As Middle Eastern companies and investment funds become more active in the global marketplace, international firms are increasingly investing in the region or entering into joint ventures with Middle Eastern partners. Islamic finance is also becoming more prominent in the Middle East and elsewhere, in particular in Europe and certain parts of Asia. Ultimately, this has resulted in increased international business either in the Middle East or with a Middle Eastern element, and many of the contracts used provide for disputes to be resolved by arbitration.

Arbitration, or tahkim, has long-standing religious and cultural roots in the Middle East. It was sanctioned by the Qur'an and promulgated by the Prophet Mohammad (PBUH) and his Companions. There are a number of areas of commonality between the tradition of arbitration espoused in Shari'ah law and current practice in the Western world. However, there are also a number of differences and tensions between the Western perception of arbitration and certain Islamic legal principles and traditions which form the cornerstone of many Middle Eastern States.

The United Arab Emirates (UAE), and Dubai in particular, is fast building a reputation as a preferred seat for international arbitration. However, the arbitration system and legislation in place have a number of differences when compared to the systems many Western users and practitioners may be accustomed to. This briefing looks at some of the key issues to be aware of when arbitrating in the UAE. It provides an introduction to those unfamiliar with arbitration in the Middle East and highlights the key concerns for more experienced users and practitioners.
THE LEGAL SYSTEM IN DUBAI AND THE UAE

The starting point for any legal discussion about Dubai is to note that the UAE is a civil law state and that effectively it has a three-tier legal system:

- First, there are a number of Federal laws that apply to each Emirate (there are seven Emirates in the UAE, of which Abu Dhabi and Dubai are the two largest).
- In addition to Federal laws, there are also a number of laws at the specific level of each Emirate.
- Within Dubai (and a number of the other Emirates), the Government has established Free Zones, one of which is the Dubai International Financial Centre (DIFC) which is of particular importance. The DIFC is an independent jurisdiction under the UAE Constitution. It has its own civil and commercial laws, which are written in English and are based on English law and other common laws. It also has its own courts, with judges from leading common law jurisdictions including England and Singapore. It is sometimes described as a “common law island in a civil law ocean”.

ARBITRATING IN THE UAE (INCLUDING DUBAI)

Procedure

Rules relating to arbitration are contained within the Civil Procedure Code (UAE Federal Law No. 11 of 1992) (CPC) and not within an independent and distinct set of legislation. This is the case in many Middle Eastern countries. Particular attention should be drawn to the following issues which may be different to a number of Western legal systems:

- **Tribunal:** There is no limit set on the number of arbitrators, but there must be an odd number (Article 206(2) CPC). If the parties fail to agree on the number or identity of the arbitrators, the UAE Courts are tasked with making the appointments, which will be final and not be subject to appeal (Article 204(2) CPC).
- **Kompetenz-Kompetenz:** There are no provisions in the legislation providing for the principle of kompetenz-kompetenz. Unless the parties' arbitration agreement provides that the tribunal can rule on its own jurisdiction, it is open to the parties to apply to the UAE Courts for a decision on whether a dispute referred to arbitration is in fact covered by the arbitration agreement.
- **First Hearing:** The arbitral tribunal must schedule a first hearing within 30 days from the acceptance of the appointment of the arbitral tribunal (Article 208(1) CPC).
- **Terms of Reference:** The subject of the dispute must be specified in the terms of reference or during the hearing of the suit (Article 203(3) CPC).
- **Witness testimony:** Must be provided under oath (Article 211 CPC).
- **Deadline for Award:** An arbitration award has to be rendered within six months after the date of the first hearing, unless the parties have: (a) expressly agreed an extension of the time within which the award is to be rendered; or (b) have delegated to the arbitral tribunal the right to extend (Article 210 CPC).
- **Evidence:** The rules of evidence tend to be flexible. There are no restrictions on how to deal with evidence in arbitration and arbitration proceedings in the UAE. The parties are generally free to agree the rules of evidence, provided they do not contravene mandatory standards of due process, natural justice and defence rights.
- **Language and seat:** The parties are free to agree the language (Article 212 CPC) and seat of the arbitration.
- **Interim relief:** The legislation is silent on the tribunal's powers to grant interim relief. According to the UAE Courts, absent specific agreement of the parties, arbitrators do not have power to grant interim or conservatory relief.
- **Challenging court proceedings:** Under the CPC, if a dispute is the subject of a valid arbitration agreement, it is not permitted for a litigation claim to be made in respect of the same matter. However, if one party does file a claim in the Courts, the other party has until the first hearing to request a stay, otherwise, the right to resort to arbitration is considered to have been waived (Article 204 CPC).

Authority to enter into arbitration agreements

The CPC provides that an agreement to arbitrate shall not be valid unless made by a person having legal capacity to make a disposition over the right (Article 203(4) CPC). While it is generally agreed that company directors have the right to agree to arbitration, it is not entirely clear whether other authorised company signatories do. There are decisions from the UAE Courts refusing to recognise arbitration agreements where the document containing the arbitration agreement was signed by a person who had a general power of attorney to bind the company, but did not have specific authority in the power of attorney to enter
into an agreement to arbitrate. It is always important to confirm, therefore, when entering into contracts providing for arbitration, that the signatories have specific authority to agree to arbitration.

Additional issues when dealing with sovereign entities

It is not always easy in the UAE to determine whether or not you are dealing with a government entity. Nonetheless, it is important to be aware of the following when dealing with government entities:

- **Capacity to enter into arbitration agreements:**
  - **Federal level:** Any federal government department entering into a contract which includes an arbitration clause must obtain the prior approval of the Council of Ministers after being reviewed by the Ministry of Justice (Council of Minister Decision No 406/2 2003, dated 15/9/2003).
  - **Additional Dubai considerations:** Without an exemption from the Ruler of Dubai, the Government of Dubai and its agencies shall not:
    - enter into a contract to be governed by laws of anywhere other than the UAE (Dubai Instruction Order of 6 February 1988); and
    - provide a stipulation in any contract for arbitration outside Dubai (Article 36, law on Dubai Government Contracts, Dubai Law No.6 of 1997).

- **Sovereign immunity:**
  - **Federal level:** The CPC contains an overall prohibition on seizing "public property owned by the state or one of the Emirates" for the purposes of enforcement (Article 247 CPC). In reality, it is likely to be very difficult to enforce any arbitral award against sovereign assets in the UAE.
  - **Additional Dubai considerations:** Dubai's sovereign immunity laws: (a) prohibit filing of lawsuits by or against the Ruler without obtaining his approval; (b) provide that the filing of lawsuits by or against the Government of Dubai and any department thereof, including public corporations, are subject to certain pre-filing formalities being complied with (notably: submitting details of the claim to the Government of Dubai's Legal Advisor; not issuing a claim for two months after submission to the Legal Advisor; and obtaining an order from the Diwan Director in order to enforce any successful judgment); and (c) prohibit the recovery of debts or obligations of the Government of Dubai and any department thereof, including public corporations, by attachment, sale by auction, or taking possession in any other legal manner, of their properties and assets (Dubai Law No. (3) of 1996 Concerning Government Claims).

Arbitrability

The CPC expressly excludes certain types of disputes as being non-arbitrable as a matter of UAE law. Matters may be deemed non-arbitrable by either: (a) existing legislation; or (b) as a matter of publicly policy by the courts. Existing legislation sets out some matters that are not arbitrable by virtue of the fact such disputes are exclusively subject to the exclusive jurisdiction of the UAE Courts or other tribunals, such as commercial agency and distributorship disputes (Article 6 and 7 of the Federal Law No. 18 of 1981, the Commercial Agency Law) and labour disputes (Federal Law No. 8 of 1980, the Labour Law).

The UAE Courts have considered arbitrability to be a question of jurisdiction, such that a tribunal that issues an award on a matter that is not arbitrable acts outside the scope of its jurisdiction. The UAE Courts are able to determine whether a matter is arbitrable, and typically do so upon reviewing an award during an application for ratification.

Arbitral institutions

The Dubai International Arbitration Centre (DIAC) is the main arbitration centre in Dubai outside the DIFC, and is commonly used by parties whose contracts provide for dispute resolution by way of arbitration where the governing law is UAE law.

The Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC) is commonly used in disputes concerning contracts with Abu Dhabi government entities.

Enforcement of domestic arbitral awards in the UAE (non-DIFC)

There is no right per se to appeal an arbitral award under UAE law (Article 217(1) CPC), save for certain limited grounds such as:

- There is no valid arbitration agreement between the parties;
- The time limit for the tribunal to render the award has been exceeded;
- There was a flaw in the appointment of the arbitral tribunal; or
There is a procedural irregularity in the award.

However, before a domestic arbitral award can be enforced by the successful party, the award must be ratified by a UAE court (Article 215 CPC). Parties seeking to apply to the UAE court to ratify an award are required to follow the same steps as if they were bringing an action in the Court of First Instance in the appropriate local or federal court (i.e. issuing a claim form and supporting documents). Once the claim is filed, it is up to the court to either ratify or annul the award. Essentially, therefore, new proceedings must be commenced.

It is common for the losing party to apply for an annulment in the form of a defence to the action for ratification. The provisions of the CPC do not permit the courts to reconsider the merits of the arbitral tribunal’s findings, but just allow examination on procedural grounds. Accordingly, it is important to ensure that all the procedural requirements of UAE law are complied with during the course of the arbitration, particularly those highlighted above that may be different to a number of other Western jurisdictions.

**Enforcement of foreign arbitral awards in UAE (non-DIFC)**

In 2006, the UAE became a party to the New York Convention on the Recognition and Enforcement of Arbitral Awards 1958 (NY Convention). Pursuant to Article 5 of the NY Convention, the UAE Courts should therefore enforce foreign arbitral awards unless the limited grounds to resist enforcement in the NY Convention are satisfied. The UAE is also a party to a number of other multilateral treaties relating to recognition and enforcement of foreign arbitral awards, notably the Riyadh and GCC Conventions.

Before the UAE ratified the NY Convention, foreign arbitral awards were dealt with in the same manner as enforcing foreign court judgments. In particular, the relevant rules of the CPC permit the UAE Courts to set aside arbitral awards/judgments on a number of grounds which are much broader than the permitted grounds in the NY Convention.

Despite the fact that the UAE ratified the NY Convention in 2006, initially it was not entirely clear whether or not local Courts would refer to the CPC when considering whether to enforce a foreign arbitral award, particularly given that there are a greater number of reasons to resist enforcement in the CPC than set out in the NY Convention. However, since 2011, there have been a number of examples of UAE Courts enforcing foreign awards, including the Airmech v Macsteel decision in September 2012 where the Court of Cassation in Dubai (the highest court in Dubai) enforced two foreign arbitral awards. This decision was particularly welcomed by the arbitration community as the court gave an unequivocal ruling that foreign arbitral awards will be enforced in Dubai in accordance with the UAE’s international treaty obligations under the NY Convention and noted that the CPC was not relevant in the context of the enforcement of foreign arbitral awards (a link to the HSF blog post of the decision is here).

However, in December 2012, the Dubai Court of First Instance declined to enforce a foreign arbitral award (an ICC award from Paris) against the Government of the Republic of Sudan. The court did not refer to the NY Convention (or indeed the provisions of the CPC relating to enforcement) and simply concluded that the UAE Courts did not have jurisdiction to hear the dispute because: (a) the parties were not domiciled in the UAE; and (b) the subject matter of the dispute had been performed outside the UAE. This was a surprising decision, not least because:

1. As a matter of UAE law, the rules in the CPC for enforcing foreign judgments do not state that the UAE Courts must have jurisdiction to hear the claim (indeed, in many circumstances, if it is a matter that falls within the jurisdiction of the UAE Court then the UAE Court will not enforce the foreign judgment); and (b) some of the provisions that the court relied on to conclude that it does not have jurisdiction are expressed in the CPC to be "without prejudice" to international conventions between the UAE and other countries.

2. Under the NY Convention, enforcement does not depend on the award debtor having a geographical nexus to the country where enforcement is sought. On the contrary, all that is required is that the award creditor presents to the enforcing court: (a) an original or officially certified copy of the foreign arbitration award; and (b) an original or officially certified copy of the underlying arbitration agreement. (There are limited grounds to resist enforcement in the NY Convention based on, amongst other things, lack of due process and public policy, but these are not relevant in the context of this case.)

It is not yet known whether the Sudan decision will be appealed (although given the passage of time an appeal seems unlikely). If the decision is not appealed, it is to be hoped that it will remain an isolated instance that will not be followed by future Courts given the general pro-enforcement approach of the UAE Courts in recent years (particularly given points 1 and 2 above were not considered by the Court of First Instance in Sudan). Overall, therefore, while the First Instance decision in Sudan is concerning and one that foreign investors should most definitely be aware of, there are still a number of positive reasons to hope that it will either be appealed or not followed in future cases.
Draft UAE Arbitration Law

The UAE legislature is in the process of considering a new Federal Arbitration Law. The most recent draft was released in February 2012, although the law has been in draft for a number of years and there appear to be no immediate plans to implement it. The draft law is based on the UNCITRAL Model Law, but it also takes guidance from a number of principles from the Egyptian arbitration law. It will be interesting to see whether this law is ever implemented and, if so, the final form that it takes, but it is positive that the UAE is considering such a law to formalise its arbitration regime.

ARBITRATION IN THE DIFC

Procedure

The DIFC passed the DIFC Arbitration Law in September 2008 (the DIFC Arbitration Law) which largely adopted the UNCITRAL Model Law as the basis of its arbitration law. Many Western users/practitioners may therefore be familiar with the procedure, but some key points to note are:

- **Tribunal:** The parties are free to determine the number of arbitrators and, in the absence of such agreement, the default position is that there will be one (Article 16). If the parties are unable to agree on the identity of an arbitrator, the DIFC Court will make the appointment (Article 17). An arbitrator can only be challenged if there are justifiable doubts as to his/her impartiality or independence or if he/she does not possess the qualifications agreed to by the parties (Article 18).

- **Procedure:** The parties are free to determine the rules that will govern the arbitration and, if no agreement can be made, the arbitral tribunal shall determine the procedures (Article 26). Moreover, the parties are free to agree the seat of the arbitration and if no agreement is made, the seat of the arbitration shall be the DIFC (Article 27).

- **Court assistance:** The DIFC Courts are required to stay court proceedings upon the request of a party if an action is brought before the DIFC Courts that is subject to an arbitration agreement. For a brief period of time last year, the DIFC Courts had held that they could only stay court proceedings in favour of DIFC arbitrations (i.e. not foreign arbitrations; **Injazat v Denton Wilde Sapte** (March 2012)). However, the DIFC Courts have since held that they can stay DIFC Court proceedings in favour of foreign arbitration proceedings (**IES v Al Fattan** (October 2012)).

Arbitral institutions

The DIFC-LCIA Arbitration Centre is the only arbitration institution in the DIFC. It is a joint venture between the DIFC and the LCIA in London. The LCIA Court in London has the same supervisory role for the DIFC-LCIA as it does for the LCIA; the LCIA Court will also make DIFC-LCIA arbitrator appointments in the absence of party agreement or at the request of the parties.

Enforcement of awards – in the DIFC and outside the UAE

An arbitral award may be set aside by the DIFC Court under very limited grounds which effectively mirror Article V of the NY Convention, namely: (a) the party making the application provides proof that a party was under some incapacity; (b) the arbitration agreement was invalid; (c) the party making the application was not given proper notice of the application; (d) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration; (e) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; (f) the subject matter of the dispute was not capable of settlement by arbitration under DIFC law; or (g) the award conflicts with public policy in the UAE (Article 41).

In addition, foreign arbitral awards should be enforced in the DIFC and DIFC arbitral awards should be enforced outside the UAE pursuant to the terms of the NY Convention.

Enforcement of awards - in Dubai and other Emirates of the UAE

The first step in enforcement of a DIFC arbitral award is for the DIFC Courts (who have supervisory jurisdiction over DIFC seated arbitrations under the DIFC Arbitration Law) to "recognise" the award (Articles 42 and 43 DIFC Arbitration Law). As set out above, the DIFC Courts may only refuse to recognise an award on limited grounds (including public policy) which essentially mirror those in Article V of the NY Convention (Article 44 DIFC Arbitration Law).

Upon recognition of an award by the DIFC Court, an order will be issued to that effect by the DIFC Court which can then be enforced through the Dubai Courts under Dubai law (2009 Memorandum of Understanding between the Dubai Courts and the DIFC Courts; and Dubai Law No. 16 of 2011). Dubai law provides that the Dubai Court has no jurisdiction to review the merits.
of a DIFC judgment or order prior to its enforcement (Article 7(3) of Dubai Law No. 12 of 2004).

For a DIFC arbitral award to be enforceable in other Emirates, once the award has been recognised by the DIFC Courts, it should be possible to send the award directly to the execution court in the relevant Emirate (Article 7(2) of Dubai Law No. 16 of 2011). Alternatively, a more cautious approach may be to first ratify the award before the local Dubai Courts and then, once ratified, the award becomes equivalent to a UAE Court judgment and can be enforced by application to the execution department of the relevant UAE Court in the relevant Emirate (Article 215 CPC). However, as far as we are aware, there has never been an instance where a party has sought to enforce a DIFC arbitral award in another Emirate, albeit we see no reason why the courts of another Emirate would not be prepared to do so. There is also a general question as to whether the UAE courts in any Emirate would enforce an arbitral award from the DIFC if it was deemed to offend the principles of Islam.

CONCLUSION

As the Middle East becomes more active in the global market place, the number of arbitrations in the region, particularly in Dubai and the UAE, is going to increase. However, the arbitration landscape in the UAE is different to that in a number of other jurisdictions and therefore those arbitrating in the UAE need to ensure that their procedures comply with local laws so that they have the best possible chance to enforce any arbitral award.

If you have any questions about any arbitration in Dubai and the UAE, or the Middle East more generally, please do not hesitate to contact any of the authors, all of whom have extensive Middle East arbitration experience.
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