Kluwer Arbitration Blog

Dubai – a hub for international arbitration?

Mike McClure (Herbert Smith Freehills LLP) · Wednesday, January 23rd, 2013 · Herbert Smith Freehills

If the answer is London, Paris, Geneva, New York, Tokyo and Singapore, what is the question? International cities? Fashion hot spots? Location of Manchester United supporters' clubs? It may well be the answer to all three questions (although I confess that I have not actually checked the Manchester United one), but they are also the top six most commonly preferred arbitration seats according to the 2010 Queen Mary/White & Case International Arbitration Survey (London being the most commonly preferred). The Survey was repeated in 2012, although it focussed on current and preferred practices in the arbitral process rather than arbitral choices. However, despite being almost three years old, the 2010 Survey remains interesting and relevant when considering the question of whether Dubai (and other cities) is – or could well become – a global hub for international arbitration.

One glaring omission from the above list is a city in the Middle East (Hong Kong may also take issue with its omission). The obvious retort is that the international nature of arbitration means that the current top seats can cope adequately with disputes from all over the world, and thus there is no need for an arbitration hub in the region. That may well be true, but as the Middle East grows in prominence in the international business community, it is not inconceivable that there will be a drive for a regional arbitration hub.

The 2010 Survey ranked the formal legal infrastructure as the number one influence on the choice of arbitral seat (factors included: the national arbitration law; arbitral enforcement regime; and neutrality and impartiality of the legal system). While it is not clear from the Survey exactly how Dubai scored in this category, there have been a number of developments in Dubai in recent months that could be viewed as a trend towards developing a more pro-arbitration infrastructure. This blog considers some of those developments.

Background: The arbitral regime in Dubai

The starting point on any legal discussion about Dubai is to note that the United Arab Emirates (UAE) effectively has a three tier legal system:

• The UAE itself is a civil law state. It has a number of codes governing various laws, both at the federal level and also at the specific level of each Emirate (there are seven Emirates in the UAE, of which Abu Dhabi and Dubai are the two largest).

• Within Dubai, the Government has established a number of "Free Zones". By far the largest (and

most well-known) Free Zone is the Dubai International Financial Centre (DIFC). The DIFC is an independent jurisdiction under the UAE Constitution. It has its own civil and commercial laws, which are written in English and default to English law. It also has its own courts, with judges taken from leading common law jurisdictions including England, Singapore and Hong Kong. It is sometimes described as a "common law island in a civil law ocean".

The DIFC has its own Arbitration Law which is modelled on the UNICTRAL Model Law. Pursuant to this law, there is no requirement for parties to have any connection to the DIFC for an arbitration to be seated there. Arbitrations seated in "mainland" Dubai are governed by Articles 203-218 of the UAE Civil Procedure Code (CPC), which is based largely on the former Egyptian Civil Procedure Law. The UAE also signed the New York Convention (NYC) in 2006 and its provisions apply to both the "mainland" and the DIFC.

Recent developments

1. Dubai: Enforcement of foreign arbitral awards

Despite the fact that the UAE ratified the NYC in 2006, until recently it was not entirely clear whether or not local courts would refer to the CPC when considering whether to enforce a foreign arbitral award, particularly given there are a greater number of reasons to resist enforcement in the CPC than in the NYC. Indeed, it was only in 2011 that a UAE court enforced a foreign award under the NYC (the decision was rendered by a court in Fujairah – one of the other seven Emirates of the UAE).

Since 2011, there have been a number of other examples of courts enforcing foreign awards. Notably, in October 2012 in Macsteel International v Airmech, the Dubai Court of Cassation enforced two related foreign awards and based its decision entirely on the provisions of the NYC (reported in a blog post by Gordon Blanke). Significantly, the court emphatically stated that the CPC provisions are not relevant in the context of enforcement of foreign awards. (Interestingly, however, the UAE courts are yet to consider whether they should enforce an award annulled at its seat, or an award arguably requiring ratification at its foreign seat.)

2. DIFC: Staying court proceedings in favour of arbitration

One area of concern/confusion for arbitration practitioners in 2012 was whether the DIFC courts could stay court proceedings in favour of foreign arbitration (i.e. non-DIFC seat). The confusion arose following the decision in Injazat v Denton Wilde Sapte (March 2012), where the DIFC Court of First Instance held that: (i) the DIFC Arbitration Law did not permit the court to stay court proceedings commenced in breach of an agreement providing for foreign arbitration; and (ii) the court did not have an inherent jurisdiction to order a stay of court proceedings in such circumstances. The court recognised that its interpretation of the DIFC Arbitration Law put the UAE in breach of its treaty obligations under the NYC, but considered that it was bound to that interpretation by the relevant provisions of the DIFC Arbitration Law.

However, in October 2012, the issue was considered again in International Electromechanical Services v Al Fattan (reported in a blog post by Khalil Mechantaf). This time, the Court of First Instance ordered a stay of the court proceedings in favour of arbitration in accordance with the arbitration agreement in the parties' contract. The court agreed that there was no statutory obligation to stay proceedings in favour of foreign arbitration (as it had said in Injazat), but it went on to say that it did not accept that it had no inherent jurisdiction to order a stay where that

jurisdiction was not expressly excluded by statute. The Al Fattan judgment was a timely correction following the confusion created by Injazat.

3. Dubai World Tribunal

In 2009, the Dubai World Tribunal (DWT) was established to hear disputes brought by or against Dubai World and its subsidiaries in the aftermath of Dubai World's restructuring (Dubai Decree No 57 of 2009, as amended by Dubai Decree No 11 of 2010). The DWT was part of a legislative insolvency package aimed at offering Dubai World's many creditors a degree of certainty and a neutral forum to pursue their claims (the Decree mandatorily excludes the jurisdiction of the Dubai and DIFC courts in respect of such claims). The DWT is based in the DIFC and over 80 claims have been submitted to it so far. The Chairman is Sir Anthony Evans and the other members are Michael Hwang SC, Sir John Chadwick and Sir David Steel (who joined in October 2012).

The DWT has noted that it will respect and enforce arbitration agreements made between Dubai World and its creditors and that parties should continue with arbitration proceedings in accordance with the terms of their relevant contract (Emirates Contracting v Nakheel – July 2011).

4. New arbitration law?

The UAE legislature is in the process of considering a new Federal Arbitration Law. The most recent draft was released in February 2012, although the law has been in draft for a number of years and there appear to be no immediate plans to implement it. The draft law is based on the UNCITRAL Model Law, but it also takes guidance from a number of principles from the Egyptian arbitration law. It will be interesting to see whether this law is ever implemented and, if so, the final form that it takes, but it is positive that the UAE is considering such a law to formalise its arbitration regime.

5. Other recent developments

There have, however, been some arbitral developments in 2012 that still require some clarification; notably, there are questions over the arbitrability of domestic property disputes (as reported in a blog post by Gordon Blanke). In addition, another area the arbitration community is watching with interest is a case in the Dubai courts where an arbitral panel is being sued by one of the parties to a DIAC (Dubai International Arbitration Centre) arbitration following allegations that it breached an order relating to confidential settlement talks.

Conclusion?

Is it possible to draw any conclusions from the above? None of the developments are particularly noteworthy in isolation (particularly for practitioners from more developed arbitration jurisdictions), but taken together they would appear to be representative of a trend towards a more developed pro-arbitration culture, albeit there are some areas that still require clarification.

Interestingly, the 2010 Queen Mary Survey also noted that three of the top six influences on the choice of arbitral seat were: convenience (ranked third); general infrastructure (fifth); and location of people, including legal advisors (sixth). Dubai scores well on all these fronts, having one of the most well connected international airports in the world, an abundance of hotels with extensive conference/hearing facilities, and a large concentration of legal professionals, many with arbitration experience from a number of different jurisdictions. Overall, while it is perhaps too

early to describe Dubai as an international arbitration hub, it most definitely has the potential to become one.

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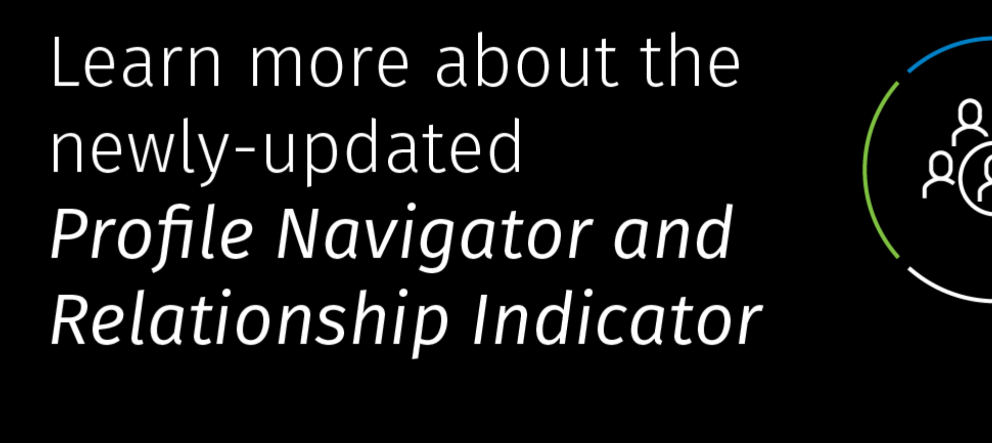

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