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The UAE is certainly a jurisdiction where changes are quick and forthcoming. The arbitration sector is no different. Over the past 10-15 years, the practice of arbitration disputes has evolved tremendously in practice and infrastructure. Whilst disputes were mostly discussed and resolved in Majlis,³ the development of the national economy, specifically driven by increasingly growing sectors such as construction, real estate and services, has caused major upheaval in the legal infrastructure and has changed how disputes have traditionally been resolved in the UAE. Today, arbitration practitioners have the benefit of resolving large and complex disputes in fully fledged courtrooms and arbitration centers that offer all that is expected from a modern alternative dispute resolution system.

The inception of the Dubai International Financial Centre, with its English court system and arbitration law, as well as the creation of the Abu Dhabi Global Market courts,⁴ are both separate from the federal court systems, and establish offshore jurisdictions that are unique to the UAE. The DIFC and ADGM offer arbitration users the choice to opt for federal laws⁵ or DIFC/ADGM arbitration laws⁶ when choosing

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³ Meaning "place of sitting" in Arabic, the term is used to describe a formal legislative assembly and also a place for social gathering, cited in *Majlis is a key feature of Civilisation in the UAE*, Gulf News, 22 May 2009.

⁴ See A.2 below.

⁵ See the arbitration chapter of UAE Federal Law No. 11 of 1992 on civil procedures, Article 203 *et seq.*

the seat of arbitration, making the UAE an extremely attractive arbitration hub for international transactions. The offshore jurisdictions such as the DIFC and ADGM have tremendously contributed (and will continue to contribute) to the UAE's transformation of its arbitration infrastructure.

Further, the accession of the UAE in 2006 to the New York Convention⁷ has since sparked a series of court decisions confirming the UAE's pro-enforcement approach to international arbitral awards.⁸ The UAE is also awaiting the most important development of all, which is the enactment of the long-awaited arbitration law, expected to improve the UAE's position in the field of arbitration. That said, many arbitration centers have in past years taken the liberty to update their institutional arbitration rules, such as the Abu Dhabi Commercial, Conciliation and Arbitration Centre in 2013, the DIFC-LCIA Arbitration Centre in 2016 as well as the rules of the Dubai International Arbitration Centre, though the latter rules remain a draft and are expected to be promulgated during the first quarter of 2018.⁹

A. Legislation and rules

There are several legislative amendments (A.1) and regulatory changes (A.2), which are further detailed in the following sections.

⁶ DIFC Arbitration Law No. 1 of 2008; ADGM Arbitration Regulations 2015, enacted by the ADGM Board of Directors on 17 December 2015.

⁷ Federal Decree No. 43 for the Year 2006.

⁸ This is specifically the case since the decision of the Fujairah Federal Court of First Instance of 27 April 2010, case No. 35/2010.

⁹ See Section A.2.



A.1 Legislation

A.1.1 Amendments to the Legal Profession Law

On 25 September 2017, the Minister of Justice passed Ministerial Resolution No. 972 of 2017 promulgating the Executive Regulations to the Federal Legal Profession Law No. 23 of 1991 (the “LPL”).¹⁰

Although the amendments to the LPL are not considered arbitration-related developments per se, the specific wording of Article 2 has caused confusion in the legal community in Dubai, sparking fears that expatriate lawyers can no longer appear before arbitration tribunals seated in the UAE. Pursuant to this article, arbitration tribunals shall not accept the representation of a lawyer that is not registered on the roll of practicing lawyers, limiting such representation to UAE nationals.¹¹ This provision, however, has been since clarified by the Dubai government, confirming that foreign practitioners are permitted to act in arbitration proceedings seated in the Emirate.¹² Other prominent UAE arbitration practitioners have also confirmed the non applicability of the LPL, which is of federal nature, to arbitrations seated in Dubai, Abu Dhabi or Ras Al Kaimah, who have all opted out of the “federal judicial structure.”¹³

A.1.2 Amendment to Article 257 of Federal Law No. 3 of 1987 on criminal matters

On 18 September 2016, Federal Decree-Law No. 7 of 2016 introduced new amendments to Article 257 of the Criminal Law, exposing

¹⁰ Federal Official Gazette, Issue 622, Year 47, 28 September 2017, entered into force on 29 September 2017.

¹¹ Tom Jones, *Has Dubai shot itself in foot again with “locals only” law?*, Global Arbitration Review, 17 November 2017.

¹² Lacey Yong *et al.*, *Dubai backtracks on “locals only” law*, Global Arbitration Review, 11 December 2017.

¹³ See for instance, Habib Al Mulla, *A clear misrepresentation of UAE’s arbitration laws*, Gulf News, 9 December 2017.

arbitrators to the risk of temporary imprisonment for acting contrary to their duty of fairness and impartiality.¹⁴

It has been just over a year now since the amendments to Article 257.¹⁵ There were unverified reports that one or two applications have been filed against arbitrators, soliciting the application of Article 257, before which the competent courts decided to stay the underlying proceedings. It remains to be seen how the provisions of Article 257 will be applied by the UAE Courts. Recently, in December 2017, the Dubai Court of Cassation issued a decision on the arbitrator's "civil" liability, confirming that, in order to establish such liability, a party would need to establish that he or she had committed a "*serious mistake of deceit, fraud, collusion with the opponent or refraining from arbitrating without acceptable justification.*"¹⁶ Although the findings of the Dubai Court of Cassation related to a civil matter and have no bearing on Article 257, itself a crime, the threshold of evidence imposed by the Court to establish civil liability is particularly high compared to other civil wrongdoings, and may itself give an indication as to the unequivocal evidence that will be required by the criminal courts in order to satisfy the *mens rea* and *actus reus* of the crime introduced by the amendments to Article 257.

¹⁴ We previously provided a detailed update on the introduction of these sanctions in our 2017 UAE Chapter. In summary, an arbitrator usually enjoys immunity for any act or omission in connection with the arbitration. This immunity has been provided under various institutional rules, namely Article 40 of the DIAC Rules, Article 31 of the DIFC-LCIA Rules and Article 16 of the UNCITRAL Rules. However, the UAE Arbitration Law is absent any statutory immunity of the arbitrator. The only exception is Article 22 of the DIFC Arbitration Law, which also extends the immunity to employees and agents of the arbitrators. However, the immunity of arbitrators is a qualified immunity subject to any evidence that the damage was caused by conscious and deliberate wrongdoing. For instance, any breach by the arbitrator of the fundamental principles of fairness and impartiality could expose that arbitrator to court proceedings. The amendment of Article 257 of the Criminal Law introduced a new dimension to the liability of arbitrators, insofar as that liability is not only a civil, but also a criminal offense carrying the sentence of temporary imprisonment.

¹⁵ The amendment became effective on 29 October 2016.

¹⁶ Cassation No. 484/2017, decision of 21 December 2017.



The major impact of Article 257 is the disruptions caused to ongoing arbitration proceedings. The past year has seen numerous resignations of arbitrators and experts from their roles for fear of being prosecuted.

Many users of international arbitration have since called the UAE legislative body to bring an end to the application of Article 257 and there are recent reports that suggest the UAE legislature will do so, bringing the concerns raised during the past months to an end.¹⁷ Until then, the current provisions of Article 257 remain in force. Parties are reminded that they cannot contract out of criminal liability and arbitrators are not prone to any immunity provisions whether in institutional arbitral rules or the UAE law.

A.2 Institutions, rules and infrastructure

There are two major developments for 2017, mainly related to the opening of an ICC representative office in Abu Dhabi and changes to be made to the prevailing DIAC Arbitration Rules of the year 2007.

A.2.1 ICC office in Abu Dhabi

In September 2017, the ICC announced the opening of its representative office in ADGM, an international financial center and a common law free zone located in Abu Dhabi. The users of international arbitration conducting business in Abu Dhabi can now opt for ADGM as a seat of arbitration¹⁸ and the ICC Arbitration Rules to govern their disputes. It is expected the ADGM will issue a complete suite of regulations related to the enforcement of ADGM awards before the courts of mainland Abu Dhabi and further beyond. The ADGM arbitration center should become operational during the first quarter of 2018.

¹⁷ *Has Dubai shot itself in foot again with “locals only” law*, 17 November 2017, in *Global Arbitration Review*.

¹⁸ Pursuant to ADGM Arbitration Regulations 2015.

A.2.2 The “New” DIAC Rules

The DIAC announced during the Dubai Arbitration Week, which took place 12-16 November 2017, the launch of the new DIAC 2018 Arbitration Rules. The New DIAC Rules not only respond to the business needs of the international community but also supplement the shortfalls and deal with common pitfalls in the exiting legal regime, taking into account the lack of a modern arbitration law and the issues faced in enforcement of domestic arbitral awards.

The DIAC has announced that the New DIAC Rules have been approved by the legislative body and are expected to be promulgated during the first quarter of 2018 by a decree issued by HH Sheikh Mohammed Bin Rashed Al Maktoum in both English and Arabic, with English as the prevailing language.

The changes introduced in the New DIAC Rules are designed to ensure the efficient conduct of DIAC arbitrations not only during the arbitration process but also at the time of ratification and enforcement of DIAC awards. The key objectives of the New DIAC Rules are to: (i) ensure that the arbitration process is conducted in a transparent and cost-efficient manner; and (ii) facilitate and enhance the enforcement of DIAC awards pending the promulgation of the long-awaited UAE arbitration law. The key amendments to the draft New DIAC Rules are: (i) the introduction of measures to increase procedural efficiency and avoid delays, such as emergency arbitrators, expedited proceedings and power to sanction counsel conduct; (ii) provisions dealing with multiple contracts, multiple parties, consolidation and joinder; (iii) a mechanism of collaboration between parties and/or co-arbitrators with the DIAC in the process of the default appointment of a sole arbitrator or the chair in cases of three tribunal members; (vi) express provision confirming that by agreeing to the New DIAC Rules, parties are presumed to have agreed to exclude the liability of tribunal members and the DIAC, hence dealing with the uncertainty that has arisen as a result of amendment to Article 257 of the Criminal Law discussed in A.1.2 above; (vii) express provision granting the tribunal the right to order the recoverability of legal fees;



(viii) Shari'ah compliant arbitration; (ix) provisions dealing with third-party funding (see Section C below) and (x) a clear reference to the DIFC as the default seat of arbitration. In this respect, the New DIAC Rules provide that where the seat of arbitration is not identified in the parties' arbitration agreement, the arbitration will be automatically deemed seated in the DIFC. This will allow parties to benefit from the comprehensive procedural framework of the DIFC Arbitration Law, which is based on the UNCITRAL Model Law. Arbitrations seated in the DIFC will also confer jurisdiction to the DIFC courts, which will act as the curial courts for the purposes of any interim precautionary measure such as attachment orders and injunctive relief.

Having the DIFC as the seat of arbitration will also enable the parties to enforce their award before the DIFC courts even against assets that are not located in the DIFC. This will ultimately save the parties from going through the cumbersome formalistic requirements of the UAE Civil Procedures Code that usually comes into play when enforcing domestic arbitral awards before the Dubai courts.

Having the DIFC as the seat will also defeat any potential challenges that the DIFC does not have jurisdiction to enforce DIAC awards. This is particularly relevant in light of the heated debate that evolved on the jurisdiction of the DIFC courts in relation to the enforcement of domestic arbitral awards (see Section B below). This debate mainly started following the decisions of the judicial tribunal that adopted a restrictive approach regarding the jurisdiction of the DIFC courts and confirmed that the Dubai courts are the courts with natural and general jurisdiction over enforcement of awards particularly in Dubai-seated arbitration. It is anticipated that such issue will no longer exist under the New DIAC Rules in light of the DIFC being the default seat of arbitration.

B. Cases

It has been an active year for the judicial tribunal, which was set out pursuant to Dubai Decree No. 19 of 2016 for resolving conflicts of jurisdiction between the Dubai mainland courts and the DIFC courts.

On 22 May 2017, in its decision in *Ramadan Mousa Mishmish v. Sweet Homes Real Estate LLC*, the judicial tribunal confirmed the existence of a positive conflict of jurisdiction between the Dubai and DIFC courts with regard to applications for enforcement and annulment of arbitral awards.¹⁹ The applicant, Mr Mishmish, brought an application before the judicial tribunal to determine whether the Dubai courts are the competent courts for recognizing or annulling an arbitration award issued by the DIAC. Mr Mishmish had previously filed an application for annulling the DIAC award before the Dubai courts, followed by an application brought by Sweet Homes for enforcing the same in the DIFC courts. After confirming the existence of a positive conflict of jurisdiction, the judicial tribunal ordered the DIFC court to cease looking into this matter and declared the Dubai courts as the competent courts for reviewing an application for annulment/enforcement of the DIAC award. Justices Michael Hwang, David Steel and Al Muhairi dissented, stating that although the courts of the seat in the underlying arbitration proceedings are the Dubai courts, the DIFC courts have exclusive jurisdiction to enforce the award of the DIFC pursuant to Article 5 of Dubai Law 16 of 2011. It is true that the decision of the judicial tribunal has simply relied on the general principle of law that the Dubai courts have general jurisdiction, which implies that whenever there are pending proceedings in relation to an arbitral award, the DIFC courts must give precedence to the Dubai courts, but there is no such principle under UAE law, which explains the policy reasons behind creating the judicial tribunal. If anything, while the Dubai courts have sole jurisdiction with regard to the validity of the award, being the courts of the seat (*lex arbitri*), there is concurrent jurisdiction, rather than a

¹⁹ Cassation No. 3 of 2017, decision of 22 May 2017.



conflict of jurisdiction, between the two forums with regard to enforcement proceedings of arbitral awards.²⁰

In a second decision, *Assas Investments Limited v. Fius Capital Limited* of 12 September 2017, the judicial tribunal dismissed in an application by Assas for determining the competent court to review the enforcement of a DIFC-LCIA arbitration award.²¹ Fius, the award creditor, had earlier commenced enforcement proceedings of the same award in both the DIFC and Dubai courts. The judicial tribunal decided that “*it is indisputable that arbitration awards from the DIFC will be recognized in mainland Dubai*” pursuant to Article 7(2) of the Judicial Authority Law.²² The judicial tribunal continued that “*there is simply no reason in principle or in law why multiplicity of execution proceedings cannot proceed simultaneously and/or cumulatively.*” Indeed, pursuing execution proceedings in respect of an arbitration award in the jurisdiction of the seat of arbitration does not mean that the award creditor is not also permitted to commence execution proceedings in the jurisdiction which recognizes that award. This is not a question of conflict of jurisdiction because each set of execution proceedings is carried out in respect of different assets and therefore the courts of both jurisdictions are competent to review the enforcement proceedings.

C. Funding in international arbitration

Third-party funding is not regulated under the prevailing UAE laws or arbitral rules and there are no court decisions that determine whether funding is permitted or not. In the absence of statutes and case law on this matter prohibiting or restricting the use of third-party funders to cover the costs of a dispute, it can be said that this practice is authorized under UAE law.

²⁰ This situation was later confirmed by the judicial tribunal’s decision of 12 September 2017 in *Assas Investments Limited v. Fius Capital Limited*.

²¹ Cassation No. 6/2017, decision of 12 September 2017.

²² Dubai Law No. 12 of 2004 as amended by Law No. 16 of 2011.

This being said, interest in third-party funding is on the rise since the recent change in the court fee system, which had led to particularly prohibitive fees for claimants. Court fees vary from one emirate to another. In Dubai, claimants are expected to pay a deposit of 7.5% of the claim amount or a maximum cap of AED 40,000. In Abu Dhabi, the court fees are 3% of the claim value, while in Ras Al Khaimah, court fees are as high as 10% or a maximum cap of AED 30,000. Although the prime intention behind the new court fee system was to deter frivolous lawsuits, the deterrence has also had an impact on impecunious claimants with meritorious claims.

As confirmed in many jurisdictions authorizing the use of external funding,²³ third-party funding does promote access to justice for impecunious parties against deep-pocketed wrongdoers. The principle of access to justice is set out and preserved under the UAE Constitution and other federal laws, thus forming the legal basis for accepting and promoting third-party funding.

With regard to arbitration proceedings, and due to the confidentiality of the arbitration process, it is difficult to opine on the extent to which arbitration cases are currently being funded by third-party investors. However, the recently proposed draft New DIAC Rules make reference to third-party funding in their suggested Article 53, granting an arbitration tribunal wide powers in ordering the disclosure of any funding arrangements. It is worth noting that the currently applicable DIAC Arbitration Rules of 2007 do not make any reference to third-party funding. However, given that the New DIAC Rules will enter into effect by a Dubai Ruler's Decree, it is evident that the third-party funding has gained the attention of the legislative bodies in the UAE.

Based on the foregoing, impecunious parties can and should have the option of seeking third-party funding in arbitration proceedings.

²³ US (New York): *Hamilton Capital VII LLC I v. Khorrami LLP*, No. 650791/2015, 2015 WL 4920281, at *5 (NY Sup Ct 17 August 2015). UK: Speech of Lord Neuberger, president of the UK Supreme Court, in 2013, cited in *Getting the Deal Through, Litigation Funding*, 2017. Australia: *Taylor & Anor v. Hobson & Ors* [2016] QSC 226.