Dubai decree changes the dispute resolution landscape

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On September 14, 2021, the ruler of Dubai issued Decree 34 of 2021 in relation to the Dubai International Arbitration Centre (DIAC). The decree abolishes the Emirates Maritime Arbitration Centre (EMAC) and the DIFC Arbitration Institute (the DAI) and assigns their rights and obligations to DIAC.

The DAI was established in 2004 under the umbrella of the DIFC Dispute Resolution Authority to promote the study and practice of arbitration. As part of the DAI's initiatives, it entered into an agreement with the LCIA for the establishment of the DIFC-LCIA arbitration centre (the DIFC-LCIA) in 2008. As a result of the decree it is understood that the DIFC-LCIA will cease to exist.

EMAC was established in 2016 to provide the maritime industry with alternative specialised dispute resolution services in the Middle East.

While the decree is effective as of its publication date, DIAC has been granted a grace period of no more than six months to replace the EMAC and the DAI.

Dispute resolution provisions

International financial institutions tend to have hybrid or split dispute resolution provisions in their agreements that give the financial institution the right to elect to have any dispute either resolved by court litigation or arbitration. For example, a credit agreement may provide for disputes to be determined by the DIFC-LCIA with the arbitration being seated in the DIFC such that the DIFC courts are the supervisory courts but also give the financial institution the right to elect instead at its sole option to have a dispute determined by the English High Court.

The reason for incorporating this type of provision is that it gives the financial institution the freedom to pursue the most appropriate dispute resolution method at the time that any dispute arises and to obtain relief that is the most appropriate to the circumstances. For example, if an English financial institution has a defaulting borrower in England and the borrower's assets are located in England, it would make sense for the financial institution to commence proceedings in the English High Court and to seek summary judgment under Civil Procedure Rule 24 in circumstances where the borrower has no prospect of defending the claim. Alternatively, if the borrower is located in onshore Dubai and has its assets there, commencing DIFC-LCIA arbitration proceedings would have been appropriate as an arbitral award would be far easier to enforce in onshore Dubai than an English High Court judgment.

Such hybrid dispute resolution provisions are recognised and accepted by the English Courts (Etihad Airways PJSC v Flother [2020] EWCA Civ 1707) and the DIFC Courts tend to follow English law principles and case authorities.

International financial institutions tend to select established international arbitration centres with sophisticated arbitration rules that are applied under the supervision of an arbitration court. The DIFC-LCIA has become a popular choice for financial institutions doing business in the Middle East because it is established in the DIFC in Dubai, it has a sophisticated set of arbitration rules that are modelled on the LCIA Rules, and those rules are applied under the supervision of the reputable LCIA court.

Impact of the decree

The decree provides that if the parties select the DIFC as the seat of an arbitration, the DIFC Law No. 1 of 2008, i.e., the DIFC Arbitration law (as amended or replaced) shall apply and the DIFC courts shall have jurisdiction to determine any case, application or challenge concerning arbitral procedures or the arbitral award issued in an arbitration administered by DIAC. If no seat is agreed between the parties, the DIFC will be the default seat.

A court of arbitration will be established within DIAC to undertake overall supervision of DIAC arbitrations with authority to supervise the application of the decree and arbitration rules and procedures, appoint tribunals and fix the costs and expenses of arbitrations.

Arbitral proceedings that have already been commenced under the EMAC or DIFC LCIA Rules will continue to run their course pursuant to those rules without interruption. In relation to arbitration agreements that specify EMAC or the DIFC-LCIA where a tribunal is yet to be appointed, DIAC shall replace EMAC/DIFC-LCIA in considering or determining the relevant disputes.

There is inevitably a degree of uncertainty concerning a number of matters triggered by the decree. In particular, at the time of writing it is unknown:

- Who will sit on the DIAC court and whether it will include a mix of civil and common law lawyers.
- How the DIAC Rules will be changed (if at all) following the decree. For example:

- The current DIAC Rules allow a successful party to recover the costs of the arbitration, i.e., the Arbitral Tribunal's fees and the institution's administrative fees, but do not specifically refer to the parties' legal costs. The onshore Dubai courts have ruled that legal costs are not recoverable under the DIAC Rules unless the parties' arbitration agreement allows it or the parties have agreed in subsequent terms of reference to give the arbitral tribunal powers to award legal costs. By contrast, the DIFC-LCIA Rules expressly grant arbitral tribunals to award legal costs and other expenses.
- Another striking difference between the DIFC-LCIA Rules and the DIAC Rules, which is of interest to financial institutions, relates to joinder and consolidation. Financial transactions often involve multiple parties and multiple contracts. The DIFC-LCIA Rules contain sophisticated provisions dealing with joinder of third parties to an arbitration or consolidation of an existing arbitration with one or more other arbitrations into a single arbitration, whereas the current DIAC Rules are silent on those issues.

- How will the institutional and arbitrators' fees be determined? The DIFC-LCIA adopts the hourly rate model of the LCIA, whereas the DIAC determines those fees on an ad valorem scale, i.e., on a predefined scale proportional to the value of the claims in dispute.

In the light of these uncertainties, and pending possible transitional arrangements in relation to the proper implementation of the decree within the next six months, financial institutions may wish to re-consider their approach to dispute resolution provisions for Middle East transactions. They may, for example, wish to consider asking borrowers to agree to amend the dispute resolution provisions in existing agreements, and should seek to do so when the opportunity arises in connection with other proposed amendments to their existing agreements.

Complaints Procedure

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