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Insights

THE PARTIES' PERSPECTIVE: A CLOSER LOOK AT THE UPDATED UAE FEDERAL ARBITRATION LAW

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SUMMARY

The recent changes to the UAE Federal Arbitration Regime (set out in *Federal Decree 15 of 2023* ("**the Amendment**") have been rightly welcomed by the arbitration community, especially in relation to the regulation of arbitrators' conduct and recognition of the increased use and worth of technology platforms. These proactive amendments to a still relatively new law do indeed represent a robust approach to keeping up to date with fast-evolving practice, and a strong statement of intent as regards the UAE's continuing ambition to be a leading hub for dispute resolution.

There has been much excellent and thought-provoking commentary on the content of the Amendment from practitioners and others in the arbitration community. So, for a slightly different take, we thought it might be interesting to look at the whole landscape from the perspective of the parties, and/or their transactional advisors, at the front-end.

CHOOSING THE SEAT AND ARBITRAL INSTITUTION

Some clients, and some advisors, will have standard approaches to their arbitration agreements: where the seat should be, what institutional rules are favoured and so on. Others consider what works best on a transaction-by-transaction basis. Common considerations arise: for the seat of arbitration, parties are interested in the availability of interim remedies, partial or interim awards, redress to the courts (and/or absence of too much court intervention) and, of course, potential enforcement of a favourable award down the road.

The law of the seat is only one piece of the jigsaw. Parties will also be focussed on which institution will administer their arbitrations, a choice often driven by practical questions of efficiency, speed, cost and accessibility of facilities. If an institution develops a reputation for being unreliable, or slow, this can prompt parties to look at alternatives, wherever the seat.

Further, more legalistic considerations might come into play based on the applicable rules of procedure, how arbitration fees are calculated, how up to date with modern practice the rules are and the extent to which they give certainty to the parties as to how proceedings will be conducted, the availability of joinder/consolidation, emergency and/or fast-track procedures and other complications, and how all these elements interact with the law of the seat.

THE UAE LANDSCAPE

When such factors are considered against the backdrop of the UAE's overall landscape, there are some additional complexities because of the number of arbitral jurisdictions available (including onshore, DIFC, Abu Dhabi Global Market), each with their own arbitration law which, to varying degrees, stipulate what is mandatory in that jurisdiction, and what can be left to the parties implied agreement via their arbitration agreement and/or the institutional rules incorporated into it. Such considerations necessitate a greater degree of precision at the drafting stage - unlike jurisdictions where merely identifying a relevant city as the "legal place" of arbitration will be enough to settle the identity of the seat.

It is hard not to have sympathy with clients and their transactional advisers. In the last couple of years, there have been decisions of both the Abu Dhabi (Case No. 1045/2022) and Dubai Courts (Case No. 458/2021), where onshore enforcement of otherwise ostensibly valid awards was delayed. The courts held that the true seats of those arbitrations were offshore jurisdictions because of the chosen administering institution and rules of procedure. In the Abu Dhabi case (where the seat had been identified as "Abu Dhabi city"), the court found that because it was an ICC administered arbitration, and the ICC had a representative office in the Abu Dhabi Global Market, the seat was actually there. In the Dubai case, the identified seat was "Dubai" but the Dubai courts held that the DIFC was the actual seat because it was a DIFC-LCIA administered arbitration. So, the parties seeking enforcement in those cases would have to start the process again even if, eventually, the matter might return to the onshore environment.

Arbitration practitioners will be familiar with the notion that "Dubai" can mean DIFC, and "Abu Dhabi" can mean ADGM, but their transactional counterparts might not have the same familiarity and might not consider that their choice of institutional rules could be a factor in determining the seat of arbitration proceedings.

CONSEQUENCES OF THE AMENDMENT

The Amendment includes worthwhile updates, but increases the divergence from the offshore arbitral regimes in the UAE.

The potential consequences of this are shown in the following example, which demonstrates the need for parties to be particularly careful when drafting in the first instance and commencing arbitration in the second.

The 2022 edition of the Rules of the Dubai International Arbitration Centre ("**DIAC**") provide that, where the seat is not agreed, the "*initial seat*" by default will be the DIFC and the appointed tribunal is empowered to finally determine the actual seat "*having due regard to any observations from the parties and any other relevant circumstances*".

The UAE Federal Arbitration Law does not apply to DIFC seated arbitrations – so the issue of which seat ultimately gets determined is a matter of DIFC arbitration law, not the Federal Arbitration Law. However, the effect will be to determine which law ultimately governs the proceedings, and the tribunal.

The DIFC arbitration law ties the tribunal's hands if the substantive dispute is governed by DIFC law; in such a case, the seat "***shall** be the DIFC*". Otherwise, it is a matter for the tribunal to determine at its discretion within the parameters set out above.

A tribunal exercising that discretion, and considering the "*relevant circumstances*", might consider their own position, especially if one or more of their number holds a trustee, board member or similar position within one of the arbitral institutions. The Amendment, at Article 10*bis*, says that such an individual can act as arbitrator in a case administered by that institution, but prescribes conditions (including the parties' consent, which may or may not be forthcoming). The consequence of breaching any of these conditions is potential civil liability for the arbitrator and the institution, as well as the invalidation of any award that tribunal issues in the case. By comparison, the DIFC Arbitration Law (and ADGM Arbitration Regulations) limits liability to instances of "*damage by conscious and deliberate wrongdoing*" but says nothing of this specific scenario.

The DIFC might therefore be a more attractive prospect, for both the tribunal and the parties, as, while civil liability for the tribunal and the institution are expressly waived in most institutional rules (including the DIAC Rules), such waivers will now be trumped in any arbitration held onshore (albeit in this narrow circumstance).

Equally, from the parties' perspective, they will probably be content with the (fairly universal) rule that the tribunal has discretion to determine the applicable rules of evidence to apply to the proceedings, but one or both of them might well be concerned by the caveat in the Amendment to the effect that this discretion is exercisable by the tribunal "*provided that these rules do not conflict with public order*". Some commentators have pointed out that it is not wholly clear how this mandatory caveat might impact matters in practice; it does not appear in the DIFC arbitration law (or the ADGM arbitration law) – nor in the DIAC Rules (which contain the same broad discretion for evidential matters at Article 25.2).

CONCLUSION

As was the case before the Amendment, the parties will help themselves by being as clear as possible about which arbitral seat, whether this be the DIFC, ADGM or onshore, they mean to agree

for example, by referring to “Onshore Dubai”). Leaving the seat to be determined by the rules, or by the tribunal, or the courts, could have surprising results and, as the available arbitration laws begin to diverge, this could become more meaningful and of greater importance.

Prior to the 2018 Federal Arbitration Law, it was generally considered that there was a considerable benefit to arbitrating under the DIFC arbitration law (enacted in 2008 and updated since) or the ADGM arbitration regulations (from 2015) over the former Civil Procedure Law arbitration provisions. The differences between the on-and-offshore regimes became less with the new law, but as that is updated some subtle differences emerge. Therefore, parties do need to give in-depth consideration to the seat, the administering institution and the procedural rules, and the interplay between them all, in order to avoid surprises.

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