

## Outside Counsel

# Testing the Scope of Article V(1)d of the New York Convention on Enforcement of Arbitration Awards Following the Dubai Arbitration Venue Combination

**O**n Sept. 14, 2021, the Dubai government issued a decree that essentially combines the three main arbitration centers that had previously been operating in Dubai, namely the Dubai International Arbitration Center (DIAC), the Emirates Maritime Arbitration Center (EMAC) and the DIFC Arbitration Institution (DAI), which operated a joint venture with the London Court of International Arbitration (LCIA). Per the decree, DIAC remains as the surviving entity while the two other entities are dissolved. While the decree offers some guidance on

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post combination arbitration process, this restructuring will likely be scrutinized by courts in the enforcement of awards issued by the DIAC going forward. Of particular interest will be court interpretations of Article V(1)d of the New York Convention in cases where parties seek enforcement of arbitration awards issued by the surviving DIAC when their arbitration agreements were entered into prior to the consolidation and provided for arbitration in either EMAC or DAI/DIFC-LCIA. More specifically, courts will most certainly be asked to

determine whether Article V(1)d of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the New York Convention, would impede enforcement of any such awards.

The Dubai decree came into effect on Sept. 20, 2021 but gave the DIAC six months to comply with the provisions of the Decree and the DIAC statute it attaches. Discussions are also ongoing between the LCIA and the Dubai government for the transition of DIFC-LCIA matters and affairs. We should therefore expect some additional guidance to be issued in the near future. However, as part of the decree, the Dubai government has already laid out the path for the combined entity by repealing the prior decrees approving the arbitration venues

and adopting a new DIAC statute which contemplates a consolidated Dubai arbitration center with international undertones and aspirations. One of the most noteworthy elements of the new DIAC statute is in its organizational structure, which provides for the establishment of an Arbitration Court (with functions similar to those of established international arbitration centers such as the ICC). This, in itself, is a key indicator of Dubai's global outlook and ambitions. Another significant provision of the new DIAC statute relates to the place and seat of arbitration: Whereas the decree provides that the head office of the DIAC will be located onshore in Dubai, it also states that it will have a branch in the DIFC, Dubai's offshore financial center. Further, Article 4(b) of the new DIAC statute provides that the DIFC branch will be the default place and seat of arbitration when parties don't specify, or agree on, place or seat. With this provision, the decree attempts to ensure that the international stature, and appeal, of the DIFC and Dubai are maintained.

We expect some uncertainty in the coming months as the

various constituents try to fine-tune a broad range of transitional matters typical of any combination of this nature. However, the one issue that will likely remain unclear relates to arbitration agreements that provide for arbitration under the auspices of either DIFC-LCIA or EMAC and were entered into prior to the effectiveness of the decree.

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While the decree offers some guidance on post combination arbitration process, this restructuring will likely be scrutinized by courts in the enforcement of awards issued by the DIAC going forward.

Obviously, parties are free to amend such provisions to reflect the new state of affairs. However, many parties may either not consider amending or be already at a point of contention such that a new agreement may just not be possible to achieve.

Article 6 of the decree covers the validity of arbitration agreements that refer to the now-defunct arbitration centers. It provides that the DIAC will step into the shoes of the named arbitration center absent an agreement to the contrary

by the parties. Further, for any arbitrations that are ongoing at those centers, the DIAC will step in to "supervise processing these claims." Pursuant to Article 8 of the decree, the rules of the defunct arbitration centers will continue to be valid but only until new DIAC rules are approved. Although these types of transitional rules are not uncommon in the context of a consolidation, they do pose a tricky question in light of the New York Convention rules that govern the recognition and enforcement of arbitration awards globally.

The New York Convention provides for very specific and narrow grounds pursuant to which a court may refuse to recognize and enforce foreign arbitral awards. Those are fleshed out in its Article V and include awards rendered where "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties" (Article V(1)(d)). Consider now arbitration proceedings held under the auspices of the new DAIC pursuant to the decree where the parties had agreed an arbitration agreement that provided for either DIFC-

LCIA or EMAC as the arbitration seat and administering body. Obviously if the authors of the agreement had included a phrase extending jurisdiction to a “successor entity” then it’s unlikely that a court would find reason to refuse enforcement under Article V(1)(d). That being said, in cases where no such wording has been agreed in the arbitration agreement, one can expect courts to focus on Article 6 of the decree and give serious consideration to the enforcement of an award that was delivered under these circumstances. Indeed, the concept of party autonomy is at the heart of arbitration generally and Article V of the New York Convention more specifically. Simply stated, it’s difficult to reconcile this overarching principle with Article 6 of the decree. The practical effect of the decree is that arbitration agreements regarding a specific venue are basically overridden by domestic laws governing the venues themselves (which may or may not govern the actual arbitration agreement). In the coming months and possibly years, we should expect that U.S. and foreign courts will be asked to scrutinize Article

6 of the decree and eventually provide some guidance on the scope of Article V(1)d as cases arise and parties seek enforcement orders. It should be noted, however, that Article V(1) of the New York Convention states that “[r]ecognition and enforcement of the award *may* be refused” (emphasis added). Therefore, even if a court finds that there

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are reasonable grounds to invoke Article V(1)d, it retains full discretion in recognizing and enforcing a DAIC award of this nature notwithstanding a valid objection.

The consolidation of Dubai’s three arbitration centers, although unexpected by many, is a natural step towards an ongoing desire by the Dubai government to position the Emirate, in its totality—offshore and onshore—as a global hub for a broad range of constituents. It

reflects a continuing and proactive effort to adopt international best practices and offer the international community an attractive option in a highly competitive space. As with all strategic initiatives of this magnitude, there will be a period of transition and adaptation. In the coming months, the various elements will focus their efforts to alleviate any ambiguities and provide the certainty and reliability that the global community will need to validate the appeal of the consolidated Dubai center. The hope is that, in doing so, they will also find a mechanism to attenuate the risk that courts refuse to enforce DAIC awards when the facts of a case support an argument that the current provisions of Article 6 of the decree fall within the scope of Article V(1)d of the New York Convention.