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Arbitration in the Gulf: What's happening?

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Gordon Nardell QC FCIArb

The topic

- Arbitration a well-established form of domestic dispute resolution in GCC States. GCC-seated arbitration increasingly used for international disputes in energy sector and other activities involving high-value FDI.
- Challenges:
 - Historical issues of compatibility of domestic legal regime with the international framework for commercial arbitration: New York Convention/Model Law
 - Esp. judicial intervention and enforceability of awards
 - Regional politics – energy policy and beyond
- Two focal points:
 - UAE – clash between archaic Federal law and commercial pressures from Dubai dispute resolution community. Likely impact of the long-awaited Federal Arbitration Law? How effective are workarounds such as “conduit” jurisdiction? And some little local difficulties.
 - Qatar – 2017 Arbitration Law... just in time for regional boycott by other GCC States.



UAE - the context



- Dubai and Abu Dhabi highly developed business and legal services hubs. Long-established arbitral institutions:
 - Onshore: Abu Dhabi - ADCCAC (1994 – current rules 2013); Dubai – DIAC (originally 1994 – current rules 2007)
 - “Offshore”: DIFC-LCIA Arbitration Centre (2008 – current rules 2016); ADGM (2015)
 - Largest subject-areas: real estate and construction. But rising commercial caseload including energy sector.
 - UAE acceded to NYC in 2006
- Domestic arbitration law: Federal Law 11/1992 - UAE Civil Procedure Code, Chapter 3 (Articles 203-218) as amended. Governs:
 - UAE-seated arbitrations, including enforcement of awards
 - Enforcement of foreign awards in UAE
- Proposals for bespoke Federal Arbitration Law, based on Model Law, “imminent” since c. 2006. Almost there. Meanwhile...

UAE Civil Procedure Code



- Generally:
 - Sits within UAE federal judicial structure.
 - Chapter 3 bears little relationship to Model Law. Civil courts have generally interpreted and applied the Code in an arbitration-friendly manner, but some pinch points...
- Judicial intervention
 - No merits challenge – but uneven interpretation of Art. 216 formal/jurisdictional grounds for annulment. Arbitrability: excludes matters of “public policy” that are not “capable of being reconciled” within Art. 203
 - Consequences of annulment: entire arbitral proceedings void (Art 216(1)(c)). Court determines merits.
- Enforcement:
 - Domestic awards: ratification by court. Civil suit under “summary procedure” – but can be lengthy. Court “reviews” the award and terms of reference (Art. 215). Appealable.
 - Foreign awards: additional steps of “consularisation” at seat followed by ministerial “authentication”; and application of rules about foreign judgments in Art 235, esp. “(e)...does not include any violation of moral code or public order”

“Public policy” and “public order” in UAE law

- Two interrelated strands:
 - Catalogue of non-arbitrable “public policy” areas
 - UAE concept of “public order” and NYC Art V(2)(b)
- UAE Civil Transactions Law (Federal Law 5/1985) Art. 3:
 - Public order “includes matters relating to personal status such as marriage, inheritance and lineage, and matters relating to... government, freedom of trade, the circulation of wealth, rules of individual ownership and the other rules and foundations on which society is based, in such a manner as not to conflict with the definitive provisions and fundamental principles of the Islamic Sharia.
- Interpretation by UAE courts – mixed results:
 - Broad approach to Art 3: any dispute about ownership (eg property rights *in rem*) caught – Abu Dhabi CC Appeal 55/2014, Dubai CC 14/2012. Non-arbitrable.
 - Ditto where no local connection other than the arbitration clause itself: Dubai CC *Canal de Jonglei* case, since allocation of international jurisdiction a matter of “public policy”.
 - Narrow approach to Art 3: purely contractual claim about ownership does not involve public policy – Dubai CC 282/2012.



The DIFC regime: DIFC-LCIA arbitration

- DIFC an “offshore” Financial Free Zone in downtown Dubai recognised by UAE law.
- Dispute resolution: DIFC Court and DIFC-LICA Arbitration Centre:
 - DIFC Court is a common law court, holding proceedings in English and operating separately from UAE/Dubai courts.
 - DIFC-seated arbitration governed by DIFC Arbitration Law 1/2008 (based on Model Law) to exclusion of CPC
 - DIFC is supervising court
 - Parties may choose DIFC seat wherever they are situated
- DIFC court has exclusive jurisdiction to enforce arbitral awards within the DIFC, whether DIFC-LICA, UAE onshore or foreign. No onshore jurisdiction. But...



A workaround: DIFC “conduit” jurisdiction? (1)

- Legal framework:
 - “Public policy” – DIFC takes minimalist, common law approach to NYC Art V
 - DIFC Arbitration Law Art. 42(4) – “Awards recognised by the DIFC Court may be enforced outside the DIFC in accordance with the Judicial Authority Law...”
 - Dubai Judicial Authority Law 12/2004 Art. 7(2): “Where the subject-matter of execution is situated outside the DIFC... arbitral awards ratified by the DIFC Court shall be executed by the competent authority having jurisdiction outside DIFC...”
 - “Tie-breaker” rules to avoid clashes of jurisdiction between DIFC and onshore courts: the Dubai-DIFC Joint Judicial Tribunal (“JT”), established by Decree 19/2016



- The *Banyan Tree* line of DIFC cases:
 - *X v Y* ARB/002/2013 and *Banyan Tree Corporate v. Meydan Group LLC* ARB/003/2013
 - Foreign award against non-UAE debtors; onshore DIAC award against UAE debtor
 - Chadwick J (May 2014) held jurisdiction of DIFC and onshore courts “mutually exclusive but complimentary”. Jurisdiction to recognise a non-DIFC award with no connection to the DIFC for the purpose of execution in onshore Dubai under Article 7. Not contrary to public policy.
 - Subsequently approved/followed: *DNB Bank v Gulf Eyada Corp* CA 007/2015

DIFC “conduit” jurisdiction? (2)



- Limits imposed by the JT:
 - *Gulf Navigation Holding v. Jinhai Heavy Industries* (Cassation 1/2017): DIFC Court ratified LMAA award in favour of Chinese creditors against UAE debtor. Debtor had filed a claim with (onshore) Dubai Centre of Amicable Settlement of Disputes seeking expert (re-)determination of the substantive issues in the arbitration. JT decided by a majority (all 3 DIFC judges dissenting) that in the event of a conflict, the Dubai onshore courts' jurisdiction over matters outside the DIFC took precedence. Declining to enforce the DIFC order did not breach the NYC.
 - Followed in *Ramadan Mousa Mishmish v Sweet Homes Real Estate* (Cassation 3/2017) – DIAC award where debtor filed application for annulment while creditor obtained recognition order from DIFC Court.
- But conduit jurisdiction recognised where no jurisdictional clash:
 - *Emirates Trading LLC v Bocimar International NV* (Cassation 5/2017): No competing onshore proceedings so no bar to enforcement under Article 7. Only the UAE Supreme Court could determine a challenge to the constitutionality of the DIFC's claim to conduit jurisdiction.

The new UAE Arbitration Law



- Status:
 - Draft law (61 Articles) approved in summer 2017 by UAE National Assembly and Cabinet. Text submitted to President for signature.
 - Examination by Constitutional and Legislative Affairs Committee of Federal National Council – approved in January, subject to further consultation via Ministries of Economy and Justice
 - Amended draft approved by FNC on 1.3.18. Now goes to President + Supreme Council.
 - But patience of some already exhausted: DIAC has opened DIFC office; proposed 2018 rules allocate supervisory jurisdiction to DIFC court. New EMAC adopts DIFC as supervisory court.
- Key provisions:
 - Generally Model Law compliant - full procedural framework; recognition of *kompetenz-kompetenz*; severability of arbitration clause; incorporation by reference satisfies “writing” requirement; general power to allocate costs.
 - Grounds for annulment per Model Law, and refusal of enforcement per NYC .
 - Arbitration agreement remains valid where award set aside
 - Arbitral award assimilated to a domestic judgment for enforcement purposes. Ratification still required but no debtor appeal against first instance decision to ratify.

Some little local difficulties



- Arbitrator immunity from civil suit:
 - CPC Art. 207(2) – arbitrator who “withdraws without good reason” following appointment “may be held liable for compensation”.
 - Standard explained by Dubai CC in Case 484/2017 (Dec 2017). DIAC arbitration. Losing party sued outgoing and replacement arbitrators for errors including lack of jurisdiction. Claim dismissed: must be a “serious mistake tainted by deceit, fraud, collusion [with a party] or refraining from arbitrating without acceptable justification”. “Ordinary mistake or negligence” not enough – must be “serious mistake or fraud”.
 - Looser test than DIFC Law Art. 22: “conscious and deliberate wrongdoing”.
- Criminal liability for bias:
 - Penal Code Article 257 (2016) – imprisonment for arbitrators breaching duty of neutrality/integrity. Now likely to be repealed – Federal Arbitration Law?
- “Locals only”?
 - Ministerial resolution 972/2017 (25.9.17) Article 2 – only those entered on UAE roll of practising lawyers may represent parties before courts and arbitral tribunals.
 - In wake of controversy at GAR Live (Nov 2017), senior lawyer close to UAE Govt stressed that Art 2 only requires UAE-based advocates to show they are on the roll when appearing in a locally-seated arbitration. Inapplicable to foreign lawyers.

Qatar



- Former 1990 Arbitration Chapter of Civil and Commercial Procedure Code replaced by Law on Arbitration in Civil and Commercial Matters 2/2017.
 - Model Law compliant
 - Resolves several (but not all) problems in relation Qatari onshore arbitration law
 - Parties to an onshore arbitration can choose between Qatar CA and QFC Court of First Instance as supervising court.
- Impact of GCC boycott?
 - 2014 rift with Saudi Arabia over alleged support for terrorist factions grew into all-out diplomatic severance with GCC States in June 2017.
 - Embargo on Qatari citizens/goods, and aircraft/vessels where Qatar last or next port of call
 - Impact on Qatari arbitral proceedings/awards?

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Thank You

GNardell@20essexst.com

London

20 Essex Street
London WC2R 3AL
Tel: +44 (0)20 7842 1200
Email: clerks@20essexst.com

Singapore

Maxwell Chambers #02-09
32 Maxwell Road
Singapore 069115
Tel: +65 62257230
Email: clerks@20essexst.com