The International Arbitration Review

Fifth Edition

Editor
James H Carter

Law Business Research

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EDITOR'S PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another. The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more lawyer hours of reading than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. However, there is a niche to be filled for analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world is consumed with debate over whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

James H Carter

Wilmer Cutler Pickering Hale and Dorr LLP
New York
June 2014

Chapter 43

UNITED ARAB EMIRATES

DK Singh[1]

I INTRODUCTION

The United Arab Emirates (UAE) is a federation of seven emirates formed in accordance with the UAE Constitution in 1971. At the time the federation was established each of the seven emirates had their respective laws in force. These laws remain in force unless they are superseded by any federal law, are in conflict with federal laws or are otherwise repealed. In accordance with the UAE Constitution individual emirates are free to promulgate legislation in relation to matters that are not exclusively reserved for federal powers. In addition to this duality there are also carveouts for free zones within the seven emirates wherein the emirate concerned has the freedom to pass laws specific to a particular free zone. In this regard the Dubai International Financial Centre (DIFC) is the most advanced and internationally reputed free zone within the UAE.

The UAE has a civil law system whereby the laws are codified in statute and there is no formal system of precedent. Arabic is the official language of the UAE, and all court proceedings in the UAE, other than in the DIFC Courts and the Dubai World Tribunal are conducted in Arabic. In arbitration on the other hand, which is a contractual agreement, parties frequently opt to conduct proceedings in English, which is the most commonly used language for business. There is as yet no arbitration law promulgated in the UAE at federal level. In February 2008 the UAE Ministry of Economic Affairs released a draft Federal Law on Arbitration and Enforcement of Arbitral Awards; further revised drafts based on the UNCITRAL Model Law on International Commercial Arbitration were published in 2010 and February 2012. It is anticipated that the promulgation of a federal arbitration law will provide a uniform basis and legislative support to the various arbitral institutions in different forums that currently operate in the UAE.

1 DK Singh is a partner at KBH Kaanuun.

Arbitration in the UAE is currently governed by Articles 203 to 218 of the Civil Procedure Code (Law No. 11 of 1992, as amended by Law No. 30 of 2005, the Code). The Code is aimed principally at domestic rather than international arbitration and it places significant limitations on arbitration proceedings in that they are potentially subject to the intervention and supervision of the courts. This can be seen to undermine the authority of arbitrators.

Pursuant to the Code, the courts have the power to dismiss an arbitrator, hear preliminary issues, grant interim measures, correct, enforce or even nullify an award.[2] This has caused concern among the international arbitration fraternity, and created a fragile ratification and enforcement process. It is mainly because of this that, historically, foreign investors have been reluctant to seat their arbitration proceedings in the UAE. There was a general perception that the practice of international commercial arbitration in the Middle East was still in its infancy. However, the UAE's accession to the New York Convention was seen as a significant step in demonstrating the UAE's commitment to foreign investors and the international community.

Under Federal Decree No. 43 of 2006, the UAE joined the New York Convention along with 16 other Middle Eastern countries. The UAE's accession to the New York Convention is considered an important move towards providing for a more straightforward enforcement of foreign arbitral awards in other convention states. In accordance with the New York Convention, arbitral awards issued in the UAE now enjoy automatic recognition in the other 142 Member States and can be enforced outside the UAE on a reciprocal basis.[3] In order to go further in addressing enforceability concerns and internationalising arbitration in the UAE, efforts have been made to reform arbitration and its practices, so that it is in compliance with its international obligations.

The UAE, and Dubai in particular, is demonstrating to the international community that it is serious about putting in place the necessary infrastructure and laws to successfully count itself as one of the key arbitration players, alongside London, Paris and Hong Kong. This has been underscored by the establishment of key regional arbitration centres such as the Dubai International Arbitration Centre (DIAC). In addition,the joint venture between the DIFC and the London Court of International Arbitration (LCIA), in February 2009, created the DIFC–LCIA Arbitration Centre (DIFC–LCIA). There are significant benefits arising from this joint venture, in particular for international investors, where the language of the arbitration is English and the rules will be familiar to many. In the long run, as arbitration matures in the region business confidence in the sector will grow and encourage further foreign investment in the region.

The DIFC–LCIA operates alongside the longer-established DIAC, and the Abu Dhabi Commercial Conciliation and Arbitration Centre. All three offer their own procedural rules and regulations for the amicable settlement of disputes through arbitration. There are other regional arbitration centres, such as those in Sharjah and Ras Al Khaimah; however, reference to regional UAE arbitration centres for the purposes of

2 UAE Civil Procedure Code, Federal Law No. (11) of 1992, Chapter 111, Articles 207, 208, 209, 214, 215, 216, 217.

3 Ibid., at p. 80.

this chapter will focus on the DIAC and the DIFC–LCIA, as these have the most tested rules and practices to date in the UAE. The relatively recent conception of the UAE's arbitration centres means official publicised statistics are limited.

Figures published by the DIAC in 2010 show a sharp increase in the caseload, where a total of 292 cases were handled by the DIAC in 2009 and 186 cases in 2010 (until June), up from 77 and 100 in 2007 and 2008, respectively.[4] The increase in arbitration cases demonstrates a growing trend towards the preferred use of arbitration forums to settle disputes as opposed to lengthy and expensive civil court proceedings. Another reason, according to the Dubai Chamber of Commerce and Industry, is the wider use of arbitration clauses in corporate contracts, specifying an obligation for disputes to be heard under DIAC Rules.[5]

In comparison, there have been around 15 arbitration cases in the DIFC–LCIA, concerning both domestic and international matters arising from countries such as the British Virgin Islands, the Cayman Islands, Hong Kong, Kuwait, Malaysia, Norway, Oman and the UAE. The current disputes being heard in Dubai under the auspices of the DIFC–LCIA rules, concern, *inter alia*, commodities, construction, engineering, energy and consultancy services, with the amounts in dispute in the cases ranging from 180,000 dirhams to over 367 million dirhams.[6]

II THE YEAR IN REVIEW

i Developments affecting international arbitration

Issues surrounding the enforcement of foreign awards within the UAE, even after the UAE's accession to the New York Convention, still exist, albeit to an ever-lessening degree. The difficulty is that the Code contains a provision allowing the UAE courts the right to refuse to execute a foreign judgment if it violates 'moral code or public order'.[7] Whether the Draft Arbitration Law will address difficulties in the procedural and enforcement aspect of arbitration awards will only become apparent after it is implemented and the reformed law is put to the test. The Draft Arbitration Law has remained in 'draft' form for a number of years. Whether the new arbitration law rectifies the difficulties surrounding the ratification and enforcement of both domestic and foreign awards will depend on the terminology of the final version. However, some measure of comfort can be taken from an application before the Dubai courts for the ratification of two related foreign arbitral awards, which were allowed at court of first instance level in January 2011, and subsequently upheld in the Court of Appeal on 22 February 2012.[8] In particular, the Court of Appeal confirmed that pursuant to the Federal Decree of 2006 concerning accession to the New York Convention, the courts may not reject the

4 Dubai International Arbitration Centre, Bi-Annual Statistics 2010, www.diac.ae/idias/resource/photo/diac_biannual.pdf.

5 Ibid.

6 Information as provided by Remy Gerbay, Registrar of DIFC–LCIA as of 26 April 2010.

7 The UAE Civil Procedure Code, Federal Law No. 11 of 1992, Chapter IV, Article 235.

8 Dubai Court of Appeal judgment in case No. 126/2011, dated 22 February 2012.

approval and execution of a foreign arbitral award, unless a party can adduce proof to establish one of the grounds set out in Article V of the New York Convention for refusal of recognition of an award (in this particular case, the relevant ground relied upon by the party challenging ratification was the capacity of the signatory to the arbitration agreement to execute the agreement on behalf of the entity). The Federal Court of First Instance in the Emirate of Fujairah in 2010 ratified an arbitral award for enforcement made by a sole arbitrator with a London seat under the London Maritime Association Arbitration Rules. The Court, however, appears not to have debated in detail the merits. The decision was not subsequently challenged by the defendant and, as such, remains in place.

The positive trend continued in the *Airmech* case where the Dubai Court of Cassation categorically ruled on 18 September 2012 that foreign awards were only subject to its jurisdiction to the extent that they were in compliance with Federal Decree No. 43 of 2006, by which the New York Convention was ratified in the UAE, and rather encouragingly rulings of this nature are becoming increasingly common. However, it should not be forgotten that the UAE adopts a civil legal system and therefore decisions of higher Courts are of persuasive value only. Accordingly the uncertainty of the ratification and enforcement process will remain unless and until a complete and independent Arbitration Law comes into effect that properly addresses the current shortcomings.

ii Arbitration developments in the local courts

There remains a great deal of uncertainty under the Code over the recognition and enforcement of arbitration awards in the local courts; the fear is that such awards will be refused on trivial and unpredictable grounds. A particular low point for arbitration in Dubai was the Court of Cassation's decision in the 2004 case of International Bechtel Co.[9] The Court of Cassation, the UAE's highest civil court, annulled an arbitral award made two years earlier in Dubai in favour of the claimant on the grounds that the arbitrator had failed to swear witnesses in the manner prescribed by UAE law for court hearings.

In a more recent case,[10] a DIAC arbitral award was nullified (and the validity of many other DIAC awards called into question) when the Dubai Court of Cassation held that Article 2 of Law No. 13 of 2008 Regulating the Interim Real Estate Register in the Emirate of Dubai is a matter of public policy, and as such, disputes in relation to Article 2 are under the exclusive jurisdiction of the Dubai courts, and are therefore not open to arbitration.[11] The effect of this decision will have potentially wide-ranging implications, depending on the extent to which the entire Law No. 13 of 2008 is determined to be in relation to matters of 'public policy'. These examples help to highlight the importance for legal practitioners of ensuring that when conducting arbitration proceedings in the UAE

9 *International Bechtel Co. Ltd v. Department of Civil Aviation of the Government of Dubai*, 300 F. Supp. 2d 112[1] (DDC 2004).

10 *Baiti Real Estate Development v. Dynasty Zarooni*.

11 Nassif BouMalhab and Susie Abdel-Nabi of Clyde & Co.

that they are done so fully in accordance with the Code in order to minimise the risk of any judgment being set aside on arbitrary technical grounds.

Arbitrations conducted through the DIAC differ from arbitrations conducted through other tribunals as to their position on the recoverability of legal fees incurred during arbitration proceedings. The DIAC Rules provide for the arbitral award to contain an award of the costs of arbitration and how those costs are to be apportioned. Those costs are defined as the administrative fees for the claim, the tribunal costs and experts' costs. However, the DIAC Rules in their current form do not appear to provide for the award of legal fees. The issue was raised in the Dubai Court of Cassation in case No. 282/2012, where the Court found that legal fees could only be awarded if (1) the applicable procedural law allowed for the recovery of legal fees; (2) the rules agreed to by the parties allowed for an award of costs of legal fees; or (3) the power to award legal fees was contained in the arbitral agreement. The Court further held that neither the Code nor the DIAC rules confer the power to award legal fees on the arbitral tribunal. On the basis of that judgment, therefore, a successful party in DIAC Arbitration proceedings may only be entitled to recover legal fees where such a power is granted by the arbitration agreement, or, possibly, if such a power is contained in the terms of reference. Of course, it remains to be seen whether the Dubai courts will adopt this approach to interpreting the DIAC Rules across the board.[12]

The challenge has also been enforcing DIFC awards in the Dubai courts, as seen in the case of *Property Concepts FZE v. Lootah Network Real Estate & Commercial Brokerage*.[13] Although the process for ratification and recognition of a DIFC–LCIA award should be relatively straightforward, under the current procedure a new Dubai court application is required, and all available details of the assets against which enforcement is sought should be provided. The application must be signed before the Chief Justice of the Dubai Commercial Court. The documents must then be taken to the execution judge; however, at this stage the court will only accept the signature of a legal representative with rights of audience before the Dubai courts (or the individual or authorised signatory in person). In practice, and despite the Protocol of Enforcement in place between the two courts, this is not necessarily straightforward and can be time-consuming. Meanwhile, the DIFC court has implemented new administrative procedures and a practice direction to clarify minor issues that arose during the course of the application for ratification in that case.

Dubai Law No. 16 of 2011, which amends Dubai Law No. 12 of 2004, has established, in greater detail, the procedure to be followed for an application for enforcement of a DIFC court order in the Dubai courts, including an order ratifying an arbitral award.

The UAE has demonstrated efforts to encourage the settlement of disputes through methods of alternative dispute resolution (ADR) by Law No. 19 of 2009 establishing the Centre for Amicable Settlements of Disputes (the ADR Law) on 15 September 2009.

12 Karrar-Lewsley, Robert, Al Tamimi & Company: Recovering Legal Costs in DIAC Arbitrations, 2013.

13 D-L9008, ARB 001/2010. KBH Kaanuun acted as the legal representatives of the claimant.

An incentive to settle is provided to participants in the form of a refund of half of the upfront fees payable for registration of a dispute with the Centre upon the parties reaching settlement. If a settlement is reached, the settlement agreement must be signed by all the parties. Article 12 of the ADR Law provides that a settlement agreement signed under the auspices of the Centre will be directly enforceable in the Dubai courts as a writ of execution.

There are likely to be mixed views on the desirability of compulsory ADR, and it will also be interesting to see how the Centre, once established, will work alongside already established centres. Many will welcome it as a simple and effective way of keeping disputes out of court, which will save time and expense for the parties, free up court time and achieve certainty for the parties. However, some may not welcome the compulsory nature of the process since many cases will not be suitable for ADR, in particular if, at the time the ADR hearing takes place, the case is not sufficiently developed for an informed conciliation process to take place or if the parties have already attempted unsuccessfully to settle their dispute.

With such uncertainty as to the UAE's approach to international and domestic arbitration under the UAE Code, many commercial contracts are now drafted subject to the arbitration rules of DIAC, the DIFC–LCIA and International Chamber of Commerce. DIAC revised and adapted its rules to meet with international standards and best practice. The new rules were issued by Decree No. (11) of 2007 and are considered to be among the most modern and developed set of international arbitration rules due to their inclusion of best arbitration practices.[14]

Another forum available for the settlement of disputes in the UAE is the DIFC, which in 2008 enacted a new DIFC Arbitration Law, DIFC Law No. 1 of 2008 (the 2008 Law), which repealed Arbitration Law No. 8 of 2004. The 2008 Law provides a legislative platform for comprehensive dispute resolution and and is based on the UNCITRAL Model Law. Other similarities include the application of the 2008 Law to both civil and commercial arbitrations, whether international or domestic, and include provisions regarding enforcement and grounds for refusing recognition or enforcement. A major change to the 2008 Law is the elimination of jurisdiction limitations – parties are now allowed to seat their arbitration in the DIFC regardless of whether they have any connection with the DIFC.

The 2008 Law was also intended to simplify the process for recognition of an award by the DIFC courts and in turn enforcing an award inside or outside of the DIFC. Pursuant to Article 42(1) of the DIFC Court Law, an award once ratified by the DIFC court is enforceable within the DIFC. Following ratification by the DIFC court, a party may apply to have the ratification order converted to a Dubai court order, which will then be enforceable. These steps have been set out in the 2009 memorandum of understanding between Dubai courts and the DIFC courts and the related protocol of enforcement, the intention being to ultimately simplify the process of enforcement of DIFC awards in the Dubai courts. The much-publicised relationship between the DIFC and Dubai courts will undoubtedly encourage foreign investors and quash any

14 Op. cit. 4.

reservations they may have regarding enforcing a DIFC award in the Dubai courts. The recent DIFC court decision in *Injazat Capital Limited & 1 Or v. Denton Wilde Sapte & Co* (a firm),[15] however, caused some consternation within the legal community as to whether the 2008 Law has failed to fully implement the terms of the New York Convention. In this case, the DIFC court held that Article 13 of the 2008 Law, which provides for a mandatory stay of court proceedings where there is a valid arbitration agreement, is only applicable to arbitration clauses where the seat of arbitration is the DIFC. Moreover, having considered the terms of Article 10 of the 2008 Law[16] and the 'detailed and precise' nature of the 2008 Law, His Honour Justice Sir David Steel went on to conclude, though reluctantly, that the court also had no discretion to order a stay of court proceedings where the seat of an arbitration agreement was not in the DIFC.

The *Injazat* decision was criticised on a number of grounds, including that the Court should have ordered a mandatory stay of the proceedings based on the presumption that legislation is drafted in a manner consistent with treaty obligations. In fact, Justice Steele considered this presumption in his judgment, but found that there was no ambiguity in the drafting of the legislation, so that the presumption was displaced. The defendant submitted, in the alternative, that there had been a 'double opt-out' of the DIFC Court's jurisdiction because, first, there was an agreement to arbitrate, and second, under the terms and conditions of the agreement, disputes were to be submitted to the law and jurisdiction of the Dubai courts.

The Court considered whether the opt-out provisions in Law No. 12 of 2004 (as amended) applied in respect of arbitration clauses, specifically whether the words 'any other court' could be construed to include a reference to arbitration. Justice Steele found (by particular reference to the definition of 'court' and 'arbitral tribunal' contained in the UNCITRAL Model Law) that the words 'any other court' in the opt-out provision referred to a court of law presided over by a judge, and not to an arbitral tribunal. Critics have suggested that this is too narrow a construction of Law No. 12.

Legal practitioners in Dubai commonly refer to the local courts of the Emirate as the 'Dubai courts', as distinct from the DIFC courts. In another controversial aspect of the *Injazat* judgment, Justice Steele nevertheless concluded that, taking into account factors such as the place of execution and performance of certain documents, the language used and the location of the parties, that the reference to 'Dubai courts' was, in the particular circumstances, a reference to the DIFC courts.

Nevertheless, Justice Steel went on to consider the validity of the arbitration agreement under Dubai law, as would be applied by the (non-DIFC) Dubai courts. He concluded that, even if the parties had opted for the jurisdiction of the (non-DIFC) Dubai courts, that the arbitration agreement was 'manifestly invalid and thus no stay could be legitimate'.

15 CFI 019/2010 *Injazat Capital Limited and Injazat Technology Fund B.S.C. v. Denton Wilde Sapte & Co*.

16 Article 10 of the 2008 Law: 'In matters governed by this Law, no DIFC Court shall intervene except to the extent so provided in this Law.'

The issue arose again soon afterwards in the case of *International Electromechanical Services v. Al Fattan*. However, in this instance, although the court also found no legislative basis for granting a stay in relation to foreign-seated arbitrations, it went on to find that the court had an inherent jurisdiction to stay proceedings in those circumstances.

These issues led to an amendment to the DIFC Arbitration Law in December 2013, to bring the Arbitration Law in line with the UAE's obligations under the New York Convention and which addressed the possibility for different treatment in determining a stay application for DIFC-seated and non-DIFC-seated arbitrations.

There has also been a recent judicial consideration of the time frame in which an award must be rendered by the Tribunal. In a 2013 case (*Middle East Foundations LLC v. Meydan Group LLC*) the defendant sought to argue that an arbitral award should not be ratified because there had been multiple extensions of time for the issuing of the award granted by the DIAC executive committee. The defendant accepted that the DIAC Rules permit the executive committee to extend the deadline, but argued that this power was limited to one extension. The court of first instance agreed with the defendant and held that the award was invalid.

Following an appeal, the Court of Appeal recently determined that the executive committee's power to grant an extension of time could be exercised multiple times. The defendant has filed an appeal in the Court of Cassation, and a determination on this is awaited.

iii Investor–state disputes

Investor–state disputes have become the focus of growing attention in the Arab world. In November 2009 Dubai World, the Dubai state trading entity and holding company for property giant Nakheel, announced it was unable to meet repayment of its estimated US$60 billion debt.[17] In response to the Dubai World financial crisis, a special tribunal was set up in December 2009 to handle debt claims arising out of the reorganisation and restructuring of Dubai World and any of its subsidiaries (the Tribunal). The Tribunal members currently comprise three senior international judges from the DIFC courts, Sir Anthony Evans (a former High Court judge of England and Wales and former Chief Justice of the DIFC courts), Michael Hwang (Chief Justice of the DIFC Courts and a former judicial commissioner of the Supreme Court of Singapore) and Justice Sir John Chadwick (judge of the DIFC courts and a former judge of the Court of Appeal of England and Wales), who is a world-renowned bankruptcy and insolvency specialist.[18] Additionally, a small claims panel of the Tribunal has been established to deal with claims less than 100,000 dirhams in value, or, where all the parties consent, in the case of employment claims of any value or other claims up to a maximum value of 500,000 dirhams.

17 Stephen McCormish and Dr Sam Luttrell, Enforcement of Contractual Rights in Dubai, p. 1 (2 December 2009), available at www.aar.com.au/pubs/ldr/cuarbdec09.htm.

18 Special Tribunal set up for Dubai World Disputes (14 December 2009) www.clydeco.com/knowledge/articles/special-tribunal-established-for-dubai-world-disputes.cfm.

The members are empowered, if necessary, to supervise the financial reorganisation of Dubai World and its subsidiaries and are authorised to adjudicate in disputes relating to restructuring the debt of Dubai World and any of its subsidiaries.

On 5 April 2010, the first claim was filed at the Tribunal against Limitless, a real estate development company unit of and business of Dubai World known for its connection to the building of the World and the Palm Islands projects in Dubai. The claim, brought by a former employee of Limitless, sought 95,000 dirhams as monies due for end-of-service payment and owed holiday pay.

In June 2010 the Tribunal considered the first application for enforcement of an arbitration award (subject to DIAC Rules and with a Dubai seat) (*Vinod Dang v. Jumeirah Islands LLC*).[19] Ratification and enforcement of the award was challenged by the respondent on the basis that the award did not include terms of reference as was a mandatory requirement under UAE law, and on a proper translation (from Arabic) and construction of the relevant provisions of UAE law the only requirement was that the arbitration agreement must be referred to or set out in the award, which had been done in the present case. The Tribunal, applying the powers it had been granted under Decree No. 57 of 2009 (as amended), ruled in favour of the applicant to recognise and ratify the arbitral award and ordered the respondent to pay interest and the applicant's costs of the application.

The Tribunal has issued Practice Direction No. 1 of 2010 that clearly sets out that the Tribunal will respect arbitration clauses in contracts. Nevertheless, in *Samer Farhan Farhat v. International City – Nakheel*,[20] the Tribunal held that an investor in a property dispute with International City (a Nakheel subsidiary) was entitled to bring his claim before the Tribunal despite the existence of, on the face of it, a valid arbitration agreement. The Tribunal found that the claimant, although he had signed the sale and purchase agreement, had not been given an opportunity to read and consider its terms, and in particular the agreement to arbitrate contained therein, and he was accordingly not bound by the arbitration clause. This is a radical departure from the approach usually expected from the courts in such circumstances, and demonstrates the scope of the Tribunal's authority and its willingness to take forceful and controversial decisions.

In *Hedley Emirates Contracting LLC v. Nakheel PJSC*, the Tribunal confirmed that Practice Direction 1 of 2010 applied to all valid arbitration agreements, whether or not arbitration proceedings had been commenced at the time of the issue of Decree 57, and that the Practice Direction applied to both domestic and international arbitrations.[21]

On 23 August 2011, by way of decree, Nakheel PJSC and all of its subsidiaries ceased to be subsidiaries of Dubai World. To allay the subsequent confusion as to the legal status of claims to be brought in the Tribunal, the Tribunal issued Practice Direction 3 of 2011, which, until further ruling, will govern any claims against Nakheel and its

19 Claim No. DWT/0003/2010 and DWT/0010/2010. KBH Kaanuun acted as the legal representative of the claimant.

20 Claim No. DWT/0018/2011 *Samer Farhan Farhat v. International City – Nakheel*.

21 Dubai World Special Tribunal Rules on Upholding Arbitration Agreements, 10 October 2011, Herbert Smith.

subsidiaries in the Tribunal. Matters already before the Tribunal as at 23 August 2011 will continue within the jurisdiction of the Tribunal. In the event of new claims to be brought, the Tribunal may require the would-be claimant to make an application to the Tribunal for the purpose of establishing whether or not jurisdiction exists. In the case of *Gaber Nemer Kerger v. The Palm Jebel Ali LLC*,[22] Nakheel challenged the continuing jurisdiction of the Tribunal to hear the case brought against it (it was accepted that at the time the claim was filed, jurisdiction did in fact exist). The Tribunal held that share transfers that resulted in the defendant no longer being a subsidiary of Dubai World did not deprive the Tribunal of the jurisdiction to hear claims against it in absence of any legislation to that effect. Additionally, the Tribunal found that it was not able to form a conclusive view as to whether or not the defendant ceased to be a subsidiary of Dubai World for the purposes of Decree No. 57. The jurisdictional question of the Tribunal is of great significance for investors in Nakheel and its subsidiaries, as most of those contractual disputes are subject to arbitration agreements, and it is widely accepted that the Tribunal has consistently offered a straightforward, efficient and predictable means of ratifying arbitral awards.

Foreign investors may seek to commence investor–state arbitration under one of the UAE's 11 bilateral investment treaties (BITs). The vast number of BITs in force worldwide and their subsequent interlocking nature have made investor–state arbitration possible. By signing a BIT, the foreign investing party is afforded substantial protection for its investment under international law. Thus depending on the terms of the BIT, an investor may have the option of enforcing an arbitral award in Dubai and against Dubai-owned assets elsewhere under the New York Convention or Washington Convention.[23]

The UAE is a signatory to the Washington Convention 1965, which established the International Centre for Settlement of Investment Disputes (ICSID). The ICSID Convention provides a comprehensive set of rules for the settlement of investment disputes, including several provisions that are clearly favourable to foreign investors. There is now greater awareness on the part of both foreign investors and governments about the investor–state dispute resolution process.

There have been a number of reported cases bought before ICSID arbitral tribunals against Arab states. Specifically in relation to the UAE, one of the most widely reported cases is the *Soufraki* case,[24] where a claim was bought against the UAE under the Italy–UAE BIT. The claimant's rights under the BIT and its right to submit a claim to ICSID were raised by the defence, but the claim was eventually rejected by ICSID in its entirety for lack of jurisdiction.

Cases such as *Soufraki* have contributed greatly to the development of case law on the determination of complex issues such as nationality under international law. In the Soufraki case it was decided that the claimant had not proven that he held the Italian

22 http://herbertsmitharbitrationnews.com/2011/10/10/dubai-world-special-tribunal-rules-on-upholding-arbitration-agreements.

23 Op. cit. 26.

24 *Soufraki v. United Arab Emirates,* ICSID case No. ARB/02/07.

nationality necessary to claim under one of Italy's investment treaties.[25] Pursuant to figures published in 2008 by the United Nations Conference of Trade and Development relating to the latest developments in investor–state dispute settlements, there are two known investment-treaty claims filed with ICSID by defendants against the UAE as of December 2007; the figures remained unchanged for December 2008.[26]

Another notable trend developing is that for the first time in known investment treaty case history, an Arab company has initiated arbitration against another Arab state. The case, *Desert Line Projects LLC v. Republic of Yemen*,[27] involved an Omani company, Desert Line, which relied on the BIT between itself and Yemen. Since the Desert Line case, a case involving an investor from the UAE against another Arab state was recently registered by ICSID, in the matter of *MTN (Dubai) Limited and MTN Yemen for Mobile Telephones v. Republic of Yemen*.[28] The significance of such Arab versus Arab investment disputes demonstrates that actions pursuant to BITs are no longer dominated by investors from Western states. It shows that Arab investors have realised that they too can take advantage of these treaties to protect their investments abroad. It is also for these reasons that a greater understanding in the UAE is required by those wishing to rely on BITs in order that parties are fully aware of their responsibilities and liabilities under a BIT.

Alternatively, investors may bring litigation proceedings in Dubai and UAE federal courts, and consider enforcing the judgment in Dubai and against Dubai-owned assets in other Gulf states under the Riyadh Convention on Judicial Cooperation 1983.

III OUTLOOK AND CONCLUSIONS

There has been much international focus on the UAE in recent times. However, the UAE has responded constructively with the establishment of the Dubai World Tribunal, which should instil some confidence in international and local investors that the systems in place can deal with potential claims efficiently and fairly. Recent trends in the rise of investor–state disputes will undoubtedly see an increase in investor–state arbitration cases. To ensure that Arab countries take advantage of the protective measures, a greater understanding of BITs and the potential liabilities under such treaties, as well as the available forums for the settlement of disputes is required. The UAE is on the cusp of being recognised as an international arbitration hub; however, much will depend on the pending Draft Arbitration Law, along with the success of arbitration centres such as the DIAC and the DIFC–LCIA. There has been substantial progress on the arbitration front in the UAE, however, there is still some way to go. For the newer arbitration centres and for the UAE government and legislative ministries, it will be an exciting and testing

25 Allen & Overy, Investment Treaty Arbitration: Protecting and Promoting Foreign Investments (2010), available at www.allenovery.com/AOWeb/binaries/51290.pdf.

26 IIA Monitor No. 1 (2008): International investment agreements, available at www.unctad.org/en/docs/iteiia20083_en.pdf.

27 ICSID case No. ARB/05/17.

28 ICSID case No. ARB/09/7; Dany Khayat, 'Investor–state disputes on the rise in the Arab world', p. 39, Arbitration Newsletter (March 2010).

time. The current developments have created high hopes for the future, with greater transparency, fairness and consistency in arbitration proceedings in the region. Only time will tell whether expectations are met.

Nonetheless, one thing is certain, the UAE is committed to arbitration and has adopted a progressive approach to reforming and developing its practices and laws to successfully deal with international and domestic arbitration. The realisation that arbitration is both an effective and cost-saving dispute resolution alternative is evident from the UAE's push towards amending its federal law on arbitration and enforcement. The UAE's recent revision of the DIAC's rules and the joint venture between the DIFC and the LCIA also demonstrate its determination to make practical and effective changes to the country's current arbitration practice.

Some commentators hint that the latest Draft Arbitration Law is not in line with the UNCITRAL Model as hoped with a number of key and substantial differences, with some even going so far as to state that the latest draft has taken a further step backwards. The long-term goal of the UAE is for continued economic growth and social development and a legal system that can competently deal with both international and domestic arbitration cases, which will ultimately appeal to foreign and local investors. Recent decisions of the Dubai courts suggest that there is an appetite to bring arbitration practice in the UAE more directly in line with international best practice.

However, with the rise in the number of arbitration cases being heard in the UAE, a comprehensive arbitration law is needed now more than ever.

Appendix 1

ABOUT THE AUTHORS

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Mr Singh is a partner at KBH Kaanuun's Dubai office.

Mr Singh is a dual-qualified lawyer with experience of and permission to work in two jurisdictions: India and the United Kingdom with over 10 years' experience. He is a partner in the corporate group and his expertise covers mainstream company and commercial work. He has brought a wealth of experience to Dubai office of KBH Kaanuun, particularly in the areas of mergers and acquisitions (acting for both public companies and private companies), company law and administration matters.

Mr Singh is also an experienced arbitrator and works closely with the dispute resolution group to assist clients in international arbitrations. He has, for three years running, been listed as a leading individual by *Chambers Asia* for his dispute resolution work and is also listed as a leading individual for developing the Indian practice of a UK-based firm.

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