

Legal Alert



Should you continue to include DIFC-LCIA arbitration clauses or EMAC arbitration clauses in your agreement?

Dubai Decree No. 34 of 2021 concerning the Dubai International Arbitration Centre (“Decree”)

By Mevan Bandara | 27 September 2021

The Decree, which came into force on 20th September 2021, abolished the Emirates Maritime Arbitration Centre (EMAC) and the DIFC Arbitration Institute (DAI) with immediate effect and has raised multiple queries in the legal and business communities, particularly as to whether parties should still opt for EMAC or DIFC-LCIA arbitration clauses in agreements that are presently being drafted.

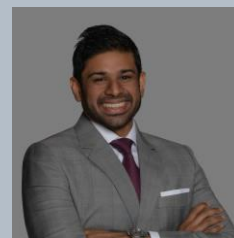
Pursuant to the Decree, the Dubai International Arbitration Centre (DIAC) will replace all rights and obligations of the now abolished EMAC and DAI. The DIAC has been granted a period of no more than six months to effectively replace EMAC and the DAI.

Although the Decree does not abolish or even make reference to the DIFC-LCIA Arbitration Centre, the DIFC-LCIA Arbitration Centre was established consequent to an agreement entered into between the DAI and the LCIA; meaning that, the abolishment of the DAI calls to question (at the very least) the mandate under which the DIFC-LCIA Arbitration Centre continues to operate. It is expected that there will be further regulation, perhaps in the form of administrative orders, that will hopefully clarify the status of the DIFC-LCIA Arbitration Centre.

However, for present purposes, two questions arise, (i) what effect does an EMAC/DIFC-LCIA arbitration clause have consequent to the Decree; and (ii) should parties continue to include EMAC/DIFC-LCIA arbitration clauses in their agreements.

Pursuant to Article 6 (a) of the Decree, all agreements executed as at the date the Decree came into force (i.e., 20 September 2021) that contain a clause providing for “*arbitration in the Canceled*

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Arbitration Centers” (i.e., EMAC and by implication DIFC-LCIA) “*shall be valid and effective*”, and the DIAC shall replace “*the Canceled Arbitration Centers*” in “*hearing and resolving disputes arising from such agreements*” unless parties agree otherwise:

All agreements concluded as at the date of entry into force of this Decree for resorting to arbitration in the Canceled Arbitration Centers shall be valid and effective, and the Dubai International Arbitration Centre shall replace these centers in hearing and resolving disputes arising from these agreements, unless the parties thereto agree to otherwise. [LexisNexis translation]

The Decree therefore provides some comfort to parties who have opted for EMAC/DIFC-LCIA arbitration clauses in agreements that were entered into on or before 20 September 2021, as the Decree specifically provides that such arbitration agreements will be valid and effective.

In addition, Article 8 (c) of the Decree provides that the arbitration rules of “*the Canceled Arbitration Centers*” (i.e., the EMAC rules and by implication, the DIFC-LCIA rules) and the DIAC will continue to apply until DIAC approves its new arbitration rules. This, however, raises another concern. If an EMAC arbitration, for example, is initiated after 20 September 2021 (and prior to DIAC issuing its new arbitration rules), does it mean that in terms of Article 6 (a) and Article 8 (c) of the Decree, the arbitration must be initiated under the EMAC arbitration rules and thereafter, the new DIAC arbitration rules become applicable once issued by the DIAC? If so, such eventuality is likely to raise multiple practical and legal issues.

The next issue to consider is what effect an EMAC/DIFC-LCIA arbitration clause has in an agreement that was concluded after 20 September 2021. Would such an agreement be valid? And which institution will administer such an arbitration? A strict interpretation of Article 6 (a) of the Decree would suggest that the comfort given in Article 6 (a) of the Decree is limited only to agreements concluded on or before 20 September 2021. For agreements entered into after 20 September 2021, there is unfortunately no definite answer to this question as of now.

It remains to be seen whether further regulations to be promulgated pursuant to the Decree will expressly provide that any reference to an EMAC/DIFC-LCIA arbitration clause will be construed as a reference to an arbitration administered under the DIAC arbitration rules. Similar provision was made when the DIAC was first created in 2007 and references to arbitration under the Dubai Chamber of Commerce Rules were deemed to be a reference to the DIAC Rules.

Until there is more clarity, the prudent approach would be not to opt for EMAC or DIFC-LCIA arbitration clauses in agreements that are presently being drafted. We understand that the relevant authorities are in discussion regarding these issues, and we expect clarifications to be issued soon. ■

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