

UPDATED DIFC-LCIA ARBITRATION RULES PROMOTE USE OF TECHNOLOGY, EARLY DETERMINATION OF CLAIMS AND CONSOLIDATION OF PROCEEDINGS

The latest Rules of Arbitration of the DIFC-LCIA Arbitration Centre (**DIFC-LCIA**) took effect on 1 January 2021 (the **2021 Rules**) replacing the 2016 Rules. The DIFC-LCIA is a joint venture between the Dubai International Financial Centre (**DIFC**) and the London Court of International Arbitration (**LCIA**). The amendments reflect those made to the Rules of Arbitration of the LCIA on 1 October 2020.

While much of the 2021 Rules will be familiar to users of DIFC-LCIA arbitration, new provisions are aimed at making proceedings more streamlined and clear for parties and arbitrators alike. The most significant developments are the introduction of an early determination procedure, an enhanced consolidation mechanism, and explicit provisions on the role of tribunal secretaries and the use of technology in the arbitral process, including in hearings.

A FOCUS ON EFFICIENCY

International arbitration remains a popular choice for dispute resolution in the Middle East and internationally, mostly due to the increased enforceability of awards and the procedural flexibility that is afforded to parties. However, surveys indicate that most users think that increased efficiency, including through use of technology, is the factor that is most likely to have a significant impact on the future evolution of international arbitration.¹ This has become all the more pressing as Covid-19 has brought dramatic new challenges to parties seeking to resolve their disputes and virtual hearings have become a new norm. At the same time, growing use of technology has brought with it increased regulation of data and a sustained focus on confidentiality. In response, the DIFC-LCIA's 2021 Rules, which apply to arbitration proceedings commenced

Notable features of the DIFC-LCIA 2021 Rules

- The 2021 Rules bolster tribunals' powers to promote the efficiency of proceedings.
- Reflecting the new normal, the 2021 Rules provide for virtual hearings and mixed in-person/virtual hearings.
- Communication by electronic means will be the default in DIFC-LCIA arbitrations.
- Claimants can commence multiple arbitrations by way of a composite request.
- Tribunals have an express power to dismiss claims or defences on a summary basis.
- Tribunals must consider data protection at the early stages of proceedings and put in place appropriate measures.
- Consolidation of related disputes is permitted even where parties are not identical in both proceedings.
- Disclosure of parties' and arbitrators' nationality is enhanced: the broad definition of "nationality" may flush out early challenges.
- Tribunal secretary appointments and functions are clarified, upholding the integrity of the tribunal's decision-making function.
- The emergency arbitrator procedure is enhanced.

¹ Queen Mary University of London et al, '[2018 International Arbitration Survey: The Evolution of International Arbitration](#)', p.3.

after 1 January 2021, seek to address these and the other 'hot topics' in international arbitration.

VIRTUAL HEARINGS AND ELECTRONIC COMMUNICATIONS AND AWARDS

A DIFC-LCIA tribunal may make any procedural order it considers appropriate with regard to the fair, efficient and expeditious conduct of the arbitration (Art. 14.5). That power includes the making of any procedural order "*with a view to expediting the procedure to be adopted in the arbitration*". In a departure from previous editions, the 2021 Rules are explicit that such orders may require the use of technology to enhance the efficiency and expeditious conduct of the arbitration, including any hearing (Art. 14.6). Reflecting current trends, the 2021 Rules are explicit that hearings may take place in person, or virtually by conference call, videoconference or using other communications technology, with participants in one or more geographical places (or in a combined form) (Art. 19.2). The arbitration shall continue to be treated for all purposes as an arbitration conducted at the arbitral seat, regardless of where any hearings take place (Art. 16.3).

As to the sending of communications, the 2021 Rules make communication by electronic means the default in DIFC-LCIA arbitrations. A Request for Arbitration (**RFA**) and a Response both shall now be filed electronically rather than in paper form (Art. 4.1). Save with prior approval, any written communication in relation to the arbitration shall be delivered by email or any other electronic means of communication that provides a record of its transmission (Art. 4.2). At the same time, the LCIA Court or a tribunal may direct that any written communication be delivered to a party at any address and by any means it considers appropriate (Art. 4.3). Further, unless the parties agree otherwise or the tribunal or the LCIA Court directs otherwise, any award may be signed electronically and/or in counterparts and assembled into a single instrument (Art. 26.2).

EARLY DETERMINATION AND PROCEDURAL TIMINGS

The 2021 Rules provide tribunals with a notable new power, to determine that any claim, defence, counterclaim, cross-claim, defence to counterclaim or defence to cross-claim is manifestly outside the jurisdiction of the tribunal, or is inadmissible or manifestly without merit; and where appropriate to issue an order or award to that effect (an **Early Determination**). An Early Determination may be made upon the application of a party, and after giving the parties a reasonable opportunity to state their views (Art. 22.1(viii)).

Since 2016, when the Singapore International Arbitration Centre (**SIAC**) became the first major commercial arbitral institution to introduce an explicit early dismissal procedure in its rules, a number of others have followed, including the Hong Kong International Arbitration Centre (**HKIAC**) and Stockholm Chamber of Commerce (**SCC**). The inclusion in the 2021 Rules of the express Early Determination procedure is to be welcomed as promoting procedural efficiency in DIFC-LCIA arbitrations.

Elsewhere, procedural timings have been refined. Where no Response is received, the LCIA Court shall appoint the tribunal within 28 days of the Commencement Date, rather than 35 days under the 2016 Rules (Art. 5.6).

Tribunals shall endeavour to make final awards within three months following the parties' final submissions (Art. 15.10).²

COMPOSITE RFA AND CONSOLIDATION

A claimant wishing to commence more than one arbitration under the 2021 Rules (whether against one or more respondents and under one or more arbitration agreement) may now serve a composite RFA (Art. 1.2). Similarly, a respondent may serve a composite Response in respect of a composite RFA (Art. 2.2). Each arbitration commenced by a composite RFA shall proceed separately, subject to the LCIA Court or the tribunal determining otherwise.

As to consolidation of arbitrations, the 2021 Rules retain the power of the tribunal to consolidate two or more arbitrations where all of the parties to those arbitrations consent in writing (Art. 22A.7(i)). Otherwise, the 2021 Rules permit the tribunal to consolidate two or more arbitrations commenced under the same arbitration agreement or any compatible agreement(s) either between the same disputing parties or – in a new provision – *"arising out of the same transaction or series of related transactions"*. The power of consolidation in the absence of agreement shall be exercised only where no arbitral tribunal has yet been formed for such arbitration(s) or, if already formed, where the tribunal(s) are composed of the same arbitrators (Art. 22A.7(ii)). A further new provision allows a tribunal to hear two or more related arbitrations concurrently where the same tribunal is constituted in each of those proceedings (Art. 22A.7(iii)). In addition, the 2021 Rules are explicit as to the power of the LCIA Court itself to consolidate arbitrations in certain circumstances (Art. 22A.8).

NATIONALITY OF ARBITRATORS AND PARTIES

Where parties to a DIFC-LCIA arbitration are of different nationalities, a sole arbitrator or the presiding arbitrator shall not have the same nationality of any party unless the parties who are not of the same nationality as the arbitral candidate all agree in writing otherwise (Art. 6.1). Under the 2021 Rules, "nationality" has been given a broad meaning. In respect of natural persons, nationality means citizenship, whether acquired by birth or naturalisation or other requirements of the nation concerned. In respect of legal persons, nationality means the jurisdiction in which it is incorporated and has its seat of effective management, and a legal person that is incorporated in one jurisdiction but has its seat of effective management in another shall be treated as a national of both jurisdictions (Art. 6.2). While a number of institutions' rules do not place restrictions on nationality, the International Chamber of Commerce (ICC) International Court of Arbitration's Rules require consideration of a prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals. The approach taken in the 2021 Rules is broadly similar and may ultimately reduce the scope for a party to challenge an arbitrator, once appointed, on the grounds of citizenship or other links to a jurisdiction.

TRIBUNAL SECRETARIES

The 2021 Rules incorporate to a broad extent provisions on the use of tribunal secretaries already contained in the (non-binding) LCIA Notes for Arbitrators. As in the Notes for Arbitrators, a tribunal secretary may only be appointed with the approval of all parties. Similarly, the parties are required to agree on the

² In recent years, the median time taken for LCIA arbitrators to prepare a final award following the close of submissions was three months: LCIA, [Facts and Figures – Costs and Duration: 2013-2016](#), October 2017.

tasks that may be carried out by the secretary. A party will be deemed to have agreed to the secretary's appointment if it has not objected within a reasonable time set by the tribunal (Art. 14A). The 2021 Rules are explicit that under no circumstances may a tribunal delegate its decision-making function to a tribunal secretary. The provisions on tribunal secretaries, emphasising the importance of transparency as to the secretary's functions and the consent of the parties to their appointment, reflect international best practice.

EMERGENCY ARBITRATORS

The 2021 Rules make minor updates to the DIFC-LCIA's emergency arbitrator procedure introduced in its 2016 Rules.

The emergency arbitrator may:

- make an order for payment of legal or other expenses incurred by any party during the emergency proceedings (Art. 9.10); and
- prior to the formation of the arbitral tribunal, confirm, vary, discharge or revoke, in whole or part, any order of the emergency arbitrator and/or issue an additional order; correct any errors, ambiguities or mistakes in any of its awards; or make an additional award as to any claim for emergency relief presented in the emergency proceedings but not decided in any of its award(s) (Art. 9.12).

CONFIDENTIALITY

The 2021 Rules expand the confidentiality obligations on parties, the tribunal and any tribunal secretary. The 2016 Rules required the parties to undertake as a general principle to keep confidential the arbitration and materials produced for the purposes or during the course of the arbitration. The 2021 Rules require the parties, tribunal and any tribunal secretary to seek the same undertaking of confidentiality from all those it involves in the arbitration, including but not limited to any authorised representatives, witness of fact, expert or service provider (Art. 30.1-30.2). This welcome change provides safeguards where the parties' arbitration agreement or the law at the seat of arbitration do not impose the same duty of confidentiality.

DATA PROTECTION

Data protection and cyber security both remain hot topics in international arbitration, following the introduction of the General Data Protection Regulation (GDPR) in the European Union in May 2018, the DIFC Data Protection Law in July 2020 and, more generally, heightened awareness of cyber risk.³ The 2021 Rules include a new provision requiring the tribunal, at an early stage of the arbitration, to consider in consultation with the parties and where appropriate the DIFC-LCIA whether it is appropriate to adopt specific information security measures to protect the physical and electronic information shared in the arbitration, and means to address the processing of personal data produced or exchanged in the arbitration (Art. 30A.5). The tribunal or the DIFC-LCIA itself may issue binding directions addressing information security or data protection (Art. 30A.6).

It will be interesting to see how the DIFC-LCIA and tribunals will put into practice the new rule on data protection and how other institutions may further adapt their own rules to address this issue. Separately, an International Council for

³ See, for example, the International Bar Association's ['Technology Resources for Arbitration Practitioners'](#), March 2019.

Commercial Arbitration (ICCA) and International Bar Association (IBA) joint task force has published a draft Roadmap to Data Protection in International Arbitration which is intended to help arbitration professionals identify and understand the data protection and privacy obligations to which they may be subject in international arbitration.⁴

ARBITRATOR AND TRIBUNAL SECRETARY RATES

Under a new 2021 Schedule of Costs, the maximum hourly rate that can be charged by arbitrators in arbitrations remains at AED 2500. It is anticipated that the maximum hourly rate will apply only to the most complex cases. In exceptional cases, the rate may be higher if agreed expressly by all parties. A new hourly rate of AED 370 to AED 860 is suggested as a reasonable rate for a tribunal secretary.

CONCLUDING COMMENTS

The 2021 Rules should help to make DIFC-LCIA arbitration more streamlined and clear for parties and arbitrators alike. In seeking to address the major issues currently facing the arbitral process, while retaining characteristics of DIFC-LCIA arbitration such as time-based charges and fees, the 2021 Rules should support the DIFC-LCIA's status as a "go-to" institution for users in the Middle-East.

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⁴ See, ICCA-IBA draft '[Roadmap to Data Protection in International Arbitration](#)', February 2020.