

Has the DIFC-LCIA been abolished? Recent change in Dubai's Arbitration Landscape

Introduction

On 14 September 2021, Decree No. 34 of 2021 Concerning the Dubai International Arbitration Centre was issued by Dubai's Ruler, His Highness Sheikh Mohammed bin Rashid Al Maktoum (the "**Decree**").¹ It came into effect on 20 September 2021.

The Decree has re-shaped the Dubai arbitration landscape by abolishing the Dubai International Financial Centre (the "**DIFC**") Arbitration Institute ("**DAI**") and the Emirates Maritime Arbitration Centre ("**EMAC**"), and consolidating arbitrations subject to their rules within a re-vamped Dubai International Arbitration Centre (the "**DIAC**"). The Decree has therefore in effect also abolished the DIFC-LCIA Arbitration Centre (the "**DIFC-LCIA**"), which had been established pursuant to an operating agreement between the DAI and the London Court of International Arbitration ("**LCIA**").

On 7 October 2021, the DIFC and the LCIA issued press releases concerning the proposed implementation of the Decree.² The DIFC proposed for ongoing DIFC-LCIA arbitrations commenced prior to the effective date of the Decree to be administered by the LCIA, with the DIFC-LCIA Registrar and Secretariat seconded from DIAC to the LCIA for this purpose. However, arbitrations commenced pursuant to agreements referring to DIFC-LCIA Rules after the effective date of the Decree would be administered by DIAC subject to DIAC Rules. It is understood that the DIFC-LCIA has stopped registering new arbitrations pending further clarification. It is unclear at this stage whether DIAC is registering new arbitrations pursuant to arbitration agreements providing for DIFC-LCIA Rules.

This client alert considers the key provisions of the Decree and its immediate impact on arbitration in Dubai.

¹ United Arab Emirates Decree No. 34 of 2021 Concerning the Dubai International Arbitration Centre:
[https://dip.dubai.gov.ae/Legislation%20Reference/2021/Decree%20No.%20\(34\)%20of%202021.html](https://dip.dubai.gov.ae/Legislation%20Reference/2021/Decree%20No.%20(34)%20of%202021.html)

² LCIA Press Release, *Update: DIFC-LCIA*, 7 October 2021: <https://www.lcia.org/News/update-difc-lcia.aspx>; DIFC Press Release, *Dubai's Position as a Global Hub for Alternative Dispute Resolution Reconfirmed through Unifying Arbitration Centres*, 7 October 2021: <https://www.difc.ae/newsroom/news/dubais-position-global-hub-alternative-dispute-resolution-reconfirmed-through-unifying-arbitration-centres/>

The Dubai arbitration landscape prior to the Decree

DIAC

- DIAC was founded in 1994 by the Dubai Chamber of Commerce and Industry. Prior to the passing of the Decree, DIAC was one of the three most commonly used arbitral institutions in the United Arab Emirates alongside the DIFC-LCIA and the Abu Dhabi Commercial Conciliation and Arbitration Centre (“**ADCCAC**”).
- DIAC arbitrations currently operate under the 2007 DIAC Arbitration Rules (the “**DIAC Rules**”), although the draft DIAC 2018 Arbitration Rules were released in November 2017 (the “**Draft New DIAC Rules**”) and are expected to be introduced in due course.

DIFC-LCIA

- The DIFC-LCIA was first established in 2008. It was, in practical terms, a joint venture between the DIFC and the LCIA. The DIFC-LCIA Secretariat, which administered DIFC-LCIA arbitrations, was employed by the DAI.
- As of 1 January 2021, DIFC-LCIA arbitrations operated under the 2021 DIFC-LCIA Rules (“**DIFC-LCIA Rules**”), which are near-identical to the 2020 LCIA Rules.

EMAC

- EMAC was established pursuant to Decree No. 14 of 2016 as part of an initiative led by the Dubai Maritime City Authority and the Government of Dubai. Located in the DIFC, EMAC acted as the Middle East’s only specialised maritime arbitration centre.
- EMAC arbitrations operated under the 2016 EMAC Arbitration Rules (the “**EMAC Rules**”), and granted supervisory jurisdiction to the DIFC Courts.

The Decree and DIAC Statute

The Decree introduces sweeping changes to DIAC’s structure and operation via an amended Statute of DIAC (the “**New DIAC Statute**”) and sets out the mechanisms through which DIAC will act as the sole institution for the administration of arbitrations in Dubai.

Implementation of DIAC as the sole institution for the administration of arbitrations in Dubai - Articles 4, 5, 6 and 9 of the Decree

Article 4 of the Decree abolishes the DAI and EMAC.

Article 5 of the Decree sets out how DIAC will assume the functions and operations of the DAI and EMAC. It provides that the following shall be transferred to DIAC:

- Article 5(a)(1) - DAI's and EMAC's properties, assets and funds;
- Article 5(a)(2) - DAI's and EMAC's employees further to a decision of the Chairman of the Board of Directors of DIAC; and
- Article 5(a)(4) - lists of arbitrators, conciliators and experts registered with the DAI and EMAC.

In accordance with Article 9 of the Decree, DIAC shall have six months from the effective date of the Decree to implement the terms of the Decree and the New DIAC Statute, so that it can fully establish itself as the unitary arbitral institution based in Dubai.

Continuing validity of arbitration agreements and arbitral tribunals subject to DIFC-LCIA and EMAC Rules - Article 6 of the Decree

With respect to **arbitration agreements**, Article 6(a) of the Decree states that agreements executed on, or before, the effective date of the Decree (i.e. 20 September 2021) shall continue to be valid and effective. However, DIAC will assume sole responsibility for administering DAI (effectively, DIFC-LCIA) and EMAC arbitrations moving forward (subject to any contrary agreement by the parties).

With respect to **ongoing arbitrations**, Article 6(b) of the Decree states that arbitral tribunals constituted under the DAI (which in practice means tribunals constituted under the DIFC-LCIA Rules) or EMAC will continue to consider and determine arbitrations in accordance with the arbitral rules and procedures they adopt in this respect. However, according to Article 6(b) of the Decree, DIAC would have sole responsibility over the supervision and administration of such arbitrations.

The DIFC issued a press release with respect to ongoing DIFC-LCIA arbitrations. According to the DIFC, there is a proposal that the LCIA will administer DIFC-LCIA arbitrations which were commenced prior to the effective date of the Decree. In order to implement this, the DIFC-LCIA Registrar and Secretariat will be seconded from DIAC to the LCIA, so as to allow ongoing DIFC-LCIA arbitrations to be administered on behalf of the LCIA and the LCIA Court. This press release appears to contradict Article 6(b) of the Decree, which intended for DIAC to administer existing DIFC-LCIA arbitrations. Administration by the LCIA of existing arbitrations may have been necessitated by concerns that the DIFC-LCIA Rules are proprietary to the LCIA, and DIFC-LCIA

arbitrations are subject to supervision by the LCIA Court, and hence in practice could not be administered by DIAC.

Further, the DIFC and LCIA stated in their recent press releases that arbitration agreements which are subject to the DIFC-LCIA Rules, and which are commenced after the effective date of the Decree, will be administered solely by DIAC in accordance with the DIAC Rules.

The above proposals are still under consultation between the Dubai government, the DIFC, the DAI and the LCIA, and so may be subject to change.

The New DIAC Statute

The New DIAC Statute was also enacted alongside the Decree. The New DIAC Statute will replace the current DIAC statute, which has been in force since 2019 pursuant to Decree No. 17 of 2019.

The New DIAC Statute is intended to overhaul DIAC. One of the key changes includes the establishment of a new DIAC arbitration court (Article 10 of the DIAC Statute), placing DIAC on a similar footing to leading arbitral institutions, such as the LCIA and the International Chamber of Commerce (the “ICC”), both of which have similar supervisory courts within their institutions.

Further, Article 4 of the New DIAC Statute confirms that the parties have autonomy to select their seat, and provides the DIFC as the default seat if the parties fail to select a seat. The DIFC as the default seat has already been introduced in the Draft New DIAC Rules, and follows the language of Article 16.2 of the DIFC-LCIA Rules, and Article 20(1) of the EMAC Rules.

The Decree’s Ramifications

The Decree has created a level of uncertainty for parties which have referred to the DIFC-LCIA or EMAC as the administering bodies in their arbitration agreements. Parties have the right to amend their arbitration agreements (as enshrined in Article 4 of the Decree). Therefore, in the first instance, contracting parties should consider if any of their arbitration agreements refer to the DIFC-LCIA (or EMAC), and if so, whether an amendment can be agreed with the counter-party. However, once a dispute has arisen, it is unlikely that parties will reach agreement on this issue. In that case, parties should consider the following key ramifications of the Decree.

The Decree does not affect arbitration agreements that are not administered by the DIFC-LCIA or EMAC

It is important to note that the Decree only impacts arbitrations that are administered by the DIFC-LCIA or EMAC. As such, arbitration agreements which are to be administered by the rules of other arbitral institutions—such as ADCCAC, ICC, or LCIA—will not be affected by the Decree, even if the DIFC is the parties' chosen arbitral seat.

The supervisory function and arbitration costs of *ongoing* DIFC-LCIA arbitrations

The recent press releases suggest that ongoing DIFC-LCIA arbitrations which were commenced prior to the effective date of the Decree will be administered by the LCIA, with the DIFC-LCIA Registrar and Secretariat seconded from DIAC to the LCIA until the completion of such proceedings. Indeed, it appears that the DIFC-LCIA Registrar and Secretariat have continued to administer ongoing DIFC-LCIA arbitrations following the effective date of the Decree on a temporary basis. This arrangement provides some confidence to the parties of the 186 ongoing DIFC-LCIA matters (including arbitrations, mediations and regulatory proceedings, as of 20 September 2021).

However, further clarification is needed with respect to arbitration costs of ongoing DIFC-LCIA arbitrations that were commenced prior to the Decree. Parties' advances of arbitration costs in DIFC-LCIA arbitrations are held in bank accounts in DAI's name. The Decree does not provide clarity on the status of parties' advances on costs. There is therefore some uncertainty whether or how arbitrators currently sitting on DIFC-LCIA tribunals will be compensated. It is also unclear whether parties which commenced DIFC-LCIA arbitration proceedings shortly prior to the Decree—but which have not yet paid an advance of costs to the DIFC-LCIA—will now be required to make such payments directly to DIAC. Conversely, it is also unclear whether parties which have already made an advance on costs to the DIFC-LCIA (or EMAC) will be entitled to a refund should they decide to amend their arbitration agreements to select a new set of arbitral rules.

However, we understand that consultations are taking place between the government of Dubai, the DIFC, DIAC and the LCIA as to how best to administer parties' advances of arbitration costs for ongoing DIFC-LCIA arbitrations. Control of the parties' funds is key: without access to and control of the funds, neither the DIAC nor the LCIA can administer DIFC-LCIA arbitrations moving forward.

Potential for jurisdictional challenges and uncertainty as to the recognition and enforceability of arbitral awards pursuant to DIFC-LCIA and EMAC arbitration agreements

The Decree creates a potential for jurisdictional challenges by parties of DIFC-LCIA (or EMAC) arbitrations commenced following the effective date of the Decree, as well as

concerns with respect to recognition and enforceability of awards rendered in such proceedings.

Unlike national courts, arbitral tribunals do not have an inherent power or jurisdiction. Rather, they derive such authority from the parties' arbitration agreement. Given that parties to existing arbitration agreements which refer to DIFC-LCIA (or EMAC) Rules did not agree to be subject to DIAC Rules or DIAC's administration of their proceedings, parties may file jurisdictional challenges against arbitral tribunals constituted under the DIAC Rules pursuant to the Decree. This is a significant risk for any proceeding, which may disrupt the arbitral process. Moreover, both the DIFC and UAE arbitration laws allow for the relevant supervisory courts to consider jurisdictional objections during recognition, enforcement and set-aside proceedings. Potential jurisdictional objections may therefore also endanger any eventual arbitral award.

Uncertainties surrounding DIFC-LCIA and EMAC arbitration agreements

Parties subject to arbitration agreements referring to the DIFC-LCIA (or EMAC) Rules which had not commenced arbitration proceedings prior to the effective date of the Decree remain in an uncertain position. The recent press releases of the DIFC and LCIA suggest that DIAC will assume responsibility for the supervisory function of DIFC-LCIA arbitrations commenced after the effective date of the Decree, subject to DIAC Rules.

However, in light of the potential for jurisdictional issues which this arrangement poses, the LCIA Court may invoke Article 32.4 of the DIFC-LCIA Rules for arbitrations which have been commenced after the effective date of the Decree. Article 32.4 of the DIFC-LCIA Rules permits the LCIA Court to administer arbitrations—in whole or in part—if it deems it appropriate to do so under the circumstances. This could serve to give effect to the parties' intention for their DIFC-LCIA arbitrations to be under the supervisory function of the LCIA Court. If, however, the LCIA Court does exercise its rights under Article 32.4 of the DIFC-LCIA Rules, there is a chance that any enforcement action—arising out of what would have originally been a DIFC-LCIA arbitral award—will still take place before the courts of the UAE, whether before the onshore UAE courts or before the DIFC courts. It is unclear at this stage whether parties will face difficulties in seeking recognition and enforcement of an arbitral award which has been rendered by virtue of the LCIA Court's application of Article 32.4 of the DIFC-LCIA Rules.

Practical considerations:

1. **Future arbitration agreements:** Subject to any further clarification, parties should refrain from referring to DIFC-LCIA or EMAC Rules in any future agreements.
2. **Existing arbitrations under DIFC-LCIA Rules commenced prior to the effective date of the Decree:** Parties subject to ongoing DIFC-LCIA proceedings

commenced prior to the effective date of the Decree may be least affected pursuant to Article 6 of the Decree and the recent DIFC and LCIA press releases. However, the position in the press releases is yet to be confirmed and clarified as at the date of this publication.

3. **Potential future arbitrations pursuant to existing agreements subject to DIFC-LCIA Rules:** Parties whose arbitration agreements contain references to the DIFC-LCIA (or EMAC) should amend their arbitration agreements to provide for an alternative arbitral institution. Even if parties are content that any future arbitration be administered by DIAC, they should consider recording this in an amended arbitration agreement in an effort to limit later jurisdictional challenges.

The most appropriate alternative arbitral institution will depend on a variety of factors including the governing law of the contract, the parties' preferred seat of arbitration, the location of the parties and their assets, as well as the place of contractual performance, among others.

It is likely that further announcements will be made in the coming weeks by the Government of Dubai, DIAC, the LCIA and EMAC as to the implementation of the Decree, which could impact the most appropriate steps that should be taken.

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