Kluwer Arbitration Blog

Upheaval of Dispute Resolution Centres in the Gulf: Recent Developments in Qatar and Dubai

Noor Kadhim (Armstrong Teasdale) · Saturday, October 23rd, 2021

On 14 September 2021, a Decree (no. 34) by the government of Dubai (currently only available in Arabic) (the **Decree**) abolished two of Dubai's most successful arbitration institutions: the Dubai Maritime Arbitration Centre (EMAC) and the DIFC-LCIA Centre.[1)] This was done without notice, and it meant that almost overnight, responsibility for regional arbitrations was transferred to the 'onshore' Dubai International Arbitration Centre (DIAC).

At or around the same time, the neighbouring state of Qatar issued Law No. 15/2021, which expanded the jurisdiction of the Qatar International Court, which is the competent court of the Qatar Financial Centre (QFC), to include disputes arising in respect of the Qatar Free Zones and Qatar Free Zones Authority (QFZA). With this development, the Qatari government appears to signal the ascendance of the QFC Court as a preferred forum for disputes, even to the detriment of arbitration.

Whilst Qatari Law 15/2021 appears to confirm a rising trend in the Gulf to enhance the remit of transnational commercial courts, the Dubai Decree seeks to eke away the competence of extra-territorial institutions, shifting power to regionally concentrated power bases instead.

For the sake of brevity, this post will focus on the recent developments in Dubai, its background, and the issues arising therefrom.

Context to the Decree

Following the Decree's entry into force, a new DIAC branch will be established in the DIFC, but that will take more time. It is claimed that the Decree aims to promote onshore Dubai as a global arbitration hub, following the issuance of Federal Law No. 6 of 2018 on arbitration (Dubai's relatively new arbitration law). The new arbitration law modernised Dubai's archaic arbitration laws, which were (rather unsatisfactorily) contained within a chapter of Dubai's Civil Procedure Code. However, as they say, the proof will be in the pudding.

Arbitration in the United Arab Emirates

One of the most important decisions made by commercial businesspeople when agreeing to arbitrate is deciding which arbitral institution will handle our potential disputes and under which set of rules. By agreeing to arbitrate, parties expressly circumvent the well-trodden route of whichever national court system is jurisdictionally appropriate to resolve disputes. Therefore, it is trite to say that two major requirements of negotiated arbitration agreements in the absence of such default procedures are foreseeability and certainty.

For businesses operating in the Arab world, the DIFC-LCIA Centre provided disputants familiar with Western arbitration practices the assurance that their arbitrations would be handled according to clear and foreseeable methods under the rules of an institution partnered with the LCIA, which carried years of experience of administering arbitrations in Europe. However, the certainty and foreseeability of arbitration in Dubai were called into question following the issuance of the Decree.

Transitional Period and Handover

In the immediate 'handover' period to the DIAC, and in the transitional period that will succeed it, there will be considerable uncertainty for businesspeople who have already negotiated, or are contemplating inserting, a clause remitting disputes to the DIFC-LCIA under its rules in their contracts.

For parties whose disputes are pending at the DIFC-LCIA, these will continue to be administered under the DIFC-LCIA Rules, but will be supervised by the DIAC pursuant to Article 6(B) of the Decree. For parties whose arbitration agreements contain a clause incorporating the DIFC-LCIA Rules, but whose disputes have not yet arisen, these will be administered under the DIAC Rules by DIAC, unless the parties agree otherwise, pursuant to Article 6(A) of the Decree.

The choice of seat of 'DIFC' by parties is not affected by the Decree: this (and the DIFC laws) will continue to apply.

Two Institutions, Two Sets of Rules

In theory, the Decree streamlines matters because there is now a centralised hub to deal with disputes (the DIAC) as opposed to two different institutions, one onshore (the previous DIAC) and one off-shore (DIFC-LCIA), operating under two different sets of rules. However, theory and practice do not always align. The homogeneity of the procedures does not always lead to the best result, notably for parties who chose the DIFC-LCIA Rules specifically to benefit from the experience and qualifications of the LCIA and who never signed up to DIAC. The discrepancy between the two sets of rules is the first challenge that parties will need to tackle; the DIFC-LCIA Rules were updated in 2021 whereas the DIAC Rules currently in force[2)] date back to 2007 and do not contain many of the innovations in other modern institutional rules to which international parties have become used (such as on joinder and consolidation, expedited procedures, and the use of digital technology).

Having worked at a major arbitral institution administering cases in the past, my personal observations are the following. First, any choice of arbitral institution should be clear and

unambiguous in order to avoid conflicts down the line, either between the parties, or between the application of opposing institutional rules. The ability to continue with DIFC-LCIA arbitrations but have them administered by DIAC is problematic. As such, for example, the ICC Rules now provide under Article 1(2) that only the ICC Court is competent to administer arbitrations under its rules. It is likely that this change, which was made following the case of Insigma Technology v Alstom, was created to prevent instances in which parties refer to an arbitral institution but ask it to apply the rules of another (such as the ICC) to the proceedings. It is to be recalled that in Insigma, the Singapore courts permitted a competing institution (Singapore International Arbitration Centre) to apply the ICC (i.e., not its own) rules, pursuant to the parties' agreement.

At a very basic level, data protection issues might also arise as a result of conflation of two institutional processes, if information about disputing parties which had not intended for their details to be made accessible to anyone other than the DIFC-LCIA is shared with the DIAC. On a practical note, 'institutional cooperation' also fails to take into account the different charging structures of institutions, and ways of calculating arbitrators' pay. For instance, under DIAC Rules, the arbitrators' pay is subject to a discretionary procedure employed by the DIAC. Under Article 2.2, the DIAC "*fixes the advance on costs corresponding to the amount of the dispute, in an amount likely to cover the fees and expenses of the Tribunal and the Centre's administrative costs*". This is akin to the sliding scale system used at the ICC. However, the DIFC-LCIA Rules are different: the tribunal is remunerated according to an hourly rate determined by the LCIA Court, under Article 2 of the Schedule on Costs. It therefore fluctuates, and depends on fixed hourly fees. It is difficult to see how these systems will be reconciled or applied effectively from an administrative perspective if the accounts department of DIAC is tasked to apply different charging methods to different cases administered by the centre in the transitional period.

Further, the DIFC-LCIA Rules contain multiple references to the LCIA taking supervisory decisions (such as on the appointment of arbitrators and arbitral challenges). This worked when the DIFC-LCIA Centre's 'umbrella' supervisory entity was the LCIA Court. But the insertion of DIAC as administering institution for pending So, to take but one example, the DIFC-LCIA Rules (Rule 26.9) provide that parties may agree to settle the dispute and thereby end the arbitration proceedings. Usually this is done through a consent award by the tribunal. However, there is a mechanism in the DIFC-LCIA Rules that allows parties to dispense with requesting a consent award, and instead leave it to the LCIA Court to conclude the arbitration proceedings after discharging the tribunal. The problem becomes: what happens when there is no LCIA Court to perform such function, and the DIAC does not have a residual, equivalent rule in such circumstances? It is concerning that this may be one of several 'black holes' that will only be discovered in due course, after the handover period, when the time comes to cross such bridges.

Furthermore, it is clear that each arbitral institution has an ethos and methodology that is specifically chosen by its users. At least in the case of the larger and more established institutions, that personality is rooted in a long history. It stands to reason that the parties chose DIFC-LCIA arbitration for a reason; not just for the content of the rules. They considered the depth and breadth of its knowledge in specific sectors and types of disputes, and its management team and direction. An abrupt transition from one institution to another does not entail a sudden 'brain transplant': the move to a new DIAC will be a gradual process in which the identity and directional approach of the ultimate entity is yet to be formulated. This is not what DIFC-LCIA would-be users signed up for.

Concluding Remarks

In conclusion, parties contemplating inserting an arbitration clause into contracts with a Dubai-based counterparty would be well-advised to take advice on whether and how to amend their existing contracts if they contain a DIFC-LCIA clause. In the interests of clarity and foreseeability, in light of the potential issues touched upon in this post, it is suggested that parties who have not yet entered into a dispute under their contract enter into a separate amendment agreement by which they clarify which rules they intend to be applicable in the DIFC-LCIA clause (for the avoidance of any disputes in due course). The other option would be to replace the disputes clause altogether (for instance, with one that either referred to the LCIA, or another regional institution likely to stand the test of time, preferably not the result of a joint venture, straddling two jurisdictions.

Similarly, in the future, when deciding upon which arbitration clause to insert into a commercial contract, it may be prudent to choose an institution that has been around, not just for a long time, but also in a jurisdiction where the rule of law is rarely called into question and where institutions with a judicial character are unlikely to be deleted with the stroke of a pen.

**The views expressed herein do not constitute legal advice. The views are the author's and do not reflect those of the firm or the firm's clients.*

References

?1 The DIFC-LCIA was established as a joint venture between Dubai International Financial Centre (DIFC), Dubai Arbitration Institute (DAI), and the London Court of International Arbitration (LCIA).

?2 Pending adoption of the '2017' DIAC Rules by the DIAC.

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