

DIFC Courts address abolition of DIFC-LCIA



*For the first time, the DIFC Courts have provided welcome clarification on some of the issues generated by Decree No. 34 of 2021 and the fallout from the abolishment of the DIFC-LCIA and EMAC. This was provided in the landmark decision of *Narciso v Nash*, in which members of Stephenson Harwood's Dubai-based disputes team – partner Mark Lakin, managing associate Magda Kofluk, and associates Samantha Martin and Mayss Akasheh – acted for the Claimant.*

The team report on this case which delves into its merits and the important precedent it sets for how contractual reference to the superseded arbitration centres should be treated in future.

The case – [Narciso v Nash \(ARB 009/2024\)](#) – is of particular significance as the DIFC Court of First instance properly considered the effect of Decree No. 34 of 2021 concerning the Dubai International Arbitration Centre, which abolished the DIFC-LCIA Arbitration Centre and transferred its rights and obligations to the Dubai International Arbitration Centre (DIAC).

Decree 34 provided that all DIFC-LCIA arbitration agreements concluded before the effective date of the decree (20 September 2021) were deemed valid, with DIAC assuming responsibility for administering disputes arising from those agreements unless otherwise agreed by the parties. The decree also attached a statute providing that arbitration agreements seated in the DIFC would be governed by the DIFC Arbitration Law and that the DIFC Courts would have jurisdiction to consider any claim, application or appeal relating to any award or arbitration measure.

Many businesses have been concerned about the practical implications of Decree 34. This has been compounded by rulings from other courts, including in the United States and Singapore. These judgments raised doubts about the effectiveness of Decree 34, questioning whether the decree could effectively substitute the parties' choice of DIFC-LCIA arbitration for DIAC arbitration. The DIFC Court's decision provides much-needed clarity and reassurance to parties whose contracts contain DIFC-LCIA arbitration clauses and establishes a firm precedent within the UAE that Decree 34 is enforceable, thereby allowing parties to continue to rely on their existing DIFC-LCIA

The Claimant, anonymised in the judgment as "Narciso", is a UAE-incorporated engineering and construction company that serves as the main contractor for a residential project in Sharjah.

Narciso entered into a subcontract with Defendant "Nash," a UAE electrical and mechanical company, for works related to the project. The subcontract provided for arbitration under the DIFC-LCIA Arbitration Centre Rules, with the DIFC as the arbitral seat and UAE law governing.

The Claimant terminated the subcontract after disputes arose. The Defendant applied to DIAC requesting it to appoint an arbitrator under article 12.3 of the DIAC Rules. The Defendant had not referred to its application as a request for arbitration and had not paid the relevant registration fee. DIAC did not treat the application as a valid request for arbitration and, instead, treated it as a request for DIAC to act as appointing authority under article 4.1 of appendix II of the DIAC Rules, which required the consent of both parties. The Claimant objected to DIAC acting as an appointing authority, arguing that such a request was premature and out of order. DIAC agreed and closed its file.

The Defendant then commenced proceedings against the Claimant in the Sharjah Court, seeking damages for breach of contract and wrongful termination. The Claimant applied to the DIFC Court for an interim anti-suit injunction ("**ASI**") to restrain the Defendant from pursuing the Sharjah proceedings in breach of the arbitration agreement.

The DIFC Court granted the interim ASI on 20 May. After being granted more time to answer the injunction, the Defendant applied on 3 June to challenge the DIFC Court's jurisdiction and discharge the interim ASI. The Defendant argued that:

- the DIFC Court did not have jurisdiction because neither of the parties was established in the DIFC, and the law applicable to the subcontract and the arbitration agreement was UAE law, not DIFC law;
- the arbitration agreement was invalid because the selected forum, the DIFC-LCIA, no longer existed and Decree 34 was in conflict with the principle of party autonomy;

- the arbitration agreement had been abandoned or the Claimant was estopped by conduct from relying on it; and
- the ASI was not justified, as the Sharjah proceedings were not vexatious or oppressive and there was no apparent injustice in allowing them to continue.

The Claimant opposed the Defendant's application on the basis that:

- the DIFC Court had jurisdiction since the parties had agreed the DIFC as the seat of arbitration, which carried with it the implicit choice of the DIFC Courts as the supervisory courts, and the DIFC Court had the power to grant ASIs pursuant to article 32 of DIFC Law 10 of 2004;
- by reason of Dubai Law No. 5 of 2021, Decree 34 forms part of the law of the DIFC;
- the arbitration agreement was valid and enforceable and governed by DIFC law as the law of the seat of arbitration;
- Decree 34 did not invalidate the arbitration agreement but preserved the parties' bargain and allowed them to resort to DIAC or any other arbitration centre if they wished;
- the arbitration agreement had not been abandoned, nor was the Claimant estopped by conduct from relying on it, as the Claimant had not shown any clear intention that the parties were not bound by the arbitration agreement, and the Defendant made a mistake in the manner in which it attempted to commence arbitration; and
- the ASI was justified, as there was no good or strong reason not to enforce the arbitration agreement.

On 20 June 2024, Justice Michael Black KC in the DIFC Court of First Instance issued his [decision](#) with reasons. He dismissed the Defendant's application and continued the interim ASI until the final determination of the Claimant's claim for a permanent ASI or until further order. The judge held that:

- the DIFC Court had jurisdiction over the Claimant's claim, as the parties had chosen the DIFC as the seat of arbitration, which carried with it the implicit choice of the DIFC Courts as the supervisory courts, and the governing law did not make any difference to the jurisdiction of the DIFC Courts to protect

their own exclusive jurisdiction and to protect the parties' agreement to refer their disputes to arbitration;

- the arbitration agreement was valid and enforceable, as it was strongly arguable that it was governed by DIFC law as the law of the seat of arbitration, and Decree 34 did not render the arbitration agreement null and void, inoperative or incapable of being performed, but preserved the parties' bargain and allowed them to resort to DIAC or any other arbitration centre if they wished;
- the arbitration agreement had not been abandoned, nor was the Claimant estopped by conduct from relying on it, as these were serious issues to be tried, and it was not clear that the Claimant had fundamentally failed to perform the arbitration agreement or shown any clear intention to renounce it, and the Defendant had made a mistake in the manner in which it tried to start the arbitration proceedings; and
- the ASI was justified, as there was no good or strong reason not to enforce the arbitration agreement, and the Defendant should be restrained from pursuing the Sharjah proceedings, which were in breach of the arbitration agreement and interfered with the jurisdiction of the DIFC Court.

Clarity that DIFC-LCIA clauses are valid and enforceable

The DIFC Court's decision is a significant development for arbitration in the UAE. By upholding the Decree, the DIFC Court has provided clarity on the status of arbitration agreements that were initially tied to the now-abolished DIFC-LCIA Arbitration Centre. This approach aligns with international arbitration standards, where courts generally aim to uphold the integrity of arbitration agreements unless there are compelling reasons not to do so. The decision is likely to be a relief to parties with existing arbitration agreements specifying the DIFC-LCIA, as it ensures that their agreements remain valid and enforceable.

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