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THE MIDDLE EASTERN AND AFRICAN ARBITRATION REVIEW 2020: THE UNITED ARAB EMIRATES

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SUMMARY

Charles Lilley explores exciting developments in the arbitration community in the United Arab Emirates through 2019. While 2019 perhaps fell short of being as important and as exciting a year as 2018, which saw the introduction of the new UAE Federal Arbitration Law, 2019 did see the launch of the Abu Dhabi Global Markets' (ADGM) arbitration guidelines, the first successful enforcement of an arbitration award in the ADGM courts and a welcomed softening in local court attitude towards the validity of arbitration agreements.

Introduction

While 2019 perhaps fell short of being as important and as exciting a year as 2018, which saw the introduction of the new UAE Federal Arbitration Law, 2019 did see the launch of the Abu Dhabi Global Markets' (ADGM) arbitration guidelines, the first successful enforcement of an arbitration award in the ADGM courts and a welcomed softening in local court attitude towards the validity of arbitration agreements.

ADGM Arbitration Guidelines

Last year we discussed the ADGM's desire to be recognised as a leading arbitral venue for the region, as shown by the opening of the ADGM Arbitration Centre: a state-of-the-art hearing centre open to all arbitrations, regardless of the institutional rules governing the arbitration.[1]

To further this ambition, in September last year, the ADGM Arbitration Centre published its arbitration guidelines. The guidelines have the stated intention of providing arbitral tribunals and the parties to arbitration with best practice procedures in order to bring greater certainty and efficiency to the arbitral process, while ensuring fairness, equality and due process. The guidelines were produced in consultation with in-house counsel and private practitioners from both civil and

common law backgrounds and, as a result, are considered to be more neutrally drafted than existing guidelines which tend to favour either common or civil law approaches.

One of the most attractive aspects of the guidelines is the amount of flexibility it offers to the parties. The guidelines are entirely optional, with parties free to opt-in to some or all of the provisions (or modules, as they are called). Parties can opt-in even if the seat of the arbitration is not the ADGM and even if the proceedings will not take place at the ADGM Arbitration Centre.

Parties are also free to amend the modules as they see fit. The guidelines are available in Word format so that parties can easily adapt the guidelines and tailor them for their particular arbitration.

The guidelines are structured into the following six modules:

- written submissions, issues and applications;
- fact witness evidence;
- expert witness evidence;
- documentary evidence;
- hearings; and
- counsel conduct.

While a detailed review of each of these modules is beyond the scope of this chapter, it is worth noting that a central theme running through each of the modules is to help ensure that the arbitration proceeds as efficiently, expediently and in as cost-effective manner as possible. For instance, the guidelines provide the following.

- The parties are to agree, following the exchange of written submissions, a list of issues of both fact and law (an exercise traditionally carried out only much later in the proceedings shortly before an evidentiary hearing, if at all). The identification of the pertinent issues in dispute at such an early stage could be useful in focusing subsequent submissions and evidence, thus bringing greater efficiency to the arbitration and minimising costs. Indeed, a tribunal may use this list of issues as a reference by ordering that both expert and factual witnesses limit their evidence to those matters set out in the list of issues.
- The parties are to identify, before the submission of witness and expert evidence, the issues in the written pleadings that each witness statement will be relevant to and explain why the witness testimony would materially assist the tribunal. This early identification should serve to focus witness evidence on the issues in dispute and minimise irrelevant evidence.

- Controversially, the tribunal may, on application by a party, exclude expert and factual witness evidence on the grounds that the evidence will not materially assist the tribunal in its decision-making. It will be interesting to see how tribunals approach such an application given the potential for a party to later challenge an arbitral award on the grounds of procedural irregularity or bias should witness evidence be excluded.

- Response submissions and witness evidence (both expert and factual) are required to be strictly responsive and are not to be used to raise new arguments or give evidence on other matters. While this seems common sense, in practice it is not unusual for response submissions and evidence to creep beyond being purely responsive.

- Parties are not permitted to request documents that support the other party's claims: a common tactic deployed to identify evidentiary gaps in the other party's case.

- Parties are encouraged, where possible, to make use of electronic bundles and minimise the use of hard copy bundles at evidentiary hearings.

The ADGM Arbitration Guidelines are further evidence of the ADGM's continued efforts to contribute to the arbitral community in the UAE. While it will be interesting to see how widely the guidelines are adopted, both in the region and further afield, the guidelines serve as a welcome addition to the palette of 'soft law' options available to parties to arbitration. This is particularly true as the guidelines can be seen as a more neutral approach to existing guidelines that favour common or civil law approaches, and offers the parties the opportunity to pick and choose and even amend elements of the guidelines so as to tailor their application to their arbitration. After all, parties elect to arbitrate their disputes over submitting to the jurisdiction of local courts, it therefore makes sense for the parties to be able to agree what provisions will govern how their arbitration is to be conducted.

Enforcement of arbitral awards in the ADGM courts

An essential component to the success of arbitration is the ability to enforce arbitral awards in the local courts. This is particularly true when enforcement is to take place in a different country to where the award is issued. International conventions and treaties such as the New York Convention play pivotal roles in facilitating the enforcement of foreign arbitral awards in signatory nations and making arbitration a viable and, indeed, attractive method of dispute resolution.

Last year saw the first successful enforcement of a foreign arbitral award in the ADGM courts under the ADGM's Arbitration Regulations. In A4 v B4,[2] Justice Sir Andrew Smith approved the claimant's application for the recognition and enforcement of an arbitral award that was issued in England and Wales under the rules of the London Court of International Arbitration (LCIA).

Reassuringly, in his judgment, Justice Sir Andrew Smith confirmed that section 56 of the ADGM's Arbitration Regulations is drafted in mandatory terms; meaning that the ADGM court is obliged to

recognise and enforce arbitral awards that are covered by the ADGM Arbitration Regulations (such as the one in this case), unless one of the grounds under the regulations for refusing recognition or enforcement is satisfied.

In A4 v B4, the defendant did not attend the hearing. However, the defendant did argue, before the proceedings were commenced in the ADGM court, that the arbitration agreement between the parties was not valid – a ground under section 57 of the ADGM's Arbitration Regulations for challenging the recognition and enforcement of an arbitral award.

Importantly, B4 did not advance such an argument in the proceedings or at the hearing before Justice Sir Andrew Smith. As a consequence, Justice Sir Andrew Smith confirmed that the court was not entitled to entertain any question about the validity of the arbitration agreement since the onus was on B4 to advance such an argument and furnish proof to support its contention. In other words, the ADGM court will not, at its own volition, investigate the validity of an arbitration agreement. It will only do so if submissions are made to it by the defending party and the defending party is able to furnish proof to support its arguments.

Justice Sir Andrew Smith did not, however, consider it necessary to engage with the question as to whether, in this case, the claimant was seeking to use the ADGM as a conduit jurisdiction (ie, to secure an ADGM court order and seek to enforce that in the onshore courts, rather than seek to enforce the arbitral award directly in those onshore courts) – an issue which has been a hot topic between the Dubai International Financial Centre (DIFC) and Dubai onshore courts in recent years. Justice Sir Andrew Smith remarked that the defendant had made no such submission and there was no evidence to suggest that was indeed the case. It is once again comforting that the court appears unwilling to commence investigations into the grounds of refusing recognition and enforcement of arbitral awards unless the defending party has made such submissions to the court.

In light of the issues that have arisen in Dubai with parties attempting to use the DIFC as a conduit jurisdiction to enforce arbitral awards in onshore Dubai, prompting the creation of the Joint Judicial Tribunal, it will be interesting to see how the ADGM courts approach this difficult question when a party makes such arguments before it.

However, putting that matter to one side for now, the claimant's success in having a foreign arbitral award recognised and enforced in the ADGM courts bodes well for arbitral award creditors and suggest that the ADGM will have an increasingly prominent role in shaping the arbitral landscape of enforcement of arbitral awards in the UAE.

Enforcement of arbitral awards pursuant to the Federal Arbitration Law

In last year's Middle Eastern and African Arbitration Review, we considered the introduction of the UAE Federal Arbitration Law and, in particular, the new regime for the enforcement of arbitration awards. Significantly, following the ratification and enforcement of an arbitration award, an order

must be issued within 60 days.[3]At the time of writing this chapter, there is very little coverage on the enforcement of arbitral awards, although it does seem from initial cases[4]that the courts have adhered to the short and challenging timeline. This is very positive news. We must now wait to see whether the courts continue to adhere to this, and await cases where a party challenges an award.

ADGM enters into additional memoranda of understanding

In 2018, the ADGM courts entered into a memorandum of understanding with the Judicial Department of the Emirate of Abu Dhabi. The effect of this arrangement was that court judgments of the ADGM courts (including those ratifying arbitral awards for enforcement) could be enforced in the onshore courts in Abu Dhabi and vice versa.

Last year, the ADGM courts expanded this to include the UAE Federal Courts and the local courts in Ras Al Khaimah (one of the seven other Emirates in Abu Dhabi) by entering into two new memoranda of understanding.

While the impact of these memoranda is likely to carry less significance than that entered into in 2018, the extended coverage of courts that will recognise and enforce court orders of the ADGM courts (including those ratifying arbitral awards for enforcement) will certainly assist in making the ADGM courts a more attractive forum for seeking to enforce foreign arbitration awards in the UAE.

Authority to enter into an arbitration agreement

Traditionally, arbitration in the UAE has been seen as an exceptional means of dispute resolution as the parties are effectively disposing of their right to refer disputes to the local courts. As a result, parties are required to enter into express agreements to arbitrate and the person who enters into that agreement must have the requisite authority to do so.

Over the years, the lack of authority of the signatory has been a common ground for a party seeking to set aside an arbitral award and prevent recognition and enforcement of that award in the local courts.

As confirmed by the Dubai Court of Cassation, it is settled law that an agreement to arbitrate shall not be valid unless made by persons having the requisite authority to do so. General managers of limited liability companies are presumed to have the requisite authority to enter into agreements to arbitrate,[5]unless the constitution of the company provides otherwise. The general manager may delegate this authority under an instrument such as a specific power of attorney.

However, last year the Dubai Court of Cassation appeared to limit the circumstances in which the local courts would consider the question of whether an individual had the requisite authority to enter into an agreement to arbitrate. In March, the Dubai Court of Cassation ruled that, where an agreement containing an arbitration clause has the company name in the preamble, and is silent as to the name and authority of the signatory on its behalf, there is a presumption that the person who

signed the agreement on behalf of the company had the requisite authority, and it is not permissible for that party to argue otherwise, as to do so would be contrary to the requirement of good faith.[6]

While the decision is a welcomed one, and is somewhat reflective of the shift in the UAE to being more pro-arbitration, parties are still cautioned to ensure that a person entering into an agreement to arbitrate has express authority to do so.

Interim measures under the UAE Federal Arbitration Law

Last year we discussed the significant introduction under the new UAE Federal Arbitration Law of the arbitral tribunal's power to order interim and conservatory measures in support of arbitral proceedings. A party may then, with the written permission of the arbitral tribunal, apply to the courts to enforce any such order within 15 days of the request.

At the time of authoring this chapter, there is limited information on how this process has operated in practice in the local onshore courts. It is, therefore, presently a watching brief as we wait to see how the local courts, which will not be familiar with playing a supporting role to an ongoing arbitral process, will approach enforcing interim measures ordered by an arbitral tribunal. In particular, whether the local courts will seek to look behind the arbitral tribunal's order, or whether the local courts will comply with the tight 15 day time frame provided under the new law.

The Joint Judicial Tribunal

Over recent years, the use of the DIFC as a conduit jurisdiction to enforce foreign court judgments and arbitration awards in onshore Dubai has been a hotly contested subject – so much so that it prompted the creation of the Joint Judicial Tribunal (JJT). In last year's Middle Eastern and African Arbitration Review, we explored the creation of the JJT to determine conflicts of jurisdiction between the DIFC and Dubai courts, and how its earlier judgments showed an apparent default preference in favour of the Dubai courts having jurisdiction over the DIFC, a preference that appeared to indicate the end of the DIFC being used as a conduit jurisdiction.

However, in last year's chapter we touched upon a number of published judgments that suggested a move away from the apparent default preference for the Dubai courts to have jurisdiction over the DIFC. Based on the JJT's decisions in 2019, this shift appears to be continuing. Of the nine applications before the JTT in 2019, the JJT determined the DIFC had jurisdiction in eight of the cases. A stark contrast to the JJT's earlier and apparent default preference towards the Dubai courts.

It is worth noting, however, that few of the cases before the JJT had what one would consider as a 'real' conflict of jurisdiction. In most of the cases the conflict was artificial as one of the parties had commenced proceedings in the Dubai courts as a delay or interference tactic with the proceedings in the DIFC.

It is reassuring, however, for those seeking to litigate in the DIFC that the JTT has recognised this[7]and has indeed considered such an approach to be a party 'abusing the process of the JJT'.[8]

New Dubai International Arbitration Centre rules remain unpublished

It is now over two years since the Dubai International Arbitration Centre (DIAC) announced the launch of its proposed new rules during the Dubai Arbitration Week in November 2017. The rules were expected to be issued in early 2018. However, two years on, the rules remain unpublished with no update on when they might be issued, or what is causing the delay.

New DIAC statute

Despite the new DIAC rules remaining unpublished, last year did see the issuance of a new governing statute for the DIAC (Decree No. 17 of 2019).

The new statute has reclarified the organisational structure of the DIAC. We await with interest as to whether these amendments and clarifications will have any significant impact on the organisation and operation of DIAC, and whether its issuance is a pre-cursor to the launch of the much anticipated new DIAC rules.

Conclusion

Since the introduction of the UAE Federal Arbitration Law in 2018, the UAE's reputation as an arbitration-friendly country has improved and the key developments in 2019 have certainly helped to enhance that reputation.

The ADGM continues to be at the forefront of regional arbitral innovation. The new ADGM Arbitration Guidelines and the level of flexibility they offer to parties are a welcomed addition to the existing 'soft law' options. Coupled with the ADGM's new Arbitration Centre, and the ADGM Court's first, and seamless, recognition and declaration on the enforcement of a foreign arbitral award, it is clear that the ADGM is making giant strides in its bid to become a serious player in the regional arbitral community.

With the enforceability of foreign awards in the ADGM and DIFC now being settled, we turn our attention to the onshore regime. We will have to wait and see how the landscape develops in 2020. In particular, we look forward to seeing how the local courts approach enforcing interim measures awarded by arbitral tribunals.

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[1]It should be noted that the ADGM does not presently have its own arbitral institution to administer arbitral proceedings and does not have its own set of arbitral rules.

[2] A4 v B4 [2019] ADGMCFI 0007>

[3] Article 55(2).

[4] See Case No. 6/2018, Chief Justice, Dubai Courts, 31st October 2018, unpublished and Case No. 9/2018, Chief Justice, Dubai Courts, 17 September 2018, unpublished.

[5] Dubai Court of Cassation Judgment 946-2018 dated 11 November 2018.

[6] Dubai Court of Cassation Judgment 1125 of 2018 dated 17 March 2019.

[7] See Cassation No.1/2019(Judicial Tribunal) – Globemed Gulf Healthcare Solutions L.L.C. vs Oman Insurance Company PS in which the JJT stated that such an approach was 'an artificial dispute created . . . solely for the purpose of avoiding or at least delaying resolution of the merits of the claim'.

[8] Cassation No. 5/2019 (Judicial Tribunal) – Appellant: Essar Projects Limited v Respondent: McConnell Dowell South East Asia Pte Limited.

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