

insights

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So, you thought your arbitration agreement was bulletproof: Beware of traps that can render arbitration agreements unenforceable

In a recent federal court case, *Baker Hughes v. Dynamic Industries*, the court decided even though the parties agreed to arbitrate, the agreement was unenforceable because the arbitration agency was “abolished.” In that case, the U.S. District Court for the Eastern District of Louisiana denied a motion to compel arbitration where the Dubai-based arbitration agency designated to administer it no longer existed. However, the record showed when Dubai decreed the designated agency was “abolished,” it transferred the assets, rights, and obligations of the dissolved agency to another Dubai entity. Also, the language of the transfer stated “DIFC-LCIA arbitration agreements entered into before the effective date of [the decree] are deemed valid.”

The plaintiff refused to arbitrate because the designated forum no longer exists. The Court agreed the arbitration agreement was unenforceable, citing several prior Fifth Circuit decisions including one where the court [refused to enforce an arbitration agreement](#) because the forum no longer administered the type of claim involved. Also, the court relied on a case in which a court refused to compel arbitration where one party sought to hold the arbitration in Mississippi because the agreed upon [Iranian forum was deemed unsafe](#) for the litigants. Specifically, in this *Baker Hughes* case, the Court concluded arbitration would not be compelled because whatever similarity the original agency DIAC may have with the new agency DIFC LCIA, “it is not the same forum in which the parties agreed to arbitrate.” The case is likely to be appealed to the Fifth Circuit.

Points to consider regarding the decision

1. The ruling appears to be in conflict with the “liberal federal policy favoring arbitration” cited in [AT&T Mobility LLC v. Concepcion](#).
2. The ruling did not expressly consider the federal court’s authority to appoint arbitrators under the Federal Arbitration Act.
3. Also, the court did not consider whether it was important that the rules of arbitration for the dissolved forum, the rules of the London Court of Arbitration, were likely preserved when Dubai transferred to the DIAC, “the assets, rights and obligations” of the DIFC LCIA and the transfer decree stated “DIFC-LCIA arbitration agreements entered into before the effective date of [the decree] are deemed valid.”
4. The court did not expressly consider the location of the forum remained in Dubai.

Lessons for drafting

One should consider at least the following:

1. Expressly state in the arbitration clause that should the designated arbitration agency no longer exist when arbitration is to be compelled, the court shall exercise its authority to appoint arbitrators “if for any ... reason” arbitrators are not otherwise appointed to serve, as outlined in the Federal Arbitration Act (9 U.S.C. § 5).
2. Expressly state that if the location designated for the arbitration cannot be used, another designated location is identified.



authorsTest

douglas

Douglas S. Lang