos Rules first launched in [January 2014](#) and marked the creation of Delos, a nascent arbitral institution seeking to provide the arbitration market with a new offering that promised fair and efficient resolution of disputes through arbitration. Delos was established by arbitration practitioners, following a year of extensive research and discussion, and is advised by [independent and experienced arbitration practitioners](#) and [global leaders](#) in the field of international arbitration and dispute resolution.

The Delos Rules differ to the rules of other major arbitral institutions, such as the London Court of International Arbitration (*LCIA*) or the International Chamber of Commerce (*ICC*), because they are designed to nudge participants in an arbitration, both the parties and arbitrators, to make time and cost-efficient choices with a “*systematic combination of incentives and innovations*” – whether that be at the contract formation stage, pre-arbitration phase, the initial claim documents, constitution of the tribunal, conduct of the proceedings, costs of the arbitration, encouraging settlement, compliance with the awards and so on.

Alignment with Other Major Arbitral Institutions

The [latest update](#) aligned the Delos Rules with other major arbitral institutions, such as the LCIA and ICC, by including provisions addressing joinder, consolidation, ex parte interim measures, and consent awards. The 2021 Delos Rules also address recent developments in arbitral practice:

- In view of the increased use of remote hearings due to the COVID pandemic, the 2021 Delos Rules expressly provide that the tribunal may “*render an award with or without holding an oral hearing or meeting and [...] conduct the same remotely [...]*” (Article 12.4(d)). The inclusion of an express power to hold remote hearings clarifies the tribunal’s discretion to decide on how proceedings should be conducted and recognises that proceeding with a remote hearing will not necessarily constitute a breach of due process. Delos was notably one of the very first institutions to put together a compendium of links to articles and advice in response to the

pandemic, as well as its own virtual hearing protocol in March 2020 (nominated for a [GAR special recognition award](#)).

- The 2021 Delos Rules now require the legal representatives of a party to disclose the identity of any non-parties from whom they are taking instructions. This disclosure obligation applies for the entire duration of the arbitration to assist prospective and acting arbitrators in complying with their disclosure duties (Articles 7.2 and 7.3; see also the [2021 ICC Rules](#) and [2021 Vienna International Arbitration Centre \(VIAC\) Rules](#)). While this disclosure obligation already existed under General Standard 7 of the IBA Guidelines on Conflicts of Interest in International Arbitration, the introduction of an express disclosure requirement is timely given the increase in funded arbitration claims.

Compliance Failure Notice

The most novel change is undoubtedly the introduction of the “Compliance Reinforcement Mechanism” (Article 16 and Appendix 6). The Compliance Reinforcement Mechanism allows an award creditor to request the publication on Delos’ website of a Compliance Failure Notice, once the time-limits for all forms of recourse against the award have expired at the seat of the arbitration and the award has not been annulled or overturned at the seat of the arbitration.

Delos retains a discretion on whether to publish the Compliance Failure Notice and will consider the award debtor’s comments on the request (if any). Both parties may also include statements to be published with the Compliance Failure Notice (Appendix 6(5)). The Compliance Failure Notice may also be varied or removed by either of the parties at any time, for example where it would be appropriate to reflect a reduced extent of non-compliance (if requested by the award creditor) or where the parties wish to vary their statements (Appendix 6(6)).

The new compliance mechanism applies as the default rule under the 2021 Delos Rules unless the Delos arbitration agreement was concluded before 1 November 2021 or the parties have agreed to opt out (Article 16.2). Importantly, the mechanism has been designed so that it may be used by all parties, irrespective of whether their arbitration agreement or award refers to the Delos Rules, so long as the parties to an arbitration agree to use of the mechanism (including all related disclosures of information). Delos hopes that use of the Compliance Failure Mechanism will encourage award debtors to behave in a reasonable manner (e.g., complying with the award or considering a potential settlement of the dispute).

The introduction of the new compliance mechanism signals Delos’ willingness to take a more active role at the enforcement stage. No doubt the arbitration community will be monitoring the take-up of this mechanism closely, and in particular, how Delos will exercise its discretion to publish awards when complex questions of non-compliance arise (for example, where interim or conditional awards are at issue or where compliance is difficult for reasons outside the award debtor’s control).

Settlement

The 2021 Delos Rules introduce an express power for the tribunal to include a pause in the arbitration timetable so that the parties may consider engaging, at their discretion, in settlement discussions (Article 12.3(a)). Importantly, the 2021 Delos Rules do not require the parties to report to the tribunal on whether such discussions even took place or their outcome. This type of power has notably been included in the recent [update to the VIAC Rules](#) (Article 28(3)).

The inclusion of such a provision is in keeping with one of the foundational principles of the Delos Rules, namely that arbitral rules should encourage parties to anticipate and tackle issues early.

Indeed, Delos already nudges the parties towards settlement by suggesting in their [model clause](#) that parties incorporate a pre-arbitration negotiation period. To incentivise this, the Delos Rules expressly empower the tribunal to allocate pre-arbitration negotiation costs incurred by the parties “*in connection*” with the arbitration and any reasonable offers to settle made openly or without prejudice save as to costs (Article 12.4(f)).

The 2021 Delos Rules have also introduced a new pre-award mechanism with settlement in mind. Provided the parties have paid the full amount of the costs of the arbitration, after the closure of proceedings and before the tribunal delivers its draft award to Delos, the parties (if agreed) can request the tribunal to: (i) provide a non-binding indication of its likely decision on all or part of the issues in dispute, and (ii) failing any request from the parties within the 60 days following the tribunal’s non-binding decision, consider all claims to have been withdrawn on a without prejudice basis with costs lying where they fall unless otherwise agreed (Article 13.7). The hope is that this provision will lead to more parties settling their disputes amicably, avoiding the costs and delay of enforcement proceedings later on.

List of Prospective Arbitrators

The Delos Rules emphasise cooperation between the parties and require the parties to jointly nominate a sole arbitrator (the default position in the majority of cases) or agree the procedure for the chair’s nomination (if a three-member tribunal is constituted). The Delos Rules tie the time available to the parties for the nomination of the arbitrator(s) to the value of the dispute, which lengthens or shortens the time available to parties when compared to other arbitration rules (Article 11). If the parties fail to cooperate as required within the strict deadlines set out in the Delos Rules, then Delos will appoint the arbitrator(s).

The 2021 Delos Rules have sought to restore the parties’ sense of ownership in a default Delos’ appointment, by including a new provision, Article 11.4, empowering Delos to propose a list of prospective arbitrators to the parties. Accordingly, while the 2021 Delos Rules prioritise efficiency and a certain pragmatism in the formation of arbitral tribunals, they also recognise the importance of building consensus around the eventual appointee(s).

Evolution of the “safe seat” Approach to Arbitrating

Another significant development is the recent update in Delos’ approach to “*safe seats*”. Delos had previously introduced the concept of “*safe seats*” in its model clauses, asking parties to pick a safe seat from a list Delos provided. Delos has now updated its model clause to allow the parties to choose whatever seat they would like.

We note however that this change in approach is of limited impact since the model clause continues to nudge parties to choose a safe seat for reasons of time and cost-efficiency, and refers the parties to the Delos Guide to Arbitration Places (*GAP*), which sets out a list of “*safe seats*”.

Further, the 2021 Delos Rules provide that Delos will continue to consider the seat of the arbitration in fixing the arbitration costs, and for that reason, choice of an “*unsafe*” seat remains likely to increase the time and costs of a Delos-administered arbitration (Article 14.2; see Appendix 7).

Conclusion

Although Delos remains a young arbitral institution, the 2021 Delos Rules herald a new approach to rule design and arbitral procedure; the rules actively attempt to pre-empt and orient the parties' conduct away from any potential misalignments of interest, which tend to increase the time and cost of arbitration. The 2021 Delos Rules are further supported in this endeavour by Delos' impressive [knowledge function](#) which Delos uses to better inform, and ultimately nudge, the arbitration community towards achieving greater efficiency in arbitration. In our view, such efforts should be commended.


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This entry was posted on Friday, February 25th, 2022 at 8:16 am and is filed under [Arbitration institution](#), [Arbitration Institutions and Rules](#)

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