

Kluwer Arbitration Blog

Building the Case for Family Business Arbitration in the GCC Region

Peter Smith (Charles Russell Speechlys LLP) · Friday, June 17th, 2022

Family businesses – commercial entities in which multiple generations of a family wield influence over decision-making – are one of the oldest and most prevalent forms of association across the world, ranging from convenience stores to multinational corporations like Walmart, Samsung and Porsche. In 2020, Boston Consulting Group [described family businesses](#) as “contributing between 25% and 49% of GDP in countries as diverse as India and Germany and employing millions of people”. In the [six Gulf Co-operation Council \(GCC\) countries](#), where family-owned businesses are heavily concentrated, they contribute about 60% of GDP, employ more than 80% of the workforce, and in the UAE and Saudi Arabia, make up around 90% of the private sector. The GCC thus has one of the highest concentrations of family businesses anywhere in the world. As a result, the resolution of family business disputes (FBD) is an important issue that merits a bespoke dispute resolution approach.

An FBD may arise between two or more family members over the ownership and/or management of the business. Because the disputants have personal relationships, an FBD is not strictly a commercial dispute between arm’s length participants. For instance, a founding parent may apply their discretion throughout their lifetime to divide profits between family members like siblings, children, in-laws and grandchildren. Upon death or retirement, a dispute may arise when the person or process that apportions profits does so in a different way. Alternatively, members of a family conglomerate may wish to “cash out” by selling their stake in the business, prompted by death, retirement, emigration, or a desire to redeploy that capital elsewhere. Disputes may arise over the identification of assets properly forming part of the overall business, the business valuation and the exit process. An FBD is a commercial dispute not a dispute involving ‘pure’ family law (whether public or private), nor a conflict about personal property or statutory inheritance rights, all of which fall within the mandatory jurisdiction of the civil ‘personal status’ courts found across the GCC.

The flexibility, privacy and confidentiality of process, and relative ease of cross-border enforcement when compared to litigation make arbitration a particularly useful forum for FBD resolution. Yet given the prevalence of arbitration in the region, it is odd that no arbitration institution in the GCC has specific rules for FBD. This is all the more surprising when the speed of change to the regional arbitration offering is considered. The [recent abolition](#) of the DIFC-LCIA Arbitration Centre by Dubai Decree 34 of 2021, the [move](#) of all future DIFC-LCIA arbitrations to the supervision of the Dubai International Arbitration Centre (DIAC), and the [publication](#) of DIAC’s new 2022 rules, are examples of how quickly the provision for and operation of arbitration

can change.

There is a further lack of public and government interest in FBD resolution. A [report](#) by the Family Business Council – Gulf (FBCG) in 2019 identified that “no specific reports on dispute resolution solutions for GCC family businesses” had previously been produced. This blog post sets out some of the issues that drafters of arbitration rules and laws should think about when considering future amendments, to cater better for family businesses and their disputes.

Stepped dispute resolution: mandatory mediation or conciliation before commencing arbitration

Arbitration can be costly and unnecessarily deplete the family assets. As an adversarial dispute resolution process, it can formalise and ratchet up the levels of animosity between family members in dispute. There may therefore be space for an alternative dispute resolution mechanism like negotiation or mediation to take place before the arbitration process is started, *even if* no express agreement has been reached between the parties. A [2021 report by the English Civil Justice Council](#) found that compulsory ADR before litigation was both legal under English law (in that parties could be compelled to go through it) and desirable in certain circumstances (paragraph 7, page 4). Indeed, this approach is already used in certain family law proceedings in England. As the English Civil Justice Council notes, financial dispute resolution is a court-assisted negotiation process in family cases, where the parties appear before a judge in a without prejudice meeting/hearing, intended to facilitate settlement between parties and “reduce the tension that inevitably arises in family disputes”.

A ‘stepped’ dispute resolution process may oblige disputing parties to mediate or negotiate in good faith for a period of time before arbitration can commence. Family business mediation can be surprisingly effective, with settlement agreements resulting from mediations binding and potentially enforceable across borders thanks in part to the 2019 United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Mediation Convention), which has been signed by 55 states (as of June 2022). In March 2022, the UAE [announced](#) that it intended to be the 56th state to sign.

Greater powers to consolidate or join disputes in the same dispute resolution process

As noted above, there is an array of potential triggers for a family business dispute, such as over business succession or when a prominent family member dies, retires or otherwise wishes to exit the business. To be clear, the issues considered in this blog post are distinct from inheritance or personal property matters and the focus is exclusively on the FBDs that may arise when considering business succession. This said, these personal matters may introduce an added a layer of animosity or complexity to what are otherwise business matters.

Disputes can also arise over management and control rights, the valuation of a family member’s stake in the business, poor business performance, or a distribution of family wealth including assets and dividends that is perceived as unfair. Changing family dynamics can cause disputes, as personal animosities arise, minor disagreements turn into bigger ones and other family members

are drawn in, with a detrimental effect on the enterprise's management and operation. Because family disputes can arise in different ways, the administration of justice would tip towards consolidating family disputes into one proceeding. One way to do this is to bind all potential parties in a single document like a family constitution or a shareholder agreement with an arbitration clause. A dispute in respect of that agreement could act as an anchor for an arbitration, whereby the parties agree after the tribunal has formed to bring other matters before it. It may be possible – and desirable – to go further, however. Somewhat surprisingly, given the business and emotional value in a family business that may be lost in a dispute, surveys have consistently shown that many family businesses do not have sufficient documentation in place to manage conflict.

The FBCG report (above) sets out data that paint a poor picture: in 2019, less than one third of large family businesses in the GCC had effective policies and practices in place to govern the family business, and in 2015, only 57 percent of surveyed entities in the Middle East used shareholders' agreements, and around a third used other forms of conflict resolution mechanism, entry-and-exit provisions and/or family councils.

As a result, arbitration institutions could consider wider powers to join or consolidate disputes, even if not on foot or outside the scope of the arbitration agreement, if the other disputes are closely connected to the anchor arbitration.

Compile, curate and publish a roster of appropriate arbitrators

An arbitrator in an FBD may have a greater jurisdiction than a court to consider matters in dispute so that a fair decision can be reached across the business and not just on one issue in isolation. Families may also wish to consider agreeing an arbitrator in advance or at least a mechanism for appointing a suitable candidate. Commercial arbitrators are often well-identified in industry guides and peer publications, but experienced private client arbitrators may not be so easy to find from public sources. Many family business arbitrators are appointed through informal connections, such as recommendations from friends.

Some arbitral institutions may be able to recommend an arbitrator on their roster who has particular knowledge and experience of family arbitrations, where family and personal relationships are mixed up with more conventional legal issues and may need to be addressed at the same time and with sensitivity. However, at present, as the FBCG report above notes, the main arbitral institutions do not publish lists of arbitrators with specific family business experience. In the UAE, Dubai Law No.9 of 2020 on Family Ownership has prompted the formation of a special judicial committee formed, [in the words of one commentator](#), out of “professionals with the relevant legal, financial, and—most importantly—family business expertise. The ultimate objective is to provide family firms with the confidentiality, speed and expertise they need to settle their disputes if they arise”. This committee could provide a list of potential arbitrators, meaning that families and their advisors can more easily find an appropriate arbitrator, either before or after a dispute crystallises.

Costs capping

Two of the advances in the new 2022 DIAC Rules were the introduction of an obligation requiring

parties to disclose the existence of third-party funding arrangements, and the express confirmation that legal fees and disbursements can be recovered inter partes (Articles 22.1 and 36.1 respectively).

With many FBDs less like commercial and more like family litigation in their dynamics, it is fair to suppose that more pressure should be put on parties not to incur unnecessary costs given their reflection in the overall depletion of the family's assets and the potential risks posed to the family's underlying businesses.

One approach would be to have mandatory costs budgeting where the tribunal approves limits on legal costs, which cap both expenditure and recovery. Another would be to fix recoverable hourly and disbursement rates. But granting tribunals powers to limit costs would be a logical extension that all but the wealthiest of parties would surely welcome.

The future

The ideas in this blog post may hopefully be a spur to future amendments to institutional rules and arbitration laws to make further accommodation for FBDs, given their economic importance and use of arbitration. This would be particularly welcome in the GCC where family businesses dominate and will likely do so for foreseeable future.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please [subscribe here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).

Profile Navigator and Relationship Indicator

Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

Learn more about the newly-updated *Profile Navigator and Relationship Indicator*



This entry was posted on Friday, June 17th, 2022 at 7:11 am and is filed under [Family disputes](#), [Gulf Cooperation Council \(GCC\)](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.