Callidus News

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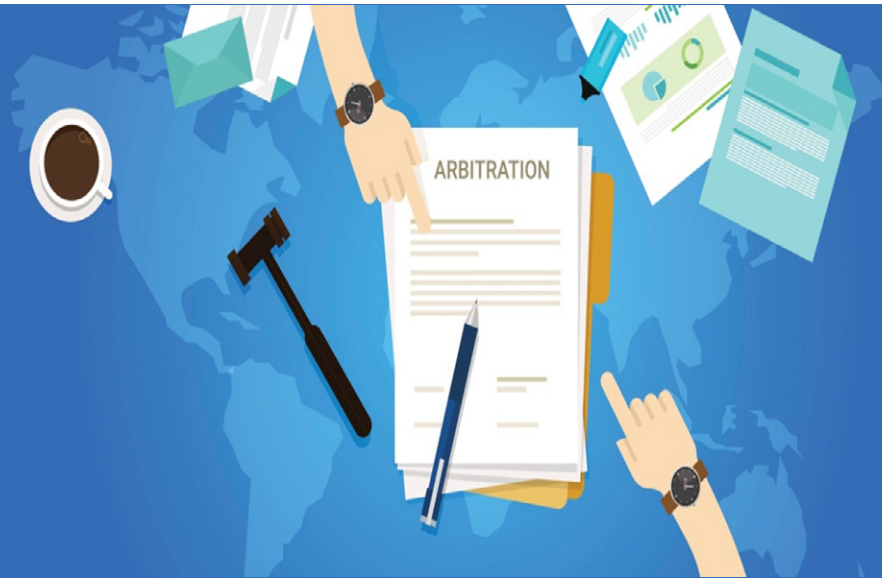
Decree No. 34 of 2021 On the Dubai International Arbitration Centre Impacting DIFC-LCIA Arbitration



From its inception, the Dubai International Financial Centre (the "DIFC") was intent upon establishing an example for regional dispute resolution. In addition to the now well-known DIFC Courts, an arbitration Centre was to be created to provide alternative dispute resolution services (i.e. Arbitration and Mediation as "ADR") for local and foreign business in the region. In 2008 the DIFC negotiated an agreement with the LCIA pursuant to which arbitrations under DIFC-LCIA Rules would be managed and administered with LCIA's assistance.

To deal with the alleged jurisdictional issues, Dubai Law 7 of 2014 was passed to amend Dubai Law 9 of 2004, the founding law of the DIFC. Pursuant to the Amended Law, the DIFC Dispute Resolution Authority (the "DRA") was created, which comprises the DIFC Courts, the Academy of Law, the DIFC Wills and Probate Registry and the **DIFC Arbitration Institute ("DAI")**.

In November 2015 DAI entered into agreements with LCIA for the management and administration of arbitrations in which the parties had selected DIFC-LCIA Rules, leading to the re launch of DIFC-LCIA. However, on 14 September 2021, The Ruler of Dubai, issued Decree No. 34 of 2021 (the "Decree"), accompanied by the Statute of Dubai International Arbitration Centre (the "Statute"). The Decree, came into effect on 20 September 2021 (the "Effective Date") and took many within the dispute resolution community by surprise, as it introduced fundamental amendments to the arbitration framework in the Emirate of Dubai, including the offshore free zone commonly known as the Dubai International Financial Centre (DIFC). Wherein, the same abolishes both of the: (i) Emirates Maritime Arbitration Centre and; (ii) DIFC's Arbitration Institute (DAI) (collectively the

THOUGHT for the MONTH

"I don't believe in taking RIGHT Decisions; I take decisions and then make them RIGHT"

RATAN TATA

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"Abolished Centres"); and provides:

- for the Dubai International Arbitration Centre ("DIAC") to assume the rights and obligations of the Abolished Centres and thereafter administer cases; and
- Lays down key details relating to the objectives, scope and organization of DIAC.

From the Effective Date, the following (in respect of each Abolished Centre) shall be transferred to DIAC:

- ownership of properties, movables, assets, devices, equipment and funds;
- employees (subject to a decision by the DIAC Board Chairman);
- financial allocation designated to the Abolished Centres by the Government of Dubai; and
- The list of the Abolished Centre's arbitrators, conciliators and experts.

In view of the above, the main concerns are as follows:

Validity of existing arbitration agreements:

All agreements entered into prior to the Effective Date that make reference to dispute resolution through an Abolished Centre's regulations shall be deemed valid and effective, unless otherwise agreed by the parties to such an agreement, in such circumstances, DIAC shall replace the Abolished Centres in considering and determining disputes. With regard to any agreement entered into after the Effective Date providing for the jurisdiction of an Abolished Centre will not be valid.

Competent Courts:

Dubai Courts and DIFC Courts will continue to consider cases, requests and challenges relating to any arbitration award or procedure issued by arbitral tribunals within DIAC and the Abolished Centers, in accordance with their respective procedures and standards.

Default Seat

Pursuant to the Statute, the Dubai International Financial Centre shall be designated as the default seat of DIAC arbitration proceedings except where the parties do not agree to a seat or place of arbitration pursuant to their arbitration agreement or otherwise.

Transition Period

The Decree provides DIAC with six months from the Effective Date to coordinate with all concerned entities and give effect to the transition set forth in the Decree and the Statute.

Described as aggressive yet progressive, the decree has definitely taken masses by surprise and it is for the parties to take immediate action on any references in existing standard terms and conditions, or existing and/or new contracts that are being currently negotiated that provide for arbitration in an Abolished Centre should be urgently reviewed and revised.

It is also expected for DIAC to issue new rules of arbitration, form a new arbitration court similar to that of the ICC International Court of Arbitration, as well as a new board and a new administering body.

FIRST INSURANCE TEST CASE: DETERMINED THE KEY ASPECTS OF THE BUSINESS INTERRUPTION LOSS COVER IN THE INSURANCE POLICY

All the businesses around the world had been facing hard times since last two years due to the Covid-19 Pandemic and without any doubt, the SME's were the most affected ones. In a study conducted based on the impact of the Covid-19 on SME's, it was showed that approximately 70% - 80% of the businesses were impacted negatively due to the international lockdowns. Though it is very common among the business entities to take an insurance policy to cover their business interruption losses if suffered, the current pandemic situation saw a huge number of policyholders approaching their insurance companies seeking indemnity over their business interruption losses.

In the earlier days when a

business was hit by any natural calamities like flood or earthquake or fire, the Company's work was usually interrupted for some time until the repairs, assessments or the other procedures were taken care of. Only on rare scenarios did it ever extended from a few couple of days to a permanent damage. Since the main intend of such policy coverage for the business interruption losses is to compensate the insured / policyholders for the income lost during the period of restoration or the time necessary to repair or restore the physical damage to the insured property, no matter how devastating the damage and its aftermath were, the business interruption policy coverage always protected the company against any financial losses due to the aforementioned natural calamities.

However the Covid-19 outbreak raised many questions and concerns about whether the business interruption loss policy includes a pandemic related losses and the answer is, it always depends on the terms of the policy and how the terms are interpreted by the authorities. To find an answer to all these concerns, the Financial Conduct Authority had filed a suit against eight Insurance companies before the UK High Court, on behalf of the SME's and the appeal was finally decided by the Supreme Court in January 2021, where the Supreme Court clarified the key issues of the contractual uncertainty for many policyholders and insurers.

In this case by Financial Conduct Authority vs Arch & Others, (Otherwise called as "FCA First Test Case"), FCA who argued for the policyholders, submitted around 21 samples of policy types, to ascertain that the clauses titled "Disease Clause" and "Prevention of Access", in those 21 sample policy types provide the coverage in the circumstances of Covid-19 pandemic.

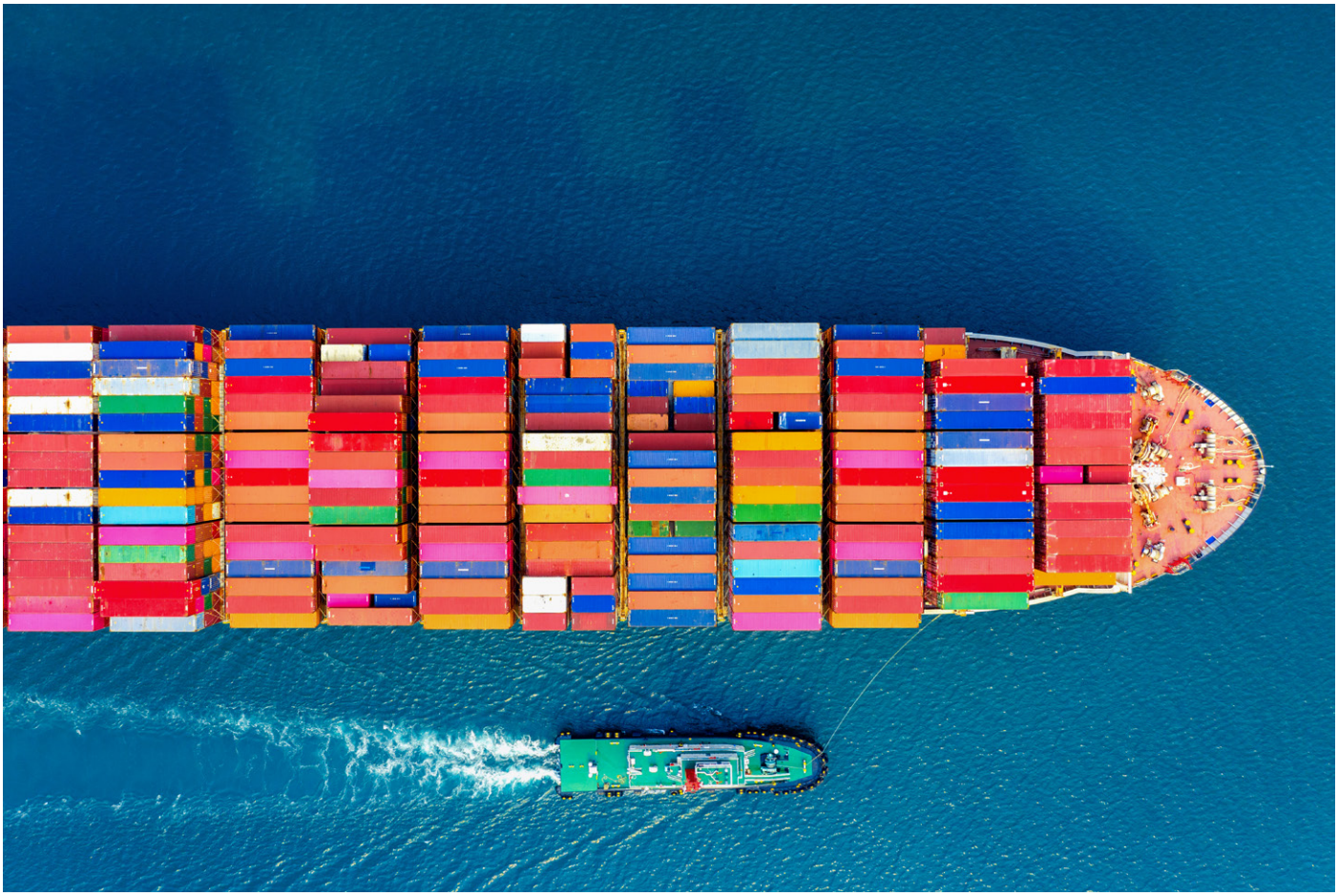
The sample "Disease clauses" that were considered to interpret this scenario provided for the insurance cover to the business interruption caused by the occurrence of the notifiable diseases within a specified radius of the policy holder's premises. It was further noted that the "Notifiable Disease" as defined in the relevant sample clause, as "an illness sustained by any person resulting from .... any human infectious or human contagious disease ... an outbreak of which the competent local authority has stipulated shall be notified to them". The Covid-19 was made a notifiable disease in England on 5th March 2020. While interpreting the clause, the Court noted that the words "Occurrence" and "Event", under insurance law specifically means that 'something which happens at a particular time, at a particular place, in a particular way'. However since the diseases that spread occurs in different places and presents in different ways, the Court observed that the correct interpretation of all the relevant Disease clause is that "they cover only relevant effects of cases of Covid-19 that occur at or within a specified radius of the insured premises. They do not cover effects of cases of Covid-19 that occur outside the geographical area".

To interpret the "Prevention of Access Clause", the Court considered the said clause in the policy of Arch Insurance, which mentioned, "loss resulting from the prevention of access to the insured premises due to the actions or advice of a government or local authority due to an emergency which is likely to endanger life or property". The Supreme Court considered that "prevention" or "denial" of access means something is stopped from happening or becomes impossible. However, it held that a total closure of a business or premises is not required to trigger the cover; instead a partial closure may be sufficient. I.e., if there was a prevention or denial of access to a discrete part of a premises or one which prevented the carrying on of a discrete part of a policy holder's business activities, it would be covered. Thus the Supreme Court, confirmed the conclusion that the "interruption" in the context of business interruption insurance does not mean a complete cessation of business, but includes an interference or disruption.

Though this case was not meant to resolve all the issues, instead the judgment has cleared some uncertainties in the interpretation of the insurance policy coverage, thereby gave clarity for the policyholders and insurers. In addition, FCA has also published a draft of the guidance for the policy holders, based on the Supreme Court Judgment, to assist the policyholders and their advisers in understanding the test case

HOT NEWS

BIMCO LAUNCHES NEW CONTRACT FOR EMPLOYMENT OF SECURITY ESCORT VESSELS



The Documentary Committee of BIMCO has approved a new standard contract for the Security Escort Vessels or SEV's. The new contract "SEV – GUARDCON" shall standardize the balanced contractual framework for SEV's that accompany merchant ships in high threat areas.

SEV-GUARDCON has been drafted specifically for cross-border transits where an SEV is needed to accompany the owner's vessel through the Exclusive Economic Zone (EEZ) or territorial waters of more than one state. The structure mirrors GUARDCON wherever possible to ensure familiarity, and the insurance provisions have been kept as close as possible to the original GUARDCON wording. The liabilities and indemnities provisions reflect that SEV-GUARDCON covers services of an independently operated SEV as opposed to a security team carried on board the merchant ship

The copy of the contract will soon be available on BIMCO's secure contract editing system, SmartCon, as well as in a sample version on the BIMCO website accompanied by explanatory notes

Courtesy: www.bimco.org

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