

DIFC-LCIA UPDATED ARBITRATION RULES

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The DIFC-LCIA issued updated arbitration rules which came into force on 1 January 2021 (the “2021 Rules”). The 2021 Rules contain several key changes that are likely to benefit parties seeking to resolve their disputes by way of arbitration before the DIFC-LCIA. Those key changes stand in stark contrast not only to the previous version of the Rules (the “2016 Rules”), but also to the rules of other arbitral institutions such as the ICC, DIAC or the LMAA.

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CONCURRENCY/CONSOLIDATION

The new 2021 Rules provide the Tribunal and the LCIA Court with enhanced powers in relation to consolidation of proceedings. The benefits of consolidation in terms of efficiency and convenience are particularly relevant in construction or energy-related disputes which frequently involve multiple parties and multiple contracts.

The 2016 Rules only allowed the Tribunal to consolidate arbitrations arising from the same arbitration agreement and they did not permit concurrency. The new Article 22A of the 2021 Rules provide the Tribunal with the powers to:

- 1) conduct two or more arbitrations concurrently where the same Tribunal is constituted in respect of each arbitration (though this is subject to approval from the LCIA Court); and
- 2) consolidate multiple proceedings where the arbitrations were *“commenced under the same arbitration agreement or any compatible arbitration agreement(s) either between the same disputing parties or arising out of the same transaction or series of related transactions”*.

Article 22A also provides the LCIA Court with the power to consolidate multiple arbitration proceedings provided that no arbitral tribunal has yet been formed. This power did not exist under the 2016 Rules. Parties will therefore now be able to apply to the LCIA Court for consolidation at an earlier stage of the proceedings without having to wait for a Tribunal to be constituted.

These amendments may even allow the Arbitral Tribunal or the LCIA Court to consolidate arbitrations between different disputing parties as it envisages consolidation of arbitrations arising out of the “*same transaction or series of related transactions*”. By way of comparison, the new ICC Rules, which also came into effect on 1 January 2021, do not allow the ICC Court to consolidate two or more arbitrations where the arbitrations are between different parties. The 2021 Rules also stand out when compared to the LMAA 2017 Terms which only allow arbitrations to be heard concurrently and do not allow for arbitrations to be consolidated or to the 2007 DIAC Arbitration Rules which mention neither consolidation nor concurrency.

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VIRTUAL HEARINGS AND ELECTRONIC FILINGS

The 2021 Rules confirm the global trend towards using modern means of communication and technology in arbitration, which has significantly increased since the severe disruption of Covid-19. The key changes include:

- the requirement to submit Requests for Arbitration and Responses in electronic form; if parties wish to deviate from this then they must first obtain written approval from the Registrar (Article 4.1); similarly, all written communications between the parties must be submitted in electronic form (e.g. email), whereas previously the Tribunal had to issue an order to that effect (Article 4.2);

- the language referring to virtual hearings (e.g. by video conference or conference call) has been updated to reflect current practices (Article 19.2). Whilst the 2016

Rules did not preclude virtual hearings, the 2021 Rules represent a clear effort on the part of the DIFC-LCIA to encourage such practices; and

- once the Tribunal issues an Award, the 2021 Rules permit it to be signed electronically and/or in counterparts (Article 26.2).

TIME LIMITS/EXPEDITED PROCEEDINGS

The 2021 Rules have also shortened certain time limits:

- the LCIA must appoint the Tribunal after 28 days from the Commencement Date and not 35 days as was previously the case (Article 5.6); and

- the Tribunal shall endeavour to hand down its final award within three months of the last submissions whether made orally or in writing (Article 15.10) whereas previously the Tribunal was required to render its award “*as soon as reasonably possible*”.

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Whilst the shortened time limits should positively impact the overall speed of the proceedings, it remains to be seen how this change will be put into effect and whether parties will insist on its implementation. If a decision is perceived as being rushed, this may possibly give rise to a challenge of the award at the enforcement stage. Similarly, the new ICC Rules include a time limit of six months from the last signature by the Tribunal or parties to the Terms of Reference for the Tribunal to render its final award (ICC Rules Article 31(1)). However, the Tribunal under the ICC Rules is also specifically given power to extend the time limit of its own accord, thereby tempering the effectiveness of this provision.

Finally, the 2021 Rules expressly provide Tribunals with the power to make an early determination on any claims, defences or counterclaims which are either manifestly outside the Tribunal's jurisdiction, manifestly without merit or inadmissible (Article 22.1(viii)). Tribunals previously had extensive powers under the 2016 Rules to deal with a variety of procedural matters. However, Tribunals have been traditionally reluctant to summarily dismiss manifestly unmeritorious claims. By incorporating specific wording granting Tribunals the express powers to make an "early determination", the 2021 Rules will no doubt encourage Tribunals to avail themselves more readily of these powers and therefore save time and costs.

Although it remains to be seen how the key changes will be implemented in practice, we expect that they will promote further the expeditious, fair and efficient conduct of arbitrations conducted under the DIFC-LCIA.

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