Kluwer Arbitration Blog

The Enforceability of DIFC-LCIA Arbitration Clauses in Light of Decree No. 34/2021: A View from Outside the UAE

Gordon Blanke (Blanke Arbitration LLC) · Tuesday, May 21st, 2024

Two recent judgments, one from the United States (US) District Court for the Eastern District of Louisiana (“Louisiana Court”) and another from the Singapore High Court (**“**Singapore Court”), have highlighted the difficulties that Decree No. 34/2021(Concerning the Dubai International Arbitration Centre) (“Decree No. 34/2021”) may cause to the enforceability of DIFC-LCIA arbitration clauses in arbitrations commenced under the Dubai International Arbitration Centre (“**DIAC**”) Arbitration Rules 2022 (“2022 DIAC Rules”) after the entry into force of the Decree. This post continues the discussion started on the subject by a previous post.

Decree No. 34/2021

By way of reminder, Decree No. 34/2021 abolished the Dubai Arbitration Institute (DAI) to make way for the *Grand DIAC* or DIAC 2.0 (as commented in a previous post) and brought an end to the Operating Agreement between the DAI and the London Court of International Arbitration (“LCIA”), which formed the basis for the DIFC-LCIA. As a result of Decree No. 34/2021, the DIFC-LCIA is now defunct and no longer operating.

Importantly for present purposes, pursuant to Article 6a of Decree No. 34/2021, DIFC-LCIA arbitration agreements concluded by 20 March 2022 are “deemed valid” and the new DIAC is required to “replace [the DIFC-LCIA] in considering and determining all Disputes arising out of the said agreements unless otherwise agreed by the parties thereto.” Read together with Article 8c of Decree No. 34/2021, which essentially replaced the DIFC-LCIA Rules by the 2022 DIAC Rules, arbitrations arising from DIFC-LCIA arbitration agreements that fall under Article 6a, i.e., that are concluded by 20 March 2022, are to be administered by the DIAC under the 2022 DIAC Rules. This means that qualifying DIFC-LCIA arbitration agreements default to an arbitration process in a DIAC forum.

The Issue

Essentially, the question of whether the combined reading of Articles 6a and 8c of Decree No. 34/2021 is, in fact, enforceable and capable of producing proper legal effect has recently arisen before both the Louisiana Court and the Singapore Court.

Taking guidance from international arbitration practice, a viable answer to this question must be informed by the applicable law, i.e., the law governing the underlying arbitration agreement, which, if not agreed by the parties, is likely to be the law governing the merits of the dispute or the law of the seat. To the extent that this is UAE law, more likely than not, the UAE, and in particular the Dubai Courts, in deference to the law-making powers of the Ruler of Dubai, will give force to the provisions of Decree No. 34/2021 and find a DIFC-LCIA arbitration agreement falling under Article 6a. to be enforceable in a DIAC forum by default. This will likely be the outcome even if a respondent raises jurisdictional objections to the DIAC, a forum to which it did not expressly agree. Pursuant to Article 6a., a respondent may escape a default DIAC arbitration only if both parties agree to an alternative arbitration forum (or to *ad hoc* arbitration for that matter). The problem with this approach is that parties are unlikely to agree to an alternative arbitration forum once a dispute has arisen: depending on the merits of the claims pending against it, the respondent will be tempted to frustrate *any* arbitration with respect to claims brought against it, whether by invoking the invalidity of the underlying arbitration agreement or by raising an arbitration defense in response to a claimant's attempt to resort to a court in breach of an existing arbitration obligation.

Article 32.4 of the former DIFC-LCIA Rules would have offered a solution to this conundrum by allowing the LCIA to take over the administration of any DIFC-LCIA arbitration process: given the strong resemblance (short of identity) between the DIFC-LCIA and the LCIA forum (taking account of their near-identical sets of arbitration rules and the key role played by the LCIA Court in both), the DIFC-LCIA and the LCIA must be considered near-perfect substitutes. Unfortunately, neither the Ruler of Dubai, nor the DIAC and the LCIA thought it appropriate for the LCIA to take over arbitrations, containing references to the DIFC-LCIA, commenced on or after 21 March 2022 (as opposed to arbitrations commenced and registered by the DIFC-LCIA on or before 20 March 2022): according to a joint press release issued by the DIAC and the DIFC-LCIA on 29 March 2022, all such arbitrations "shall be registered by [the] DIAC and administered directly by its administrative body in accordance with the respective rules of [the] DIAC."

Irrespective of the foregoing, there is an alternative argument for saying that by enforcing DIFC-LCIA arbitration agreements as DIAC arbitration agreements by default in accordance with Article 6a read together with Article 8c of Decree No. 34/2021, the Dubai Courts place themselves in violation of Article II(3) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), which requires the court of a Convention Country, including the courts of the UAE (which is a party to the Convention), to "refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." Indeed, the DIFC-LCIA and the DIAC are entirely different arbitral fora and parties that have agreed to one cannot be taken to have agreed to the other (absent their express agreement to the contrary). In other words, given the procedural differences between the DIAC and the (former) DIFC-LCIA forum, a DIAC arbitration agreement must be considered "null and void" by default (without the parties' express consent), and as such "inoperable" within the meaning of Article II(3) of the New York Convention.

This also stands confirmed by the patent lack of continuity between the former DIFC-LCIA and the new DIAC and their respective arbitration rules: neither the former DIFC-LCIA staff or case management team nor the DIFC-LCIA Rules have been wholly, if at all, transferred to the new DIAC. The transfer of both the DIFC-LCIA Rules and the case management system, having been franchised to the DIA by the LCIA, would have required the LCIA's consent in any event. Further, in DIAC arbitration, the LCIA Court never played the pivotal role that it used to in the

administration of arbitrations under the former DIFC-LCIA Rules. Certainly, the former DIFC-LCIA arbitration was designed as the equivalent of an LCIA arbitration seated in the DIFC. The new DIAC, by contrast, is not a proper successor organisation to the DIFC-LCIA: as a result, the DIAC arbitration variant is simply unable to serve as a credible substitute for former DIFC-LCIA arbitration.

In addition, it is arguable that defaulting the former DIFC-LCIA forum to a DIAC forum violates the requirement of written arbitration agreements under Article 7 of the 2018 UAE Federal Arbitration Law as amended. To comply with the *pacta sunt servanda* principle that underlines the idea of contractual consent and party autonomy under UAE law, and in arbitration more generally, a change of arbitral forum would require a written amendment (by the parties' authorised signatories) to the underlying arbitration clause. Tellingly, in the past, the Dubai courts have appeared to take a strict approach to the unenforceability of arbitration agreements that make reference to arbitral institutions that no longer exist. As an example, an agreement to arbitrate in accordance with the Arbitration Rules of the Centre for Commercial Conciliation and Arbitration of Dubai Chamber of Commerce and Industry that was concluded after that centre had ceased to exist and had been replaced by the DIAC after the adoption and entry into force of Decree No. 10 of 2004 establishing DIAC, was considered null and void *ab initio* (see Case No. 1042/2017 – *Oger Dubai LLC v Daman Real Estate Capital Partners Limited*, ruling of the Dubai Court of Cassation of 4 April 2018). No such nullity would have been found had the parties agreed to arbitration under those rules before the adoption and entry into force of Decree No. 10 of 2004. There is no reason to believe that this position would not also hold under the UAE Federal Arbitration Law.

This is precisely the position taken by the Louisiana and the Singapore Courts (albeit, probably, on the misguided basis of the US Federal Arbitration Act and the Singapore International Arbitration Act.)

The Louisiana Court's View

More specifically, relying on the "liberal federal policy favoring arbitration" under the US Federal Arbitration Act and the "fundamental principle [pronounced by the US Supreme Court] that arbitration is a matter of contract" and as such "strictly a matter of consent", requiring "private agreements to arbitrate [to be] enforced according to their terms," the Louisiana Court confirmed in its decision dated 6 November 2023 in *Baker Hughes* that "[b]ased upon Supreme Court precedents, the United States Court for the Fifth Circuit has held that it cannot compel arbitration when the agreed upon arbitration tribunal [and the parties' chosen arbitral institution] is unavailable or no longer exists." Against this background, the Louisiana Court held that "[w]hatever similarity the DIAC may have with the DIFC LCIA, it is not the same forum in which the parties agree to arbitrate …[t]hat forum is no longer available" and that "[a]ccordingly, no enforceable forum selection clause compels the dismissal of this case on the ground of forum non conveniens." The Louisiana Court held that it could simply not rewrite the arbitration agreement, "nor can the Dubai Government." (*Baker Hughes*, pp. 3-5.)

The Singapore Court's View

This view was echoed by the Singapore Court in its recent ruling in *DFL v DFM*, making express reference to the Louisiana Court's holding in *Baker Hughes* as follows: "Parties' submission to arbitration is purely contractual. They cannot be compelled to arbitration under a set of rules that they did not agree to. The Decree [i.e., Decree No. 34/2021] could not force an arbitration under the DIAC Rules on the respondent without his agreement." (*DFL v DFM*, para 21.) On that basis, the Singapore Court also rejected the potential application of a contractual severance clause, which provided for provisions that were or were to become illegal, invalid or unenforceable to be severed and replaced with a substitute provision that was lawful and gave effect to the contracting parties' intentions. In the Singapore Court's view, "the arbitration procedure under the DIAC Rules was not in accordance with the parties' agreement for arbitration under the DIFC-LCIA Rules." (*DFL v DFM*, para 28.)

Conclusion

It is difficult to ignore the elephant in the room: defaulting DIFC-LCIA arbitration clauses to the DIAC forum pursuant to a combined reading of Articles 6a and 8c of Decree No. 34/2021 seriously undermines the concept of party autonomy in arbitration and raise concerns with an experienced international arbitration judiciary. For the reasons set out above, this is hardly surprising and must be taken seriously by the Dubai legislator. Leaving things as they are will likely continue to clash with the good sense of the international arbitration community and raise concerns over the proper enforceability of the DIAC arbitration forum against parties that never contracted into DIAC arbitration. That said, short of any corrective legislative action by the Dubai government, contracting parties with existing DIFC-LCIA arbitration clauses are urged to revise their arbitration obligations to reflect an *existing* forum of their choice, such as the LCIA (which is presently the closest substitute to former DIFC-LCIA arbitration).

This entry was posted on Tuesday, May 21st, 2024 at 8:27 am and is filed under DIAC, Enforceability, Enforcement, Enforcement of arbitration agreement, MENA, New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, United Arab Emirates
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.