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Presumptive Validity of Arbitration Agreements: U.S. Court of Appeals Aligns With the DIFC on Enforcement of DIFC-LCIA Clauses

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In a recent decision of 27 January 2025, in *Baker Hughes Saudi Arabia Company Limited v. Dynamic Industries, Incorporated & Ors*, the United States Court of Appeals for the Fifth Circuit ("COA") overturned the ruling of the United States District Court for the Eastern District of Louisiana ("District Court"), and enforced the parties' arbitration agreement referring to the arbitration centre under the DIFC-LCIA clause, a joint venture between the Dubai International Financial Centre ("DIFC") and the London Court of International Arbitration ("LCIA") ("COA Judgment").

The decision of the District Court has been previously discussed on this blog **here** and **here**. The District Court's judgment was an important milestone in the enforceability of DIFC-LCIA arbitration clauses outside the United Arab Emirates ("UAE") since the abolishment of the DIFC-LCIA in 2021 by way of Decree No. 34 of 2021. As also discussed in an earlier post, the District Court's judgment was in stark opposition to the views taken by the DIFC Court of First Instance ("DIFC CFI") in *Narcisco v. Nash* ("Nash") where the DIFC CFI upheld the validity of DIFC-LCIA arbitration clauses.

COA Judgment

In the COA Judgment, the COA examined the provisions governing the dispute resolution process under the subcontract. In this regard, Schedule A of the subcontract ("Schedule A") provided Dynamic Industries Inc. ("Dynamic") with an option to arbitrate any dispute arising from the subcontract in the Kingdom of Saudi Arabia ("KSA"). Alternatively, Schedule E of the subcontract ("Schedule E") stipulated that if Dynamic did not choose to arbitrate in KSA, the parties could first attempt mediation. If the mediation failed, either party could refer the dispute to "arbitration under the Arbitration Rules of the DIFC-LCIA". In such a case, the seat, or legal place, of the arbitration would be the DIFC, Dubai, UAE.

The COA ruled that the parties' agreement to arbitrate remained valid even after the designated forum, i.e., the DIFC-LCIA, ceased to exist. Consequently, it remanded the matter back to the District Court to act in accordance with the same. In deciding this, the COA interpreted the contract *de novo* and evaluated the following questions:

- whether Schedule E stipulated a particular arbitral forum, the DIFC-LCIA, or only a set of

arbitral rules, the DIFC-LCIA Arbitration Rules ("DIFC-LCIA Rules");
- assuming Schedule E stipulated DIFC-LCIA as a forum, whether that forum is available; and
- assuming Schedule E stipulated a specific forum and that forum was unavailable, whether the District Court erred by refusing to allow the parties to arbitrate under the subcontract.

In answering the first question, the COA assessed whether the parties intended to choose a particular forum, i.e., DIFC-LCIA, or only the application of the DIFC-LCIA Rules. While the District Court interpreted this clause as a forum selection clause, the COA found this interpretation to be incorrect. The COA held that the parties submitted their dispute to arbitration under the DIFC-LCIA Rules without specifying a particular forum. In its analysis, the COA applied the rules of contractual interpretation to conclude that if the parties had intended DIFC-LCIA as the exclusive forum to administer the arbitration, they had several ways to do so. However, the language of the clauses merely referred to the DIFC-LCIA Rules rather than making a definitive choice of the forum to administer the arbitration. Further, the COA noted that nothing in the DIFC-LCIA Rules indicated that only the DIFC-LCIA could apply those rules.

The COA also considered whether selecting a set of arbitration rules implicitly indicated the parties' choice of the forum to administer the arbitration. On this issue, the courts in the United States of America ("US") have issued a plethora of conflicting judgments, which were considered in the COA Judgment. Some US decisions, such as the Second, Fourth, and Eleventh Circuits, have held that agreeing to a set of arbitral rules implies the selection of the corresponding arbitral institution as the proper forum to administer the arbitration. Others, including the Ninth Circuit in a separate ruling, without explicitly taking a firm position, questioned this interpretation, and held that merely agreeing to the arbitral rules may not imply that the parties have selected the corresponding arbitral institution as the forum to administer the arbitration.

In this case, the COA did not take a definitive stance on either position. Instead, it proceeded with a hypothetical "even if" analysis to address the second question. Even if the clause in question implied a choice of forum, DIFC-LCIA could not be deemed entirely unavailable, as the Dubai International Arbitration Centre ("DIAC") is cognate to the DIFC-LCIA to which the rights and obligations of the DIFC-LCIA centre have been transferred. However, the COA did not decide whether the DIFC-LCIA is unavailable as a forum.

The Test of the Dominant Purpose

In considering when a designated arbitral forum is deemed unavailable, the COA emphasised the need to assess the parties' intention to arbitrate.

The COA clarified that the parties did not intend to designate the DIFC-LCIA as the exclusive forum, as their contract provided for multiple possible fora for arbitration. As a result, the COA concluded that the arbitration could take place before any appropriate forum under the subcontract. The COA further explained that even if the parties had implicitly designated the DIFC-LCIA as a forum, this designation could not be considered integral to the subcontract, as the parties' primary intent was simply to arbitrate. For the DIFC-LCIA (as an institution) to be deemed an integral part of the agreement, the contract would have needed to include "pervasive references" to "exclusive jurisdiction" or clear evidence that the parties had "unambiguously expressed their intent not to arbitrate their disputes if the designated arbitral forum was unavailable". In the COA Judgment, the COA held that neither of these conditions were met. It also noted that the subcontract did not specify the DIFC-LCIA as the sole authority competent to apply the DIFC-LCIA rules.

Additionally, the COA also noted that numerous other courts have compelled arbitration despite the unavailability of the designated forum, provided the agreement's primary purpose was for the parties to arbitrate their dispute. Resultantly, the COA remanded the matter to the District Court to consider whether any other forum, such as the LCIA, the DIAC, or a forum in the KSA, could apply the DIFC-LCIA Rules in a manner consistent with the parties' intent. If such a forum existed, the District Court may refer the parties to arbitration in that forum, otherwise, the District Court could consider compelling arbitration in KSA in accordance with Schedule A.

Commentary

Article II(3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") requires the national courts to compel arbitration unless the arbitration agreement is null and void, inoperative, or incapable of being performed. The question is whether the abolishment of the DIFC-LCIA rendered the arbitration agreement incapable of performance.

The COA Judgment was well-reasoned and meticulous insofar as it emphasised the parties' clear intention to arbitrate, noting that the contract makes no mention of litigation. Instead, it granted Dynamic the option to initiate arbitration in KSA. Even if Dynamic did not exercise this option, either party retained the right to arbitrate under the DIFC-LCIA Rules. In both scenarios, arbitration remained the designated dispute resolution mechanism, eliminating any argument of impossibility or frustration. Moreover, the DIFC-LCIA forum could not be deemed entirely unavailable, as the DIAC to which the rights and obligations of the DIFC-LCIA centre have been transferred, effectively mirrors its functions. This continuity definitively undermines any objection based on the grounds of frustration or impossibility of performance.

Earlier, in Nash, the DIFC CFI, while commenting on the District Court's judgment, observed that it "did not appear to appreciate the difference between forum and the procedural rules" and that the "parties agree to arbitrate subject to a set of institutional rules; the forum is and always remains international arbitration". The COA appeared to agree with the DIFC CFI's comment on the distinction between the forum and procedural rules. However, on the broader claim that "the forum is and always remains international arbitration", the COA noted that in certain cases, parties may make an implied choice of forum by selecting a specific set of rules. In such instances, the implied choice could form an integral part of the agreement. In the present case, the COA did not find the choice of institution to be integral to the parties' agreement to arbitrate. The COA Judgment made it clear that arbitration must proceed, however, the manner in which the said arbitration must proceed remains unclear. While the COA acknowledged the fact that DIAC mirrors the DIFC-LCIA, it did not refer the parties to initiate the arbitration by approaching the DIAC. This aligns with the DIFC CFI's decision in *Nash*, which cited the Abu Dhabi Court of First Instance's ruling in *Vaned Engineering GMBH v Reem Hospital* (Case No. 1046/2023), emphasising that Decree No. 34 of 2021 does not force parties to resort to DIAC. Instead, the parties remain free to select an alternate institution.

The COA's directions concerning the selection of an appropriate institution for the District Court to compel arbitration could be tricky. The LCIA clarified that it would only administer the existing cases commenced and registered by the DIFC-LCIA on or before 20 March 2022, and any subsequent arbitration commenced thereafter would be administered by the DIAC. In any event, the LCIA cannot administer arbitration under another institution's rules (FAQ No. 20, LCIA website). Further, compelling the parties to arbitrate in the KSA, may raise concerns of party autonomy, as arbitration in the KSA can only proceed if Dynamic chooses to do so. Therefore,

Dynamic's consent is necessary to initiate arbitration in the KSA, failing which, the dispute resolution process under Schedule E is triggered. Schedule E confirms the DIFC as the seat, reinforcing the DIAC as the most suitable forum, but it remains to be seen, whether the District Court takes the view to direct a DIAC-administered arbitration. In our view, turning to other institutions may not be a viable option, as they will likely encounter difficulties in arbitrating under the rules of a defunct institution.

In 2024, the Singapore High Court (discussed previously here) while considering a challenge to the enforcement of a DIAC tribunal's provisional award, examined the validity of the arbitration agreement in light of the abolition of DIFC-LCIA. In that case, the Singapore High Court observed that an express agreement on institutional rules "concern[s] the basic architecture of the arbitration and typically has a substantial impact on the arbitral proceedings." The decision of the Singapore High Court was later appealed before the Singapore Court of Appeal. However, the scope of the appeal did not include a determination on the enforceability of the DIFC-LCIA arbitration agreements and was limited to whether the appellant had submitted to the Tribunal's jurisdiction.

The COA, by bifurcating the issues of "consent to arbitration" and "choice of institution/rules", has reinforced the principle of the presumptive validity of arbitration agreements, aligning with the objectives of the New York Convention. This decision could mark the end of the long-debated enforceability of the DIFC-LCIA arbitration agreements. While it remains uncertain whether the DIAC will be widely accepted as the alternative to the DIFC-LCIA by arbitration stakeholders, what appears to be settled is that the parties' agreement to arbitrate in such cases is an obligation which stands independent of their choice of institution or procedural rules.

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This entry was posted on Tuesday, April 29th, 2025 at 8:55 am and is filed under MENA, UAE arbitration chapter
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