

Kluwer Arbitration Blog

DIAC 2022 Rules of Arbitration: A Modernised Set of Rules for a New Era

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As previously reported on the Blog ([here](#) and [here](#)), in September 2021, Dubai Decree No. 34 of 2021 (**Decree**), and a new statute (**Statute**) regulating the Dubai International Arbitration Centre (**DIAC** or **Centre**), made significant changes to the institutional arbitration landscape in the UAE, by consolidating all local arbitration centres into a single arbitration centre, namely a “new” DIAC. The Statute significantly enhanced DIAC’s organisation and governance with *inter alia* the creation of a new Court of Arbitration (**Arbitration Court**). On 25 February 2022, the DIAC’s Board of Directors approved the long-awaited, new DIAC arbitration rules (**New DIAC Rules**), which came into effect as of today (21 March 2022). The New DIAC Rules will apply to all requests for arbitration filed after this date, regardless of the date of the underlying arbitration agreements.

The New DIAC Rules no doubt constitute a welcome improvement to the previous version of the Rules (**2007 Rules**), which had not been updated since 2007. The New DIAC Rules are very much in line with the latest changes introduced by the Arbitration Rules of the International Chamber of Commerce (**2021 ICC Rules**) and the Arbitration Rules of the London Court of International Arbitration (**2020 LCIA Rules**). This post provides an overview of the New DIAC Rules and demonstrates how they constitute a positive development for arbitration in the UAE.

Changes to Increase the Efficiency of Proceedings

The changes introduced by the New DIAC Rules are mainly designed to increase efficiency, flexibility, and transparency, and to embrace the growth of the use of technology.

Use of Technology and Modern Means of Communication

In the Covid-19 era, there has been a clear shift towards paperless communications and remote hearings. The New DIAC Rules also embrace this trend, and electronic communications between the parties, the Tribunal and the institution have now become the default rule (Article 3.1). This development is similar to the 2020 LCIA Rules and will result in cost savings and promote greener arbitration practices. The New DIAC Rules also foreshadow the introduction of a case management system by DIAC for the filing of requests for arbitration (Article 4.3) and answers to

requests (Article 5.3). More notably, Article 34.6 of the New DIAC Rules now allows the use of electronic signature for awards.

Expedited Proceedings and Exceptional Procedures

Most leading arbitral institutions, such as the ICC and the LCIA, already provide for some form of expedited or emergency arbitration. The New DIAC Rules introduce both expedited proceedings (Article 32) and exceptional procedures, which includes emergency arbitration (Appendix II).

For expedited proceedings, the New DIAC Rules prescribe a time limit of 3 months (from the date of transmission of the case file to the Tribunal) within which the Tribunal is obliged to issue the Final Award, with a limited scope for an extension of time by the Arbitration Court “*on exceptional grounds*” (Article 32.5). By way of comparison with the 2021 ICC Rules, which prescribe a 6-month deadline from the date of the case management conference, the New DIAC Rules introduce an ambitious, fast-track process which will likely attract users and help save time and costs.

As regards the exceptional procedures, the New DIAC Rules grant Tribunals the power to order interim measures, and prescribe the test to be met. Given the seriousness of this power, Tribunals can “*require the party applying for an interim measure to provide appropriate security in connection with the measure*”, to ensure that parties do not make frivolous applications.

As for emergency arbitrators, Article 2 of Appendix II to the New DIAC Rules provides that a party may, prior to the constitution of the Tribunal, apply to the Centre for emergency relief without notice to the other party, if the applicant believes that “*such notice may jeopardize the efficacy of the application*” (Article 2.2). If the Arbitration Court is “*prima facie satisfied that in view of the relevant circumstances it is reasonable to allow such proceeding, the Centre shall seek to appoint the Emergency Arbitrator within 1 day of receipt*” of the application (Article 2.5). Likewise, after their appointment, emergency arbitrators are required to provide a timetable within 2 business days of receiving the file from the Centre. If these very short timeframes are achieved in practice, they will appeal to users and improve the efficiency of proceedings.

Multiple Contracts, Consolidation and Joinder

In a further effort to increase efficiency, the New DIAC Rules introduce provisions dealing with multiple contracts, consolidation and joinder, which are largely similar to the provisions of the 2021 ICC Rules and the 2020 LCIA Rules.

A party may submit a single request for arbitration in respect of multiple claims arising out of or in connection with more than one arbitration agreement, “*provided the requirements of Article 8.2 below are or may be satisfied*” (Article 8.1). Therefore, multi-contract disputes may now be heard in a single arbitration.

The Arbitration Court has the authority to consolidate two or more arbitrations into a single arbitration prior to the appointment of the Tribunal, where all claims are made under the same arbitration agreement, the arbitrations involve the same parties, the disputes arise out of the same

legal relationship or series of related transactions, or the underlying contracts consists of a principal contract and its ancillary contracts (Article 8.2).

In contrast with the 2021 ICC Rules, which do not grant a Tribunal the express power to consolidate proceedings, the decision of the Arbitration Court under the New DIAC Rules is without prejudice to the Tribunal's own power to consolidate proceedings upon application by one of the parties.

The New DIAC Rules also introduce provisions facilitating the joinder of additional parties to an existing arbitration by the Arbitration Court, provided that all parties consent in writing or that the party to be joined may be a party to the arbitration (Articles 9.1-9.3). The Arbitration Court's decision to allow the joinder of any additional party is without prejudice to the Tribunal's powers to rule on its own jurisdiction.

The New DIAC Rules provide for a similar regime for joinder of additional parties after constitution of the Tribunal but sensibly and expressly require the Tribunal to consider relevant factors in doing so, including potential conflicts of interest and the impact of the proposed joinder on the arbitration and its efficient and expeditious progress (Article 9.4).

A notable feature of this new regime is that it allows the joinder of third parties even in the absence of all parties agreeing, which will no doubt enhance efficiency in the resolution of multi-party disputes.

Changes to Enhance Transparency and Due Process

Third-Party Funding

Like the 2021 ICC Rules, the New DIAC Rules now require parties to disclose the existence of a third-party funding arrangement “*together with details of the identity of the funder, and whether or not the funder has committed to an adverse costs liability*” (Article 22.1). The New DIAC Rules go further, as they prohibit parties from entering into a third-party funding arrangement, “*if the consequences of that arrangement will or may give rise to a conflict of interest between the third-party funder and any member of the Tribunal*” (Article 22.2). Importantly, the Tribunal may “*take into account the existence of any third-party adverse costs liability when apportioning the costs of the arbitration between the parties*” (Article 22.3). Disclosure of the funding agreement will often benefit a party as it demonstrates that an independent third party has faith in the merits of the claim. Disclosure of the funding agreement at an early stage will also prevent the other party from raising conflict arguments at the enforcement stage. It will be interesting to see how DIAC Tribunals deal with the allocation of costs in these circumstances. Should the funder be accountable for costs if the funded party is unsuccessful? In practice though, the funder's liability for adverse costs may not be an issue as funding agreements often deal with liability for adverse costs, or there will be appropriate insurance in place to cover the funded party's liability for an adverse costs order.

Changes to Party Representation

Similar to the 2021 ICC Rules, Article 7.5 of the New DIAC Rules provides that, subject to the Tribunal's approval, a party may change or add to its representatives. In considering this issue, the Tribunal is obliged to consider potential conflicts of interest, the stage at of the arbitration proceedings, and any time and cost impact that the proposed in representation may cause.

The intention behind these provisions is to prevent parties from making tactical appointments to derail an arbitration; for example, by intentionally changing counsel to stall the proceedings.

Alternative Appointment Process

The New DIAC Rules introduce a novel alternative appointment process of a sole arbitrator (Articles 13.1-13.5) or a chairperson (Articles 13.6-13.9). The alternative appointment process will apply if the parties:

- fail jointly to nominate a sole arbitrator (or the co-arbitrators fail to jointly nominate a chairperson within the required time-limit);
- have not stipulated any mechanism of appointment; and
- notify the Centre of the agreement to the alternative appointment process.

Under this alternative process, DIAC will communicate to the parties (or the co-arbitrators) a shortlist of at least three names of suitable candidates. Each party (or co-arbitrator) may add to the list up to three candidates of its own. The parties (or co-arbitrators) will then have seven days to arrange the names in order of preference, and return the list to DIAC without copying the other party (or the other co-arbitrator). The candidates will then be invited in the order of preference until one accepts to serve as the sole arbitrator or chairperson. This alternative process should bring more transparency to the appointment of arbitrators, whilst permitting parties to be more involved in the selection of arbitrators.

Other Notable Changes

As anticipated in the Statute, the New DIAC Rules now provide that, in the absence of parties' agreement on the seat of the arbitration, the "*initial seat of the arbitration*" would be the DIFC (Article 20.1). However, Article 20.1 also provides that the Tribunal will have the power finally to determine the seat, having regard to any observations from the parties and any other relevant circumstances. Therefore, the New DIAC Rules leave the final decision as regards the seat of arbitration to the Tribunal. The concept of an "initial" seat is unusual and likely to lead to certain complications if the Tribunal subsequently decides to change the initial seat, not least because the arbitration would be subject to two different procedural laws: for instance, the DIFC Arbitration Law would apply initially but, if the seat is changed to onshore Dubai, the UAE Federal Arbitration Law would then become the new *lex arbitri*. Amongst other things, this will raise disputes as to the competent curial courts.

In the absence of parties' agreement as to the seat of arbitration, a unique choice of seat (rather than an "initial" followed by a "final" seat) should either be left to the institution or the Tribunal. It would have been more sensible and practical for the New DIAC Rules to provide that, absent parties' agreement (i) the seat will be the DIFC; or (ii) that the Arbitration Court will determine the

seat (like the 2021 ICC Rules); or (iii) that the seat will be the DIFC, unless the Arbitration Court decides otherwise (like the 2020 LCIA Rules, wherein London is designated as the default seat subject to the LCIA Court's decision); or (iv) the seat will be determined by the Tribunal after consultation with the parties (like the Stockholm Chamber of Commerce Arbitration Rules 2017).

The New DIAC Rules now expressly include in the definition of “*costs of the arbitration*” the “*fees of the legal representatives and any expenses incurred by those representatives together with any other party's costs*” (Article 36.1). Since a judgment of the Dubai Court of Cassation in 2013, the recoverability of parties' costs has been a salient and persistent issue of DIAC arbitrations, and this clarification is a welcome development. The New DIAC Rules do not provide guidance on the meaning of “any other party's costs”. Therefore, absent any specific exclusion, it appears that executive management costs, costs of in-house counsel and other party employees may well be recoverable under Article 36.1.

Other notable changes that are likely to increase efficiency include the following:

- The Tribunal must now contact the parties to set the date for a preliminary meeting within 15 days from receipt of the file (Article 23.1), as opposed to 30 days under the 2007 Rules.
- The Centre may grant the Respondent an extension of time for the filing of the Answer to the Request for Arbitration of 10 days (Article 5.7), as opposed to 14 days under the 2007 Rules.
- The new Article 24 (written statements, modification, and withdrawal of claims) no longer sets out default time-limits for the exchange of written statements, leaving it to the Tribunal to determine such time-limits after consultation with the parties. Under the 2007 Rules, Articles 23 and 24 provided for 30 days for the submission of the statement of claim and the statement of defence, or such later time-limit that that the Tribunal would allow. This provision should improve efficiency as Tribunals will now have discretion to determine shorter time-limits for the exchange of written statements.
- In line with the already existing practice of the DIAC under the 2007 Rules, Article 34.4 now includes an express award “checklist” that sets out minimum content requirements of awards. Article 34.5 introduces a soft scrutiny process of awards by the Arbitration Court to ensure “*insofar as possible that the formalities of required by the Rules have been complied with*”. These provisions should assist younger arbitrators in ensuring that minimum formal requirements are met to safeguard the integrity of their awards.

Conclusion

The New DIAC Rules are significantly aligned with latest changes made to the rules of other leading arbitration institutions. Despite a few oddities, such as the concept of “initial” seat of arbitration, the New DIAC Rules, if truly operated in accordance with their stated objectives, i.e. to “*deliver flexibility and choice to the parties*”, are likely to contribute to the continued growth of arbitration in Dubai and the wider region.


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