

The New DIAC Rules 2018  
Issues relevant to arbitration in the UAE

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# Introduction

- Dubai International Arbitration Centre (DIAC) is the largest arbitration institution in the Middle East. The current DIAC Arbitration Rules were enacted in 2007.
- During the Dubai Arbitration Week that took place in November 2017, DIAC announced that new Rules are to be enacted in 2018.
- The New Rules will be released and come into force upon the Ruler of Dubai, issuing the official decree needed in this regard.
- The New Rules come with significant changes in an attempt to deal, to the extent possible, with current issues relevant to arbitration in the UAE.

# The Seat of Arbitration - *DIFC v Dubai*

- Article 20.1 of the current Rules:

*“The parties may agree in writing on the seat of the arbitration. In the absence of such a choice, the seat of arbitration shall be Dubai”*

- Article 25.1 of the New Rules:

*“The parties may agree in writing on the seat of arbitration. In the absence of such a choice, the seat of arbitration shall be the Dubai International Financial Centre (DIFC)”.*

- If the seat of arbitration is Dubai:
  - The procedural rules set out in Chapter III (Articles 203 – 218) of the UAE Civil Procedure Code apply;
  - Dubai Court is the competent court to provide supervision and assistance (interim measures, ratifying arbitration awards, challenging arbitrators etc); and
  - If the losing party opts not to comply with the award, the award should be ratified and enforced by Dubai Court.

- If the seat of arbitration is the DIFC:
  - The DIFC Arbitration Law No. 1 of 2008 shall apply;
  - DIFC court is the competent court to provide supervision and assistance (interim measures for examples); and
  - If the losing party opts not to comply with the award, the award should be recognised and enforced by the DIFC courts

**It is evident that arbitrations seated in DIFC will enjoy favorable provisions as to – *inter alia* – the enforcement of awards, ordering interim remedies, and the validity of the arbitration agreement.**

## *DIFC v Dubai* (cont.)

### Current State:

Even if the seat of arbitration is not the DIFC, the DIFC Court can be used as a conduit jurisdiction for enforcement of domestic arbitral awards following the decision in *Banyan Tree v Meydan Group LLC* relying upon Article 5(a)(d) of Law No. (12) of 2004 on the Judicial Authority at DIFC, as amended by DIFC Law No. 16 of 2011.

However, what if a party initiates proceedings before the DIFC Court and the other party initiates proceedings before Dubai Court?

The Judicial Tribunal was established to resolve any conflict of jurisdictions between Dubai Court and the DIFC Court.

The Judicial Tribunal appear to favour the jurisdiction of Dubai mainland court and consider it to have the general jurisdiction to ratify and enforce domestic arbitral awards as well as to enforce foreign arbitral awards under the New York Convention 1958.

- Article 7.1 of the New Rules:

*“The parties may be represented or assisted by persons of their choice, irrespective of their nationality or professional qualifications. [...]”*

# Party Representation (cont.)

- Article 212(1) of the UAE Civil Procedures Code provides that arbitrators are not bound by the Civil Procedures Code except those of Chapter III.
- The Dubai Court of Cassation ruled that the parties could be represented by non-lawyers. [*decision no. 216 of 2012 – issued on 10 February 2013*]
- Ministerial Resolution No. 972 of 2017 amending the Executive Regulations to Federal Legal Profession Law No. 23 of 1991.
- Article 2 of the new Executive Regulations prohibits non-registered lawyers from representing a party before “*arbitral tribunals*”.

# Party Representation (cont.)

- The 2017 Executive Regulations are arguably not applicable in Dubai.
- Dubai, Abu Dhabi and Ras Al Khaimah are not part of the judicial federation. Each Emirate has its own high court, and each emirate has its own laws organising legal profession.
- However, the response to the 2017 Executive Regulations is not clear.
- The application of Article 7.1 of the New DIAC Rules resolves the issue.

# Power to Award Legal Cost

- Current Rules:

Article 4.2 of the Appendix – Costs of Arbitration:

*“The final Award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.”*

Article 2.1 of the Appendix – Costs of Arbitration:

*“The costs of the arbitration shall include the Centre's administrative Fees for the claim and any counterclaim and the fees and expenses of the Tribunal fixed by the Centre in accordance with the Table of Fees and Costs in force at the time of the commencement of the arbitration, and shall include any expenses incurred by the Tribunal, as well as the fees and expenses of any experts appointed by the Tribunal”*

# Power to Award Legal Cost (cont.)

- The Dubai Court of Cassation ruled that arbitral tribunal acting under the DIAC Rules do not have jurisdiction to award legal costs (Cassation Decision No. 282 of 2012).
- The New Rules- Article 2 of the Appendix Costs of Arbitration:

*“The arbitration costs shall include inter alia the Centre's registration fee, the advance on costs, the fees and expenses of any Tribunal or party-appointed expert, the legal representation fees and other party costs, to the extent reasonably incurred.”*

# Tribunal's Power to Sanction Counsel Conduct

## Article 50:

In order to promote the good and equal conduct of the parties and their representatives during arbitral proceedings conducted under the Rules, the Tribunal is vested with the authority to impose sanctions when there is an attempt to unfairly obstruct the arbitration or jeopardize the award; when knowingly they make any false statements, procure or assist in the preparation of, or rely upon, any false evidence; or when they conceal or assist in the concealment of any document.

# Power to Suspend

It is a common scenario that a party initiates arbitration before satisfying pre-arbitration requirements. The other party raises a jurisdictional challenge

Arbitral tribunals prefer to suspend the proceedings to allow the satisfaction of these requirements but there is no piece of law that allows arbitrators to do so.

Article 6.2 of the New Rules:

*“Upon application of a party, the Tribunal may suspend the proceedings to allow one or more requirements of the arbitration agreement to be satisfied.”*

# Multiple Contracts - Article 8

Subject to the provisions of Article 6.3, claims arising out of or in connection with more than one contract may be made in a single arbitration, provided that:

a. the parties to the contracts consent to a single arbitration to be conducted in accordance with the Rules;

or

b. the contracts contain arbitration agreements referring such disputes to arbitration to be conducted in accordance with the Rules, the arbitration agreements are compatible, and:

i. the disputes arise out of the same legal relationship(s); or

ii. such contracts consist of a principal contract and its ancillary contract(s); or

iii. the disputes arise out of the same transaction or series of related transactions; or

c. the claims involve multiple contracts between the parties originating from the same economic relationship.

# Emergency Arbitrator

- DIAC introduced for the first time a procedure for appointing an emergency arbitrator under the Rules 2018.
- A party in need of an emergency relief may make an application for emergency interim relief on the condition that such application is submitted prior to the constitution of the tribunal.
- Once all the required conditions are met, the executive committee will seek to appoint an emergency arbitrator within 3 business days of receipt by the secretariat of such application and payment of registration fee.
- An emergency arbitrator must be impartial and independent. Any challenge to the appointment should be made within one day.

# Emergency Arbitrator (cont.)

- An emergency arbitrator may not act as an arbitrator in any future arbitration related to the dispute, unless agreed by the parties.
- Within 2 business days of appointment, the emergency arbitrator shall establish a schedule for consideration of the application for emergency relief.
- The parties should be allowed sufficient opportunity. The arbitrator has authority to rule on his/her jurisdiction.
- The emergency arbitrator has the power to order interim reliefs.
- The emergency arbitrator shall be considered *functus officio* after the Tribunal is constituted. The Tribunal may reconsider, modify or vacate the interim award or emergency relief order issued by the emergency arbitrator. The order will cease to be binding after 90 days if the Tribunal is not constituted.

# Expedited Proceedings – Article 18

Prior to the full constitution of the Tribunal, a party may file an application for arbitral proceedings to be conducted on an expedited basis.

18.2 Expedited proceedings may apply if:

- a. the amount in dispute is below AED 2,000,000 (exclusive of interest and legal representation costs); or
- b. the parties expressly agree; or
- c. in cases of exceptional urgency; or
- d. if considered appropriate by the EC, based on the overall circumstances of the dispute.

18.3 In such case:

- a. a Tribunal consisting of a sole arbitrator will be appointed (unless exceptionally determined otherwise by the EC), within 7 days of the advance on costs being fully paid or such time as exceptionally extended by the Secretariat;
- b. the Secretariat may shorten any time limit under the Rules as deemed appropriate;
- c. in addition to the Request and the Answer, the parties shall only submit simultaneous and succinct statements of claim and defense within 15 days from the date the file is transferred to the Tribunal, unless otherwise directed so by the Tribunal after consultation with the parties;
- d. the dispute shall be decided on the basis of documents only, unless the Tribunal decides otherwise after consultation with the parties;
- e. the award shall be made within 3 months from the transfer of file to the Tribunal, unless extended by the EC on exceptional grounds.

# Signing the award abroad

- Article 212(5) of the Civil Procedures Code states:

*“The arbitrators’ award shall be issued within the United Arab Emirates; otherwise the rules applicable to arbitration awards passed in foreign countries shall apply thereto.”*

- Arbitrators have to travel to the UAE only to sign the award.
- Article 42.2 of the New Rules states:

*“All awards shall be deemed to have been signed and issued at the seat of arbitration, without the physical presence of the Tribunal at the seat of arbitration”.*

# Shariah-Compliant Arbitration

Article 52: The Centre will maintain a list of arbitrators qualified in Islamic Law. The Centre shall make appointments from such list where the arbitration agreement so mandates or where the parties so agree. Any award made by such Tribunal shall be in accordance with mandatory provisions of Shariah law as mandated by the parties, the arbitration agreement and/or the applicable law. The Rules shall apply to the proceedings, in addition to the present provision.

# Third-party funding – Article 53

53.1 The Tribunal may order the disclosure of the existence and details of a party's third-party funding arrangement, including details of the identity of the funder, the funder's interest in the outcome of the proceedings, and whether or not the funder has committed to undertake adverse costs liability.

53.2 The Tribunal may take into account any third-party funding arrangements in apportioning the costs of the arbitration.

53.3 The Tribunal may make adverse costs orders against third-party funders when deemed appropriate.

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# Questions

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