

# A unified arbitration hub?

Chatura Randeniya and Mevan Bandara of Afridi & Angell discuss the impact of the changes brought about by Dubai Decree No. 34 of 2021 concerning the Dubai International Arbitration Centre.

**O**n September 20, 2020, in a move that caught many by surprise, the Emirate of Dubai made significant changes to the arbitration landscape in Dubai. While the changes are largely seen to be beneficial in the long-term for the consolidation of Dubai as an arbitration hub, they have given rise to some practical questions in the immediate and short term.

#### WHAT HAS CHANGED?

The most significant change introduced in the Decree is the abolishing of the Emirates Maritime Arbitration Centre (EMAC) and the DIFC Arbitration Institute (DAI) (defined as the 'Cancelled Arbitration Centres' in the Decree, although it is worth noting that the DAI is not an 'Arbitration

Centre' in the sense that it does not have a set of rules and administers arbitrations as the EMAC does) and the transfer of all their assets, rights and obligations to the Dubai International Arbitration Centre (DIAC). Pursuant to Article 5 of the Decree, all assets of the Cancelled Arbitration Centres, the employees of the Cancelled Arbitration Centres that the DIAC require, financial appropriations allocated to the Cancelled Arbitration Centres are to be transferred to DIAC. To this end, the DIAC has been granted a period of not more than six months to effectively replace EMAC and the DAI.



The rationale behind this move, it is assumed, is for Dubai to hitherto have one arbitration centre administering arbitrations in Dubai, similar to several other global arbitration hubs.

### IS THE DIFC-LCIA ARBITRATION CENTRE IMPACTED BY THE DECREE?

While the Decree abolishes both EMAC and the DAI (which, as noted above is not strictly an ‘arbitration centre’), there has been much discussion as to the impact the abolishment of the DAI has on the DIFC-LCIA Arbitration Centre. Although the Decree does not abolish or even make reference to the DIFC-LCIA Arbitration Centre, it is known that the DIFC-LCIA Arbitration Centre was established consequent to agreements entered into between the DAI and the LCIA, and that the Secretariat (including the Registrar) are employed by the DAI. The Decree makes several references to the Cancelled Arbitration Centres (plural) and their rules. As the DAI does not have any rules, the reference of the rules of the cancelled centres (plural) in, for example, Article 8(c), can only be given meaning by including the DIFC-LCIA in the equation. Therefore, it would be unsurprising that the abolition of the DAI has caused discussion (at the very least) regarding the mandate under which the DIFC-LCIA Arbitration Centre continues to operate and whether the Secretariat can continue to administer arbitration cases.

The DIFC-LCIA has been a popular choice for administering arbitrations in Dubai and has earned a reputation for being an effective, well-administered arbitration centre. In 2021 alone, the DIFC-LCIA has administered over 180 cases. Therefore, due consideration should be given to the impact the Decree has on ongoing DIFC-LCIA arbitrations and DIFC-LCIA arbitration clauses that are contained in agreements.

### WHAT ABOUT ONGOING ARBITRATIONS UNDER THE EMAC / DIFC-LCIA RULES?

Although Article 6 (b) of the Decree appears to contemplate that ongoing arbitrations of the Cancelled Arbitration Centres (i.e., EMAC and, by implication, the DIFC-LCIA) will continue without interruption, the language of the Decree also appears to make this conditional on the DIAC and its administrative body taking over supervision of any such cases. Therefore, a question arises as to whether arbitration proceedings

can continue without interruption pending the DIAC taking over supervision of such cases. As of date, we are unaware whether DIAC has assumed supervision of these cases. All that has been stated thus far by the LCIA and the DIFC-LCIA is that consultation is taking place between the LCIA and the government of Dubai to seek to ensure the good management of existing and future cases under the DIFC-LCIA Rules and that, the casework team continues to deal with the day-to-day management of cases. What is unclear, however, is how the DIFC-LCIA Secretariat (that was formerly employed by DAI) can continue to perform its functions without the supervision of the DIAC. The ‘unofficial message’ from the DIFC-LCIA Secretariat is that the LCIA will take over administration of the DIFC-LCIA cases pursuant to Article 32.4 of the DIFC-LCIA arbitration rules and that a joint statement from the Government of Dubai and LCIA is imminent.

Therefore, parties to an arbitration and their arbitrators will need to consider what steps might need to be adopted in order to cover this interim period, otherwise potential challenges to a final award can conceivably be made on the basis, for example, that the arbitration procedure adopted was not in accordance with the agreement of the parties, or was otherwise defective.

### WHAT EFFECT DOES AN EMAC/ DIFC-LCIA ARBITRATION CLAUSE HAVE CONSEQUENT TO THE DECREE?

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

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 September 20, 2021, as the Decree specifically provides that such arbitration agreements will be valid and effective. However, there is a question regarding the applicability of these rules once the new DIAC Rules come into being (see below).



Until there is more clarity, the prudent approach would be to consider alternatives to EMAC or DIFC-LCIA arbitration clauses in agreements that are presently being drafted.”



Another issue to consider is what effect an EMAC/DIFC-LCIA arbitration clause has in an agreement that was concluded after September 20, 2021. 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 September 20, 2021. For agreements entered into after September 20, 2021, there is no definite answer to this question as of now.

**WHAT HAPPENS AFTER THE NEW DIAC ARBITRATION RULES HAVE BEEN ADOPTED?**

An additional consideration should be given to Article 8 (c) of the Decree which 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 September 20, 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, it would be a highly unusual scenario likely to raise multiple practical and legal issues. There is no definite answer to these questions, and it is expected that there will be further regulation, perhaps in the form of administrative orders, that will hopefully clarify these issues.

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 after September 20, 2021 (or such other date) 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 to consider alternatives to EMAC or DIFC-LCIA arbitration clauses in agreements that are presently being drafted. For example, parties who have keenly negotiated the application of the DIFC-LCIA Rules may consider the LCIA Rules, which are very similar, or may consider the DIAC Rules (which are, although dated, adequate for most disputes) if there is a preference for ‘home-grown’ rules.

While there are a number of issues raised by the Decree, no doubt the relevant authorities will work to resolve these swiftly. However, in the interim, parties in or contemplating arbitration, and their advisors should be aware of these issues and take such steps as may be necessary to mitigate their possible consequences. 📌



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