

The New DIAC Arbitration Rules 2022: A Funder's Critical Perspective on Article 22

The new arbitration rules of the Dubai International Arbitration Centre ("DIAC Rules 2022") entered into force on 21 March 2022¹. Various law firms already provided concise summaries of the rules, invariably praising the changes and descriptively taking note of the new third-party funding provision, namely Article 22². The scope of this post is limited to Article 22. Its aim is to examine whether the new provision truly signals a positive development.

Article 22 reads as follows:

22.1. Prior to the constitution of the Tribunal, a party who has entered into a Third-party Funding Arrangement must promptly disclose that fact to all other parties and the Centre, together with details of the identity of the funder, and whether or not the funder has committed to an adverse costs liability.

22.2. After the constitution of the Tribunal, the parties shall not enter into a Third-party Funding Arrangements [sic] if the consequence of that arrangement will or may give rise to a conflict of interest between the third-party funder and any member of the Tribunal. A party entering into such an arrangement shall make the same disclosure to all other parties, the Centre and the Tribunal, as required by Article 22.1 above.

22.3. The Tribunal may take into account the existence of any third-party adverse costs liability when apportioning the costs of the arbitration between the parties.

¹ <http://www.diac.ae/idias/resource/Rules2022.pdf>

² By way of example, see <https://www.clydeco.com/en/insights/2022/03/the-2022-diac-arbitration-rules-and-administration> and <https://www.whitecase.com/publications/alert/renewal-diac-new-rules-launched-2022>.

At this juncture, mention should be made of the absence of the Arabic version of the Rules. To our knowledge and despite several requests to DIAC, this version has, however, not yet been made public. This is unfortunate, especially if – as some predict – local parties will constitute the main users of the DIAC Rules 2022 (and in Arabic) in the wake of the highly controversial Dubai Decree No. 34 of 2021 (“Decree”). However, the Rules were originally drafted in English and there is no general reason why the Arabic version should supersede the English version in case of an unlikely inconsistency.

Article 22 implicitly recognises the lawfulness of third-party funding arrangements³. However, the provision is problematic for several reasons.

First, it remains unclear whether Article 22 applies retrospectively to pending (pre-21 March) arbitrations under the DIAC, EMAC and DIFC-LCIA Rules, it being reminded that the EMAC and DIFC-LCIA arbitration centres were abolished by the Decree and it being noted that an agreement between DIAC and LCIA was reported on 28 March 2022, the precise content and consequences of which are still being reviewed⁴. The very first paragraph of the DIAC Rules 2022 suggests that the rules apply prospectively but the language ‘subject to specific introductory provisions referred to in the Rules’ in the same paragraph, together with the inclusion of ‘Third-Party Funding Arrangement’ in Article 1 under Section 1 (‘Introductory Provisions’), leaves some degree of uncertainty.

Secondly, it is not necessarily coherent to impose new disclosure obligations on funded parties in *arbitral* proceedings but to effectively exclude these same obligations in *conciliation* proceedings.⁵ To give a very recent contrasting example, the newly-unveiled ICSID Rules (to take effect on 1 July 2022) includes third-party funding provisions that apply in both arbitration and conciliation proceedings⁶.

Third, the scope of the disclosure obligation: the funded party is now required to disclose not only the existence of funding and the identity of the funder, but also ‘whether or not the funder has committed to an adverse costs liability’⁷. Besides *ad hoc* arbitrations and leading institutional rules that do *not* impose any disclosure obligations on the funded parties (SCC Rules 2017, LCIA Rules 2020, Swiss Rules 2021), the new DIAC Rules 2022 go even further than the broad SIAC Investment Rules that give the *power* to the Tribunal, ‘where appropriate’, to order disclosure as to whether the funder ‘has committed to undertake adverse costs liability’⁸. This

³ On the potential greater risks of a Dubai onshore-seated DIAC arbitration as opposed to one that is seated in the DIFC, see James Baldwin, *The DIACs confidence-inspiring arbitration rules for a new era*, 21 March 2022, available at:

<https://www.lexology.com/library/detail.aspx?g=5c320d9a-61d8-4157-8605-16c566dd6273>

⁴ DIAC and LCIA reach deal, 28 March 2022, Global Arbitration Review, available at: <https://globalarbitrationreview.com/diac-and-lcia-reach-deal>

⁵ See Article 3 of Appendix II to the Rules.

⁶ Rule 13 and Rule 12 in ICSID Convention proceedings, and Rule 23 and Rule 21 in ICSID Additional Facility Proceedings.

https://icsid.worldbank.org/sites/default/files/publications/rule_amendment_proposals_convention.pdf

https://icsid.worldbank.org/sites/default/files/publications/rule-amendment_proposals_additional-facility.pdf

⁷ Article 22.1 DIAC Rules 2022.

⁸ Article 24(l) of the SIAC Investment Rules 2017:

latter rule is indeed significantly different and narrower from the new DIAC rule that orders the *funded party*, in each and every possible case, to disclose whether the funder has undertaken adverse costs liability.

Fourth, the lack of direction: Article 22.3 DIAC Rules 2022 provides that “The Tribunal may take into account the existence of any third-party adverse costs liability when apportioning the costs of the arbitration between the parties”. Does this provision mean *a contrario* that the third-party adverse costs liability should not be taken into account when the tribunal is not apportioning the costs? How and why should the third-party adverse costs liability be taken into account in the first place?

Importantly, Article 22 also leaves directly unaddressed – like all other institutional rules – the increasingly recurrent question as to whether third-party legal fees may be recovered, at a time when arbitral tribunals increasingly appear to award such fees⁹ Or was Article 22.3 (in combination with Article 36.1¹⁰) meant to cover and encourage that possibility in a veiled way? It is difficult to say.

The wording of Article 22 DIAC Rules 2022 undoubtedly gives wide discretion to the arbitrators. It is also likely to give significant leeway to lawyers to interpret the provision in different ways. Clients and funders, whose interests are more closely aligned than may be thought, may however see Article 22 with less enthusiasm.



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If you have any questions related to this, or any other query, please do not hesitate to get in touch with Régis on: rbonnan@profileinvestment.com.

<https://siac.org.sg/images/stories/articles/rules/IA/SIAC%20Investment%20Rules%202017.pdf>

On this point and for other insightful comments, see Jae Hee Suh, *Disclosure of third party funding: Hong Kong and Singapore setting the trend?*, Practical Law Arbitration Blog, 2 October 2017, available at:

[http://arbitrationblog.practicallaw.com/disclosure-of-third-party-funding-hong-kong-and-singapore-setting-the-trend/#:~:text=Rule%2024\(1\)%20of%20the,the%20outcome%20of%20the%20proceedings%2C](http://arbitrationblog.practicallaw.com/disclosure-of-third-party-funding-hong-kong-and-singapore-setting-the-trend/#:~:text=Rule%2024(1)%20of%20the,the%20outcome%20of%20the%20proceedings%2C)

⁹ For two recent examples of ICC awards awarding such fees, see Jack Ballantyne, *Indonesia resists award over aborted satellite project*, Global Arbitration Review, 21 February 2022, available at

<https://globalarbitrationreview.com/indonesia-resists-award-over-aborted-satellite-project>; and Tenke Fungurume Mining SA v Katanga Contracting Services SAS [2021] EWHC 3301 (Comm) (07 December 2021), available at [https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Comm/2021/3301.html&query=\(bank\)](https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Comm/2021/3301.html&query=(bank)).

¹⁰ Article 36.1 (costs of the arbitration) is broadly worded. It reads as follows: “The costs of the arbitration shall include *amongst other things* any registration fees under the Rules, the Centre’s administrative fees, the fees and expenses of the Tribunal and any experts (whether appointed by the parties and/or the Tribunal), the fees of the legal representatives and any expenses incurred by those representatives, *together with any other party’s costs as assessed and determined by the Tribunal*” (italics added).