

## Dispute Resolution Hotline

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### NAVIGATING THE TRANSITION FROM DIFC-LCIA TO DIAC

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- In September 2021, “Decree No34 of 2021 Concerning the Dubai International Arbitration Centre” abolished the Dubai International Financial Centre-London Court of International Arbitration (“DIFC-LCIA”) Centre and transferred all its rights and obligations to Dubai International Arbitration Centre (“DIAC”). The decree provided that all arbitration agreements referring disputes to the DIFC-LCIA would remain valid, with the DIAC administering disputes under such agreements instead.
- In *DFL v. DFM*, the Singapore Court of Appeal enforced an interim award issued in an arbitration conducted under the DIAC Rules, where the arbitration agreement provided for the rules of the DIFC-LCIA. The court determined that the parties had consented to the DIAC tribunal’s jurisdiction by arguing the merits of the interim relief application before the Tribunal and failing to raise any jurisdictional objections at that time.
- The enforceability of awards from disputes under arbitration agreements originally referring to the DIFC-LCIA Rules but administered by DIAC varies across different countries. Parties impacted by Decree 34 should consider updating their arbitration agreements to enhance the predictability and enforceability of their final awards.

The abolition of the Dubai International Financial Centre-London Court of International Arbitration Centre (“DIFC-LCIA”) in September 2021, by way of “Decree No. (34) of 2021 Concerning the Dubai International Arbitration Centre” (“Decree 34”), has raised significant concerns regarding the enforceability and recognition of arbitration agreements resorting to DIFC-LCIA arbitration.

Decree 34 brought about significant changes, including:

1. the abolishment of the DIFC-LCIA Arbitration Centre: all rights and obligations of DIFC-LCIA were transferred to the Dubai International Arbitration Centre (“DIAC”), which was to be headquartered in Dubai with a branch in the DIFC; and
2. the validation of existing DIFC-LCIA arbitration agreement: all agreements that provided for arbitration under the DIFC-LCIA were deemed valid even after the abolishment of the DIFC-LCIA. The decree provided that DIAC would replace the DIFC-LCIA in considering and determining all disputes arising out of these agreements unless otherwise agreed by the parties.

On 29 March 2022, DIAC and the London Court of International Arbitration (“LCIA”) also issued a joint press release stating that all arbitrations commenced on or after 21 March 2022, which were to be conducted under the DIFC-LCIA Rules, shall be registered and administered by DIAC under its rules (the “Press Release”).

Decree 34, along with the Press Release, has ignited debate over whether legislation can mandate parties to an alternative institution in breach of an agreement’s specified procedure. This concern has been at the center of multiple international cases. These cases throw light on what is now emerging as a prominent issue relating to abolishment of the DIFC-LCIA Arbitration Centre and its transition to DIAC under Decree 34.

Recently, in *DFM v. DFL*,<sup>1</sup> the Singapore Court of Appeal (“SGCA”) enforced an interim award issued in an arbitration conducted under the Dubai International Arbitration Centre (“DIAC”) Rules, where the arbitration agreement provided for the rules of the DIFC-LCIA. In a prior decision,<sup>2</sup> the Singapore High Court enforced the interim award, noting that although the arbitration did not follow the agreed DIFC-LCIA rules, the parties had effectively consented to the DIAC tribunal’s jurisdiction by participating in the interim relief application. This decision was confirmed by the SGCA on

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appeal, which found that the parties had waived their right to challenge the jurisdiction of the DIAC tribunal.

## BRIEF FACTS OF DFM V. DFL

In this case, the parties had entered into an agreement in 2018 with an arbitration clause providing for disputes to be resolved by arbitration seated in London and to be conducted under the DIFC-LCIA Rules. Once disputes arose between the parties, after the DIFC-LCIA had been abolished, the claimant commenced an arbitration against the original respondent under the DIAC Rules.

The original respondent filed an Answer, reserving its rights as to the impact of Decree 34. When the claimant applied to the DIAC tribunal for interim relief, the original respondent contested the merits of such application without specifically raising any jurisdictional objections.

Subsequently, the tribunal issued an interim award for the relief sought by the claimant. The claimant sought to enforce the interim award in Singapore, for which permission was granted by the Assistant Registrar. However, the original respondent challenged the enforcement order and argued that the interim award could not be enforced under Section 31(2)(e)<sup>3</sup> of the (Singapore) International Arbitration Act 1994, as the arbitral procedure was not in accordance with the parties' agreement to arbitrate under the DIFC-LCIA Rules.

## SINGAPORE HIGH COURT'S JUDGMENT

In brief, the Singapore High Court's analysis concerned the following key issues:

1. **Severability of the arbitration agreement:** The claimant argued that a clause in the agreement allowed for the clause mandating arbitration under the DIFC-LCIA Rules to be severed and replaced with a clause providing for arbitration under the DIAC Rules. However, the court rejected this argument, stating that the choice of institutional rules significantly impacts the basic architecture and procedure of the arbitration. The court highlighted fundamental disparities between the DIFC-LCIA Rules and DIAC Rules, such as compressed timelines, provisions for *ex-parte* emergency relief applications, and an ad valorem fee structure under the DIAC Rules. Consequently, the court found that an arbitration under the DIAC Rules would fundamentally contradict the parties' intentions expressed through their agreement to apply the DIFC-LCIA Rules. Thus, the court found that the severability clause under the parties' agreement could not operate to unilaterally replace those rules.
2. **Submission to jurisdiction:** The court found that, despite reserving jurisdictional objections in its reply to request for arbitration and statement of defense, the original respondent had submitted to the tribunal's jurisdiction over the interim relief application by failing to specifically raise those challenges while substantively contesting the merits under the DIAC Rules. This amounted to an unequivocal, clear, and consistent intention to submit to the tribunal's jurisdiction for the interim relief application.
3. **Enforcement of the interim award:** The court rejected the original respondent's argument that the interim award should not be enforced pending the resolution of the jurisdictional issue in the main arbitration proceedings. The court held that its conclusions were aligned with the tribunal's assumption of jurisdiction for the interim application, and if the original respondent subsequently succeeded on its jurisdictional objections, the interim relief orders would be discharged. In that event, the original respondent could enforce applicant's undertaking to abide by any order or award as to damages that the respondent may have sustained on account of the interim relief orders.

## SGCA'S JUDGMENT

The sole issue in the appeal was whether the original respondent, having raised his objections to the Tribunal's jurisdiction to hear the arbitration, had nonetheless submitted to its jurisdiction at least for the purpose of determining the interim relief application. The SGCA ruled that the original respondent waived his right to invoke section 31(2)(e) of the IAA to resist enforcement of the award by not objecting to the Tribunal's jurisdiction over the interim relief application and actively contesting it on its merits.

## ANALYSIS

In the present case, it was the respondent's conduct that convinced the Singapore courts of the respondent's submission to the arbitral tribunal's jurisdiction. However, the Singapore High Court held that given the fundamental differences between the DIFC-LCIA and DIAC Rules, substituting the DIAC Rules for the DIFC-LCIA Rules may not be straightforward, despite the Decree and the Press Release. Other courts have taken differing views on how easily the DIFC-LCIA Rules may be substituted by the DIAC Rules.

### The view from the UAE Courts

In the UAE, the Abu Dhabi Courts have considered this issue. In AD Commercial Action No. 1046-2023, the Abu Dhabi Court of First Instance held that the closure of an arbitration institution does not inherently nullify an arbitration clause, and that parties may proceed under an alternative arbitral framework or request court intervention for the appointment of arbitrators. This was upheld by the Abu Dhabi Court Commercial Court of Appeal,<sup>4</sup> where the Court found that the dissolution of the DIFC-LCIA does not render arbitration agreements referring to it unenforceable. This affirms that such agreements remain effective despite the Centre's abolition in 2021. The court notably referred to international jurisprudence to uphold the principle of party autonomy and the validity of arbitration agreements, even when the named institution ceased to exist. This Court of Appeal judgment was then further upheld by the Abu Dhabi Court of Cassation,<sup>5</sup> which added that according to Article 6 of Decree 34, all arbitration agreements executed before the date of Decree 34 and referring disputes to any of the abolished institutions shall remain valid and enforceable and that DIAC shall be the supervising institution over such disputes. Nonetheless, there remains uncertainty about the enforceability of DIFC-LCIA clauses in other jurisdictions, meaning parties should take care and reassess their arbitration agreements to mitigate potential jurisdictional challenges.

More recently, the DIFC Courts<sup>6</sup> considered this issue for the first time in the case of *Narciso v Nash [ARB 009/2024]* ("Narciso"). In this case, the DIFC Courts granted an anti-suit injunction to prevent proceedings taking place in the Sharjah Courts (UAE),<sup>7</sup> in light of an arbitration agreement between the parties which provided for

The defendant in *Narciso* had previously attempted to commence DIAC arbitration proceedings by virtue of Decree 34 and requested DIAC to appoint an arbitrator. However, due to procedural errors, the parties' disagreement on DIAC acting as the appointing authority and the failure to pay the DIAC registration fee, the arbitration was not registered, leading to a closure of the DIAC file. The defendant then referred to the dispute to the Sharjah Courts.

After the DIFC courts granted the anti-suit injunction, the defendant applied to have the injunction discharged arguing, among other things, that the arbitration agreement was invalid since it required disputes to be referred to the DIFC-LCIA, which had been dissolved pursuant to Decree 34. In response, the claimant argued that Decree 34 did not invalidate the arbitration agreement but rather, permitted the parties to either proceed with the DIAC or agree to proceed with another arbitration institution. The DIFC Courts agreed with the claimant's position and held that the anti-suit injunction was enforceable. The court held, among other things, that Decree 34 did not invalidate the arbitration agreement or the reference to a DIFC seat within the arbitration agreement.

### ***The view from the US Courts***

The issue has also been considered by the US District Court of New Orleans.<sup>8</sup> In this case, the court found that an arbitration clause referring to the DIFC-LCIA Rules was unenforceable after Decree 34, and that Decree 34 cannot mandate parties to refer their disputes to the DIAC. The court held that even if the DIFC-LCIA and DIAC rules were similar, parties cannot be mandated to refer their disputes to a different forum than that agreed in their arbitration clause.

### ***The view from the Indian Courts***

While the Indian courts have not yet encountered similar situations relating to the substitution of DIFC-LCIA Rules with DIAC Rules, they have generally taken the position that courts or arbitrators should not rewrite the terms of a contract between parties.<sup>9</sup> Additionally, under Section 48(1)(d) of the Indian Arbitration and Conciliation Act, 1996,<sup>10</sup> the enforcement of an arbitral award may be refused if the arbitral procedure was not in accordance with the agreement of the parties. Consequently, it remains to be seen whether Indian courts will refer disputes to an institution other than the one specified in the arbitration agreement. Interestingly, a situation arose in India in 2016 when the LCIA decided to end the operations of its independent subsidiary, LCIA India. In such cases, for the LCIA Rules to replace the LCIA India Rules in existing arbitration clauses, the consent of both parties was required.<sup>11</sup>

## **CONCLUSION**

It is expected that the uncertainty surrounding the enforceability of arbitration agreements referencing the DIFC-LCIA Rules is likely to persist globally as indicated by the decisions above. However, the jurisprudence from the UAE, while not binding, suggests that arbitration awards where the DIFC-LCIA Rules were substituted with the DIAC Rules are more likely to be enforced within the Arab nations in the Middle East as compared to common law jurisdictions. It remains crucial for parties to strategically align their actions with their jurisdictional objectives and consider where any resulting award is to be enforced. To avoid potential disputes and costly litigation, parties may also consider revising existing agreements with suitable modifications.

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You can direct your queries or comments to the relevant member.

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<sup>1</sup> [2024] SGCA 41.

<sup>2</sup> [2024] SGHC 71.

<sup>3</sup> **"Refusal of enforcement**

31. [...]

[...](2) A court so requested may refuse enforcement of a foreign award if the person against whom enforcement is sought proves to the satisfaction of the court that —

[...]

(e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

[...]"

<sup>4</sup> In *Abu Dhabi Commercial Court of Appeal Judgment 449 of 2024*.

<sup>5</sup> *Abu Dhabi Court of Cassation Challenge No. 536 of 2024*.

<sup>6</sup> The DIFC Courts are English language, common law courts within the Dubai Court system.

<sup>7</sup> Sharjah is an Emirate within the United Arab Emirates.

<sup>8</sup> *Baker Hughes Saudi Arabia Co Ltd v. Dynamic Industries et al*, 2023 WL 7299129 (E.D. La. 2023).

<sup>9</sup> *Venkataraman Krishnamurthy v. Lodha Crown Buildmart Pvt Ltd*, Civil Appeal No. 971 of 2023; *Shree Ambica Medical Stores v. Surat People's Coop. Bank Ltd*, (2020) 13 SCC 564; *General Assurance Society Ltd. v. Chandumull Jain*, AIR 1966 SC 1644; *P.S.A. Sical Terminals Pvt Ltd v. Board of Trustees*, 2021 SCCOnline SC 508.

<sup>10</sup> **48. Conditions for enforcement of foreign awards.—(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that—**

[...]

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

[...]

<sup>11</sup>See <https://www.lcia-india.org/Default.aspx>.

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