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United Arab Emirates

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A. Legislation and rules

The economic growth of the United Arab Emirates (UAE) has brought with it significant development in various industry sectors, including tourism, infrastructure and construction, trade, and international investment.

The UAE's exceptional growth has also highlighted the need for a modern legal and judicial system that is capable of instilling confidence in the growing services market and of attracting more inward investment. Most foreign investors are accustomed to the certainty and predictability that is available in other modern legal systems, be it a common or a civil law system. That is mostly reflected in a developed court system consistently rendering binding legal precedents, offering the stability and credibility that a foreign investor requires. Recently, an active network of arbitration centers and robust arbitral regulations have also contributed to the success of foreign legal systems in attracting foreign direct investments.

In the UAE, foreign investors are reluctant to use domestic courts to settle disputes, since the UAE court system does not apply the principle of binding precedent. This gives rise to a feeling of unpredictability for foreign investors. Further, the procedures of the state courts are conducted in Arabic, which may not be convenient for businesses coming from non-Arab countries.

With a view to diversifying its legal system and offering more flexibility and certainty, the UAE has undertaken a significant reshuffle of its legal framework, which now includes separate jurisdictions and court systems that are modelled on the common law, and a network of active arbitration centers, including the Dubai International Arbitration Centre (DIAC), the Dubai International Financial Centre-London Court of International Arbitration (DIFC-

LCIA) and the Abu Dhabi Centre for Conciliation and Commercial Arbitration (ADCCAC).

More specifically, the UAE legal framework offers businesses various options for dispute settlement, including the state court system (civil law), the DIFC court system (common law) and arbitration.

This DIFC is a free zone in the Emirate of Dubai, created in 2004, that has its own civil and commercial laws and its own courts. It is modelled on international best practices and largely follows the English common law. It has been designed to appeal to the international business community and attract further foreign investment to the region. The DIFC also has its own arbitration law that is based on the UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Arbitration Law), which represents international best practices. An arbitration seated in the DIFC is subject to the procedural framework set out in the DIFC Arbitration Law of 2008.

More recently, Abu Dhabi has taken similar steps in creating a court system that is separate from that competent to resolve disputes in the Emirate of Abu Dhabi. The Abu Dhabi Global Market (ADGM) is a free zone in the business district of Abu Dhabi. It was established in 2013 and applies a distinct framework of regulations, offering a separate common law court system. Similar to the DIFC, the ADGM has been designed to attract international investment into Abu Dhabi. The ADGM also has its own arbitration law based on the UNCITRAL Model Law, and is a very recent addition to the UAE legal system. Since the DIFC and ADGM are in free zones, they are considered separate jurisdictions for the purpose of the recognition and enforcement of arbitration awards.

Owing to growing maritime activity in the region, the Dubai government has now established the Emirates Maritime Arbitration Centre (EMAC), which aims to provide high-quality maritime arbitration services.

In the following sections, we address the latest developments in the arbitration field in the UAE.

A.1 Legislation

Arbitration in the UAE continues to be governed by the UAE Civil Procedures Code (Federal Law No. 11 of 1992, amended in 2014) alongside the New York Convention and other multilateral or bilateral conventions.

For some time, there has been an expectation that the UAE will introduce a new federal arbitration law to replace the relevant provisions of the Civil Procedures Code, which are perceived to be too restrictive and not in line with international best practice. Although we continue to await the enactment of a federal law, there have been some developments this year in relation to arbitrations conducted in certain free zones, the application of certain laws governing companies that agree to arbitration, and the introduction of criminal sanctions for arbitrators who fail to act fairly and impartially.

The DIFC Arbitration Law governs arbitrations seated in the DIFC. The rules of the DIFC-LCIA have been updated this year to bring them in line with the changes introduced in 2014 to the LCIA Arbitration Rules.

The ADGM also recently enacted its own Arbitration Regulations, which establish the legal framework for any arbitration conducted within the ADGM and provide for the recognition and enforcement of arbitral awards in the ADGM courts.

A.1.1 Power to enter into arbitration agreements - Ministerial Resolution No. (272) of 2016

The UAE Commercial Companies Law of 1984 and the recently enacted UAE Commercial Companies Law (CCL) both provide that a director of a joint stock company (JSC) can only agree to arbitration if expressly authorized to do so by the shareholders or in the constitutional documents.

Moreover, Article 58(2) of the Civil Procedures Code provides that a special authorization is required in order to agree validly to arbitrate or to delegate such a power.

Prior to the enactment of the CCL, the UAE courts had decided in a number of cases that unlike directors of JSCs, managers of limited liability companies (LLCs) are presumed to have the power to agree to arbitration, such that a special authorization to that effect is not required.

However, the new Article 104 of the CCL has extended the provisions of the CCL relating to JSCs to LLCs incorporated in the UAE mainland. This resulted in a degree of debate among the legal profession and uncertainty over the correct interpretation and application of certain provisions of the CCL to LLCs.

On 28 April 2016, Ministerial Resolution No. (272) of 2016 was introduced to clarify the position by expressly excluding the application to LLCs of certain provisions of Article 154, including the provisions requiring JSC directors to have express powers to enter into arbitration agreements.

It is nevertheless always prudent to expressly give directors such powers (in the articles of association or by virtue of a shareholders' resolution) to avoid any arguments during an arbitration or at the stage of enforcement proceedings that the relevant directors lacked the authority and capacity to agree to arbitration on behalf of the relevant company.

A.1.2 Failure to act fairly and impartially - criminal sanctions: Federal Decree-Law No. 7 of 2016

On 18 September 2016, Federal Decree-Law No. 7 of 2016 amended Article 257 of the Criminal Law. The key amendment that has attracted a high level of attention in the region and beyond is Article 257, which expands the scope of crimes relating to the obstruction of justice, driven primarily by the objective of combatting bribery and corruption.

This provision exposes arbitrators to the risk of temporary imprisonment if they are found to be acting contrary to their duties of fairness and impartiality.

However, from an evidential standpoint, however, proving criminal intent in the context of impartiality or lack of integrity is cumbersome. The public prosecutor will only refer the case to the criminal court once the prosecutor concludes, based on a full investigation, that a crime has been committed. It is yet to be seen how this new and unexpected criminal provision will be applied.

While the risk of temporary imprisonment may cause an arbitrator to decline a new appointment if they wish to do so, retiring from existing appointments is not without risk. Article 207(2) of the DIAC Rules provides that, "if an arbitrator, after having accepted his appointment, withdraws without good reason, he may be held liable for compensation." It is doubtful that a change in the law would be a good reason.

Although it is fair to say that this new law has been introduced with the good intention of tackling bribery and corruption in the region, it does at first glance appear to be somewhat extreme. There is also the potential for it to conflict with other rules in place, such as the DIFC Arbitration Law and the ADGM Arbitration Regulations — which leave it open for arbitrators to be liable for intentional wrongdoing but do not go as far as exposing arbitrators to the risk of imprisonment. Article 22 of the DIFC Arbitration Law states this:

> "*No arbitrator, employee or agent of an arbitrator, arbitral institution, officer of an arbitral institution or appointing authority shall be liable to any person for any act or omission in connection with an Arbitration unless they are shown to have caused damage by conscious and deliberate wrongdoing…*"

Furthermore, Article 5.4 of the new DIFC-LCIA Rules provide for an arbitrator to sign a written declaration stating, "whether there are any

circumstances currently known to the candidate which are likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality or independence and, if so, specifying in full such circumstances in the declaration."

Given the criticisms being made of this new law, it does seem likely that some form of clarification will need to be introduced.

A.2 Institutions, rules and infrastructure

A.2.1 Re-launch of the DIFC-LCIA Arbitration Centre and new DIFC-LCIA Rules

In 2015, the LCIA and the Dispute Resolution Authority of the DIFC completed a restructuring of the DIFC-LCIA Arbitration Centre so that it can operate in parallel with, but also independently from, the DIFC courts.

In 2016, the DIFC-LCIA Arbitration Centre introduced new DIFC-LCIA Arbitration Rules. The changes mirror the amendments introduced to the LCIA Rules in 2014 and are aimed at improving the efficiency and cost-effectiveness of the arbitration process. The new rules apply to any arbitration commenced on or after 1 October 2016.

The key changes are as follows:

a) Emergency arbitrator provisions have been introduced in line with other arbitral institutions such as the ICC. These rules allow for parties to apply for an emergency arbitrator to be appointed to determine urgent matters or order emergency or protective measures pending the formation of the arbitral tribunal. These provisions do not affect the rights of parties to apply to the DIFC courts for interim measures.

b) Certain time periods have been reduced with the aim of speeding up the arbitration process. The new rules also provide for an accelerated procedure for the appointment of a replacement arbitrator, and also for revocation and challenges to the appointment and nomination of a replacement

arbitrator. Filing can also be done online and awards are now required to be rendered as soon as reasonably possible" following the last submission from the parties (Article 15.10).

c) Arbitrators are specifically required to dedicate sufficient time to the arbitration and to sign a declaration that the candidate is ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration (Article 5.4).

d) The Arbitral Tribunal can now take into account the parties' conduct in the arbitration, including any cooperation in facilitating the proceedings, as to time and cost, and any noncooperation resulting in undue delay and unnecessary expense (Article 28.4).

These changes to the rules are a step forward in recognizing the DIFC-LCIA as a world-class arbitration institution.

A.2.2 DIAC opens representative office in DIFC

A domestic arbitral award (such as the awards issued by DIAC in the UAE, but outside the DIFC) may only be enforced following ratification by the competent UAE court. This ratification process should not involve a review of the merits of the arbitration award. While the requirements set out in the UAE Civil Procedure Code are formalistic, and deemed rather cumbersome, in more recent years, the UAE has demonstrated a liberal approach in the application and the interpretation of the ratification requirements and enforcement of arbitral awards.

As a further step toward facilitating the enforcement of domestic arbitral awards, the DIAC signed a Memorandum of Understanding (MOU) on 20 September 2016 with the DIFC Dispute Resolution Authority for mutual cooperation, including the enhancement of the recognition and enforcement of DIAC arbitral awards through the DIFC courts.

In line with the MOU, DIAC opened an office in the DIFC on 27 September 2016. This move will permit parties to an arbitration who agree to apply the DIAC Rules to now: (a) seat their arbitration in the DIFC and benefit from the application of the comprehensive framework applied under the DIFC Arbitration Law; (b) apply to the DIFC courts for interim remedies in support of their arbitrations; and (c) enforce their awards through the DIFC courts.

In the words of the chairman of the DIAC Board of Trustees, Dr. Habib Al Mulla of this Firm:

> "*…as part of its development plans, the DIAC has decided to establish an office in the DIFC thus providing parties to arbitration disputes with an alternative option of courts that they can resort to in order to obtain recognition and enforcement of their awards.*
>
> *[…] arbitration is about choice, and […] the presence of the DIAC in the DIFC office will give arbitration parties the choice of resorting either to the DIFC courts or to the Dubai courts if they so wish to enforce their awards.*"

A.2.3 Decree No. 19 of 2016 — establishing the judicial authority of the courts of Dubai and the DIFC courts

On 9 June 2016, the ruler of Dubai issued Decree No. 19 (Decree) establishing a new judicial authority with the mandate of resolving conflicts of jurisdiction between the Dubai courts and DIFC courts.

According to Article 4 of the Decree, a conflict of jurisdiction can arise where both the Dubai courts and the DIFC courts uphold their jurisdiction (positive conflict), decline their jurisdiction (negative conflict) or issue conflicting decisions.

There have been many cases in the DIFC courts where the extent and nature of its jurisdiction has been at issue. This has especially been the case in the context of the enforcement of foreign arbitral awards and court judgments in the DIFC courts. Many of the cases have

recognized the fact that the DIFC courts can be used as a "conduit" jurisdiction, allowing them to decide on matters even though there is no nexus to the DIFC.

For example, in *Egan v. Egan [2014],* the DIFC court decided that it had jurisdiction to enforce a foreign award regardless of whether the defendant had assets within the DIFC or not. In *DNB Bank v. Gulf Eyadah [2016]*, the Court of Appeal decided that a party could seek ratification of a foreign court judgment in the DIFC courts and then transfer the matter to the Dubai courts for execution.

The introduction of this Decree raises the question of whether the DIFC courts have gone too far in expanding the scope of their jurisdiction, with the result that this Decree is intended to limit their jurisdiction, going forward. The alternative view is that this Decree is just another step toward Dubai raising its profile and bolstering the credibility of its judicial system by ensuring that both courts operate in a flawless and efficient manner.

B. Recent cases

B.1 *Dubai Courts: Fluor Transworld Services v. Petrixo Oil*

As we have mentioned, the UAE is a signatory to the New York Convention. As such, the UAE courts should enforce foreign arbitral awards unless the limited grounds set out in the Convention are shown to apply.

In recent times, there has been a positive trend of the UAE courts complying with their obligations under the Convention and enforcing foreign arbitration awards.

However, a recent decision of the Dubai Court of Appeal caused some concern, as the court refused to enforce a foreign ICC arbitration award for an arbitration seated in London. The refusal was made on the basis that no evidence had been submitted to prove that the United Kingdom was a signatory to the Convention. The United Kingdom has

been a signatory to the Convention since 1975 and the decision was most unusual and unexpected.

The decision was, however, overturned on appeal to the Court of Cassation, which correctly found that both the United Kingdom and the UAE were signatories to the Convention. The Court of Cassation found that the Court of Appeal erred in law and confirmed that in accordance with Article 3 of the Convention, each contracting country must recognize arbitral awards as binding unless the limited circumstances set out in the Convention apply.

While this case did raise some concerns, it is very much classed as a "rogue" decision and it is expected that the Dubai courts will continue in the positive trend of recognizing foreign arbitration awards.

B.2 *DIFC Courts: Ginette v. Geary*

In a 2015 case in the DIFC courts (*Ginette PJSC v. Geary [2015] DIFC ARB 012),* it was determined that, notwithstanding the fact that a signatory to an agreement lacked express authority to bind a company to arbitration, the company may nonetheless be bound by the arbitration agreement through the doctrine of apparent authority.

The doctrine of apparent authority is set out in Articles 130 and 131 of DIFC Contract Law. In summary, apparent authority arises where a principal, such as a corporation, represents to a third party that an officer or agent is authorized to act on its behalf and the third party relies on that representation.

In this case, the parties entered into a settlement agreement with an arbitration clause that provided for any dispute to be referred to arbitration in the DIFC, pursuant to the DIFC-LCIA Arbitration Rules.

A dispute arose concerning the non-payment of amounts due under the settlement agreement, and the claimant commenced arbitration proceedings.

The respondent argued that it was not bound by the arbitration agreement, as the settlement agreement (containing the arbitration agreement) had been signed by the respondent's executive manager, who the respondent claimed, lacked the requisite authority to cause the respondent company to enter into and be bound by the arbitration agreement.

While the respondent's Articles of Association permitted the board to "conduct conciliations or approve arbitrations," the respondent's board did not expressly approve entry into the arbitration agreement.

The respondent also challenged the validity of the arbitration agreement on the basis that the agreement was governed by UAE law, which restricts the director's powers to enter into arbitration agreements, as opposed to DIFC law.

At first instance, the court found that even if the respondent's signatory to the settlement agreement lacked actual authority to bind the respondent to the arbitration agreement, the arbitration agreement was binding upon the respondent company under the DIFC law on apparent authority.

The court also held that even if UAE law governed the arbitration agreement, the doctrine of apparent authority would still apply. In this respect, the court cited a Dubai Court of Cassation case (*Case 547/2014*), which set a precedent for the application of the doctrine of apparent authority.

The Court of Appeal upheld the decision at first instance and in doing so, Justice Roger Giles expressed the view that, "… there was no other want of authority in the Executive Managing Director to enter into the arbitration agreement. Article 26 of the appellant's articles permitted delegation of signing authority, and as I have said the appellant accepted

that it was bound by the settlement agreement; thus it accepted that the Executive Managing Director had authority to enter into that agreement. He signed next to the company stamp, which is ordinarily reserved for transactions approved by the Board. His authority to enter into the settlement agreement carried with it, once Board agreement to arbitration is found, authority to commit the appellant to the arbitration agreement in clause 18 as one of its provisions."

C. Trends and observations

A number of developments in the region demonstrate positive steps being taken to develop the arbitration systems in the DIFC and the ADGM free zones, as well as address conflicts arising between the Dubai courts and the DIFC courts, and extend the level of cooperation between DIAC and the DIFC courts. All of these steps move the UAE forward in terms of its recognition as a global hub for businesses and a sophisticated jurisdiction for the resolution of disputes.

On the other hand, the recent amendment to Article 257 of the Federal Law No. 3 of 1987, which subjects arbitrators to the risk of "temporary imprisonment" has introduced a level of concern among arbitrators who practice in the region.

This new "criminal law" for arbitrators has the potential to have a negative impact, but experienced practitioners with an understanding and knowledge of the region will recognize the intention behind it; to curb bribery and corruption. It remains to be seen how this new law will be applied by the courts.

The surprising ruling by the Court of Appeal in *Fluor Transworld Services v. Petrixo Oil* is also likely to be viewed as an exception to the norm, and it is expected that the Dubai courts will continue with the positive trend of ratifying foreign arbitral awards in accordance with the New York Convention.