

Client Alert

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A sneak peek into the new DIAC 2018 Arbitration Rules

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The Dubai International Arbitration Centre (DIAC) announced the launch of the new proposed DIAC 2018 Arbitration Rules (the New Rules) during Dubai Arbitration Week in November 2017. The New Rules not only respond to the business needs of the international community but also deal with the common pitfalls in the existing procedural regime. Businesses operating and doing deals in the United Arab Emirates (UAE) will have access to a more effective dispute resolution mechanism and now need to consider how to amend existing contracts or draft new agreements to take advantage of the proposed new regime.

The UAE has long acknowledged the importance of an effective legal framework to support international business and has been investing in this field in recent years. The current DIAC Arbitration Rules came into force in 2007 and are being revolutionised in line with the nation's economic vision and development as a global trade and finance hub. Currently, arbitration rules in the UAE are governed by the Arbitration Chapter of the UAE Federal Law No. 11 of 1992 as amended by Law No. 10 of the 2014 Civil Procedures Code and businesses can turn to one of five institutions across the UAE, with DIAC and the Dubai International Financial Centre (DIFC) being the most popular mainland and free zone systems respectively in UAE-seated arbitrations.

The draft of the New Rules has been approved by the UAE government, apart from the provisions relating to third-party funding, which is subject to further amendment. The New Rules are expected to be promulgated by decree in both English and Arabic, with English being the prevailing language, early in 2018.

The changes introduced in the New Rules are designed to ensure the efficient conduct of DIAC arbitrations not only during the arbitration process but also at the time of ratification and enforcement of DIAC awards - both elements of crucial importance to the international business community. The key objectives of the New Rules are to: (i) maintain the procedural economy of the arbitration process to ensure that the process is conducted in a transparent and cost-efficient manner, and (ii) facilitate and enhance the enforcement of DIAC awards pending the promulgation of the long-awaited UAE arbitration law.

Whilst the bulk of the procedural rules of conducting arbitrations remain the same, the most notable provisions of the New Rules are brand new and seek to fill the

gaps in providing extra protections addressing loopholes in the current rules. Particular highlights include:-

- DIFC as the default seat of arbitration;
- Awards to be deemed to have been issued at the seat whether or not they were signed at the seat of arbitration;
- Creation of a Secretariat to administer and scrutinize draft awards;
- Introduction of measures to increase procedural efficiency and avoid delays (e.g., emergency arbitrator, expedited proceedings, power to sanction counsel conduct);
- Multiple contracts, multiple parties, consolidation and joinder addressed;
- Confidentiality and publication of the award;
- Collaboration between parties and/ or co-arbitrators with DIAC in the process of default appointment of a sole arbitrator or the chairperson in cases of three tribunal members;
- Third-party funding;
- Recoverability of legal fees;
- Shari'ah compliant arbitration; and
- Exclusion of liability of tribunal members and the DIAC.

1. The DIFC as the default seat of arbitration

Before an arbitration award can be enforced in the UAE, it must first be ratified by the relevant local courts. A ratification order of a domestic award can be obtained from the mainland Dubai courts, subject to a number of procedural formalities stipulated in the UAE Civil Procedures Code.

Similarly, a ratification order can be sought through the DIFC courts, an independent common law jurisdiction. A domestic award can only be challenged before the DIFC courts on the grounds stipulated under Article 42 of the DIFC Arbitration Law. The DIFC courts have recently expanded their jurisdiction to ratify domestic arbitration awards even in cases with no nexus or connection to the DIFC. This has allowed award creditors to use the DIFC courts as a "conduit jurisdiction" in order to avoid the cumbersome procedural formalities that are usually invoked before the mainland Dubai courts when enforcing domestic awards.

However, the status of the DIFC courts as a conduit jurisdiction has been brought to a halt following the recent decisions of Dubai's newly established Judicial Tribunal ruling that only the Dubai courts have natural and general jurisdiction over enforcement of awards in Dubai, particularly in Dubai seated arbitrations.

This means that the DIFC courts will only have jurisdiction to ratify a domestic award only if the parties have identified the DIFC as their arbitration seat.

In an attempt to facilitate the enforcement of domestic arbitral awards, the New Rules stipulate the DIFC as the new default seat. Accordingly, in cases where parties have agreed to resolve disputes through the DIAC rules but have not identified the seat of arbitration in their arbitration agreement, the arbitration will automatically be seated in the DIFC, rather than on mainland Dubai, where there is no arbitration law, as is currently the default position. This will in turn allow the parties to benefit from the comprehensive procedural framework of the DIFC Arbitration Law, which is based on the UNCITRAL Model Law.

Arbitrations seated in the DIFC will also confer jurisdiction to the DIFC courts, which will act as the curial courts for the purposes of any interim precautionary measures such as attachment orders and injunctive relief.

Importantly, with the DIFC as the seat of arbitration, parties will be able to enforce their domestic arbitral awards before the DIFC courts even against assets that are not located in the DIFC. This will be achieved not only on the basis of the New Rules but also under the Memorandum of Understanding that was signed between DIAC and the DIFC Dispute Resolution Authority in September 2016 with the aim to enhance recognition and enforcement of DIAC arbitral awards through the DIFC courts. An award creditor will then be able to further execute the award on onshore Dubai by virtue of the Protocol of Enforcement between the Dubai courts and the DIFC courts, avoiding the bureaucracy of the Dubai courts.

In view of the above, having the DIFC as the seat of arbitration will defeat any potential claims that the DIFC does not have jurisdiction to enforce DIAC awards, particularly following the Judicial Tribunal's restrictive approach regarding the jurisdiction of the DIFC courts in ratifying awards issued in Dubai seated arbitrations, which will no longer be an issue under the New Rules.

2. Place of signing of arbitration award

One of the concerns usually faced by arbitral tribunals at the time of issuance of awards, particularly in Dubai seated arbitrations, is the place where they should sign the award and particularly whether they could sign it outside the UAE or should fly to the UAE to do so to avoid any procedural difficulties on the enforcement of the award. The basis of this concern mainly arose from the provisions of Article 212(4) of the UAE Civil Procedures Code, which provide that, in order for an award to be perceived as a domestic award, it will have to be issued in the UAE; otherwise it will be deemed as a foreign award. There is a

lack of clear guidance as to what an award issued in the UAE actually means: for example, would an award be deemed to have been issued in the UAE if the tribunal's deliberations took place in the UAE? Or is it a prerequisite for the award to be physically signed in the UAE to be regarded as a domestic award?

As a result of this ambiguity, tribunal members usually take a cautious approach and ensure that they are physically present in the UAE for signing the award in order to avoid any potential challenges regarding its enforcement. For example, the tribunal could be perceived to have acted contrary to the parties' intention to have a UAE award but ending up with a foreign award because it was signed outside the UAE.

The New Rules now clarify that an arbitration award will be deemed to have been rendered at the seat of arbitration even if the tribunal members were not physically present at the seat for signing of the award.

3. Emergency arbitrator

One of the new features of the New Rules is that it imposes measures to assist creditors in safeguarding their claims pending a final determination of the claims on the merits. Specifically, the New Rules allow the parties to apply for urgent interim measures such as attachment orders against a debtor's assets by way of appointing an emergency arbitrator.

4. Expedited proceedings

Another novel feature of the New Rules is that they address the urgent demands of businesses to have the dispute resolved very quickly, as opposed to an ordinary arbitration action.

The New Rules allow a party, prior to the constitution of the tribunal, to file an application for the arbitral proceedings to be conducted on an expedited basis. In such proceedings, the tribunal will be formed on an expedited basis and the award will be made within three months from the transfer of the file to the tribunal, unless extended by the DIAC Executive Committee (EC) on exceptional grounds.

5. Tribunal's power to sanction counsel conduct

In an attempt to restrict the use of 'guerrilla tactics' usually invoked in the arbitration process, the New Rules emphasize the tribunal's power to draw adverse inferences from a party who tries to frustrate the proceedings and/or make false statement, conceal or assist in the concealment of any document. This has always been an inherent power vested in arbitration tribunals; however,

the emphasis on such authority under the New Rules is certainly a welcome change.

6. Multiple contracts

In an attempt to maintain the procedural economy of the arbitration and avoid contradictory awards, claims arising out of more than one contract can now be held in a single arbitration. This is subject to a number of conditions:

- a. the parties to the contracts consent to a single arbitration to be conducted in accordance with the New Rules;
- b. the contracts contain arbitration agreements referring such disputes to arbitration to be conducted in accordance with the New Rules, the arbitration agreements are compatible, and the disputes arise out of the same legal relationship(s);
- c. the disputes arise out of the same transaction; or
- d. the claims involve multiple contracts between the parties originating from the same economic relationship.

7. Consolidation of proceedings

To ensure efficiency, the rules provide for the possibility of consolidation of a number of arbitration proceedings in a single arbitration upon application by a party to the EC where:

- all the parties to the arbitrations consent to consolidation;
- all claims in the arbitrations are made under the same arbitration agreement;
- the arbitration agreements are compatible, meaning: (i) the disputes arise out of the same legal relationship(s), (ii) the contracts at the centre of the disputes consist of a principal contract and its ancillary contract(s), or (iii) the disputes arise out of the same transaction or series or related transactions; or
- the claims involve multiple contracts between the parties that originate from the same economic relationship.

8. Joinder of parties

Joinder of one or more additional parties as Claimant or Respondent in an arbitration is also possible under the New Rules upon an application made by one of the parties to the EC. This is subject to the following:

- a. at any time during the proceedings, all parties (including the additional party to be joined) have consented in writing to the joinder and the arbitral tribunal agrees; or
- b. prior to the full constitution of the tribunal, the additional party to be joined is a party to the agreement contained in the arbitration agreement, or, where the additional party to be joined is not a party to the agreement containing the arbitration agreement, all parties (including the additional party) have consented in writing to the joinder.

9. Confidentiality and publication of the award

The New Rules provide that the award may be made public with the consent of the parties or may be made public by the decision of the DIAC in redacted form to preserve the anonymity of the parties and the tribunal. The public reaction to this change has yet to be seen, particularly in light of the ongoing debate as to whether or not it would be more beneficial to the arbitration community to publish arbitration awards.

10. Compliance with procedural formalities

In order to enhance the enforceability of arbitration awards before the curial courts, the New Rules stipulate that the tribunal and DIAC shall assist the parties in complying with all necessary formalities and that DIAC shall take any steps deemed necessary to enable the tribunal to comply with any terms of a direct or indirect court request. This change aims to ensure the enforceability of arbitration awards without them being easily nullified for failure to comply with certain procedural requirements or formalities of the seat.

11. Assistance with tribunal appointment

The New Rules provide that the EC shall be tasked with assisting the parties in nomination process of the tribunal, especially in situations where the parties' arbitration agreement is inoperable or defective. This is again another service that the EC will offer to parties, particularly in situations where an arbitration agreement does not specify the number of arbitrators or does not contain the necessary elements of an operable arbitration clause (e.g. the language of the arbitration, governing law, seat etc.).

In order to ensure that the proceedings will not be unnecessarily delayed, the New Rules also provide that prior to the tribunal appointment, the relevant arbitrator will have to indicate not only its independence and/or impartiality but also its availability. The New Rules further empower the EC to decline an

arbitrator appointment if it considers that the candidate lacks sufficient time to dedicate to the arbitration process.

12. Alternative appointment process

The New Rules give parties and co-arbitrators the opportunity to ask the EC to be involved in the default appointment process of a sole arbitrator or chairperson (as the case may be). This process could be triggered if the parties: (i) fail to jointly appoint a sole arbitrator, (ii) have not stipulated any method of appointment, and (iii) agree to the alternative appointment process set out in the New Rules.

In this scenario, DIAC will simultaneously provide each party with an identical list of three candidates for the parties to choose from. The parties will have seven days to remove names, re-order the remaining names by preference and send back the names to DIAC without exchanging their list with the other party. DIAC will then choose the appropriate candidate by order of preference from the lists.

This process can also be pursued in cases of three-member tribunals where the co-arbitrators fail to nominate a chairperson.

13. Third-party funding

The New Rules introduce provisions on dealing with third-party funding arrangements and states that DIAC may in certain cases order the disclosure of the existence and details of a party's third party funding arrangement. This is to safeguard the award from potential challenges on the basis of conflict of interest. This topic is still subject to great debate, given its wide scope, and is the only provision of the New Rules that has yet to be approved.

14. Recoverability of legal fees

The UAE Court of Cassation in Case No. 282/2012 ruled that legal fees are not recoverable under the existing DIAC Rules unless the tribunal is vested by the parties (e.g. under the terms of reference or arbitration agreement with such power). This has previously caused concerns particularly to award creditors who have thereby not been entitled to claim their legal fees in the arbitration.

The New Rules have dealt with this issue and now contain clear provisions dealing with recoverability of costs, including legal representation fees and other party costs to the extent reasonably incurred. This amendment will defeat any challenges regarding the tribunal's power to award legal costs in DIAC arbitrations.

15. Shari'ah compliant arbitration

In order to widen the scope of accommodating the business needs of the parties, the New Rules stipulate that DIAC will maintain a list of arbitrators qualified in Islamic law to accommodate cases where the parties have agreed to appoint an arbitrator experienced in Shari'ah law.

16. Exclusion of liability

On 18 September 2016, Federal Law Decree No. 7 was issued, amending certain provisions of the UAE's Penal Code. The key amendment that attracted wide attention and commentary is Article 257, which was previously directed only at court-appointed experts and translators, but now exposed arbitrators to the risk of temporary imprisonment if found to be acting contrary to their duty of fairness and impartiality. Article 257 applies to all arbitrators conducting arbitrations, whether on mainland Dubai or offshore.

It remains to be seen how this new and unexpected amendment will be applied. There is uncertainty as to how the public prosecutor will deal with allegations advanced on the basis of the newly amended Article 257. To this end, it should be noted that proving criminal intent in the context of lack of impartiality is cumbersome. The public prosecutor will only refer a potential claim to the criminal court if there is conclusive evidence that a crime has been committed. The arbitration community is currently awaiting clarification in the application of this article.

In consideration and understanding of the concerns this amendment has caused, the New Rules introduce clear provisions that no member of the tribunal or person appointed by the tribunal, the EC and its members shall be held liable to any person or party for any act or omission in connection with the arbitration.

Conclusion

The proposed New Rules aim to cope with international arbitration standards and address common pitfalls that are usually encountered in UAE seated arbitrations. It remains to be seen how the New Rules will apply in practice, but their issuance is certainly a step in the right direction pending the promulgation of the long-awaited UAE arbitration law.

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