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DIAC 2.0: A Mirage or A Tale of 1001 Arabian Nights

Gordon Blanke (Blanke Arbitration LLC) · Saturday, January 29th, 2022

The recent adoption of Decree No. 34/2021 (see [Dubai Government Decree No. 34 of 2021](#), which entered into force with effect from 20 September 2021) provides for the consolidation of local arbitration centers into a single institution, the Dubai International Arbitration Centre 2.0 (DIAC 2.0). Some perspectives on Decree No. 34/2021 have already been shared on the Blog (see [here](#) and [here](#)). In sum, despite the good intentions that have been said to lie behind the Decree, reality tells a different story and the adoption of the Decree has left arbitration in Dubai in disarray. This post argues that, for the Decree to achieve its main objectives, it will require the uncompromising support of an international investor community that it is unlikely to secure.

To avert a flight of arbitral references from Dubai and the Dubai International Financial Centre, the Dubai-based judicial free zone (DIFC), as a chosen seat of arbitration, DIAC 2.0 would do well in establishing a fresh institutional relationship with the London Court of International Arbitration (LCIA) in the form of a DIAC-LCIA. This would likely allow DIAC 2.0 to salvage and harness the achievements and reputation of the DIFC-LCIA for its own grander purposes moving forward in the implementation of the Decree. Failure to create a DIAC-LCIA is likely to result in the LCIA exploring alternative options of partnering up with the Abu Dhabi Global Market (ADGM), the Abu-Dhabi-based judicial free zone, to create an ADGM-LCIA. As a result, former users of the DIFC-LCIA will be likely to migrate their free zone arbitration requirements to the ADGM-LCIA, with the ADGM winning out over the DIFC in matters of common law-style free zone arbitration.

Decree No. 34/2021

As discussed in earlier posts, the main objective of Decree No. 34/2021 is to unify the institutional arbitration offering of Dubai under DIAC 2.0, a new, reconstituted DIAC, which will have both an onshore and an offshore presence. To that end, the Decree contemplates the dissolution of the old DIAC, the Emirates Maritime Arbitration Centre (EMAC) and the DIFC Arbitration Institute (DAI), which, in turn, has triggered the disintegration of the joint venture between the LCIA and the DAI which formed the basis of the DIFC-LCIA. DIAC 2.0 will be reconstituted with a new Administrative Body and a new Board of Directors (latter of which by virtue of a recent Dubai Government Decree forming the Board of Directors of the Dubai International Arbitration Centre, dated 7 November 2021). The new Board of Directors is now in the process of appointing a DIAC Court, which – by analogy to the LCIA Court – will form the operational backbone of DIAC 2.0. Importantly, DIAC 2.0 will operate in complete independence from the Dubai Chamber of

Commerce and Industry (DCCI), to which the old DIAC was formally affiliated. These latter are, no doubt, positive features of the Decree, which deserve unstinting support. That said, the dissolution of the DIFC-LCIA, which has turned out to be an inevitable consequence of the implementation of the Decree No. 34/2021 (albeit that the DIFC-LCIA is not even mentioned in the Decree), causes reasoned concerns that Dubai as a seat of arbitration will lose one of its principal points of attraction.

Having been established in 2008, by early 2021, shortly before the adoption of Decree No. 34/2021, the DIFC-LCIA had succeeded in registering an impressive total of around 180 active references. A significant portion of these references was made up of disputes referred to the DIFC-LCIA by foreign, non-UAE parties in relation to disputes unrelated to the UAE, who opted in favour of the DIFC-LCIA arbitration with a DIFC seat as a viable alternative to London-seated LCIA arbitration or comparable institutional arbitrations seated in other common law jurisdictions further afield, such as Singapore under the Rules of the Singapore International Arbitration Centre (SIAC). An equally significant portion of references will have gone to foreign and local investors with a preference for common-law-style arbitration for the resolution of UAE-related disputes. The choice of DIFC-LCIA arbitration in combination with a DIFC seat by such parties was essentially motivated by:

- the close affiliation of the DIFC-LCIA with the LCIA, with the LCIA serving as the administrative decision-maker in DIFC-LCIA arbitrations under the DIFC-LCIA Rules, which are – barring the default seat of arbitration, which is the DIFC as opposed to London – identical to the LCIA Rules. For the avoidance of doubt, Art. 32.4 of the DIFC-LCIA Rules even empowers the LCIA Court to take over the direct administration of a DIFC-LCIA reference if required; and
- the resulting reassurance that DIFC-LCIA arbitration with a seat in the DIFC is essentially an LCIA arbitration conducted in the DIFC, a common-law jurisdiction, and as such offers all the advantages the parties would expect from an LCIA arbitration with a seat in London.

The establishment of the DIFC-LCIA allowed international and local users to contract into an autonomous, self-contained common-law arbitration process under a common-law-inspired institutional set of rules in the Middle East. Irrespective of the distinctively positive features of DIAC 2.0, including its planned institutional presence offshore, DIAC 2.0 will not be able to instill the confidence of a common-law-style arbitration *à la* DIFC-LCIA.

As a natural corollary, the dissolution of the DIFC-LCIA will trigger a flight risk of references that simply cannot be stemmed by DIAC 2.0. As such, existing and future references that would otherwise have gone to the DIFC-LCIA are therefore likely to move to:

- the London-based LCIA, with pending references migrating to direct administration by the LCIA Court by virtue of Art. 32.4 of the DIFC-LCIA Rules, and with parties that wish to arbitrate in the DIFC referring to DIFC-seated arbitration under the LCIA Rules; and to
- the ADGM-ICC, which operates out of the ADGM in direct competition with the DIFC-LCIA, thus offering a viable institutional alternative for DIFC-seated arbitrations or incentivizing parties to opt for ADGM-ICC arbitration in combination with an ADGM seat, offering advantages similar to those arising from a DIFC seat.

To counteract this risk, DIAC 2.0 would be well advised to explore options of co-operation with the LCIA in the form of a new DIAC-LCIA, albeit that there is a tangible risk that the LCIA might

decide to go its own way, establishing an alternative offshore presence in collaboration with the Abu Dhabi-based ADGM. Importantly in this context, current proposals by the DIFC to administer pending DIFC-LCIA references by the former DIFC-LCIA staff on secondment from DIAC 2.0 to the LCIA (the former DIFC-LCIA staff having been transferred to the DIAC pursuant to the Decree) have remained unanswered by the LCIA (see “[Dubai’s Position as a Global Hub for Alternative Dispute Resolution Reconfirmed through Unifying Arbitration Centres](#)”, DIFC Press Release, 7 October 2021 (last accessed on 6 November 2021) and “[Update: DIFC-LCIA](#)”, LCIA Press Release, 7 October 2021 (last accessed on 6 November 2021)), foreshadowing challenges to any continued co-operation between the DIFC and/or the DIAC and the LCIA, as the case may be.

A new DIAC-LCIA

To avoid the reputational damage that a dissolution of the DIFC-LCIA might entail for Dubai as a seat of arbitration and to curb the potential flight of DIFC-LCIA references from the DIFC and Dubai more generally, the DIAC would be well advised to negotiate a novel form of inter-institutional co-operation with the LCIA under the umbrella of a new DIAC-LCIA.

This would facilitate the transition from the DIFC-LCIA to an offshore DIAC and allow the offshore DIAC to take over the operations of the DIFC-LCIA without any institutional fall-out by a simple rebranding exercise (provided evidently that appropriate inter-institutional agreements were to be put in place between all relevant stakeholders, including the DIAC and the LCIA, to the desired effect). This would allow the existing DIFC-LCIA staff to transfer to a new DIAC-LCIA and continue to administer existing and future references under a renamed (yet otherwise unchanged) set of DIAC-LCIA Rules. The new DIAC-LCIA would operate out of the existing offices of the DIFC-LCIA in the DIFC, which would be rebranded as the DIAC-LCIA. This would create the basis of an historically unprecedented inter-institutional relationship based on each institution’s unrivalled expertise in the administration of arbitral proceedings under their respective institutional rules, a relationship, in which the LCIA would continue to lend its undivided support to the continued success of the DIAC’s future offshore operations. Given that the new DIAC will be divorced from the Dubai Chamber of Commerce and Industry (DCCI), provided the full support of the LCIA, there would not appear to be any practical, legal or political obstacles to any such co-operation. The LCIA, for sure, would stand to benefit from its continued physical presence in the DIFC, standing firm in its direct competition with the ADGM-ICC in the region.

A new ADGM-LCIA

In the alternative, the LCIA Court may consider moving its UAE offshore arbitration offering from the DIFC to the ADGM. The ADGM, which benefits from its own arbitration law, the 2015 ADGM Arbitration Regulations, and serves as a seat of arbitration in its own right, would serve the LCIA as an ideal alternative joint venture partner. Given that the ADGM – like the DIFC – operates as an autonomous common law jurisdiction from within the UAE, there is no reason why the LCIA Court should not entrust its offshore arbitration offering to the ADGM. The ADGM Arbitration Centre, the arbitration services centre based in the ADGM, would likely accommodate an ADGM-LCIA – like it does the ADGM-ICC – as a new door tenant (similar to the basis on which Maxwell Chambers in Singapore houses a number of foreign arbitral institutions).

Conclusion

In the light of the foregoing, the adoption of Decree No. 34/2021 might have some unintended consequences. The tangible flight risk of free zone arbitration references resulting from the dissolution of the DIFC-LCIA will be certainly one of them. That said, there is still time to address this concern and counteract the damaging impact the dissolution of the DIFC-LCIA might have on the attraction and reputation of Dubai as a seat of arbitration.

With the creation of the DIFC-LCIA, Dubai originally succeeded in setting up an arbitration landscape that would offer both local and international users a free choice between two fully autonomous processes of arbitration: one onshore, administered by a local arbitral institution, i.e., the DIAC, and governed by the 2018 UAE Federal Arbitration Law with the curial competence of the mainland Dubai courts; and the other one offshore, administered by the DIFC-LCIA and governed by the 2008 DIFC Arbitration Law with the curial competence of the DIFC Courts. The Decree deprives the offshore arbitration variant of its self-contained autonomy, provoking parties in search of common law arbitration packages to look at competing jurisdictions, whether onshore or offshore.

The projected offshore success of DIAC 2.0 is no more than a mirage or, at best, just another tale of 1001 Arabian nights. DIAC 2.0 had better vie for the LCIA as a joint venture partner to establish a DIAC-LCIA, failing which its offshore ambitions might succumb to the creation of a new ADGM-LCIA.

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