

Insights

## DIFC-LCIA ARBITRATION CLAUSES: ARE THEY ENFORCEABLE?

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### SUMMARY

The US Court of Appeals for the Fifth Circuit has recently upheld the enforceability of a DIFC-LCIA arbitration clause, notwithstanding the fact that the DIFC-LCIA no longer exists. The decision highlights the uncertainty that surrounds the enforceability of DIFC-LCIA arbitration clauses.

### BACKGROUND

On 14 September 2021 Dubai Decree No. 34 of 2021 abolished the Dubai International Financial Centre Arbitration Institute (DAI), which administered DIFC-LCIA arbitrations, replacing it with the Dubai International Arbitration Centre (DIAC).

For most in the arbitration community, it was an unexpected and significant change to the arbitration landscape in Dubai. The DIFC-LCIA Arbitration Rules were an adaptation of the LCIA Rules and were administered by staff from the LCIA and as such DIFC-LCIA administered arbitration was a popular choice for parties operating in the region. As a result, a significant number of contracts negotiated prior to the abolition of the DAI contain DIFC-LCIA arbitration clauses and it is likely that many such clauses exist in live contracts today.

In March 2022, the DIAC and LCIA reached an agreement whereby all DIFC-LCIA arbitrations commenced on or after 21 March 2022 would be registered by the DIAC and administered under the new DIAC Arbitration Rules, unless otherwise agreed by the parties. At the same time, the DIAC published new, improved Arbitration Rules designed to make DIAC arbitration a more attractive option. See our BCLP Insight [DIAC Rules 2022 – Finally fit for purpose](#).

The agreement of terms between the DIAC and LCIA was intended to achieve orderly management of future arbitrations referring to the now obsolete DIFC-LCIA arbitration. However, the transition has not been entirely seamless. Whilst decisions from the DIFC<sup>[1]</sup> and Abu Dhabi<sup>[2]</sup> courts have

confirmed that arbitration agreements referring to the DIFC-LCIA remain valid and enforceable, not all jurisdictions have agreed.

## BAKER HUGHES V DYNAMIC INDUSTRIES

In November 2023, in a dispute between Baker Hughes Saudi Arabia and Dynamic Industries, a Louisiana District Court<sup>[3]</sup> held that neither the court nor the Dubai government court could rewrite the parties' arbitration agreement and order the arbitration to be held in a forum to which the parties did not contractually agree.

Baker Hughes contracted with Dynamic to supply materials, products, and services for an oil and gas project in Saudi Arabia. The contract provided for disputes to be resolved by arbitration under the Arbitration Rules of the DIFC LCIA.

A dispute arose and Baker Hughes commenced court proceedings in the United States. Dynamic applied to the court to dismiss the claim on the ground of *forum non conveniens* or to compel arbitration. The court denied the application to compel arbitration on the grounds that the DIFC-LCIA no longer existed, following its abolition by Dubai government decree. The court relied on a Fifth Circuit precedent stating that courts cannot rewrite parties' agreements and order arbitration at a forum not named in the arbitration agreement.

*"Whatever similarity the DIAC may have with the DIFC, it is not the same forum in which the parties agreed to arbitrate. That forum is no longer available, and this Court thus cannot compel Plaintiff to arbitrate."*

Dynamic successfully appealed the decision. On appeal, the Fifth Circuit held that the district court erred by not compelling arbitration, as the agreement's primary intent was to arbitrate disputes, not to select an exclusive forum. The dispute is remanded back to the lower court with an instruction to compel arbitration in a suitable forum, consistent with the parties' intent.

## DISCUSSION

Whilst the Fifth Circuit ultimately upheld the arbitration agreement, the decision highlights the uncertainty that surrounds the enforceability of DIFC-LCIA arbitration clauses. For example, the Singapore High Court<sup>[4]</sup> followed the approach of the district court in the Baker Hughes case, accepting that an agreement for arbitration under the DIFC-LCIA Rules was frustrated by the Decree.

*"Parties' submission to arbitration is purely contractual. They cannot be compelled to submit to arbitration under a set of rules that they did not agree to. The Decree could not force an arbitration under the DIAC Rules on the respondent without his agreement."*

Whilst courts may now follow the rationale of the US Court of Appeals, this is unlikely to be the last time that the enforceability of a DIFC-LCIA arbitration clause is challenged.

The abolition of the DAI and the replacement Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC) with the Abu Dhabi International Arbitration Centre (arbitrateAD) were intended to modernise and simplify the arbitration landscape in the UAE. However, the changes have introduced a degree of uncertainty into an already complex arbitration landscape which offers three arbitral jurisdiction (onshore Dubai, offshore DIFC and offshore ADGM). In addition, changes to the Federal Arbitration law, again designed to modernise the arbitration law, have introduced some welcome changes but have also increased the divergence between the onshore and offshore arbitral regimes in the UAE. See our BCLP Insight [The parties' perspective: a closer look at the updated UAE Federal Arbitration Law](#).

All of this makes it difficult for clients and their advisors, who may not be arbitration specialists, to navigate the changes to the arbitral landscape in the UAE. For parties entering new contracts it is important to understand the choice of arbitral seats and arbitral institutions now available and to choose accordingly. For parties involved in disputes under existing contracts referencing arbitral institutions or rules that no longer exist, there is scope to agree to adopt alternatives. We have experience of disputing parties agreeing to do exactly that. However, once a dispute has arisen, there is a very real concern that some parties (particularly respondents) may be unwilling to discuss alternatives.

Hopefully, decisions like that of the US Court of Appeals, which upholds the parties' choice of arbitration over litigation, will help allay some of those concerns, supporting the UAE's continuing ambition to be a leading hub for arbitration.

[1] [ARB 009/2024 Narciso v Nash | DIFC Courts](#)

[2] *Vaned Engineering GMBH v Reem Hospital*

[3] *Baker Hughes Saudi Arabia Co. v. Dynamic Industries, Inc.*, Civ. A. No. 2:23-cv-1396 (E.D. La. Nov. 6, 2023)

[4] *DFL vs DFM [2024] SGHC 71*

## RELATED PRACTICE AREAS

- Construction Disputes
- International Arbitration

## MEET THE TEAM



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