

Client Alert

International Disputes

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DIFC and Abu Dhabi Courts Uphold DIFC-LCIA Arbitration Agreement

SUMMARY

The Dubai International Financial Centre (“**DIFC**”) court in *Narciso v Nash* has confirmed the validity of an agreement providing for arbitration under the now defunct DIFC-LCIA, endorsing another recent decision by the Abu Dhabi courts in *Vaned Engineering GMBH v Reem Hospital*. Until recently, it was unclear how the UAE onshore and freezone courts would treat such arbitration agreements, following *Decree No. 34/2021* (the “**Decree**”), which abolished the DIFC-LCIA and transferred all rights and obligations to the Dubai International Arbitration Centre (“**DIAC**”).

Given these rulings, it is clear that the UAE onshore and freezone courts are keen to uphold the validity of such arbitration agreements, with DIAC replacing the DIFC-LCIA as the arbitral institution, as envisaged under the Decree. The takeaway for parties is that they cannot seek to avoid arbitration by arguing that the arbitration agreement referring to the DIFC-LCIA has been rendered invalid by the Decree. On the contrary, support for arbitration from the courts in the UAE is alive and kicking.

BACKGROUND

In *Narciso v Nash*, the parties entered into a subcontract for a residential project in Sharjah (“**Subcontract**”). The Subcontract included a provision for DIFC-seated arbitration under the DIFC-LCIA rules with a sole arbitrator to be appointed by Narciso (“**Arbitration Agreement**”). The Arbitration Agreement did not include a governing law clause. According to the supplementary terms and conditions of the Subcontract, the governing law of the Subcontract was “*the Laws of the Emirates Abu Dhabi and the Federal Laws of the United Arab Emirates*”. Various disputes arose between the parties, leading to Narciso terminating the Subcontract.



Pursuant to the Arbitration Agreement, Nash requested that Narciso nominate a sole arbitrator. Narciso refused and DIAC declined to act as the appointing authority without Narciso's consent. Nash wrote to the London Court of International Arbitration ("LCIA"), who noted they were no longer able to assist. Nash subsequently initiated proceedings in the Sharjah Court, but Narciso obtained an interim anti-suit injunction from the DIFC court without notice, halting such proceedings.

Nash brought an application challenging the DIFC court's jurisdiction and seeking to discharge the interim anti-suit injunction on the grounds that (i) the Arbitration Agreement was invalid, or (ii) even if it was valid, the Arbitration Agreement had been abandoned or terminated by Narciso or Narciso was estopped by conduct from relying on it, and (iii) even if the Arbitration Agreement were effective, the anti-suit injunction was not justified. Narciso challenged Nash's submissions and requested that the DIFC court continue the interim anti-suit injunction.

THE DIFC COURT'S DECISION

The DIFC court continued the interim anti-suit injunction. In reaching this decision, Justice Michael Black KC held:

1. The DIFC court had jurisdiction over the claim, as the parties had selected the DIFC as the seat of arbitration, which implied the choice of the DIFC court as the supervisory court. The governing law did not affect the jurisdiction of the DIFC court to protect its exclusive jurisdiction and uphold the parties' agreement to resolve disputes through arbitration. It was strongly arguable that the Arbitration Agreement was governed by DIFC law (and not UAE law) as the law of the seat of arbitration, on the basis that the parties agreed that the arbitration would be DIFC-seated.
2. The Decree did not render the Arbitration Agreement null, void, or incapable of performance. Instead, it preserved the parties' original agreement and allowed them to resort to DIAC or appoint another arbitration institution if they mutually agreed.
3. It was not the function of the DIFC court to determine whether the Arbitration Agreement had been abandoned or that Narciso was estopped from relying on it. These were factual questions and serious issues to be tried.
4. The interim anti-suit injunction was justified. There were no good or strong reasons not to enforce the Arbitration Agreement. Nash should be restrained from pursuing the Sharjah Court proceedings, as this would arguably breach of the Arbitration Agreement.

ABU DHABI COURT OF APPEAL DECISION

In his judgment, Justice Michael Black KC cited the "*impressive reasoning*" in *Vaned Engineering GMBH v Reem Hospital*, which was upheld by the Abu Dhabi Court of Appeal. In that case, the Abu Dhabi court held that:

1. Both parties unequivocally chose arbitration as the method for resolving their disputes.
2. The abolition of the DIFC-LCIA did not automatically invalidate the arbitration agreement or make it unenforceable.
3. The provisions of the Federal Arbitration Law (which similar to the DIFC Arbitration Law is derived from the UNCITRAL Model Law) gives effect to the parties' original bargain by ensuring any procedural gaps are filled.
4. The Decree upholds the parties' bargain and reinforces the principle of party autonomy. If the parties did not wish DIAC to administer their arbitration once the Decree came into effect, they could agree to appoint an alternative arbitral institution.



5. The rules of arbitration institutions are not “*permanent and fixed*” in nature and are subject to change. Such changes do not give a party the right to reject the arbitration agreement.

FOREIGN COURT RULINGS

While there is now a consensus on the treatment of DIFC-LCIA arbitration clauses within the UAE, certain courts outside of the UAE have considered the Decree as a violation of party autonomy. At the end of 2023, a United States (“**US**”) District Court in *Baker Hughes Saudi Arabia Co. v. Dynamic Industries* concluded that neither the court nor the Dubai government possessed the authority to alter agreements between parties and mandate that proceedings occur in a forum other than that which the parties originally agree upon. This remained true even if there were similarities between the DIFC-LCIA and DIAC rules. More recently, the Singapore High Court in *DFL v DFM* made reference to the US district court decision and emphasised that the Decree cannot compel arbitration under DIAC without the parties’ agreement.

Both the Abu Dhabi court and DIFC court addressed the decision in *Baker Hughes Saudi Arabia Co. v. Dynamic Industries*. The Abu Dhabi court noted that while it “*fully appreciate[d]*” foreign judgments, the priority of the Abu Dhabi court was to uphold party autonomy. The court found that party autonomy was preserved by upholding the arbitration agreement, given (i) the parties had agreed to resolve their disputes by arbitration, (ii) procedural elements such as the “*cancellation of the arbitration institution*” would not render an arbitration agreement incapable of performance, and (iii) the parties had the right to resort to an arbitration institution other than DIAC if they so wished. The DIFC court noted the *Baker Hughes* decision was under US law and that the US District Court “*did not appear to appreciate the difference between forum and the procedural rules*”. The DIFC court concluded that *Vaned Engineering* was more “*closely reasoned*” and upheld the “*twin principles of party autonomy and holding parties to their agreements to arbitrate in a way that resonates with the pro-arbitration policy of the DIFC Courts.*”

PRACTICAL IMPLICATIONS

The decisions by the DIFC and Abu Dhabi courts provide welcome clarity in onshore UAE and in the DIFC that arbitration agreements referring to the now defunct DIFC-LCIA will be upheld, either through DIAC or another arbitration institution agreed to by the parties. Even so, parties and practitioners remain well advised to consider replacing existing DIFC-LCIA arbitration agreements to limit the risk of jurisdictional disputes. This is especially important where parties may wish to enforce awards in foreign courts, which may come to different views as to the validity of an agreement providing for arbitration under the DIFC-LCIA.



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