THE NEW DIFC-LCIA RULES 2021: A DRIVE TO EFFICIENCY

Zoe O'Sullivan QC and Sophia Hurst of Serle Court consider the updated DIFC-LCIA Rules which came into effect on 1 January 2021.

The updated rules represent a modernising of the previous rules, both extending previous powers and breaking new ground. In this article, we consider three particularly notable aspects of the new rules:

(1) the conferral on the Arbitral Tribunal of a power to make an early determination
(2) multi-party disputes
(3) electronic/virtual hearings.

Early determination

For the first time, the Tribunal is now expressly given the power under Article 22.1 (viii)

"*to determine that any claim, defence, counterclaim, cross-claim, defence to counterclaim or defence to cross-claim is manifestly outside the jurisdiction of the Arbitral Tribunal, or is inadmissible or manifestly without merit; and where appropriate to issue an order or award to that effect (an 'Early Determination').*"

This provision is designed to make DIFC-LCIA arbitration more attractive and cost-efficient by encouraging arbitral tribunals to take a tough line in dismissing points of no merit. It is particularly likely to be attractive

to banks and other financial institutions seeking to recover debts where the defences advanced are either fanciful as a matter of fact, or rely upon misconceived arguments of law.

The concept of 'admissibility' is distinct from that of jurisdiction. A party may argue that even though the tribunal has jurisdiction over the merits, there are reasons why it should not exercise that power: see ***PAO Tatneft v Ukraine*** [2018] EWHC 1797 (Comm) at [100]. For example, a party may argue that the reference to arbitration is premature because the parties have not yet complied with prior steps in a tiered dispute resolution clause.

As with all the powers under Article 22, the Tribunal may exercise its right of early determination on its own initiative or on the application of a party, but only after giving the parties a reasonable opportunity to state their views. We suggest that in practice it is unlikely that the Tribunal will impose early determination against the wishes of both parties, and that the most common situation will be where

one party is applying for early determination and the other is seeking to resist it.

Arbitral Tribunals invited to apply this rule will have to overcome any cultural reluctance to impose a summary determination on parties whose consent is the foundation of their jurisdiction. A party who loses an early determination is likely to claim that it has been deprived of its right to be heard. The success of the new rule will partly depend on the DIFC Court demonstrating a pro-arbitration stance by rejecting challenges to early determination awards save where it is obvious that the affected party has suffered substantial injustice. In that regard, it is encouraging to note that the DIFC Court has previously adopted a robust approach to challenges to awards under Article 41 of the Arbitration Law, emphasising the high evidential hurdle an applicant faces in seeking

to challenge a prima facie valid award under Article 41 in decisions such as ***Ginette PJSC v. (1) Geary Middle East FZE (2) Geary Limited*** **[2015] DIFC ARB 012 (7 April 2016)** and **[2016] DIFC CA 005 (9 October 2019).**

What the new rule does not make explicit (compare for example Article 43.1 of the HKIAC Rules 2018) is whether the Tribunal may make an early determination of:

(1) one or more discrete issues of

fact or law which form only part of a claim, defence or cross-claim; or

(2) a point of law (including a point of contractual construction).

We suggest that the wording is wide enough to extend to both situations, when coupled with the other case management powers such as the Tribunal's power under Article 14.6(iv) to decide the order and time in which issues will be decided and its power under Article 26.1 to make separate awards on different issues at different times.

The hurdle which must be crossed by a successful applicant for early determination is a high one. "*Manifestly outside the jurisdiction*" and "*manifestly without merit*" will require very clear cases. The parties are likely to have recourse to the test for immediate judgment in the DIFC Court. RDC 24.1 permits the court to enter immediate judgment where it considers that the claim, issue or defence has "*no real prospect of succeeding*". As to what this means in practice, see ***GFH Capital Limited v Haigh*** [2014] DIFC CFI 020 (10 November 2016) at [9] (Justice Roger Giles), endorsed by the Court of Appeal in ***Saif Sulaiman Mohammad Al Mazrouei v Bankmed (SAL)*** [2019] DIFC CA 011.

There is clearly scope for argument as to whether the threshold of "*manifestly without merit*" is higher than "*no reasonable prospect of success*", as the words would seem at face value to suggest.

There is also no equivalent in Article 22.1(viii) requiring the Tribunal to be satisfied that "*there is no other compelling reason why the case or issue should be disposed of at a trial*." But we suggest that where such a compelling reason is shown to exist (for example, where it is clear that there are factual disputes which can only be resolved at a full hearing) the Tribunal will find that the claim or cross-claim is not "*manifestly*" without merit.

Multi-party disputes

Article 22A of the Rules includes provisions designed to address the problems that arise in cases where there are multiple parties, or potential parties, to the dispute, and/or multiple contracts with separate arbitration clauses. The new power given to the tribunal under Article 22A.7(iii) to order that two or more arbitrations may be conducted concurrently is a helpful addition to the 2016 Rules. Likewise, the new Rules extend the power to order consolidation of multiple arbitration proceedings, previously only enjoyed by the Tribunal, to the LCIA Court. The key advantage to this is that the parties can agree or apply to the Court for consolidation at a much earlier stage, prior to formulation of the Tribunal. This, combined with the change to Article 1.2 allowing a Claimant to submit disputes arising under multiple arbitration agreements in a single Request for Arbitration (and so overturning the decision in the English case of ***A v B*** [2017] EWHC 3417 (Comm) that separate Requests under the LCIA Rules are required), ought to have the effect of streamlining proceedings much earlier on.

The most extensive departure from the 2016 Rules, and indeed compared to other institutional rules, are the changes to the tribunal's power to consolidate arbitrations which do not arise out of the same arbitration agreement, and may not even involve the same parties or transaction, provided they are sufficiently related.

Recent examples in the region demonstrate the complexities that arise where related parties are not all caught by the same arbitration clause. In ***Bankmed (SAL) v Fast Telecom General Trading LLC*** [2017] DIFC CFI 033 (22 January 2020) the Court considered whether to grant a stay of DIFC court proceedings under Article 13 of the DIFC Arbitration Law in favour of an arbitration. It declined to do so on a true construction of the arbitration agreement in a facility agreement, holding that it did not extend to individuals who had provided separate personal guarantees of the obligations under the facility but were not

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party to the agreement even though they had guaranteed the obligations arising in that agreement and to that extent, the Claimant's claim against the guarantors relied on the facilities agreement. In that case, the guarantor had argued that the dispute against him should be resolved by the tribunal, albeit that there was no arbitration clause in the guarantee.

The 2016 Rules would have allowed the guarantor to be joined to the arbitration had both parties consented in writing and that option is still enshrined in new Article 22.1(x). Absent such consent, even had there been an arbitration clause in the guarantee, that would not have been enough under Article 22.1(x) of the 2016 Rules to allow for consolidation because the rules only permitted consolidation of arbitrations "*commenced under the same arbitration agreement or any compatible arbitration agreement(s) between the same disputing parties*". Article 22.7(ii) goes further and allows consolidation where commenced either under the same arbitration agreement or any compatible agreement, "*between the same disputing parties or arising out of the same transaction or series of related transactions*".

That the arbitrations do not have to involve the same parties or even transaction is a significant extension of the Tribunal's power to consolidate, and a positive step towards resolving the sort of difficulties exemplified in the ***Bankmed*** case. We also note that this change goes further than Article 10(c) of the new ICC Rules (which also came into effect on 1 January 2021) which permits consolidation only when "*the claims in the arbitrations are not made under the same arbitration agreement or agreements, but the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible*."

Virtual hearings and electronic proceedings

The new rules also adapt DIFC-LCIA arbitration to the changes forced on it by the COVID pandemic. Many of these are so obviously beneficial that we suggest that parties and their legal advisers will be reluctant to go back to the old ways of continent-hopping and paper bundles.

Under new Article 4.1, the Request for Arbitration and Response must be filed electronically, and under new Article 4.2, communications between the parties must also be in electronic form. This is a welcome change from the previous default of correspondence by registered post.

Under new Article 26.2, the award can be signed electronically and/or in counterparts and assembled into a single instrument. This will make life much easier for arbitrators based in different jurisdictions to add their signatures and issue the award. However, parties may still wish to take local advice as to the enforceability of an electronically signed award.

New article 19.2 expressly confers the power to order a virtual hearing, providing:

"*As to form, a hearing 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)*".

This article will not lay to rest arguments that a party cannot have a fair hearing without an in-person examination of witnesses, but it makes it clear that the Tribunal has the power to order a virtual hearing even without the consent of one of the parties: "*The Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing*."

Conclusion

In its 2019 Annual Report, the DIFC-LCIA Arbitration Centre reported an 18% increase on the previous year in requests for arbitration and mediation. In spite of the pandemic it remains one of the fastest growing arbitration centres. These Rules are to be welcomed as a further step in promoting the fair, efficient and innovative conduct of arbitrations in the region.

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