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

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In a recent ruling of 20 June 2024 (ARB 009/2024 *Narcisco v. Nash*), the Dubai International Financial Centre ("***DIFC***") Court of First Instance ("***DIFC CFI***") was asked, as part of a wider investigation to grant an anti-suit injunction, to consider the validity of an arbitration agreement that provided for arbitration under the DIFC-London Court of International Arbitration ("***LCIA***") Rules ("***DIFC-LCIA Rules***") in arbitral proceedings commenced after the enactment of Decree No. 34/2021 Concerning the Dubai International Arbitration Centre ("***Decree No. 34/2021***").

Decree No. 34/2021 gave rise to the creation of the *Grand DIAC* or *DIAC 2.0* and abolished the DIFC-LCIA, as a result of which the DIFC-LCIA is now defunct and no longer operating. More specifically, 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 with the Dubai International Arbitration Centre (***"DIAC"***) Arbitration Rules 2022 ("***2022 DIAC Rules***"), arbitrations arising from DIFC-LCIA arbitration agreements 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.

As discussed in further detail in a previous post, this raises the question of whether a combined reading of Articles 6a and 8c of Decree No. 34/2021 is, in fact, enforceable and capable of producing proper legal effect at the risk of compromising the rule of party autonomy in international arbitration. As also discussed in the previous post, both the United States Court of the Eastern District of Louisiana ("***Louisiana Court***") and the Singapore High Court ("***Singapore Court***") answered this question in the negative, holding that defaulting an arbitration under the DIFC-LCIA Rules to a DIAC forum constitutes a violation of party autonomy and as such renders the arbitration agreement invalid (save for the parties' choice of an alternative institutional forum).

In *Narcisco v. Nash*, the DIFC CFI rejected that proposition in its entirety and lent full support to the provisions of Decree No. 34/2021. In doing so, Michael Black KC, who issued the ruling, rejected the findings of the Louisiana Court and endorsed the Abu Dhabi Court of First Instance's approach in Case No. 1046/2023 – *Vaned Engineering GmBH v. Reem Hospital* (upheld by the Abu Dhabi Court of Appeal).

To start, Black KC felt compelled to give full effect to the provisions of Decree No. 34/2021 (ruling, para. 55). To that end, Black KC relied, without reservation, on the Abu Dhabi court's findings in *Vaned Engineering*, from which he cited *"in extenso as its impressive reasoning is generally persuasive and not limited to UAE law"* (ruling, para. 56). The Abu Dhabi courts, in turn, held (ruling, para. 57) that (i) the validity of an arbitration agreement was usually not affected by the discontinuation of a contractually-agreed administering institution for reasons outside the parties' control, (ii) Decree No. 34/2021 left the parties free to resort to an administering institution other than DIAC, and (iii) arbitral institutions, including their institutional rules, commonly evolved over time.

Black KC fully endorsed the approach adopted by the Abu Dhabi courts, emphasising that Decree No. 34/2021 did not undermine the principle of party autonomy and that *"if the […] parties had been genuinely concerned about the differences between the DIFC-LCIA and DIAC Rules they could have agreed to the rules of the LCIA itself which were materially identical the DIFC-LCIA Rules"* (ruling, para. 58). Black KC then cited the Abu Dhabi courts' take on the ruling of the Louisiana Court in full, highlighting that the priority of the UAE courts and of the 2018 UAE Federal Arbitration Law was to uphold the rule of party autonomy in arbitration (ruling, para. 59).

Against this background, Black KC held that the Abu Dhabi courts' ruling *"appears to […] be more closely reasoned"* and *"to uphold the twin principles of party autonomy and holding parties to their agreements to arbitrate in a way that resonates with the pro-arbitration policy of the DIFC Courts"* in circumstances where the substitution of the DIFC-LCIA with the DIAC did not result in a change of forum, the forum remaining international arbitration (ruling, para. 60). As a result, even if Decree No. 34/2021 were not binding in the proceedings before him, Black KC would nevertheless conclude, relying on the Abu Dhabi courts' reasoning, that *"Decree 34 does not render an arbitration agreement subject to DIFC law unenforceable on the grounds of violation of the principle of party autonomy"* (ruling, para. 61).

In their respective analyses, both the DIFC CFI and the Abu Dhabi courts focused on the rule of party autonomy in arbitration. There can be no doubt that the starting point for any assessment of the validity of an arbitration agreement is the question of whether it complies with the principle of party autonomy, *i.e.*, whether it has been concluded with the consent of the parties. This is a fundamental requirement of arbitration internationally given that arbitration is a creature of contract, the legitimacy of which depends on the parties' contractual consent. Absent such consent, an arbitration agreement will be considered invalid and unenforceable. This is essentially the approach adopted by both the Louisiana Court and the Singapore Court.

The question that arises in this context is whether every single component of an arbitration agreement (*i.e.*, language, seat, number of arbitrators, institutional framework) requires the parties' agreement for it to be considered valid and enforceable. In a pro-arbitration jurisdiction, the answer to this question must be in the negative: A failure by the contracting parties to specifically agree on any of the components of an arbitration agreement does not render the agreement to arbitrate invalid. These are matters that, absent party agreement, fall within the powers of the arbitral tribunal to determine under the applicable procedural law. As Black KC correctly identifies, the question of the validity of the arbitration agreement in this circumstance is one of *forum*, *i.e.*, whether the parties have agreed to resolve their disputes by *arbitration* – as opposed to the courts (or another form of dispute resolution). In so far as it is not disputed that the parties have agreed to the *obligation to arbitrate* any of their disputes, they must be taken to have agreed to arbitration as the *forum* for the resolution of their disputes.

That said, what Black KC overlooks is that the parties' original selection of the mode of arbitration, *i.e.*, institutional or *ad hoc*, or of the administering institution (and its institutional rules), over which arbitral tribunals are not accorded any default powers under any arbitration law, will usually be at the heart of the parties' choice of forum, *i.e.*, whether to resort to arbitration or the courts. This is on the basis that *ad hoc* arbitration is simply not considered a suitable substitute for institutional arbitration. Similarly, arbitration under one arbitral institution is usually not considered a viable substitute for arbitration under another. It is rare that arbitral institutions and their rules are sufficiently similar to warrant a seamless substitution. One of the very few (if not only) exceptions to this rule are the DIFC-LCIA and the LCIA, both of which were applying substantively the same institutional rules.

This is precisely where Decree No. 34/2021 falls short: It forces a change of institutional forum between two arbitral institutions, the DIAC and the DIFC-LCIA, in circumstances where the DIAC is not a proper successor organisation to the DIFC-LCIA. As concluded in the previous post, the DIFC-LCIA and the DIAC are entirely different arbitral fora and parties that have agreed to one cannot be considered 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 DIFC-LCIA 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 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"*.

In any case, Article 6a of Decree No. 34/2021 does provide for a safety valve by expressly empowering the parties to agree to an arbitral forum different from the DIAC. In this sense, the parties are free to resort to a non-DIAC forum at their own will. This stand is endorsed by both the DIFC CFI and the Abu Dhabi courts. To this end, Black KC emphasises the parties' power to contract into LCIA arbitrations. Although this introduces the principle of party autonomy into the operation of Decree No. 34/2021, the problem is that the parties' exercise of their contractual autonomy with respect to the choice of forum under the Decree No. 34/2021 is limited to contracting out of the DIAC forum, which applies by default, rather than to contract into a forum of choice. Where a dispute has already arisen between the parties under a DIFC-LCIA arbitration agreement, the parties might find it particularly challenging to agree on a non-DIAC forum, let alone an arbitration administered by the LCIA. Out of tactical considerations, one of the parties may refuse to agree to change the DIAC default forum, in particular to the LCIA forum, in circumstances where the latter is strongly preferred by the other party.

This situation leaves a lot to be desired. While the approach of the DIFC CFI and local Abu Dhabi courts is understandable, it is far from convincing, and certainly not warranted on the basis of forum selection considerations in arbitration in circumstances where one arbitral institution is precisely not like, and as such not an easy substitute for, any other.

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