# Kluwer Arbitration Blog

## US Court Refuses to Enforce a DIFC-LCIA Arbitration Clause due to Abolishment of the DIFC-LCIA Arbitration Centre

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On 6 November 2023, the United States ("**US**") District Court of New Orleans, Louisiana ("**Louisiana Court**") rendered a decision on the enforceability of a DIFC-LCIA arbitration clause. The Louisiana Court ruled that the DIFC-LCIA arbitration clause was unenforceable because it referred to an arbitral institution that had been abolished.

This decision from the Louisiana Court is the first international decision after the enactment of Decree No. 34 of 2021 ("**Decree 34**") on 14 September 2021, accompanied by a new statute regulating the operation and management of the Dubai International Arbitration Centre ("**DIAC**"). Decree 34, which came into force on 20 September 2021 ("**Effective Date**"), abolished the Emirates Maritime Arbitration Centre ("**EMAC**") and the DIFC Arbitration Institution ("**DAI**"), the administering body of the DIFC-LCIA Arbitration Centre, with immediate effect while assigning all their obligations, rights, and resources to the DIAC. The DIFC-LCIA was essentially a joint venture between the Dubai government and the London Court of International Arbitration.

Pursuant to Article 6a of Decree 34, existing arbitration agreements that were signed before the Effective Date which refer disputes to the EMAC or the DIFC-LCIA are "deemed valid". All arbitrations commenced on or after the Effective Date will be registered by the DIAC and administered directly by its administrative body. In administering such arbitration proceedings, the DIAC will apply the rules of procedure of the DIAC, including the tables of fees and costs, through the DIAC's own case management systems, unless otherwise agreed by the parties. Therefore, the parties remain free to opt out of the DIAC regime if they wish to do so.

Even though Decree 34 expressly confirmed that existing agreements referring to the DIFC-LCIA arbitral institutions, entered into before the Effective Date, remained valid, and were to be taken over by the DIAC, there were concerns raised around the invalidity of the arbitration agreement for lack of consent to arbitration as commented on in previous blog posts here and here.

**Background to the Louisiana Court's decision**

The dispute relating to the decision of the Louisiana Court arose out of a contract for the supply of materials and provision of services for an oil and gas project to be performed in the Kingdom of Saudi Arabia ("**KSA**"). The contract was concluded between subsidiaries of US companies Baker Hughes Saudi Arabia ("**Claimant**") and Dynamic Industries Saudi Arabia ("**Respondent**") ("**Contract**").

The Contract contained an arbitration clause under the DIFC-LCIA Rules, seated in the DIFC, which was concluded before the enactment of Decree 34.

The Claimant sought to bypass the arbitration agreement and sued the Respondent directly before the Louisiana Court for unpaid services. The Respondent sought a dismissal of the Claimant's claim on the ground of forum non conveniens or in the alternative to compel the Claimant to arbitrate its claims.

**Parties' Arguments and Findings of the Louisiana Court**

The Claimant argued that the arbitration clause was unenforceable because the selected forum, the DIFC-LCIA no longer exists, having been abolished by Decree 34.

On the other hand, the Respondent argued that the Louisiana Court may nevertheless compel the Claimant to arbitrate its claims in the DIAC. The gist of the Respondent's argument was that Decree 34 "transferred the assets, rights and obligations" of the DIFC-LCIA to the DIAC and "expressly states that DIFC-LCIA arbitration agreements entered into before the effective date of [the decree] are deemed valid".

In rendering its decision, the Louisiana Court rejected the Respondent's argument. The Louisiana Court considered the validity of the arbitration agreement by reference to US law. The Louisiana Court started by noting that the US Federal Arbitration Act ("**FAA**") makes written arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract". Based on this provision, the Louisiana Court confirmed that the US Supreme Court had interpreted the FAA as reflecting a "liberal federal policy favoring arbitration".

The Louisiana Court then explained that this provision reflects the "fundamental principle that arbitration is a matter of contract" and that the FAA's central purpose is to ensure that "private agreements to arbitrate are enforced according to their terms". As a result, the "first principle that underscores all of the US Supreme Court's arbitration decisions is that arbitration is strictly a matter of consent".

To illustrate the point, the Louisiana Court referred to the decision in Nat'l Iranian Oil Co. v Ashland Oil Inc. In this case, a dispute arose between the parties under a contract that required any disputes to be arbitrated in Iran. The defendant refused to participate in arbitration in Iran due to the dangerous conditions in that country. The claimant requested the court to compel the defendant to arbitrate in Mississippi instead. The US courts in this case denied the motion and explained that "because arbitration is a creature of contract, we cannot rewrite the agreement of the parties and order the proceeding to be held in Mississippi".

The Louisiana Court also referred to the decision in Ranzy v Tijerina, 393 Fed. App'x 174 (5th Cir. 2010), where the US Court of Appeals Fifth Circuit considered an arbitration clause that required the parties to arbitrate all disputes before the National Arbitration Forum ("**NAF**"). The NAF (now known as Forum) is an American organisation that provides alternative dispute resolution services. It used to handle many consumer arbitrations. However, by the time the dispute between the parties arose, the NAF had ceased to handle the type of claim the claimant had brought against the defendant. Once again, the US courts in this case denied the defendant's motion to compel arbitration, explaining that the parties' contractual choice of forum was an "integral part of the agreement to arbitrate, rather than an ancillary concern" that the US courts could not disregard or

circumvent.

Based on those precedents, the Louisiana Court rejected the Respondent's arguments on the basis that it cannot rewrite the agreement of the parties and that the DIAC was a different forum to which the parties did not contractually agree. The Louisiana Court commented that: "with all due respect" the Dubai government "does not have the authority to unilaterally change the arbitration forum agreed by the parties".

**Commentary**

The Louisiana Court's decision is noteworthy for two reasons.

First, Article II (3) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**") mandates the court of a contracting state when seized of an action in a matter in respect of which the parties have made an agreement to arbitrate, to refer the parties to arbitration "unless it finds that the said agreement is null and void, inoperative or incapable of being performed".

The Louisiana Court refused to recognise that, by virtue of Decree 34, the DIAC effectively became the successor of the DIFC-LCIA. Arguably, the arbitration agreement is still capable of being performed as a successor institution exists. Given the express wording of Decree 34, it is likely that as matter of UAE law (or even DIFC law), the arbitration agreement would be considered valid and enforceable.

Second, the Louisiana Court considered the validity of the arbitration agreement under US law and did not consider whether to apply the law applicable to the underlying contract or the law of the seat of arbitration, DIFC law. This is perhaps because the contract involved subsidiaries of US companies and because the FAA Chapter 1 permits a court to deny enforcement on the basis of defenses found "at law or in equity for the revocation of any court".

There is no clear consensus amongst member states of the New York Convention regarding the determination of the law applicable to the arbitration agreement where none is expressly made. There are essentially two main possibilities: the law governing the underlying contract or the law of the seat of arbitration.

In international contracts, it is advisable for the parties to specify the governing law of the arbitration agreement. Failure to do so may lead to uncertainty if the national courts have to determine the issue.

In Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb [2020] UKSC 38, the United Kingdom Supreme Court found that where there is no express choice of law governing the arbitration agreement but an express choice of seat, there was a strong presumption that the arbitration agreement would be governed by the same law as the curial law. In the Enka decision, the United Kingdom Supreme Court endorsed the "validation principle" which provides that national courts should interpret arbitration clauses in a manner which renders them valid.

In contrast to the Louisiana Court's decision and reasoning, one may also refer to the approach taken by the Paris Court of Appeal in the case of SAS ADB c REO Inductive Components AG (Paris, Section 1, arrêt du 20 mars 2012, no. 10/23578).

In this case, a dispute between a French and a German company was submitted to arbitration pursuant to the rules of the German Arbitration Commission ("**DAS**"). The German company (REO AG) obtained an order for execution of the DAS award from the Paris Court of First Instance. The French company (ADB) appealed that decision and argued that the arbitration clause was void as it referred to an arbitral institution which no longer existed. The clause called for arbitration under the rules of the DAS. However, the DAS ceased to exist in 1992. The arbitration proceeded under the rules of the German Arbitration Institute ("**DIS**") formed via the merger of the German Arbitration Committee and German Arbitration Institute. The Paris Court of Appeal ruled that the validity of the arbitration clause was not affected by the fact that the DAS no longer existed given that the DIS is the successor of the latter.

The Paris Court of Appeal's decision highlights the pro-arbitration approach of the French Courts which refused to consider the arbitration clause void or inoperative in circumstances where a successor institution exists. In contrast, the Louisiana Court's decision refused to recognise the DIFC-LCIA arbitration agreement as valid on the basis that the DIFC-LCIA arbitration centre no longer existed even though, by virtue of Decree 34, DIAC became the successor of the DIFC-LCIA Arbitration Centre.

Whilst it is uncontroversial that arbitration is a matter of consent and a party should not be forced to arbitrate in a forum which it did not choose, a party should equally not be allowed to frustrate the arbitration process by arguing lack of consent simply to avoid its prior commitment to arbitrate. Given the express wording of Decree 34, the abolishment of the DIFC-LCIA does not render the arbitration agreement inoperative or invalid. If a party to a contract which provides for DIFC-LCIA arbitration does not wish to proceed to arbitration under the auspices of the DIAC, it should at least select and propose another institution before suing its counterpart before national courts.

**Conclusion**

The Louisiana Court's decision is a good illustration of the difficulties that may arise when an arbitration clause refers to an arbitral institution that no longer exists. It will be interesting to see how UAE courts will decide similar challenges.

Parties with contracts that still provide for DIFC-LCIA arbitration should try to mutually agree to amend their arbitration clause to mitigate the risks that enforcing courts may refuse to recognise the validity and/or enforceability of the arbitration agreement as the application of different laws may lead to different outcomes.

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data of leading arbitral institutions, to uncover potential conflicts of interest.



This entry was posted on Friday, February 2nd, 2024 at 8:33 am and is filed under DIFC, MENA
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