A NEW DAWN IN DUBAI: WILL COMPANIES AND THEIR SHAREHOLDERS EMBRACE THE NEW DUBAI INTERNATIONAL ARBITRATION CENTRE (DIAC) RULES?

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The stated aims of the new DIAC Arbitration Rules, which came into effect as of 21 March 2022, are to: (i) enhance the "efficiency and cost-effectiveness" of the practice of arbitration, and (ii) include provisions that "deliver flexibility and choice to the parties" to arbitration. These have been long-term priorities for companies that use the arbitral process, and other leading arbitral institutions have in recent years amended their rules to address these concerns. But how well do the DIAC's new Rules measure up to those of their competitors?

Expedited proceedings

The previous version of the DIAC Rules, issued in 2007, provided for expedited formation of the arbitral tribunal only by written request in cases of exceptional urgency, but did not contain any provisions allowing for expedited procedures once the tribunal had been constituted. Although tribunals constituted under the old DIAC Rules might have considered themselves vested with a general power to order specific measures to expedite proceedings when it saw fit, there has been a perception that arbitrators would be more inclined to do so if the rules expressly stated that it could expedite the procedure.

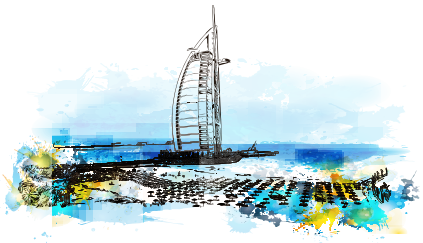
The DIAC Rules now do so.

Expedited procedure rules will apply where: (i) the parties agree in writing, or (ii) where the total sums claimed and counterclaimed in the arbitration is below or equals AED 1 million, or (iii) in cases of exceptional urgency as determined by the DIAC Arbitration Court upon application by a party (Article 32).

Under the expedited procedure, the DIAC will seek to appoint a sole arbitrator within 5 days of the DIAC Arbitration Court's decision that the expedited procedure is to apply (Article 32.3), and the sole arbitrator has just 3 months to issue the final award from the date it receives the case file from the Centre (Article 32.5). The procedure to be adopted in the expedited arbitration is left to the discretion of the sole arbitrator, with a "limit [to] the scope of any evidence to be submitted" the one practical example suggested by the Rules (Article 32.4).

The DIAC's approach differs to that of the LCIA, which in 2020 included within its updated rules a non-exhaustive list of eight measures, some or all of which a tribunal could adopt in any arbitration entirely at its discretion, and regardless of the amount in dispute.

The new DIAC Rules instead leave the decision on whether there should be expedition up to the parties (and both parties must agree), or prescribe them where the amount in dispute is under AED 1 million (unless the parties opt out) – which does provide some greater certainty to companies and their shareholders that select the DIAC in their arbitration agreements.



Settlement

The facilitation of settlement has attracted much less attention from other leading arbitral institutions than provisions designed at saving time and cost. This is despite both anecdotal and recent statistical evidence suggesting that arbitrations are far less likely to settle than equivalent court litigation cases. This will trouble companies that use arbitration (and their shareholders alike) because settlement will obviously very often be preferable to seeing an arbitration through to final award.

Set against this background, the DIAC's inclusion of a conciliation process in its new Rules (Appendix 2, Article 3) should be applauded. The process can be commenced by an application for conciliation by one of the parties, and is presided over by one conciliator, appointed by the Arbitration Court (unless parties agree to a panel of three), who will have absolute discretion to determine the procedure of the conciliation. The conciliation process is to be concluded within two months (unless the parties agree to extend the period). If the attempt at conciliation fails, the conciliator terminates the conciliation proceedings without prejudice to the merits of the dispute.

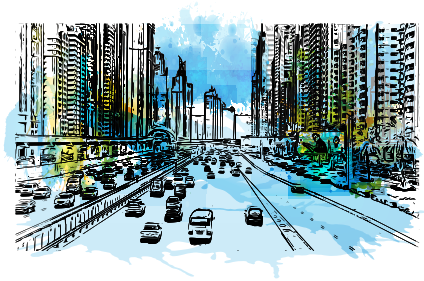
This process has features of, but is surely a vast improvement on, "med-arb" – a process where parties attempt mediation, and if no settlement is achieved the mediator becomes the arbitrator. A concern with this process is that it may discourage open dialogue at the mediation stage, and risks an arbitrator being influenced by information presented off the arbitral record.

In contrast, the DIAC's provision of a "conciliator-in-reserve", operable on request of the parties, should increase the likelihood of parties attempting to resolve their dispute by mediation. This likelihood might have been increased still further if the new Rules imposed on tribunals a positive duty to encourage parties to consider applying for conciliation; but it is anticipated that the conciliation process will be endorsed by counsel and arbitrators in any event given its undoubted benefits.

DIFC as the Default Seat

Unless the parties have agreed otherwise, the Dubai International Financial Centre ("DIFC") shall be deemed to be the seat of the arbitration (Article 20.1) – a change from the 2007 Rules which provided for onshore Dubai as the default seat.

The new Rules do however specify that the tribunal retains the power to finally determine what the seat will be, absent any agreement by the parties, and with due regard to the relevant circumstances. Instances of corporate parties neglecting to specify a seat in their arbitration agreements are likely to be few and far between, but specifying the arbitration-friendly DIFC as the default supervisory courts for DIAC arbitrations is certainly a positive development.



Legal fees are recoverable

The new DIAC Rules specify that the costs of the arbitration now include the "fees of the legal representatives and any expenses incurred by those representatives" (Article 36.1), and that the Tribunal may make decisions on these costs of the arbitration (Article 36.2). This is an important inclusion given the Dubai courts' previous ruling that tribunals were not empowered under the 2007 DIAC Rules to award legal costs unless parties explicitly provided for this, for example in the terms of reference or in the arbitration agreement itself.

Consolidation

The new Rules broaden the power of tribunals and the DIAC Arbitration Court to order consolidation of arbitrations made under the same agreement to arbitrate; or where the arbitrations involve the same parties and arise out of the same legal relationship(s), the same principal contract, or the same transaction / series of transactions (Article 8). When used in practice, this provision will undoubtedly increase efficiency and reduce costs.

Note that the new DIAC Rules (like the latest LCIA iteration of 2020) permit consolidation only if no tribunal has not yet been constituted in the other arbitration(s) (there is no such restriction for consolidation under the HKIAC Rules, for example). Companies may therefore consider providing for a broader consolidation mechanism, if so desired, in their arbitration agreements.

Conclusion

The new DIAC Rules will be well received by companies and shareholders alike that operate in Dubai, the MENA region and beyond. The amendments and additions incorporate measures which will promote cost and time efficiency, will maintain the reliability of the process, and undoubtedly consolidate the DIAC as one of the eminent global arbitral institutions.