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LITIGATION FUNDING

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Featuring topical articles by guest authors and the Harbour Team.

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Developments in the desert
The oasis that third party funding offers

Mark King, Director of Litigation Funding at Harbour, introduces this edition of Harbour View mostly dedicated to changes in the legal landscape of the Middle East, the development of arbitration in the region and how third party funding could sit well within that environment.

It is difficult to fathom that thirty years ago, Dubai's Sheikh Zayed Road (now a 14 lane superhighway bordered by awe-inspiring luxury hotels and offices) consisted of a small carriageway with a smattering of buildings either side. This alone is a bold statement of how the Middle East has transformed over the past decades. Countries such as the United Arab Emirates ("UAE"), Saudi Arabia and Qatar attract significant foreign investment and continue to see their economies grow.

The articles by our guest authors in this Harbour View explain how the legal landscape of the Middle East has changed as a consequence of this economic growth, and continues to do so. In particular, developments in the DIFC/ADGM Courts and in arbitration in UAE and Saudi Arabia illustrate that a number of Gulf countries are eager to instil confidence and certainty in dispute resolution in the region.

This makes the development of third party funding ("TPF") within the Middle East likely, despite its current embryonic stage. That said, the forecast for its future within the region suggests that it could soon enjoy the same attention shown by other leading jurisdictions worldwide. In this article, I set out the role that TPF could play within the Middle East and how it may sit within the current climate.

What do businesses operating in the region say?

Understanding how businesses are impacted by disputes and how they see the current legal landscape in the region is essential in understanding the role that TPF may play. In a conversation with **Helen Graham, General Counsel of Dubai Transport Company,** it became clear that businesses need to assess legal outcomes for which a system of binding precedent and published awards/reasoned judgments is needed. In the local courts, procedures to short-circuit meritless claims and defences would be a welcome development. This together with difficulties in enforcement are key issues they, and undoubtedly other businesses, face in this respect. Indeed, it is hoped that the recent developments in the DIFC/ADGM Courts and in arbitration enable parties to overcome these hurdles.

I asked Helen Graham, General Counsel of Dubai Transport Company, part of the Dutco Group, a few questions which gives an excellent snapshot of the key issues faced by businesses when dealing with disputes in the region.

Is there a common/frequent hurdle businesses involved in disputes face in the Middle East?

"As a civil law jurisdiction, absence of binding precedent in the local courts leaves businesses with uncertainty in how a judge will rule and without a valuable body of knowledge, as a system of precedent encourages detailed factual and legal reasoning. The business community would welcome procedures to short-circuit meritless claims and defences which are a clog in local courts."

What are the practicalities you and your Board consider in deciding whether to pursue a claim?

"We review enforceability and recoverability from the Defendant; whether an attractive forum for dispute resolution is available and, last but not least, whether the claim is cost effective to pursue."

What is your experience of getting paid/ enforcing judgments and awards in the region?

"Arbitration awards are more likely to be voluntarily complied with, although cost awards are more likely to require enforcement as the 'loser pays' principle is not the rule in regional jurisdictions and is resisted. Execution proceedings are inevitably required for local court judgments, although the methods of execution can be limited and are not always effective."

What do you consider to be the most interesting recent legal development in the Middle East?

"The use of the DIFC Courts as a 'conduit' jurisdiction for enforcement in Dubai."

What are the key factors you look at when appointing a law firm in the region?

"We look at sector experience and legal acumen obviously, but are also assessing the proportionality of legal resources that will be applied and the impacts of that on overall cost."

The role that TPF can play

Is it permitted?

In the UAE, there is no prohibition against litigation and arbitration and this is also the case for the wider Middle East.

The reason that the concept has not developed much is likely due to historic hurdles which recent legal developments have since sought to remedy. Its use as a viable risk management tool to businesses may therefore not yet have fully permeated through to boards of directors, when considering whether their company should pursue a claim. The changing legal landscape suggests that this may not be for much longer as the use and types of funding offered become more publicised and transparent within the region.

What are the key criteria a funder will consider in funding a claim in the Middle East?

The criteria reputable funders consider when funding a claim in the Middle East are no different to anywhere else in the world. They include:

- a creditworthy defendant
- a clear, reliable and effective enforcement and execution process (addressed in further detail specific to the Middle East later in this publication)
- the 'likely' claim value, as opposed to the 'face' claim value
- the cost of bringing the proceedings (i.e. amount of funding required)
- the settlement prospects
- a legal opinion concluding that the claim has good merits
- an experienced legal team.

What benefits could it offer?

In its simplest form, TPF means a third party agrees to pay a claimant's legal costs of pursuing its claim, in return for a share of the proceeds if the claim is won. Traditionally, funding was aimed at individuals and businesses who had a good legal claim but insufficient funds to pursue it. Even if a party did have some funds, it was a common tactic for 'Goliath' defendants to increase the duration and cost of the proceedings to exhaust the claimant's funds and discourage them from continuing. A claimant backed by a funder sends a strong message to defendants that such tactics do not work and that an experienced third party believes in the strength of the claim by covering the costs of pursuing it.

In addition, we see a new demand for funding from blue chip businesses, listed companies and financial institutions who see it as an effective hedging tool. Their use of external funding allows a claim to be pursued despite a restricted legal budget or it frees up working capital preserved for other purposes. If litigation or arbitration claims are externally funded, a business need not include the legal costs within its balance sheet, which for listed companies could have a detrimental effect on share price.

Of course, one of the main benefits remains that if the claim is not successful, there is nothing for the claimant to repay, regardless of their motivation to seek funding. This is the risk the funder takes.

Any positive regional developments for TPF?

The expectation that the use of TPF in the region will increase is supported by specific recent developments in Dubai and Abu Dhabi.

In the Dubai International Financial Centre ("**DIFC**"), a working party is preparing a draft practice direction which is set to endorse the use of TPF for claims heard in the DIFC Court. It is expected that this practice direction will be released in conjunction with recommended best practices regarding third party funding which will draw largely upon the Association of Litigation Funders' Code of Conduct adopted in England and Wales, of which Harbour is a founding member. This is encouraging as it can ensure that funders meet certain requirements intended to protect claimants who may seek the use of funding for claims in the DIFC.

Harbour and other funders have offered practical insights on the practice direction to the DIFC working party and it is expected that the DIFC will invite further comments on its draft practice direction and guidelines for the use of TPF through a public consultation in autumn 2016.

Speaking with Harbour, the **Registrar of the DIFC Courts, Mark Beer OBE,** confirmed that: "The future of international dispute resolution will favour those centres which acknowledge the importance of third party funding, and provide a regulatory framework which supports its development in an open and balanced way. As legal fees increase, and pressure to contain costs builds, in-house legal teams will be looking for better ways of managing litigation budgets and reducing litigation risk. Third party funding is one solution, but if not carefully nurtured it can lead to unjust outcomes. Courts, in particular, need to embrace the advantages of well-structured funding to increase access to justice and ensure that contracts are honoured, whilst at the same time eliminating some of the poor practices that have been seen in markets which do not regulate third party funding. As we in the DIFC Courts have seen case values and complexity increase significantly over the past few years, with the average value per claim being US$32m in 2015, the need to provide a supportive environment to our end users, being global commerce, which allows them to spread the cost and risk of litigation is as important as ever."

In Abu Dhabi, the newly established Abu Dhabi General Market ("**ADGM**") has its own court with jurisdiction over civil disputes. The ADGM Courts' own Procedural Rules reflect much

of the Civil Procedure Rules in England and Wales. Article 225 of the ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015 stipulates that funding agreements may be used subject to certain requirements set out in the Regulations.

A number of international arbitral institutions, also used by parties in the Middle East, have recognised the use of TPF in arbitration proceedings and are responding to it positively. For example, the ICC sets out guidance to tribunals on recoverability of costs by a funded party and issues regarding security of costs and disclosure of information on the funding provided (see the ICC Commission Report on Decisions in Costs in International Arbitration published in 2015). However, it is important to remember despite these developments that the underlying seat of the arbitration must not have any prohibitions or restrictions on funding.

"We find that the progress made in enforcement, arbitration and in the DIFC/ ADGM courts provides us with more comfort in considering funding claims in the region than ever before."

Where next?

These legal developments have helped to mitigate a number of hurdles which may have otherwise restricted the availability of TPF in the Middle East. This should encourage claimants involved in disputes in the region to seriously consider how funding may help them effectively manage their litigation/arbitration risk.

Funders may still be cautious of funding claims in the local courts of Middle Eastern countries because of the costs and challenges mentioned elsewhere in this publication. However, we find that the progress made in enforcement, arbitration and in the DIFC/ADGM courts provides us with more comfort in considering funding claims in the region than ever before and we think there is every reason to suggest that the use of funding will continue to grow in the region.

Arbitration in the Middle East: the state of play

Henry Quinlan, Partner and Head of Litigation & Arbitration, and Sam Stevens, Senior Legal Consultant – both from DLA Piper Middle East LLP – provide some general background to the development of arbitration in the region before focusing on significant recent developments.

Attitudes towards international arbitration in the Middle East have certainly come a very long way since the dark days of 1950s and 1960s, when a number of arbitral awards whose findings were adverse to Arab states (and whose approach to the application of Islamic Sharia was questionable) gave rise to a deeply entrenched suspicion in many jurisdictions across the region that arbitration (in its present international form) was a western concept and did not offer a fair means for resolving disputes.

Today, by contrast, in commercial sectors such as construction, insurance, energy and financial services, arbitration has eclipsed court litigation as the dispute resolution mechanism of choice in high value and complex transactions in many Arab jurisdictions.

In this article, we provide some general background to the development of arbitration in the Middle East, before focusing on significant recent developments in the region, in particular in Saudi Arabia and the UAE.

Some regional context

The rise in arbitration and other "western" methods of dispute resolution in the region is partly a result of the Middle East's evolving business demographic: the dramatic expansion and diversification of the regional economies, and the vast infrastructure plans which have progressed in tandem, have resulted in many more foreign companies doing business here than was the case some 60 years ago. The widespread use of arbitration by foreign multi-nationals has naturally permeated the Middle East as a result.

It is also fair to say that the regional suspicion of arbitration has significantly receded in recent years. One only has to look at the plethora of arbitration centres that now exist in major Middle Eastern cities - Cairo, Doha, Manama, Abu Dhabi and Dubai, to name but a few - to conclude that arbitration has established a very strong institutionalised foothold in the region (which is likely to strengthen further as the Middle East risks entering another - albeit less dramatic - economic downturn seven years after the global financial crisis).

However, notwithstanding the increased respect for, and understanding of, arbitration in the region, the Middle East remains, in some instances, a very difficult place in which to arbitrate. In some cases, arbitration has grown dramatically here despite, rather than because of, the relevant legal system that supports it.

While the position has improved markedly in recent years, many Arabic-language, civil law courts still view the process of arbitration with a degree of suspicion. This prevailing attitude can manifest itself in ways which probably seem bizarre to arbitration practitioners in the common law world, and indeed in the many European civil law jurisdictions with a healthy respect for arbitration. For example:

1. Arbitrators presiding over arbitrations seated in Middle Eastern jurisdictions which have not enacted modern arbitration legislation are often confronted with a myriad of potential procedural pitfalls which, in practice, means that one mistake could lead (and often does) to the subsequent annulment of the award.

2. In some circumstances, despite both parties to an arbitration agreement acknowledging that the agreement is valid and binding on them, local courts will still grant an order appointing a court-appointed expert to investigate and opine on disputed matters which fall squarely within the jurisdiction of the arbitral tribunal.

Increasingly, there are ways and means of avoiding or mitigating these (and other) regional arbitration risks. It is partly as a result of the need to address or understand these regional challenges and pitfalls that "free zones" in the Middle East have established their own arbitral seats, and that international arbitral institutions have opted to establish regional versions of their own global centres.

For example, commercial parties entering into contracts in the UAE can avail themselves of the significant benefits of seating their arbitrations in the Dubai International Financial Centre (DIFC), as well as the nascent Abu Dhabi Global Markets (ADGM) freezone. Outside the UAE, Qatar has followed suit by establishing the Qatar Financial Centre which has its own arbitration regulations. Further afield, countries such as Egypt, Bahrain, Oman, Jordan and Iran have enacted modern arbitration legislation based on the UNCITRAL Model Law.

There is some way to go before the major arbitration hubs of the Middle East can be regarded as being on an equal footing with jurisdictions in the west and east which explains why many parties involved in a dispute in the Middle East still agree seats, laws and arbitral institutions outside of the region. Indeed, it would be difficult to find an arbitration practitioner in this region who has not cast an envious eye over much simpler and friendlier arbitration regimes such as Singapore, with only one jurisdiction, one set of courts and one arbitral institution.

Such simplicity is unlikely in jurisdictions like the UAE, given the number of different court systems and the onshore/offshore intricacies. However, the progress made in the Middle East is undeniably positive. While further issues can be expected in the evolution of arbitration legislation and jurisprudence in this complex region, there are clear signs that governments and courts are alive to the need to provide the legal and physical infrastructure to support the role of arbitration in the resolution of modern commercial disputes.

To give the reader a flavour we briefly highlight a few recent key developments in Middle East arbitration.

New arbitration and enforcement regime in the Kingdom of Saudi Arabia

As the region's economic powerhouse, Saudi Arabia's regional influence is hugely significant. In light of the Saudi regime's desire to diversify the country's economy, partly due to the "new normal" of lower oil prices, the potential opportunities for foreign investors in the Kingdom have never been greater.

Arbitration has historically not been a popular method of dispute resolution in Saudi Arabia. Historic distrust, language restrictions, the courts' intervention in the arbitral process, and the uncertainty surrounding the enforcement of arbitral awards have been limiting features. However, it is the last point which has garnered the most recent publicity in international arbitration circles. In the past, many arbitral awards which parties have sought to enforce in Saudi Arabia have fallen victim to the courts' willingness to look into the merits of the case, and their wide interpretation and application of what constitutes "public policy" in the Kingdom.

However, with the passing of the new Law of Arbitration, along with the new Enforcement Law in 2012, there is reason to be quietly confident that the arbitration landscape in Saudi Arabia is improving. The proposed establishment of a commercial arbitration centre in 2014, the Saudi Centre for Commercial Arbitration, was also encouraging.

The cause for optimism is supported by our own recent experience in Saudi Arabia of enforcing (under the new regime) an US$18.5 million ICC award handed down in London against a Saudi Arabian award debtor. Encouragingly, the process before the Enforcement Court took less

"There are clear signs that governments and courts are alive to the need to provide the legal and physical infrastructure."

than three months and the Claimant's claim has been satisfied. There is also the welcome news that a female arbitrator's appointment by a party has recently been confirmed by the administrative Court of Appeal in Dammam.

It remains to be seen how the new arbitration and enforcement provisions will be applied consistently in practice, but the current approach suggests that it appears likely that, over time, the arbitration landscape in Saudi will be gradually re-shaped and strengthened by these legislative changes.

Abu Dhabi Global Market - the UAE's new "offshore" arbitral seat

In December 2015, the Abu Dhabi Global Market ("ADGM") enacted its own arbitration regulations, thereby creating the UAE's second major "offshore" arbitral seat after the DIFC. With arbitration regulations based upon the UNCITRAL Model Law, the emergence of ADGM as a new arbitral seat in the UAE's largest emirate will further strengthen its position as the leading arbitration hub in the region.

ADGM, an offshore financial free zone intended to attract foreign, regional and local companies and investors to Abu Dhabi has already incorporated various English statutes directly into its legal framework. It has established a state-of-the art court whose procedures will be based on English (and internationally recognised) procedure, and its judiciary will be led by pre-eminent common law judges. As a result, ADGM has firmly laid the groundwork for a credible and supportive arbitration jurisdiction. The arbitration regulations themselves reinforce the likelihood that ADGM will become a successful arbitral seat.

At present, it is unclear whether, and by what process, ADGM court judgments (including those enforcing arbitral awards) will be enforced in other jurisdictions. The DIFC Courts now have an established process for the enforcements of judgments in Dubai and more widely, and it is likely that the ADGM will take similar steps.

The ADGM presently lacks an arbitral institution of its own (such as the DIFC-LCIA) to administer arbitrations seated there, though we expect this to change. For the present, parties will either have to opt for ad hoc arbitration seated in ADGM or adopt international or regional arbitration rules, such as the LCIA, ICC or ADCCAC (the Abu Dhabi arbitral institution).

Finally, since its establishment in 2008, the DIFC-LCIA has experienced a long "lead time", in generating a significant caseload of arbitrations - though it is now increasingly busy. It will be interesting to see whether Abu Dhabi entities are required to incorporate ADGM-seated arbitration into their contracts; otherwise, ADGM arbitration is likely to experience similarly slow growth in its early years.

Re-launch of the DIFC-LCIA Arbitration Centre

The DIFC-LCIA Arbitration Centre, a joint venture formed in 2008 between the DIFC and the London Court of International Arbitration ("LCIA"), re-launched in November 2015 on a new statutory footing. This involved a restructuring of the legislation to ensure the centre has legitimacy within the DIFC, intended to address concerns regarding the jurisdictional reach and constitutionality of the centre (and, therefore, the enforceability of its awards outside the DIFC).

Together with the American Arbitration Association's joint venture with the Bahrain Chamber of Commerce ("BCDR-AAA"), the re-launch of the DIFC-LCIA arbitration centre is further confirmation of the ongoing commitment of two of the world's leading arbitral institutions to sister operations in the Middle East.

The DIFC, an economic free zone created in 2004 as part of Dubai's ambition to establish itself as a global financial capital, boasts a bespoke legal and regulatory framework governing activities within the jurisdiction, and has its own autonomous common law court system. In particular, most of the UAE's codified civil laws have been expressly disapplied in the DIFC.

Benefiting from a modern arbitration law based on the UNCITRAL Model Law and its own arbitration centre the DIFC offers parties an advantageous alternative to seating an arbitration in non-DIFC ("onshore") Dubai/UAE, where the (inadequate) provisions governing arbitration in the UAE Civil Code continue to apply in the absence of a federal arbitration law. The DIFC Court, staffed primarily by highly experienced judges from across the common law world, has so far shown itself to be a very robust supervisory court, and an ardent defender of arbitration in general.

The current outlook

The trend in the field of dispute resolution in the Middle East is only going one way: towards more internationally recognised methods of dispute resolution and, in particular, towards arbitration. The region remains a difficult one in which to operate at many levels, and the complications which onshore/offshore and civil/common law jurisdictions create will remain; and each new development will no doubt bring new challenges.

However, as the developments which we have chosen to highlight in this article show (and they only represent some of the recent changes in the region), countries in the region are not afraid to innovate and to adapt so as to make investment into the region more attractive - and that can only be good for the end-user companies and investors who can avail themselves of these new routes to justice.

The cause for optimism is supported by our own recent experience in Saudi Arabia of enforcing (under the new regime) an ICC award from London in Saudi Arabia.

"This change in approach for onshore enforcement was a huge boost for Dubai's credentials as an arbitration friendly jurisdiction."

Developments in enforcing a judgment or arbitral award in the UAE

By Keith Hutchison, Partner, Clyde & Co LLP, Dubai. This article considers recent progress with the enforcement of foreign arbitral awards and court judgments in Dubai in the United Arab Emirates ("UAE").

Even the strongest claim is only as good as its prospects for enforcement. No claimant wants to pursue a claim for money where there is no prospect of recovery at the end of the litigation process. A business should therefore always have its eyes wide open when thinking about how to enforce its legal rights and recover against a counterparty if things go wrong.

Middle Eastern jurisdictions have not traditionally provided the level of certainty that parties may want and, consequently, some claimants have been discouraged from pursuing good claims or enforcing a judgment or arbitral award in their favour. This article focuses on the emergence over the last five years of a new paradigm for enforcement of foreign awards and judgments in Dubai and recent cases that have proven its success.

Why is enforcement important?

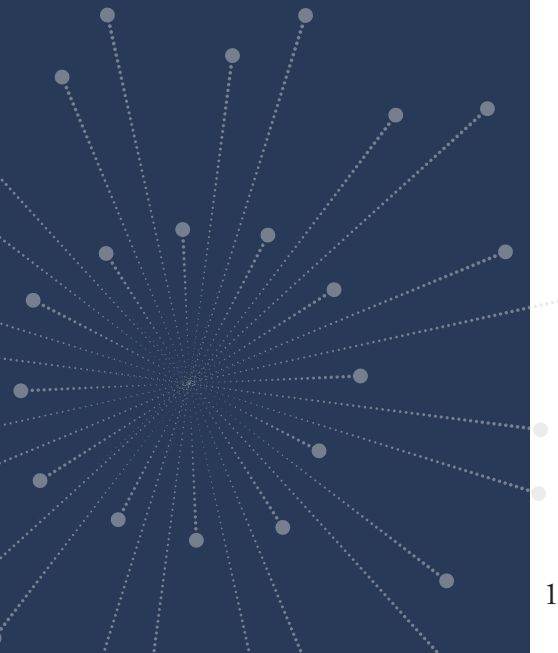
Judgment or award creditors want to obtain satisfaction of their award or judgment debt as promptly and efficiently as possible by the recovery of money from the debtor. Unless payment is made voluntarily, this means executing the judgment or award against a debtor's assets in the jurisdiction(s) where they are located. Key questions include: is there money or assets to satisfy a judgment or award? Where is it, what mechanisms exist to get it, and is there a realistic prospect of success at reasonable and proportionate cost? Where assets are in a foreign jurisdiction there will generally be a requirement for judicial recognition and enforcement of the judgment or award in that jurisdiction before being able to execute it.

Glossary

'Recognition' is the process by which a court states that it recognises the existence of a foreign judgment or arbitral award.

'Enforcement' is the process by which a court orders that a foreign judgment or arbitral award is executable in its jurisdiction.

'Execution' is the final state of a suit whereby the judgment or order is actually enforced against the assets of the judgment debtor, i.e. using judicial execution procedures to obtain monetary satisfaction of the judgment or award debt. Common examples of execution measures in the UAE include judicial attachment (seizure) of funds in bank accounts and ordering their payment to the creditor, the judicial sale of real and moveable property and third party debtor orders.



The DIFC courts

The Dubai International Financial Centre ("DIFC") Courts were established as a distinct branch of the courts of Dubai operating in parallel to the 'local' Dubai Courts, while being constitutionally courts of the UAE. The DIFC Courts have their own jurisdiction and offer an English language common law system providing a sophisticated forum for resolution of civil and commercial disputes. Their original jurisdiction was limited by statute to civil and commercial disputes which had a nexus with the DIFC. Since 2011, the DIFC Courts also have jurisdiction where it is conferred upon them by the agreement of the parties without any requirement of a connection to the DIFC. We consider below how the Courts' enforcement jurisdiction has recently been determined to be wider under DIFC law than some had originally thought.

While the DIFC Courts have a robust process for enforcement against assets within the DIFC, of particular relevance for this article is the mechanism for enforcement of judgments and orders of the DIFC Courts in the onshore Dubai Courts. The Dubai law which governs the relationship between the two judicial systems provides that each court is obliged to execute a judgment of the other and must not review the merits. No further recognition or 'ratification' of a DIFC Courts judgment is necessary before proceeding to execution against assets in the onshore Dubai Courts.

Where possible, pursuing enforcement through the DIFC Courts for execution onshore may therefore be an attractive option to take.

Enforcement of foreign awards

Dubai Courts (onshore)

The New York Convention (to which the UAE has been a signatory since 2006) provides limited grounds for an enforcing court to refuse recognition and enforcement of an arbitral award rendered in another member state. These include where:

- the parties lacked capacity to enter into the arbitration agreement
- the arbitration went beyond the scope or procedure of the arbitration agreement
- the award is not yet binding and
- recognition and enforcement of the award would be contrary to public policy.

Recent years have seen a welcome shift away from a troubled past of refusals to enforce foreign awards in the Dubai Courts with a number of successful enforcements under the New York Convention. This trend was led in 2012 by *Macsteel International v Airmech (Dubai) LLC* (a Clyde & Co case) where the Dubai Court of Cassation (the highest onshore Dubai Court) held unequivocally that the New York Convention takes precedence over the Federal Civil Procedure Code that would otherwise apply to such matters. This change in approach for onshore enforcement was a huge boost for Dubai's credentials as an arbitration friendly jurisdiction.

The Dubai Court of Cassation has entrenched this position in a number of subsequent cases. For example, in June 2016 it overturned a Court of Appeal judgment which refused to enforce an LCIA award from London on the perverse grounds that the United Kingdom was not a proven signatory to the New York Convention.

These developments have not been without the odd blemish. For example, in 2013 the Dubai Court of Cassation refused enforcement of a foreign ICC award on the grounds that the courts had no jurisdiction over the award debtor, a Sudanese government Ministry which was not domiciled in Dubai but believed to have assets there. However, the broad enforcement outlook is positive. Increasing familiarity of the local judiciary with these matters should militate against more adverse enforcement decisions.

DIFC Courts

For judgment and award creditors seeking to enforce against assets onshore in Dubai, the DIFC Courts are now confirmed to be an effective alternative route to the Dubai Courts. Recent case law has established that the DIFC Courts have a 'conduit jurisdiction' where their enforcement orders will be processed for execution in the Dubai Courts without any merits review or a requirement for a separate recognition. The term 'conduit' is used to mean the court's jurisdiction to recognise and enforce awards and judgments where there are no assets of the award debtor within the DIFC and the creditor's intention is to use the resulting DIFC order to execute against assets onshore.

In *Banyan Tree Corporate Pte Ltd v Meydan Group LLC* ARB-003-2013 and CA-005-2014 (a Clyde & Co case) the DIFC Court of Appeal affirmed that the DIFC Courts have jurisdiction to enforce arbitral awards regardless of their origin (the subject of the case was an onshore Dubai award) and whether or not there is a connection or 'nexus' of the dispute, parties or award with the DIFC. The defendant had unsuccessfully argued that it was the onshore Dubai Courts that had jurisdiction. Having confirmed their jurisdiction, the DIFC Courts in Banyan Tree went on to order the recognition and enforcement of the award against a defendant domiciled in onshore Dubai in circumstances where neither the parties nor the award had any connection with the DIFC. Whether a defendant has any assets in the DIFC was also held to be irrelevant to the issue.

There is now a line of authority of award enforcement orders being made in appropriate cases, for both foreign and domestic Dubai awards alike, as arbitration award creditors take advantage of the legitimate use of DIFC Courts as a conduit jurisdiction. Onshore Dubai Courts execution procedures have since been engaged in many of these cases, thereby demonstrating the effectiveness of the process.

In deciding these enforcement cases, the DIFC Courts have emphasised that they do not appropriate the jurisdiction of the onshore Dubai Courts to supervise awards; rather an award creditor seeking enforcement against an onshore debtor has a choice as to the jurisdiction in which it may apply for recognition and enforcement.

> "...pursuing enforcement through the DIFC Courts for execution onshore may be an attractive option to take."

Enforcement of foreign judgments

DIFC courts

The DIFC Courts provide a preferable alternative to parties ultimately seeking to enforce a foreign monetary judgment onshore in Dubai. This avoids a variety of pitfalls posed by seeking to enforce a foreign judgment directly through the Dubai Courts (as mentioned below). As is the case for arbitral awards, the DIFC Court can order for enforcement of a foreign judgment which the onshore Dubai Courts will execute without being subject to a merits review or further recognition.

The legitimate use of the DIFC Courts as a conduit jurisdiction for enforcement of foreign judgments was confirmed by the DIFC Court of Appeal in *DNB Bank v ASA Gulf Navigation Holding PJSC* CA-007-2015. Having confirmed their jurisdiction, the DIFC Courts in that case went on to order the recognition and enforcement of the foreign judgment (an English court judgment) on the facts, applying common law principles. It is anticipated that a track record of such enforcement will be established in time.

The DIFC Courts have also entered into various bi-lateral memoranda with courts of many foreign jurisdictions which set out an understanding of the respective procedures for the enforcement of money judgments from one court in the other's courts (for example, New York Southern District, the English Commercial Court and the Courts of Singapore, Australia (New South Wales), South Korea, Kazakhstan and Jordan). Although not binding, these memoranda provide helpful guidance on what the courts will consider when asked to enforce each other's judgments.

Dubai Courts (onshore)

The regime of foreign judgment enforcement directly through the Dubai Courts is very

different to foreign awards and makes rather unhappy reading for judgment creditors. While UAE law provides for the enforcement of foreign judgments, in practice such enforcement is extremely difficult.

The principal obstacles (in most cases insurmountable) are that the Dubai Courts will not enforce a foreign judgment (i) where there is no reciprocity of enforcement in the foreign jurisdiction, or (ii) if the Dubai Courts have jurisdiction over the subject matter of that judgment. The Dubai Courts may in such an enforcement case decide to re-hear the substantive dispute. There is, unfortunately, scope here for abuse by judgment debtors preventing enforcement by, for example, refusing to participate in the foreign proceedings, or commencing separate proceedings in Dubai in respect of the same dispute. Given these hurdles, the use of the DIFC's conduit jurisdiction will be a valuable route in effecting successful enforcement going forward.

Is all this finally determined?

In short, not entirely. It is unsurprising that there are defendants who have sought to challenge the constitutional legitimacy of conduit jurisdiction enforcement into onshore Dubai through the DIFC Courts. Some have alleged a conflict of jurisdiction between the two courts and others have challenged the constitutionality of the laws that make it possible. The good news for enforcing parties is that all such challenges so far have been unsuccessful. However, there are known to be extant challenges that remain to be determined.

Also, perhaps in recognition of such challenges and to deal with them at a 'Dubai-level', a new special Judicial Tribunal was established in Dubai in June 2016 to decide upon conflicts of jurisdiction between the onshore Dubai Courts and the DIFC Courts. At this early stage there are a number of questions surrounding the Tribunal's role and interaction with the jurisdiction of the Union Supreme Court, which in time will be answered, but it is hoped that the Tribunal could serve further to enhance the efficient administration of justice between the parallel Dubai court systems. For further background and insightful commentary on this Tribunal, Michael Black QC and Tom Montagu-Smith authored a useful update, published by **XXIV Old Buildings**.

Conclusion

Dubai's legal system has led by example in the region with the improvement in its judicial treatment of arbitration awards, both in the onshore courts and through the establishment of the DIFC Courts as specialist financial courts. The conduit jurisdiction cases have confirmed new routes for local enforcement of foreign judgments and awards. Indeed, there is already proven success from these developments with DIFC Courts enforcement orders that have since progressed to execution against assets onshore.

The result of all this is increased confidence and certainty in the legal framework and processes that underpin much of modern commerce in the region. This must be a good thing and the enforcement landscape is looking better than it ever has.


COSTS

Using costs awards to control the cost of international commercial arbitration

Professor Doug Jones AO is an International Arbitrator. Ranking him in Band 1 for International Arbitration, Chambers Asia Pacific 2016 wrote: "[he] is regarded by many as the leading construction arbitrator in the world". This article is based on the CIArb Roebuck lecture on cost awards of 9 June 2016.
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For a great variety of reasons, arbitration is the preferred method by which to resolve international commercial disputes. Gary Born puts it succinctly in International Commercial Arbitration (Kluwer Law International, 1st Edition 2009, Volume I): "Businesses perceive international arbitration as providing a neutral, speedy, and expert dispute resolution process, largely subject to the parties' control, in a single, centralized forum, with internationally-enforceable dispute resolution agreements and decisions".

There is an inherent cost advantage in having a dispute resolution procedure that is both expert and expeditious, and accordingly, arbitration's cost efficiency has long-been championed as a key attraction to the practice.

There is, however, no shortage of empirical evidence to suggest that perceptions of this cost-efficiency have diminished in some part. The recent 2015 survey by Queen Mary College and White & Case reported that high cost was the most commonly cited "worst characteristic of arbitration" with the "lack of effective sanctions during the arbitral process" a close second.

There is often a focus from arbitral institutions on arbitrators' fees. However, the ICC Commission Report on Controlling Costs in 2012 found that costs incurred by the parties accounted for 83%, by far the largest part of the total cost of international arbitration proceedings, while arbitrators' fees accounted for only 15%.

This unhelpful concentration upon arbitrators' fees easily ignores the value which arbitrators can add to the advancement of the institution of commercial arbitration. Primarily, it is arbitrators who are best placed to solve the problems of cost and lack of effective sanctions, with cost awards offering the unique opportunity to solve both simultaneously. They are also best-placed to offer discipline to arbitrations so often referred to as blind man's bluff.

This article seeks to offer ideas of how to engage with cost allocation and serves as a quick exposition on the practical functions of cost awards and the considerations that go into the making of a cost award, for the benefit of arbitrators, counsel, and parties alike.

In practice

Principally, the time to discuss cost awards with parties is as early as possible, preferably at the first case management conference. Users of arbitration understand the utility of this conference, with its main purpose being to streamline the arbitration procedure. An early discussion of costs allows the tribunal to create the necessary impetus to drive parties' conduct in more efficient ways.

A number of features that may affect the total cost of the arbitration related or the process of cost allocation can sensibly be dealt with here. An early preliminary discussion of each where relevant, has proven useful to consider in my experience. In no particular order of importance:

1. ***The expected behaviour of parties and any sanctions that come with behaviour that depart too far from the agreed standard.*** I have personally found there to be significant value in including a general provision in Procedural Order No. 1 which, by agreement, expressly addresses the tribunal's expectation that the Parties will conduct themselves in a manner consistent with the efficient use of time and resources. Typically, the provision will further explain that unreasonable behaviour could include excessive document requests, excessive legal argument, excessive cross-examination, dilatory tactics, exaggerated claims, failure to comply with procedural orders, unjustified interim applications and unjustified failure to meet deadlines contained in procedural orders.

2. ***The elected cost allocation method***, for example, the "English rule" that "costs follow the event" or the more broad US approach where each party bears their own costs. Most arbitration statutes are silent on the method of cost allocation (with the notable exception of the English statute), and that decision is largely left to the broad discretion of the arbitrators, with primacy held by the parties' procedural autonomy.

3. ***Differing legal cultures between the parties and any imbalances arising from the relative size of the parties and their representatives.*** These differences may be extensive depending on the nature of the differences, and imbalance is seen all too often where, for example, a small or medium sized enterprise represented by a boutique firm is matched up against a government entity or conglomerate represented by an international magic circle firm and, as a result, is left facing a disproportionately large bill.

4. ***Party presence at the initial and subsequent case management conferences.*** As the ultimate bearers of the financial burden, the hope is that parties themselves would be more receptive to cost considerations which otherwise might be lost on the ears of their representatives.

5. ***Suggesting parties prepare and exchange a litigation budget.*** This allows the tribunal to manage the cost of the litigation, and to potentially limit the costs able to be awarded against a party. This is modelled off the budgeting process recommended by Lord Justice Jackson in his influential Review of Civil Litigation Costs.

6. ***Delivering interim cost awards.*** These can be particularly useful to address poor cost management, afford relief to the prejudiced party, and to proactively deter further inefficiencies on the part of the impugned party. Where there is no clear authority for the tribunal to determine and order immediate payments of costs, I have found it equally useful to fix the costs to be taken into account in the final award of costs, without

ordering immediate payment. This may be appropriate in certain jurisdictions to avoid breaching national arbitration statutes. In the UAE, for example, it is well known that tribunals arguably have no jurisdiction to order costs unless the parties expressly agree to it. Interim awards on costs, however, remain ambiguous, and fixing costs without the concurrent order for payment enables the tribunal to demonstrate to the parties the cost consequences of their actions, in a manner consistent with UAE law.

7. ***Consider mandatory applicable statutes that may influence the parties' agreement or impact on the tribunal's discretion to allocate costs.*** In Hong Kong (Section 74(8) of the Hong Kong Arbitration Ordinance) and England (Section 60 of the English Arbitration Act 1996) for example, no agreement as to costs between the parties is binding unless made after the dispute arises. Other national arbitration statutes expressly permit or limit tribunals from awarding interest on costs, security for payment, interim relief, the amount of costs recoverable at any given stage of the proceedings, or even so far as seeking assistance from the Courts for taxation of costs. These statutes are broad ranging and should always be considered at an early case management conference.

8. ***Encourage parties to present their rebuttals to costs claimed by opposing parties when they arise,*** as opposed to staying silent in the hope that the tribunal will allocate costs in their favour. Tribunals are welcome to receive silence on costs claimed as agreement in principle to the amount of costs claimed by the opposing party, thus it is important for issues to be raised as soon as possible.

9. ***The threshold of "reasonableness" of the costs claimed,*** and improper or bad faith conduct by the parties. These will be addressed in detail in the next section.

Factors of allocation

The two necessary factors for tribunals to consider in the process of cost allocation are reasonableness and improper conduct.

Reasonableness

Reasonableness as a factor in cost allocation can be viewed in two lights; one in the sense of "proportionality", and the other in the sense of "necessity".

The question of reasonableness in comparison with the value in dispute inevitably evokes considerations of proportionality. Proportionality principles are broadly applied to factors such as:

- the rates
- number and level of fee-earners - and specialists - involved
- the amount of time spent at various phases of the arbitration
- the legal complexity of the arbitration
- disclosure requests
- and even the disparity of costs incurred by the parties.

The end goal is twofold: firstly to ensure that the costs of the dispute are maintained to a relatively small proportion of the amount in dispute, and secondly to encourage parties to adopt a sensible attitude when making decisions on legal expenses and courses of action, else their costs are unrecoverable.

The second question in relation to necessity is founded on the underlying principle that parties should be able to justify their particular choices, actions, and conduct as necessary within the circumstances of the arbitration. The ICC Commission's 2015 Report on Decisions on Costs in International Arbitration provides a non-exhaustive list of issues for tribunals to consider

in light of the necessity principle. This rather extensive list includes:

- the complexity of the matter
- the existence of any unnecessary claims or counterclaims
- the withdrawal of unmeritorious claims in a timely manner
- the scope of evidence submitted by the parties
- the accuracy and method in which evidence was submitted
- and the length and relevance of any oral or written testimonies of witnesses and experts.

Reasonableness goes to determining whether costs incurred should be recoverable, not simply whether they are too high. The efficient and fair management of proceedings calls for tribunals to condemn disproportionate and unnecessary spending by denying the recoverability of that spending should it occur.

Improper conduct/bad faith

The inability of tribunals to hold malicious or frivolous representatives in contempt, or to impose professional disciplinary sanctions, leaves much to the integrity of arbitration counsel. Whilst there are a number of initiatives currently underway in an effort to address this issue, for example in the creation of a Global Arbitration Ethics Council, many institutional rules, arbitration guidelines, and national statutes enable cost allocation against unscrupulous counsel as the tribunal's primary response.

The ICC Commission's 2015 report lists a variety of instances where improper conduct or bad faith may arise. Many of these are intuitive, such as excessive document disclosure and requests for the same, falsifying witness or expert evidence, falsifying submissions to the tribunal, and even acting aggressively and without professional courtesy. Interestingly, the report also identifies pre-arbitral conduct as an area for tribunals to consider when allocating costs, including whether arbitration could reasonably have been avoided, threatening litigious behaviour, parallel court proceedings in breach of an arbitration agreement, interfering with the counterparty's business interests, prejudicial press campaigns, and perhaps most egregious, post-formation conflicts that parties instigate with the aim of destabilising the tribunal and the arbitration.

The rejection of Calderbank offers might also be another consideration. Necessarily, a tribunal would be at liberty to consider the circumstances in which the party declined the offer, as is frequently undertaken in common law courts *(Miwa Pty Ltd v Siantan Properties Pte Ltd (No 2) [2011] NSWCA 344 at [5]-[8] and [17]-[20])*.

Awarding costs against parties guilty of behaving in such ways achieves two main objectives: the first being compensation for any party that has incurred unnecessary costs as a result thereof, and the second being deterrence against similar future conduct.

Conclusion

For tribunals, cost allocation is the most persuasive and commanding power they have over parties and counsel. In my view, further exploration and embracement of this practice is necessary to ensure that arbitration retains its cost-saving benefits, whilst also providing some form of sanction against disingenuous parties. New developments in this area are sure to follow and should be welcomed.


“For tribunals, cost allocation is the most persuasive and commanding power they have over parties and counsel.”

Harbour news

The team's extensive expertise in dealing with high value, complex commercial litigation and arbitration funding requests was further expanded with the arrival of Lucy Pert, previously at Quinn Emmanuel, as Director of Litigation Funding and Peter Yam as Corporate Counsel in London. In Hong Kong, Harbour's Asia Pacific hub was strengthened by Kiran Sanghera, previously at the Hong Kong International Arbitration Centre, joining as an Associate Director of Litigation Funding. Other recruits included Silvia Van den Bruel as BD & Marketing Manager, previously at Devereux Chambers, and Darryl Davies as Financial Controller, joining from Arcus Investment Limited.

Having over 14 years' experience funding in 13 jurisdictions and under 4 seats of arbitral rules, enabled us to offer nuanced feedback to the Ministry of Law's public consultation on the Draft Civil Law (Amendment) Bill 2016 and Civil Law (Third Party Funding) Regulations 2016 for Singapore in July. In **our response** we highlighted possible methodologies which can help bolster public confidence in third party funding.

Also in July, Insolvency News revealed the shortlist for the upcoming TRI Awards and Harbour Litigation Funding was recognised as a finalist in the category 'Insolvency Litigation Funder of the Year', confirming its outstanding reputation in the market.

We announced that Harbour Fund II is backing an AUD$ 200m+ class action run by Australia's leading class action specialists Maurice Blackburn Lawyers in August. More than 13,000 seaweed farmers, whose livelihoods were decimated by an avoidable oil spill on the Montara oil field west of Darwin, launched an Australian class action against the oil giant responsible for operating the Montara Well Head Platform, the rig that leaked.

Ruth Stackpool-Moore attended the SIAC Congress in Singapore.

As usual, the IBA's Annual Conference, this year in Washington, did not disappoint with excellent legal workshops and many networking opportunities. Susan Dunn spoke at three panels and, together with a host of other eminent international experts, discussed modern litigation issues corporate counsel are faced with and third-party funding solutions and developments. She also travelled to New York to meet with existing and new contacts.

Highlights in our litigation funding calendar are the Harbour Lectures. The 4th Annual Harbour Lecture will take place in London on 12th October with Lord Justice Briggs as its distinguished speaker on "On the cusp of a civil revolution". As part of Hong Kong Arbitration Week, Harbour Hong Kong will host its inaugural Harbour Lecture on 19th October with international arbitrator Neil Kaplan CBE QC SBS as its first guest speaker on "Anyone for costs?". The Harbour Team will also organise an insolvency round table discussion on 17th October and attend the 'ADR in Asia Conference' on 18th October, another highlight that week. If you would like to attend either of our lectures, please email Pauline Raballand at pauline.raballand@harbourlf.com.

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Featuring topical articles by guest authors and the Harbour Team.

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