

## Insights

# DIAC RULES 2022 – FINALLY FIT FOR PURPOSE

Mar 10, 2022

On 2 March 2022, the DIAC published its much anticipated new arbitration Rules (the “**2022 Rules**”). They come into effect on 21 March 2022 and apply to arbitrations commenced after that date.

The introduction to the 2022 Rules notes “*there have been many changes to the practice of arbitration*” since the publication of the 2007 Rules. To name but a few: Dubai enacted the DIFC Arbitration Law in 2008, Abu Dhabi the ADGM Regulations in 2015 and the UAE the Federal Arbitration Law in 2018; virtual hearings, encouraged by the Covid-19 pandemic, seem set to stay; and, more recently, Decree No. 34 of 2021 abolished the DIFC-LCIA and Emirates Maritime Arbitration Centre and merged them into the DIAC.

The 2022 Rules, at almost twice the length of the 2007 Rules, represent a modern and flexible approach to arbitration which factor in the above developments and, as discussed below, appear well suited to dealing with complex construction and engineering disputes which still dominate arbitration in Dubai, Abu Dhabi and the wider region.

## CORE OBJECTIVE

The core objective of the 2022 Rules is for all arbitrations to “*be conducted justly, fairly, impartially, efficiently and proportionately*” and the Tribunal shall ensure that arbitrations are run “*expeditiously, diligently and in a cost-effective manner.*”<sup>[1]</sup>

This core objective does indeed run through the 2022 Rules which are now more prescriptive: clear time-frames are set out; partial awards or orders are encouraged;<sup>[2]</sup> and new time-saving procedures introduced, such as Expedited Proceedings and the ability to appoint an Emergency Arbitrator.

## ELECTRONIC FILINGS AND VIRTUAL HEARINGS

As with other modern institutional rules, the 2022 Rules make specific provision for communications, notifications and filings to be issued electronically, including the Request for Arbitration. The 2022 Rules reference an “*electronic case management system*” which may be implemented by the DIAC.<sup>[3]</sup>

Preliminary meetings<sup>[4]</sup> and hearings<sup>[5]</sup> may take place in person at any location, by telephone or through any appropriate means of virtual communication, including video conferencing. This clarification is particularly welcome for construction arbitrations which often have multiple experts and witnesses of fact and hence where the costs and inconvenience of travelling to a physical place is often burdensome.

## NON-PARTICIPATING PARTIES

An interesting and practical development are the provisions aimed at discouraging and dealing with recalcitrant and non-participating parties. For example:

- once a party has been notified of the arbitration, its non-participation is now expressly noted as not preventing the arbitration from proceeding;<sup>[6]</sup>
- during the conduct of the arbitration, where a party fails to engage in consultations with the Tribunal by the times prescribed, the Tribunal shall issue rulings so the arbitration proceeds;<sup>[7]</sup>
- if a Claimant fails to submit its statement of claim, the Tribunal may decide not to proceed with the claim. Conversely, where a Respondent fails to submit its statement of defence, the Tribunal may decide to proceed with the arbitration;<sup>[8]</sup> and
- if a party fails to attend a hearing, without showing good cause, the Tribunal may proceed with the hearing.<sup>[9]</sup>

Whilst Tribunals may always have had such discretion, only the most robust would proceed in the face of non-participation, and very often only after all avenues have been exhausted, and so these express provisions are welcome and reflect the core objective of the 2022 Rules.

One controversial measure introduced is the requirement for a party wishing to change its representation, after the Tribunal is constituted, to inform the other party and (the controversial bit) the change is subject to the Tribunal's approval.<sup>[10]</sup> The requirement to obtain the Tribunal's approval directly conflicts with a party's right to choose its own representation (which is acknowledged in the 2022 Rules). It appears aimed at discouraging parties from changing counsel to simply delay the proceedings whilst it seems unlikely that a Tribunal would not give its approval unless there was a blatant attempt to "game the process", even having to ask for approval, and perhaps justify its reasons may help, may dissuade a party from changing counsel just to waste time.

Finally, addressing the (all too common) tactic of a Respondent not paying its share of the advance on costs, the 2022 Rules provide that any party may pay the other party's share of the advance and may request that the Tribunal, once constituted, issue an immediate partial-award on costs.<sup>[11]</sup> This

would allow the paying party (subject the applicable governing laws) to enforce the partial-award in the courts to promptly recover payment from the non-paying party.

## CONSOLIDATION AND JOINDER

A party may apply to consolidate multiple arbitrations before or after a Tribunal is constituted. In both cases, multiple arbitrations may be consolidated if the parties agree or, where the Arbitration Court or Tribunal, as the case may be, consider that the arbitrations arise out of the same arbitration agreement or they involve the same parties and meet the specific criteria listed in the 2022 Rules.<sup>[12]</sup>

As to joinder, a party may make an application to be join a third party before and after the Tribunal is constituted. A third party may be joined where all parties agree, or where the Arbitration Court or Tribunal consider that the third party is a party to the arbitration agreement.<sup>[13]</sup>

Consolidation and joinder have obvious application to construction disputes which involve multiple parties and multiple contracts. However, in our experience, consolidating different arbitrations or joining a third party is not without its challenges, and it is not always clear that doing so makes the process more efficient – it has the potential to add confusion to already complex disputes (and often benefits one party over the other(s)).

## EXPERTS

The 2022 Rules empower the Tribunal, in consultation with the parties, to appoint an independent expert to report to it on specific issues identified by the Tribunal. The Tribunal will negotiate the expert's terms of reference and receive the expert's report before sharing it with the parties for their comments.<sup>[14]</sup>

In high value construction arbitrations it is common for parties to engage their own experts. In such cases, particularly where there is a small pool of suitably qualified experts, a Tribunal may find it difficult to find an expert that is conflict-free to act or, if it does, dealing with three competing expert reports could add an additional layer of complexity. These provisions are likely to be of greater use where neither party relies on expert evidence, but there remains a technical issue that the Tribunal considers important.

## SEAT OF THE ARBITRATION

Where the parties have not agreed to the seat of the arbitration, the "*initial seat of the arbitration shall be DIFC*." Once the Tribunal is constituted it has the power to finally determine the seat.<sup>[15]</sup>

Where the agreement to arbitrate indicates a location/venue for the arbitration, unless the parties agree otherwise, such location/venue shall be the deemed legal seat of the arbitration.

## EXPEDITED PROCEDURE

A new Expedited Procedure applies to disputes arising out of arbitration agreements which were agreed after 21 March 2022 and where the total of the sum(s) claimed and counterclaimed is below or equal to AED 1m (approximately USD 272,300). Parties are free to opt in (i.e. where the value of the claims is higher than AED 1m) or opt out of this procedure.<sup>[16]</sup>

Where applicable, a sole arbitrator is appointed and must render the Final Award within three months from the date of transmission of the file to the Tribunal.

The USD 272,300 threshold is lower than the ICC's USD 3m threshold which applies to its expedited procedure. However, despite the low threshold, the new Expedited Procedure, which will inevitably be quicker and cheaper than the traditional route, may prove popular with suppliers and subcontractors that have otherwise avoided arbitration due to the likely length of the proceedings and the perceived expense.

## INTERIM REMEDIES AND EMERGENCY ARBITRATOR

Appendix II to the 2022 Rules deals with "Exceptional Procedures" which includes the Tribunal's powers to order interim measures and a new Emergency Arbitrator procedure.

These provisions will be of particular interest to contractors and subcontractors operating in the region where, over the last few years, there appears to be a growing trend of unjustifiable calls on performance, retention and other forms of bonds. In addition to a party's right to seek interim measures in the local courts, contractors and subcontractors may now turn to their constituted Tribunal for interim relief to, for example, prohibit a call on project bonds.

If any interim measures are required before an arbitration has commenced, the new Emergency Arbitrator procedure provides a rapid-route for the appointment of a sole arbitrator to consider and order applications for emergency interim relief.

## THIRD PARTY FUNDING

In recognition of the growing use of third party funding, the 2022 Rules provide that a party who has entered into such an arrangement must notify all other parties and the DIAC of the arrangement and, importantly, whether or not the funder has committed to an adverse costs liability.

Once the Tribunal is constituted, parties are only permitted to enter third party funding arrangements where they will not give rise to a conflict of interest between a third-party funder and any member of the Tribunal.<sup>[17]</sup>

## COSTS

Lastly, but certainly not least, the 2022 Rules empower the Tribunal to award costs incurred in the arbitration, including the fees and expenses "*of any experts (whether appointed by the parties*

*and/or Tribunal), the fees of the legal representatives and any expenses incurred by those representatives, together with any other party's costs."*<sup>[18]</sup> The Tribunal may also make an award on costs at any point during the arbitration.

This simple but important addition to the 2022 Rules addresses one of the oddities under the 2007 Rules that Tribunals could only award costs incurred by it and the DIAC, but not a party's legal or other costs unless the parties specifically empowered it to do so. The new provisions will also, hopefully, put to rest unattractive arguments at the enforcement stage that a Tribunal did not have the requisite authority to award costs (despite, very often, both parties claiming costs throughout the proceedings).

## CONCLUSION

Decree No. 34 of 2021, and the press releases that followed, confirmed that arbitrations commenced after 20 September 2021, and which refer to the DIFC-LCIA Rules in the arbitration agreement, are administered by the DIAC. However, it is still not clear what arbitration rules, if any, those arbitrations are to follow.

It is not for the DIAC to answer that question but parties that find themselves in that situation might consider agreeing to use the new and improved 2022 Rules.

The new 2022 Rules are more than an update to the previous 2007 Rules, but mark a wholesale shift in approach. The changes made, including the introduction of the Expedited Procedure, Emergency Arbitrator, consolidation and joinder, bring the 2022 Rules in line with other institutional rules such as the ICC and LCIA. What distinguishes the 2022 Rules from other institutional rules is their focus on the core objective of fairness and efficiency and the enhanced powers Tribunals have to rein-in disruptive conduct. On paper, at least, the 2022 Rules are finally fit for purpose.

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[1] Articles 17.1 and 17.2 of the 2022 Rules.

[2] Article 6.6 in the context of a challenge to the Tribunal's jurisdiction and Article 34.1 generally.

[3] Articles 3.1, 4.3, 5.3 and 32.2 of the 2022 Rules.

[4] Article 23.2 of the 2022 Rules.

[5] Articles 20.2 and 26.1 of the 2022 Rules.

[6] Article 3.6 of the 2022 Rules.

[7] Article 29.1 of the 2022 Rules.

[8] Articles 29.2 and 29.3 of the 2022 Rules.

[9] Article 26.4 of the 2022 Rules.

[10] Article 7.5 of the 2022 Rules.

[11] Articles 3.3 of Appendix I of the 2022 Rules.

[12] Article 8 of the 2022 Rules.

[13] Article 9 of the 2022 Rules.

[14] Article 28 of the 2022 Rules.

[15] Article 20.1 of the 2022 Rules.

[16] Article 32 of the 2022 Rules.

[17] Article 22 of the 2022 Rules.

[18] Article 36.1 of the 2022 Rules.

## **RELATED CAPABILITIES**

- Construction Disputes
- International Arbitration
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