

THE INTERNATIONAL
ARBITRATION
REVIEW

THIRTEENTH EDITION

Editor
James H Carter

THE LAWREVIEWS

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CONTENTS

PREFACE.....	vii
<i>James H Carter</i>	
Chapter 1 ENERGY AND COMMODITY ARBITRATIONS.....	1
<i>Christian Jeffery</i>	
Chapter 2 FINANCIAL DEBT AND DAMAGES IN INVESTOR–STATE ARBITRATION	6
<i>Richard Caldwell</i>	
Chapter 3 ARGENTINA.....	13
<i>Federico Campolieti and Santiago Peña</i>	
Chapter 4 AUSTRIA.....	20
<i>Venus Valentina Wong and Alexander Zollner</i>	
Chapter 5 BELGIUM	34
<i>Arnaud Nuyts and Bruno Hardy</i>	
Chapter 6 BELIZE	44
<i>Eamon H Courtenay SC and Stacey N Castillo</i>	
Chapter 7 CHINA.....	54
<i>Wan Jia, Cui Wei and Wu Shanshan</i>	
Chapter 8 CYPRUS.....	63
<i>Alecos Markides</i>	
Chapter 9 ENGLAND AND WALES.....	73
<i>Duncan Speller and Mark Feldner</i>	
Chapter 10 FINLAND.....	88
<i>Kirsi Kannaste, Thomas Kolster and Laura Tuure-Fallström</i>	

Contents

Chapter 11	GERMANY.....	99
	<i>Tanja V Pfitzner</i>	
Chapter 12	GREECE.....	110
	<i>Eleni Skoufari and Christos Kostopoulos</i>	
Chapter 13	INDIA.....	121
	<i>Shardul Thacker</i>	
Chapter 14	INDONESIA.....	136
	<i>Karen Mills and Margaret Rose</i>	
Chapter 15	ISRAEL.....	145
	<i>Zvi Bar-Nathan and Daphna Kapeliuk</i>	
Chapter 16	ITALY.....	154
	<i>Michelangelo Cicogna and Andrew G Paton</i>	
Chapter 17	JAPAN.....	167
	<i>Yuko Kanamaru, Yoshinori Tatsuno and Daniel Allen</i>	
Chapter 18	LIECHTENSTEIN.....	173
	<i>Mario A König</i>	
Chapter 19	LUXEMBOURG.....	181
	<i>François Kremer and Séverine Hamm</i>	
Chapter 20	MALAYSIA.....	189
	<i>Yap Yeow Han, Lilian Saw, Yap Mei Yan, Bryan Wang and Prabjit Dev Singh</i>	
Chapter 21	MYANMAR.....	200
	<i>Minn Naing Oo, Kang Yanyi and Ei Ei Khin</i>	
Chapter 22	NETHERLANDS.....	206
	<i>Yvette Borrius, Jan Willem Bitter and Bart Jan Hermans</i>	
Chapter 23	NIGERIA.....	216
	<i>Babajide Ogundipe, Olamide Aleshinloye and Olayinka Ajose-Adeogun</i>	
Chapter 24	NORWAY.....	220
	<i>Carl E Roberts and Norman Hansen Meyer</i>	

Chapter 25	PARAGUAY.....	234
	<i>José A Moreno Rodríguez, Felicita Argaña Bendlin, Lucía Casal Zaldívar, María Belén Moreno and José Moreno Bendlin</i>	
Chapter 26	PHILIPPINES	241
	<i>Ruth Nichole R Ureta, Fritzzie Lyn F Español and Via Monina C Valdepeñas</i>	
Chapter 27	PORTUGAL.....	253
	<i>José Carlos Soares Machado and Rita Lynce de Faria</i>	
Chapter 28	ROMANIA	260
	<i>Sorina Olaru and Daniela Savin (Ghervas)</i>	
Chapter 29	SINGAPORE.....	274
	<i>Margaret Joan Ling and Vivekananda Neelakantan</i>	
Chapter 30	SPAIN.....	285
	<i>Emma Morales, Pablo Torres and Ana Velasco</i>	
Chapter 31	SWEDEN.....	303
	<i>Maria Fogdestam Agius</i>	
Chapter 32	SWITZERLAND	314
	<i>Martin Wiebecke</i>	
Chapter 33	UKRAINE.....	337
	<i>Oleg Alyoshin, Vsevolod Mazurenko and Olha Nosenko</i>	
Chapter 34	UNITED ARAB EMIRATES	348
	<i>Matthew Page, Alexander Wagg and Amira Ioana Shaat</i>	
Chapter 35	UNITED STATES	360
	<i>James H Carter, Claudio Salas and Russell Childree</i>	
Appendix 1	ABOUT THE AUTHORS.....	375
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	403

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 hours of reading from lawyers 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 by an 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 often debates 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

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UNITED ARAB EMIRATES

Matthew Page, Alexander Wagg and Amira Ioana Shaat¹

I INTRODUCTION

i The legal system

The United Arab Emirates (UAE) is a federation made up of seven emirates, founded on 2 December 1971. The legal system of the UAE is comprised of the federal judicial system, separate rules and laws applicable to particular emirates within the UAE, and those applicable to certain of the free zones established in the UAE.

Each emirate is bound by federal law but is also allowed under the federation to establish its own legislature and judiciary, although federal law retains primacy. Of the seven emirates, Abu Dhabi, Dubai and Ras Al Khaimah have their own laws and judicial systems.

In Abu Dhabi and Dubai, respectively, the Abu Dhabi Global Market (ADGM) and the Dubai International Financial Centre (DIFC) are offshore 'islands' with their own separate courts and laws based on common law.

ii UAE Arbitration Law

Agreements to arbitrate contractual and tortious disputes seated onshore in the UAE, outside of the ADGM and DIFC, are governed by Federal Law No. 6 of 2018 concerning arbitration (the UAE Arbitration Law).

The UAE Arbitration Law was long awaited and is based on the UNCITRAL Model Law, having entered into force in June 2018. Article 26 of the UAE Arbitration Law mirrors the principle of equality between the parties within the UNCITRAL Model Law and provides that the parties shall be treated with equality and given adequate and sufficient opportunity for submission of their claims and defences.

Under the UAE Arbitration Law, agreements to arbitrate must be evidenced in writing, and while the UAE Arbitration Law provides that the arbitration agreement can be incorporated by reference and made through correspondence, including emails (Article 7), in a break from the UNCITRAL Model Law the person entering into an agreement to arbitrate must have either capacity or authority to do so (Article 4).

The UAE courts must dismiss an action commenced in respect of a dispute where a valid agreement to arbitrate exists if the respondent raises the existence of an arbitration agreement 'before making any other motions or plea on the subject matter of the action' (Article 8).

Not all provisions of the UAE Arbitration Law are mandatory, with many providing scope for the parties to agree otherwise. One such example is that found in the UAE

¹ Matthew Page is a partner, and Alexander Wagg and Amira Ioana Shaat are associates at Hedef & Partners.

Arbitration Law in respect of the date of commencement of the arbitration. Article 27 provides that ‘Unless otherwise agreed by the parties to Arbitration, the Arbitral Proceedings shall commence from the day following the formation of the Arbitral Tribunal’. This article represents a departure from the UNCITRAL Model Law that provides that proceedings commence from the date that the respondent receives the Request for Arbitration.

iii Arbitration seated in UAE free zones

Free zones in the UAE conduct special-purpose business in geographic areas under an amendment to the UAE Constitution allowing for their creation. There are two major free zones within the UAE that have their own system of laws and courts: DIFC and ADGM.

Dubai International Financial Centre

The DIFC is one of many economic free zones established across the UAE by Federal Law 35/2004 and Dubai Law 9/2004. Federal Law 8/2004 exempts the DIFC from commercial and civil federal jurisdiction and regulations. The DIFC courts do not, however, have jurisdiction over criminal, administrative and money laundering laws. Dubai Law 12/2004 established the DIFC judicial authority and the DIFC court system, which includes the Court of First Instance and Court of Appeal. DIFC Arbitration Law No. 1 of 2008 applies to arbitrations seated in the DIFC.

Abu Dhabi Global Market

The ADGM is a free zone established in 2015 in Abu Dhabi with another set of common law-based laws and courts including a Court of First Instance and a Court of Appeal. The ADGM Application of English Law Regulations 2015 dictate that ‘The common law of England (including the principles and rules of equity), as it stands from time to time, shall apply and have legal force in, and form part of the law of, the Abu Dhabi Global Market’, ‘so far as it is applicable to the circumstances of the Abu Dhabi Global Market’ and ‘subject to such modifications as those circumstances require’ (Article 1).

The ADGM Arbitration Regulations 2015 (the ADGM Arbitration Law), which are based on the UNCITRAL Model Law, apply to ‘arbitrations where the seat of the arbitration is the Abu Dhabi Global Market, or where an arbitration agreement applies these Regulations’ (Article 8).

iv UAE arbitral institutions

Dubai International Arbitration Centre

The Dubai International Arbitration Centre (DIAC) was established in Dubai by the Dubai Chamber of Commerce and Industry in 1994 and continues today to be one of the busiest arbitral institutions in the UAE. On 20 September 2021, Decree No. 34 of 2021 Concerning the Dubai International Arbitration Centre (DIAC Decree) came into force abolishing both the DIFC Arbitration Institute (DAI) and Emirates Maritime Arbitration Centre (EMAC) and transferring their assets, rights and obligations to DIAC, establishing a single unified arbitration centre under a new overhauled DIAC. DIAC’s recent announcement on 21 March 2022 confirmed that arbitrations commenced on or after that date referring to the DIFC-LCIA Rules will be administered by DIAC in accordance with the new DIAC Rules 2022, unless the parties agree otherwise. DIAC’s new arbitration rules came into force on 21 March 2022, replacing its old 2007 rules.

Abu Dhabi Commercial, Conciliation and Arbitration Centre

The Abu Dhabi Commercial, Conciliation and Arbitration Centre (ADCCAC) was established in 1993.

DIFC-LCIA Arbitration Centre

The DIFC-LCIA Arbitration Centre was established in 2008 as a joint venture between DAI and the London Court of International Arbitration (LCIA). Following enactment of the DIAC Decree, on 20 September 2021, the DAI was in effect abolished, commencing an uncertain six-month transitional period for existing arbitrations being administered by the DIFC-LCIA Arbitration Centre as well as new arbitrations referring to the rules of the DIFC-LCIA. Given the success of the DIFC-LCIA Arbitration Centre, the DIAC Decree came as a surprise to many and subsequently, in March 2022, once agreement had been reached between DIAC and the LCIA it was clarified that all existing cases commenced with the DIFC-LCIA (and having been issued a registered case number) on or before 20 March 2022 will be administered to completion by the LCIA. Arbitrations commenced after that date under the DIFC-LCIA Rules will be administered by the new DIAC under the new DIAC Rules 2022, unless the parties agree otherwise.

ADGM Arbitration Centre

The ADGM Arbitration Centre was launched in October 2018. The ADGM Arbitration Centre is not an arbitral institution, rather it is a neutral facility targeted at conducting hearings for both mediations and arbitrations. The ADGM Arbitration Centre can be used to conduct hearings for arbitrations seated in the ADGM, as well as any other arbitrations.

It is evident that there are plans for the International Chamber of Commerce (ICC) to open a representative office within the ADGM Arbitration Centre since its launch, and in December 2020 the ICC Court Secretariat announced that it is set to open its fifth international case management office at the ADGM Arbitration Centre.

Other arbitral institutions

Other institutions worthy of note include (1) the Sharjah International Commercial Arbitration Centre (Tahkeem); (2) the Ras Al Khaimah Centre for Reconciliation and Commercial Arbitration; and (3) the International Islamic Centre for Reconciliation and Arbitration (IICRA) (an international, independent, non-profit organisation of the Islamic finance industry).

v Enforcement

The UAE acceded to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) on 19 November 2006.

The UAE is also a signatory to the multilateral treaty known as the 1996 Agreement on Enforcement of Court Judgements, Delegations and Judicial Notices in the Gulf Cooperation Council (GCC) States, in relation to the enforcement of arbitration awards between GCC states. Additionally, the UAE is a party to the Riyadh Convention. There are bilateral treaties entered into by the UAE for enforcement of judgments internationally in France, India, China, Kazakhstan, Pakistan, Armenia, Azerbaijan, Afghanistan, Nigeria and Tadjikistan.

The DIFC and ADGM also benefit from further bilateral memorandums of guidance for reciprocal recognition of judgments with countries such as England and Wales, Australia, New Zealand, Hong Kong and Singapore.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

Decree No. 34 of 2021 concerning the Dubai International Arbitration Centre

Undoubtedly, the most important development for UAE arbitration in 2021 was the surprise introduction and swift enactment of the DIAC Decree.

Following enactment of the DIAC Decree, on 20 September 2021, both the DAI and EMAC were abolished and their assets, rights and obligations transferred to DIAC. The DIFC-LCIA Arbitration Centre, being a joint venture between DAI and the LCIA, and one of the most prominent arbitration centres in the UAE for more than a decade, was therefore in effect unable to continue to operate in the UAE beyond the six-month transitional period.

The DIAC Decree dictated that DIAC will (1) have its headquarters in mainland Dubai and a branch in the DIFC; (2) consist of a new board of directors, court of arbitration and an administrative body which will together undertake the overall supervision and management of the new DIAC; and (3) that DIAC would issue new arbitration rules to replace the 2007 DIAC Rules, in line with its stated objectives to strengthen Dubai as a global centre for dispute resolution and apply international best practice. DIAC proceeded to issue its new arbitration rules on 21 March 2022.

The DIAC Decree provided a period of six months for DIAC to coordinate with all concerned entities to make adjustments in consistency with the decree (Article 9). Following enactment of the DIAC Decree, there were certain press releases issued as agreements were slowly reached between DIAC and the LCIA Arbitration Centre during a period of great uncertainty.

At the end of the six-month transitional period provided for under the DIAC Decree, DIAC's announcement on 21 March 2022 confirmed that DIAC now registers arbitration cases referring to the rules of arbitration centres abolished by the Decree. Such referrals are accepted from 21 March 2022 and shall be administered under the new DIAC arbitration rules (unless the parties agree otherwise) which also came into effect on 21 March 2022.

On 28 March 2022, DIAC and the LCIA also issued announcements clarifying the position in respect of ongoing, existing DIFC-LCIA arbitrations. These announcements by DIAC and the LCIA provided welcome clarity to those arbitrators, parties and practitioners engaged in existing DIFC-LCIA arbitrations, stating clearly that the LCIA will administer all existing DIFC-LCIA cases to completion. Existing DIFC-LCIA arbitrations include only those that were successfully registered with the DIFC-LCIA and provided with a registered case number on or before 20 March 2022.

In addition, and corresponding with DIAC's announcement on 21 March 2022, all arbitrations, mediations and other alternative dispute resolution proceedings referring to the respective rules of the DIFC-LCIA (including ad hoc proceedings where the DIFC-LCIA is requested to act as appointing authority or administrator), commenced on or after 21 March 2022 shall be registered and administered by DIAC in accordance with the new DIAC Rules 2022, unless the parties agree otherwise.

DIAC Rules 2022

On 21 March 2022 DIAC issued, pursuant to the DIAC Decree, its new arbitration rules, replacing its old 2007 rules. The new DIAC Rules 2022 marked a significant step forward for arbitration in the UAE, given that they represented a long-awaited and substantial improvement and modernisation of DIAC's previous rules, and reflected recent international best practice.

The key highlights of the new DIAC Rules 2022 include:

- a* Seat – the default seat for proceedings is the DIFC, in absence of agreement by the parties, and unless the Tribunal determines otherwise. This represents a marked change from the prior DIAC rules which provided for a default seat of on-shore Dubai. This change by itself demonstrated DIAC's desire to be an internationally accessible arbitration institution.
- b* Recovery of legal costs – for the first time, the DIAC Rules 2022 now provide for the recovery of a party's legal costs. Previously, the DIAC rules had not empowered a tribunal to make an award of a party's legal costs. Notably, tribunals are now even empowered to make interim orders for the preservation of a party's legal costs.
- c* Consolidation and joinder of proceedings – the DIAC Rules 2022 now allow for consolidation of proceedings, and joinder of third parties to proceedings after the appointment of the Tribunal.
- d* Interim measures and emergency arbitrator – the DIAC Rules 2022 provide for 'exceptional procedures' which include interim measures and the appointment of an emergency arbitrator. Tribunals are empowered to issue preliminary orders (defined as a temporary measure) at any time prior to issuance of its final award, and on the application of a party, to:
 - maintain or restore the status quo pending determination of the dispute;
 - prevent harm or prejudice to the arbitration;
 - prevent the dissipation of assets;
 - preserve evidence; and
 - provide security for the costs of the arbitration.

In advance of the appointment of a tribunal, a party can make a request to DIAC to appoint an emergency arbitrator to determine an application for emergency interim relief.

- e* Expedited proceedings – the DIAC Rules 2022 provide for expedited proceedings where the sum in dispute is less than 1 million dirhams; where the parties agree to expedited proceedings; or where the case is one of exceptional urgency, as determined by the DIAC Arbitration Court. Under expedited proceedings, parties can expect a tribunal consisting of a sole arbitrator to be appointed within five days.
- f* Third-party funding – the DIAC Rules 2022 provide that a funded party must disclose the fact that it is being funded both to the opposing parties and to DIAC. Parties are also prevented from entering into a funding agreement where it could give rise to a conflict between the tribunal and the funder.
- g* DIAC Arbitration Court – the DIAC Decree provided for the establishment of a new DIAC Arbitration Court. The Arbitration Court is intended to provide supervision of cases managed by DIAC. The DIAC Rules 2022 empower the Arbitration Court to appoint arbitrators and determine questions on the existence of a valid arbitration agreement (subject to the tribunal's power to make a final determination on jurisdiction), and consolidation and joinder of proceedings.

- b* Virtual hearings – the new DIAC Rules provide for pleadings to be submitted electronically, and for hearings to be conducted virtually. In 2021 there has been a significant rise in arbitration hearings being conducted virtually. While there are new challenges (particularly to cross examination of factual and expert witnesses) associated with conducting hearings virtually, in large part the move to virtual hearings has been broadly welcomed by parties and legal representatives in saving time and cost.

A number of these changes will be recognisable to those familiar with rules updated in 2021 by both the ICC and the LCIA.

UAE Mediation Law

On 29 April 2021, Federal Law No. 6 of 2021 on Mediation in Civil and Commercial Disputes (UAE Mediation Law) was issued in the UAE.

The UAE Mediation Law provides, for the first time, a modern and robust foundation for conducting mediations in the UAE.

The UAE Mediation Law sets out two distinct types of mediation: judicial mediation, whereby courts are empowered to refer, with the parties' consent, disputes to mediation; and non-judicial mediation whereby parties are free to enter into an agreement to mediate their dispute before a mediation and consolidation centre. Parties that engage in mediation are protected from counterparties having recourse to either the courts or arbitration while the parties are engaged in mediation.

Importantly, the UAE Mediation Law protects documents, information, and agreements, including settlement efforts from being produced in any subsequent court proceedings or arbitration. Settlements reached between the parties are binding and treated with the same effect for enforceability as if they were a judgment of the courts.

ii Arbitration developments in local courts

DIFC courts' discretion in setting aside an award under DIFC Arbitration Law

On 29 December 2021, the DIFC Court of Appeal issued its judgment in *Lachesis v. Lacrosse*,² in which it considered provisions of the DIFC Arbitration Law concerning the court's discretion in setting aside an award.

The appellant and the respondent had entered into two charterparties for the charter of two separate vessels for the purpose of work on an offshore project. Disputes arose concerning non-payment of hire by the appellant to the respondent.

The appellant (who had commenced the arbitration) made an application to set aside an arbitration award, which was dismissed by the DIFC Court of First Instance, and also dismissed by the Court of Appeal.

The governing law of one charterparty was English law, the seat of the arbitration was the DIFC, and the arbitration was to be conducted in accordance with the Rules of the Ladonna Centre (LADONNA). At the outset of the arbitration, the parties agreed that disputes under both charterparties should be heard under the same governing law, and jurisdiction provisions.

The DIFC Court of Appeal determined three issues pursuant to the DIFC Arbitration Law.

² *Lachesis v. Lacrosse* [2021] DIFC CA 005.

Signature of award

The appellant argued that the award was invalid and must be set aside for lack of signature on each page (as required by the LADONNA Rules), and lack of connection between the signature page and the operative part of the award. As the award had not been signed on every page, the appellant submitted that Article 41(2)(a)(iv) of the DIFC Arbitration Law provided the court should set aside the award as ‘the arbitration procedure was not in accordance with the agreement of the parties’. The Court of First Instance held that the courts had discretion whether to set aside an award, and the appellant had failed to address the Court’s discretion and why it should be exercised in favour of setting the award aside. The Court of First Instance also held that the appellant had waived its right to object to the format of the award, on the basis that it had not, pursuant to Articles 9 and 40(1)(a) of the DIFC Arbitration Law submitted a request within 30 days to the tribunal, that it correct the error in its award.

The Court of Appeal held that it had no power to set aside an award unless the challenge came within one of the specified grounds set out in Article 41(2) of the DIFC Arbitration Law, and even then the court’s power was a discretionary power. Failure to comply with the LADONNA Rules did not mean that the court must set aside an award, and it found that there were overwhelming reasons not to do so.

Incapacity to act

The appellant argued that the award must be set aside as its former solicitors did not have authority to merge the governing law, and jurisdiction provisions of the second charterparty with that of the first charterparty. The governing law clause of the second charterparty provided for UAE law. The Court of First Instance held, pursuant to Article 41(2)(a)(ii) of the DIFC Arbitration Law, that the incapacity cited by the appellant referred to the capacity of a party to enter into an arbitration agreement; however, in this case the complaint was founded on the alleged incapacity of its legal advisers to amend the governing law of the underlying agreement, and not the arbitration agreement.

The Court of Appeal held that if any question of incapacity arose, it related to an underlying agreement and not the agreement to arbitrate, and therefore fell outside of Article 41(2)(a)(ii) of the DIFC Arbitration Law.

Unfair and unequal treatment

The appellant also argued that the award must be set aside because of unfair and unequal treatment of its witnesses and legal representatives during the course of the arbitration hearing, in breach of the right to equality and full opportunity to be heard provided by Article 25 of the DIFC Arbitration Law. The Court of First instance considered Articles 41(2)(a)(ii) and 41(2)(b)(iii) of the DIFC Arbitration Law as grounds to set aside an award either where a party was ‘unable to present his case’; or where ‘the award is in conflict with the public policy of the UAE’. The Court of First Instance held that the appellant had not supported how it had been unable to present its case, and had not explained how the award would have been different had it been allowed to take the steps it was allegedly stopped from taking.

The DIFC Court of Appeal reviewed 59 complaints by the appellant, together with the respondent's responses, however found none to support its case that it had been denied the right to a fair and equal hearing. In its judgment, the court stated:

Neither errors of law nor errors of fact on the part of the Tribunal, if any there were, disclose a ground upon which the Award could be set aside; the Arbitration Law is based on the Model Law which does not permit such challenges. Importantly, this Court needs to scrutinise challenges of this nature carefully – and guard against arguments on the merits being dressed up as legitimate complaints of unfairness demonstrating a failure of natural justice. It is also important to recognise that a mere trivial and inadvertent technical breach of the requirement of a fair hearing, without substantive consequences, will not, or not necessarily, suffice to set an award aside; this is not a game of procedural snakes and ladders.³

Interpretation of the wording of an agreement to arbitrate

In its judgment in Case No. 526/2020 Abu Dhabi Court of Cassation dated 20 July 2020, the court clarified that it is possible for parties to enter into an arbitration agreement after a dispute has arisen even if the parties have started court proceedings. However, the court went on to state that the arbitration agreement must specify the issues that were to be subjected to arbitration between the parties. That approach to specificity of the arbitration agreement was also followed by another recent judgment of the Abu Dhabi Court of Cassation in March 2021, in which the court held that a simplistic arbitration clause which failed to specify the issues and simply referring to the application of UAE law in the event of arbitration did not evidence the parties' explicit agreement to resort to arbitration to resolve any disputes.

Separately, in its judgment in Case No. 69/2019, the UAE Federal Supreme Court investigated the ambiguity of the parties' intentions in an English language ADCCAC arbitration clause to refer disputes to arbitration. The Court of First Instance held that the agreement to arbitrate prevented the courts from hearing the dispute. The judgment was appealed on the basis of an argument that the clause was an option method of dispute resolution to be agreed by the parties. The Court of Appeal determined that the clause did not subject the dispute to arbitration. On appeal to the UAE Federal Supreme Court, the court overturned the judgment of the Court of Appeal.

In another notable case, on its judgment in Case No. 1308/2020 Dubai Court of Cassation dated 3 March 2021, the court held that a simple reference to incorporating International Federation of Consulting Engineers (FIDIC) general conditions did not bind the parties to the arbitration clause referring disputes to arbitration within those general conditions. Even though pursuant to Article 7(2)(b) of the UAE Arbitration Law parties can incorporate an agreement to arbitrate by reference, in this case the parties had not specifically incorporated by express statement the arbitration provisions of the FIDIC general conditions.

Payment orders where there is an agreement to arbitrate

Pursuant to amendments to the UAE Civil Procedures Law, the UAE courts now provide for a mechanism of 'payment orders' whereby a claim can be made for an uncontested commercial debt and a summary judgment obtained which can be enforced swiftly against the debtor.

3 *Lachesis v. Lacrosse* [2021] DIFC CA 005, paragraph 45.

In its judgment in Case No. 1098/2020 Dubai Court of Cassation dated 27 January 2021, the court held that a dispute involving contested values in a construction contract that envisaged the need for experts to determine values and extensions of time, the conditions for an application for a payment order were not fulfilled. The appellant contested the court's jurisdiction on the basis of an arbitration clause.

Joint Judicial Committee

The Joint Judicial Committee (JJC) was established in 2016 by Dubai Decree 19/2016 as a final adjudicator of disputes involving jurisdictional conflicts between the DIFC courts and the onshore Dubai courts. The tribunal is made up of three DIFC Court judges, three Dubai Court judges, and the President of the Dubai Courts.

The role of the JJC is called for when 'the same dispute has been presented to the two courts and they both issued a statement indicating that each of them stick to their jurisdiction of hearing the case, or that both of them abandon hearing it' as explained by the JJC as its reasonings for most of its decisions.

In the notable Case No. 8/2020 JJC Cassation dated 22 March 2021, the JJC held that 'the United Arab Emirates was a party to the New York Convention for the recognition of foreign arbitration decisions and their implementation by Decree No. 43 of 2006, which states to accept the procedure in any jurisdiction in the country and the DIFC Courts is one of such jurisdiction'.

This case changed the way in which the DIFC Courts are to be used as an independent jurisdiction (as opposed to a 'conduit' jurisdiction, implying that the DIFC Courts are to be used in extraordinary circumstances) for recognising and enforcing foreign arbitral awards, under the New York Convention. Previously, the JJC considered that Dubai Courts had primary jurisdiction in Dubai to enforce foreign arbitration awards over those of the DIFC. However, Case 8/2020 instils the notion that the DIFC Courts are an integral part of the court system of the UAE, therefore the DIFC Courts have jurisdiction to accept recognition and enforcement applications without giving the Dubai Courts a priority. This is the case even if the matter (or parties) has no connection to the DIFC at all.

Covid-19, force majeure and exceptional circumstances

The outbreak of covid-19 at the start of 2020 caused an unprecedented change in the way both the legal profession and its clients had to work and adapt. Court hearings and arbitration hearings largely moved online. Internationally, the ICC issued guidance in April 2020 covering possible measures to mitigate the effects of covid-19 on ICC arbitrations. The guidance encouraged parties and the arbitral tribunal to not materially delay proceedings as a result of covid-19 and encouraged parties to make use of technology for pleadings and hearings.

In the construction sector, FIDIC released guidance on the interpretation of FIDIC standard form contracts in light of possible impacts of covid-19.

In 2021, the UAE courts began to issue judgments in disputes involving issues related to the covid-19 pandemic, *force majeure*, and exceptional circumstances. In the UAE, a claim may be commenced (or defended) for non-performance where, as a result of the pandemic, performance became impossible. However, where parties agree contractual provisions to the contrary, risk will be allocated according to the contract.

The UAE Courts of Cassation have relied on government-issued restrictions as the basis for *force majeure* events. In its judgment in Case No. 512/2021 Abu Dhabi Commercial

Cassation dated 25 May 2021, the Court of Cassation upheld the judgment of the Court of First Instance determining that ‘if a force majeure arises that makes the performance of the obligation impossible, the corresponding obligation shall, be extinguished and the contract *ipso facto* rescinded’, and that ‘force majeure must be the sole reason for the damage to occur’.

In recent judgments arising out of contractual disputes in which the parties have been affected by covid-19, the courts have consistently held that:

- a *force majeure* cannot be relied on where the defendant had been at fault prior to the *force majeure* event relied on;
- b *force majeure* events must be unforeseen and not anticipated at the time of entering into the contract; and
- c delay in obtaining government approvals (unrelated to covid-19, and in relation to construction projects generally) does not qualify as a *force majeure* event under UAE law.

The courts have also held that contractual provisions made specifically in respect of *force majeure* will be applied by the courts.

The current jurisprudence in respect of ‘exceptional circumstances’ is most recently set out in Case No. 1995/2020 Dubai Commercial Court of Appeal dated 14 October 2020. In that case the defendant argued that the contract should be reduced to a reasonable time frame pursuant to Article 249 of the UAE Civil Code on the basis that its obligations under the contract had become oppressive and it was threatened with heavy losses under the contract as a result of covid-19. The Court of Appeal upheld the judgment of the Court of First Instance in favour of the claimant, holding that the exceptional circumstances on which the defendant relied had occurred after its payment obligation was due.

iii Investor–state disputes

The UAE is a signatory to 106 bilateral investment treaties, including most recently with the Democratic Republic of Congo, North Macedonia, Israel and Zambia. Bilateral investment treaties signed between states establish the terms for investment by investors of one state in the other state, and often provide for disputes to be referred to an international arbitration institution such as the International Centre for Settlement of Investment Disputes (ICSID). In November 2021, Jersey signed a bilateral investment treaty with the UAE designed to promote responsible investment including considerations of public health, the environment and labour protections.

The UAE is a signatory to the ICSID Convention, ratified in December 1981. The UAE is also a signatory to multilateral investment treaties including the Organisation of Islamic Cooperation Agreement of Promotion (the OIC Agreement), Protection and Guarantee of Investments, the Arab League’s Unified Agreement for the Investment of Arab Capital in the Arab States, and the Energy Charter Treaty.

In an ongoing arbitration commenced on 21 April 2021,⁴ a Swedish national registered an ICSID dispute against the Government of Dubai Legal Affairs Department under Sweden’s bilateral investment treaty with the UAE. The dispute arose from the Swedish national’s investment in an optical data storage company in Dubai and was commenced as a result of the Swedish national’s deportation from the UAE. The Swedish national argued that the UAE breached the equitable treatment standard under the bilateral investment treaty.

⁴ *Amir Masood Taberi v. United Arab Emirates* (ICSID Case No. ARB/21/19).

In the past year, an ICSID dispute commenced by Indian and United Kingdom nationals has been continuing against the UAE as a party.⁵ The dispute involves the sale of plots of land at the World Islands Project in Dubai, developed by Nakheel and subsequently bailed out by the Dubai government following the 2008 global financial crisis.

In a different matter, a tribunal issued an award in an ICSID dispute on 3 April 2020,⁶ commenced by the UAE-based VTEL Middle East and Africa Limited and VTEL Holdings Ltd, together with two Jordanian entities, Itisaluna Iraq LLC and Munir Sukhtian International Investment LLC, against the Republic of Iraq. Following the acquisition of a licence by the claimants for the provision of telecommunications services in the Republic of Iraq, the dispute arose because the claimants were prevented from operating their own international gateways. The claimants commenced their claim as investors under Article 8(1) of the OIC Agreement regarding fair and equitable treatment, and full use and protection of their investment. The tribunal had to determine ‘whether the Claimants are able to incorporate into the OIC Agreement, by operation of its MFN clause, the ICSID arbitration clause in the Iraq Japan BIT’. The tribunal found that it did not have jurisdiction under the OIC, whether read alone or together with any other treaty, and upheld the respondent’s objection to jurisdiction.

In 2020, Qatar Airways commenced investment treaty claims seeking US\$5 billion in damages from the United Arab Emirates, Bahrain, Saudi Arabia, and Egypt, who banned it from their airspace and their markets, and revoked its licences to operate from June 2017. Qatar Airways’ claims are based on the Arab Investment Agreement, and the OIC Agreement.

III OUTLOOK AND CONCLUSIONS

The enactment of the DIAC Decree on 20 September 2021 represents the largest change to the arbitration landscape in the UAE in recent times. The surprise announcement in effect abolishing the successful DIFC-LCIA Arbitration Centre effectively paused ongoing arbitrations being administered by the DIFC-LCIA Arbitration Centre during the six-month transitional period.

However, DIAC and the LCIA ultimately agreed a pragmatic way forward whereby all existing DIFC-LCIA arbitrations already registered with the DIFC-LCIA Arbitration Centre prior to 21 March 2022 will be administered to completion by the LCIA. Arbitrations commenced after 21 March 2022 referring to the DIFC-LCIA Rules will be administered by DIAC in accordance with the new DIAC Rules 2022, unless the parties agree otherwise.

The new DIAC Rules 2022 have been welcomed and allow for DIAC to administer arbitrations in accordance with updated provisions reflecting international best practice and mirroring many of the positive developments seen in the recent changes to the rules of other institutions, such as the ICC and the LCIA Rules.

Notably, if the DIAC Rules 2022 are chosen and no seat of arbitration is expressly specified in the contract, the default seat will be the DIFC (with the DIFC Courts having supervisory jurisdiction and the DIFC Arbitration Law being applicable), pursuant to Article 4 of the Statute to the DIAC Decree. Otherwise, if the parties choose Dubai as the seat of arbitration, the UAE Arbitration Law will apply to the arbitration and the Dubai Courts will have supervisory jurisdiction.

5 *Shokat Mohammed Dalal v. United Arab Emirates* (ICSID Case No. ARB/19/10).

6 *Itisaluna Iraq LLC and others v. Republic of Iraq* (ICSID Case No. ARB/17/10).

Covid-19 continues to have an impact on both the substantive nature of claims and the procedural running of disputes, with UAE-based arbitration centres being quick to encourage exclusive usage of digital methods for filing, exchange of pleadings and virtual hearings.

In the construction sector, to which by far the most significant proportion of UAE arbitral disputes relates, squeezed cash flow has led to a rise in bonds being called and a consequent further increase in arbitrations commenced arising out of the resulting dispute and, in particular, to seek to protect any attachment granted by the UAE courts preventing payment of those bonds.

Certain major players in the UAE construction industry were forced into bankruptcy as a result of adverse market conditions, and the effects of this will continue to be felt throughout the wider UAE construction industry over the coming year and in the arbitration sphere.

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Matthew is a partner specialising in construction and commercial arbitration and litigation in the UAE and internationally. He has acted as counsel in numerous arbitrations, both ad hoc and under the rules of the major arbitral institutions, including the LCIA, ICC, DIAC, DIFC-LCIA, ICSID and UNCITRAL.

He is a solicitor-advocate qualified in England, a registered practitioner of the DIFC courts, and conducts advocacy in international arbitration proceedings. He also sits as an arbitrator.

Matthew's main practice is in handling complex high-value construction disputes, in both domestic and international arbitration and litigation in the DIFC and Dubai courts, acting for developers, contractors, sub-contractors and consultants in all types of construction projects.

He also advises clients in commercial arbitrations and litigations in other industry sectors including energy, oil and gas, real estate, tele-communications and shareholder disputes.

Prior to joining Hadef & Partners, Matthew worked for major international firms in London (including Herbert Smith), and obtained an MA Hons in History and Law from Cambridge University.

He is praised in *The Legal 500's* 2021 edition as 'very hard working and shows great judgment in his dealings with the client and opponents' and in *The Legal 500's* 2022 edition: 'produces excellent written work, and has great drive and enthusiasm'.

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He has spent most of his life in the Middle East, having lived in Oman and Abu Dhabi, and has been based in Dubai since 1999.

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Amira is an associate in the Dispute Resolution, and Shipping teams in Dubai. Amira represents clients in general commercial as well as complex arbitration and litigation proceedings.

Educated in both the common and civil law systems, Amira holds an LLB with Honours from the University of Law in the UK and a 'Licence en Droit' (Bachelor of Laws) from Paris Descartes, Paris-Sorbonne University. Amira completed her training contract in London with a prominent UK law firm and qualified as a solicitor-advocate in March 2018 with full rights of audience before all civil courts in England and Wales.

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