Kluwer Arbitration Blog

The Aftermath of Decree 34: The Saga Continues in Singapore

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In September 2021, the United Arab Emirates ("UAE") issued Decree No. 34 of 2021 ("Decree 34") by which the DIFC Arbitration Institution, the administering body of the DIFC-LCIA arbitration centre ("DIFC-LCIA") was abolished with immediate effect, and all its obligations, rights, and resources were assigned to the Dubai International Arbitration Centre ("DIAC"). Decree 34 also provided that all DIFC-LCIA arbitration clauses concluded by 14 September 2021 ("Effective Date") were deemed valid and to be replaced by DIAC, unless otherwise agreed.

The impact of Decree 34 produced a ripple effect: first by an earlier decision of the United States Eastern District Court of Louisiana ("Louisiana Court"), commented on in a previous post, and now by a recent decision of the Singapore High Court ("Singapore Court").

In this post, we take a deeper dive into the implication of the Singapore Court decision and its impact on the UAE arbitration landscape.

Singapore Court Decision

Similar to the Louisiana Court, the Singapore Court decision concerned a DIFC-LCIA arbitration agreement entered into before the Effective Date. However, unlike the Louisiana Court decision, which dealt with the issue of enforcement of a DIFC-LCIA arbitration agreement, the Singapore Court decided on a challenge to the enforcement of a DIAC tribunal's provisional award granting proprietary injunction over the respondent's assets ("Provisional Award"). The main argument put forth by the respondent in challenging the enforcement action was that the DIAC arbitration was contrary to the parties' DIFC-LCIA arbitration agreement.

Interestingly, the applicant accepted that Decree 34 frustrated the parties' DIFC-LCIA arbitration agreement. However, it argued that any provision that was rendered unlawful, such as reference to the DIFC-LCIA, could be severed and replaced with lawful provisions that gave effect to the intention of the parties. The applicant contended that this was in accordance with the parties' intention, which was to arbitrate their dispute by an institution in Dubai.

The Singapore Court did not agree. Instead, it found that the DIAC arbitration was not in accordance with the parties' agreement to arbitrate in the DIFC-LCIA. Citing Gary Born, the Singapore Court noted that the express agreement on institutional rules "concern[s] the basic

architecture of the arbitration and typically have a substantial impact on the arbitral proceedings". It took the view that it would be "a stretch to say that the parties intended, at the time they signed the Settlement Agreement, to accept arbitration administered by any institute in Dubai (whether then existing or not)". In reaching its view, the Singapore Court considered the significant differences between the rules of DIFC-LCIA and the DIAC, such as different timelines, calculation of costs and procedures for emergency arbitration.

In rendering its decision, the Singapore Court also referred to the Louisiana Court decision which denied a defendant's motion to dismiss the court proceeding on the basis of *forum non conveniens*. While the Singapore Court similarly adopted the view that Decree 34 could not force a party to arbitrate in the DIAC without its agreement, it did not go further like the Louisiana Court did in stating that the Dubai government "does not have the authority […] to unilaterally change the arbitration forum agreed by the parties".

Notwithstanding the above sentiments, the Singapore Court eventually dismissed the respondent's application to set aside the enforcement of the Provisional Award on the basis that the respondent did not raise any jurisdictional objection on the interim relief application and thus it could not rely on the jurisdictional arguments to challenge the enforcement of the Provisional Award. The Singapore Court also did not see any concern with granting the enforcement of the Provisional Award pending the tribunal's decision on jurisdictional objections in the main DIAC arbitration proceedings; it considered that the tribunal's ultimate decision would supersede the enforcement order, with the respondent having an avenue of seeking an award for costs or damages.

While the Louisiana Court decided that there was "no enforceable forum selection clause" and that it could not compel arbitration, as the forum of DIFC-LCIA was "no longer available", the Singapore Court did not quite decide on the enforceability of the arbitration clause but found that the arbitration procedure under the DIAC was not in accordance with the parties' DIFC-LCIA arbitration clause. Despite taking a more pro-arbitration stance by upholding the enforcement of the DIAC Provisional Award, the Singapore Court decision has done little to address the issues surrounding the legitimacy of DIAC arbitrations pursuant to DIFC-LCIA arbitration clauses entered into before the Effective Date.

New York Convention and Validity of Arbitration Agreements

Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") sets out an exhaustive list of grounds on which the recognition and enforcement of an award may be refused. Article V(1)(a) provides the ground for refusing enforcement where an arbitration agreement "is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made." The said provision provides for the determination of the validity of arbitration agreements to be first assessed according to the law chosen by the parties. If there is no agreement on the law governing the arbitration agreement, then the courts have to look into the "law of the country where the arbitration award was made". While there are differing approaches taken as to whether the law governing the main contract governs the arbitration agreement in the absence of a governing law of the arbitration agreement, it is generally established that the seat of the arbitration is the place where the award is made.

In the Singapore Court decision, the governing law of the contract was English law, and the arbitration clause provided for London as the seat of arbitration. On the other hand, in the Louisiana Court decision, the contract was governed by the laws of the Kingdom of Saudi Arabia and the seat of arbitration was the Dubai International Financial Centre ("DIFC"), Dubai, UAE. Notably, neither the Louisiana Court nor the Singapore Court assessed the validity of the arbitration clauses under the law of the agreed seat of arbitration or the agreed governing law.

Peculiarly, the Louisiana Court did not consider any deference to the DIFC supervisory courts or to Decree 34 to be warranted despite the arbitration being seated in the UAE (i.e., DIFC). It is also worth comparing the approach taken by the Singapore Court with that of the UK Supreme Court in Enka v Chubb where the purposive interpretation of an arbitration clause was preferred "which seeks to interpret the language of the contract, so far as possible, in a way which will give effect to – rather than defeat – an aim or purpose which the parties can be taken to have had in view."

Thus, when determining the validity of the arbitration agreement, the UK Supreme Court has endorsed the validation principle which provides for contracts to be interpreted to ensure their validity rather than render them ineffective. Fundamentally, in Enka v Chubb, the UK Supreme Court also held that the choice of governing law of the contract will generally apply to the arbitration agreement if the parties have not expressly or impliedly specified the law for the arbitration agreement. The Singapore Court decision did not carry out such an analysis.

References to Defunct Arbitral Institutions

Reliance is frequently made on Article II(3) of the New York Convention when arguing the invalidity of arbitration agreements under Article V(1)(a). Under Article II(3), the national courts of the contracting states are to refer the parties to arbitration unless the arbitration agreement is found "null and void, inoperative or incapable of being performed".

Jurisprudence suggests that courts often uphold arbitration clauses even where the specific arbitral institution has become defunct. In the case of SAS ADM v Rea Industries, the Paris Court of Appeal upheld the validity of an arbitration clause that provided for rules of the German Arbitration Committee, despite that it ceased to exist in 1992 after its merger with the German Institute of Arbitration. The Paris Court of Appeal rejected a formalistic approach and found the arbitration clause to be valid even if it was arguable that the arbitration centre and its rules were non-existent.

Even where arbitration clauses have referred to institutions that do not exist, courts have generally decided in favour of arbitration and interpreted the non-existent institutions as a reference to the existing arbitral institutions. In Epoux Convert v Société Droga,[1)] the Paris Court of Appeal upheld an award rendered by the Arbitration Court of the Chamber of Commerce of Yugoslavia even though the arbitration agreement referred to a non-existent institution, "Belgrade Chamber of Commerce". Some courts have also upheld arbitration agreements referring to non-existent institutions by replacing them with institutions that exist. More recently, the Singapore High Court in Re Shanghai Xinan Screenwall Building upheld an award issued by a China International Economic and Trade Arbitration Commission tribunal which provided for a non-existent institution, the China International Arbitration Centre.

The courts tend to preserve the parties' intent to arbitrate by interpreting such clauses to refer to successor institutions or replacing them with other similar institutions as also seen in the Paris Court of Appeal decision in SAS ADM v Rea Industries discussed above.

Contrast With the Abu Dhabi Landscape

In contrast to the approach of Decree 34, which did not lead to the DIAC amending its rules to explicitly provide that it would take over the administration of DIFC-LCIA arbitration clauses entered into by the Effective Date, the recently launched rules of the Abu Dhabi International Arbitration Centre (arbitrateAD) explicitly provide that all arbitrations referring to Abu Dhabi Commercial Conciliation and Arbitration Centre ("ADCCAC") commenced on or after 1 February 2024 are to be administered by arbitrateAD. By incorporating this explicitly within the arbitrateAD rules itself, it clarifies the mandate and protects the legitimacy of arbitrateAD arbitrations pursuant to ADCCAC arbitration clauses that are initiated on or after 1 February 2024, although without the application of the Emergency Arbitrator and Expedited Proceedings provisions, unless expressly agreed. As commented on in a previous post, this is likely because these provisions were not in the ADCCAC Rules 2013 and therefore the parties would not be deemed to have agreed to their application.

Concluding Remarks

Both the Louisiana Court and Singapore Court took restrictive interpretations of the arbitration agreements without deferring to either the courts of the seat of the arbitration or the governing law chosen by the parties. These decisions showcase the need for courts to be pragmatic in preserving the parties' underlying intent to arbitrate, especially where successor or replacement institutes are available.

Decree 34 explicitly provides for DIFC-LCIA arbitration clauses to be valid and replaced by the DIAC, and in theory there should be little difficulty in finding that DIFC-LCIA arbitration clauses are valid and capable of being taken over by the DIAC. This is supported by court decisions that have found that defunct centres are a reference to their successor centres, and also accounts for the fact that institutions may undergo reorganisation and revisions to their rules.

References

?1 Epoux Convert v. Société Droga, Court of Appeal of Paris, France, 14 December 1983, 1994 Rev. Arb. 483 as cited in the New York Convention Guide.

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