

CD corporate disputes

APR-JUN 2018

www.corporatedisputesmagazine.com



Inside this issue:

FEATURE

UK and UPC ratification

EXPERT FORUM

**Challenges when enforcing
arbitral awards**

HOT TOPIC

**Litigation in the pharmaceutical
and medical device sector**

PERSPECTIVES

COURTS CONNECTIVITY PAVES THE WAY FOR INCREASED BUSINESS CERTAINTY ACROSS MENA REGION

BY **NOUR HINEIDI KIRK AND MAHIKA HART**

> DIFC COURTS

The recent news that Carillion, the UK's second-largest construction company, will enter into compulsory liquidation has sent shockwaves throughout the sector and put thousands of jobs at risk. While the true cause of Carillion's collapse remains a developing story, delayed payments from Middle East contracts and the expensive withdrawal from other projects in the Middle East are commonly cited as significant contributory factors. While Carillion joint ventures remain active in the United Arab Emirates (UAE) and Oman, the major risks involved in doing business in the Middle East remain a key feature in the Carillion story.

There is currently some dispute as to how much these disputes in the Middle East contributed to Carillion's liquidation, with Carillion's auditors and Middle Eastern companies contesting evidence given by Carillion's chief executive. Nonetheless, the storyline of the Middle East's role in the collapse has taken shape and is unlikely to dissipate in the near future. Accordingly, this substantial and far-reaching collapse feeds into a widespread and misleading cautionary tale that doing business in the Middle East & North Africa (MENA) region is too risky to be worthwhile.



The fear of uncertainty in the MENA region is a topic of concern among business owners and other stakeholders as they consider entering into the region's markets, or as they consider steps forward on projects already initiated. However, the recent opening up of Saudi Arabia and additional regional efforts to create judicial collaboration and increased standardisation on other rule of law topics, signal a promising shift in the regional legal landscape.

In September 2017, Saudi Arabia established a committee to enhance global judicial cooperation, aimed at coordinating, with other governments, to boost international judicial cooperation and

exchange of international advice. Saudi Arabia also officially launched a new system of commercial courts in October 2017 to create a business environment rooted in trust and stability. Although the Saudi commercial courts follow a different model, they join the Dubai International Financial Centre (DIFC) Courts in the increasing regional trend towards specialised commercial courts aimed at creating trust and stability for international investors and business partners. In conjunction with the announcement of 'Saudi Vision 2030', the creation of these commercial courts and the establishment of the global judicial cooperation committee show Saudi's new

commitment toward implementing international legal best practices.

Saudi Arabia, along with Bahrain and Abu Dhabi, have recently provided modern updates to their arbitration laws. With the exception of Iraq, Libya, Yemen, Somalia and Sudan, most MENA countries are signatories to the New York Convention. However, implementation and application of the convention has traditionally been inconsistent across the region, leaving many businesses with significant challenges in seeking enforcement of their arbitral awards. The trend towards more standardisation in arbitration laws along with the proliferation of arbitration and mediation centres in the MENA region signal a new commitment to alternative dispute resolution that will likely continue in the years to come.

Many judiciaries and arbitration centres in the MENA region have also sought to modernise with increased use of technology, streamlined procedures and online tracking systems. Saudi Arabia and the UAE have taken great strides towards using technology to create more transparency and efficiency in national court litigation. The Saudi Ministry of Justice has initiated plans to digitise litigation operations and further implement state-of-the-art technology in its legal system as part of its plan to boost economic investment and

development. Specialised commercial courts in the region, including the DIFC Courts, have turned to technology to help accelerate the pace of litigation, reduce costs and create transparency. Similarly, the many arbitration and mediation centres across the

“At this pivotal time of change and positive development in the legal systems across MENA, attentiveness is the best practice for businesses operating in and looking to start operations in the region.”

MENA region are turning to electronic filing systems to increase efficiency.

Additionally, in the last few years there has been a flurry of cooperative agreements between judiciaries in the MENA region. Since May 2016, agreements on judicial cooperation have been established between Saudi Arabia and Egypt, Kuwait and Egypt, Oman and Morocco, and Jordan and Oman. Further discussions on judicial cooperation remain ongoing between Bahrain and Jordan, Bahrain and Egypt, as well as Kuwait and Sudan. Most of these agreements resolve to promote judicial cooperation through the mutual sharing of expertise and visits between judiciaries,

including training and seminars. Judges in the region are seeking to learn from each other and establish more standardised best practices in region – a promising development signalling that similar change in other areas of legal practice will be forthcoming.

In the UAE, there have been significant developments regarding judicial cooperation. Along with its many existing agreements with nations in the region, the UAE continues to lead with international collaborations, recently commencing discussions regarding judicial cooperation with Romania and Mozambique. The DIFC Courts, operating as an independent and international free zone court, has established important regional and international connections in the last few years, including a memorandum of understanding on judicial cooperation and on enforcement of foreign judgments. Among recent cooperative efforts are agreements with the High Court for Zambia, the Federal Court of Malaysia and the Shanghai High People's Court, adding to an already substantial list of partnerships.

These trends towards regional and international partnerships, judicial cooperation, technological developments and other standardisation in the legal field come during a climate of increased emphasis on international economic development and investment from nearly every government in the MENA region. The corresponding legal shifts across MENA signify an acknowledgment that stability and standardisation in the legal field are important gateways towards

further international economic progress in the region. Courts and judicial benches are seeking to learn from one another and to create more consistency in their provision of justice. This attitude will continue to flow through many aspects of the legal systems in the region, both criminal and civil, with a heavy emphasis on commercial disputes. While these shifts are still ongoing, businesses around the world must stay abreast of these developments, many of which will inform the best practices necessary to achieve and maintain security in contract in the MENA region.

At this pivotal time of change and positive development in the legal systems across MENA, attentiveness is the best practice for businesses operating in and looking to start operations in the region. Businesses must make sure to seek the most current legal advice on their dispute resolution clauses before entering into contracts and they should not neglect active negotiation of these clauses. Most importantly, businesses should invest in up-to-date legal advice to enable swift action and renegotiation of dispute resolution clauses as developments continue in the region. Unfortunately, renegotiation of dispute resolution clauses often seems unnecessary and is not commonly pursued. Too often, the dispute resolution clause could have been updated to reflect important legal shifts but was instead left to create larger problems once a dispute emerged.

Businesses should ensure their legal counsel takes an aggressive look from the outset towards

enforcement prospects should a dispute emerge. Parties should look towards enforceable assets and work backwards towards a dispute resolution clause that they prefer, seeking to maximise their prospects of enforcement in contract negotiations. This is especially relevant now in the MENA region, where the dispute resolution choices available are no longer bilateral. There is increasing choice among arbitration and mediation centres in the region, with increasing numbers having been established in recent years. Choice of arbitral seat and governing law can significantly change arbitral proceedings and enforcement prospects.

Even in the realm of national court litigation, there is choice between the newer international commercial courts that follow a common law system and proceed in English language – such as the DIFC Courts, and traditional local and onshore courts – which likely proceed under civil law traditions and that country's native language. These choices, from the outset, make a significant difference in the event a dispute emerges, particularly in the context of enforcement, which will be affected by the location and legal circumstances of relevant assets. While there is no formulaic dispute resolution clause appropriate for all businesses seeking to act in the MENA region, parties often fail to appreciate at the beginning of a relationship just how important these choices may become down the road.

The above observations are especially true in the construction industry, where large-scale disputes

seem to be more and more common, regardless of region. As evidenced by the Carillion collapse, which has principally been attributed to a few large construction contracts, construction disputes can make or break a company. Thorough consideration of dispute resolution choices may make all the difference.

Adequate attention to these ongoing changes in the legal landscape of the MENA region will help businesses to ensure that they will not be involved in the next Carillion catastrophe. In fact, adequate attentiveness and legal advice can provide the necessary assurances that doing business in the MENA will provide many of the safeguards that exist for international investors in other regions. This remains an exciting and dynamic area of change and positive development to watch in the coming years, with the MENA region trending towards an increased role in legal innovation and economic progress. 



Nour Hineidi Kirk

Deputy Registrar

DIFC Courts

T: +971 (4) 427 3308

E: nour.kirk@difccourts.ae



Mahika Hart

Postgraduate Law Fellow

DIFC Courts

T: +971 (4) 427 3350

E: mahika.hart@difccourts.ae