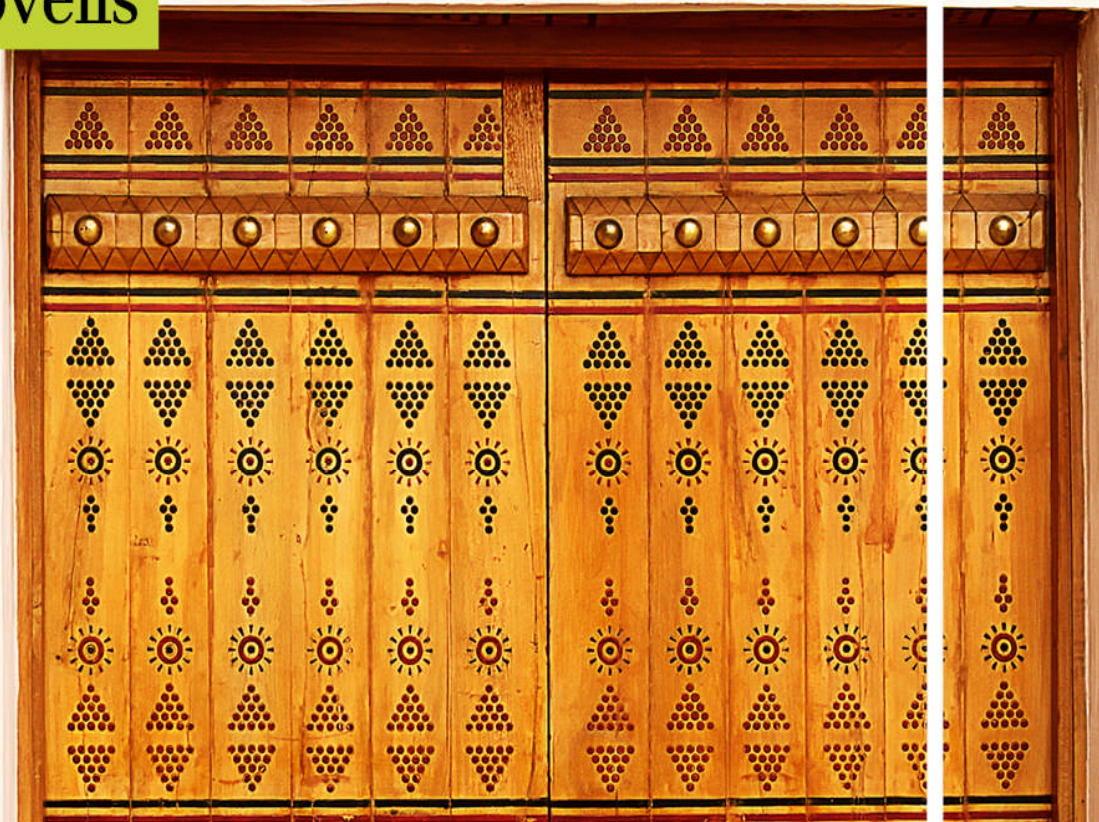


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## Enforcement of local arbitration awards in the Arab world and overseas

September 2013





# 1. Introduction

It is slowly becoming the norm, sometimes even a condition, when contracting with Middle Eastern companies, whether state or privately-owned, for disputes to be subject to local law with proceedings conducted locally, either before local courts or under the auspices of local arbitration centres. As a result, foreign investors have become increasingly interested in understanding how a locally issued arbitral award is enforced locally, namely where the assets of the Middle Eastern company are most likely situated.

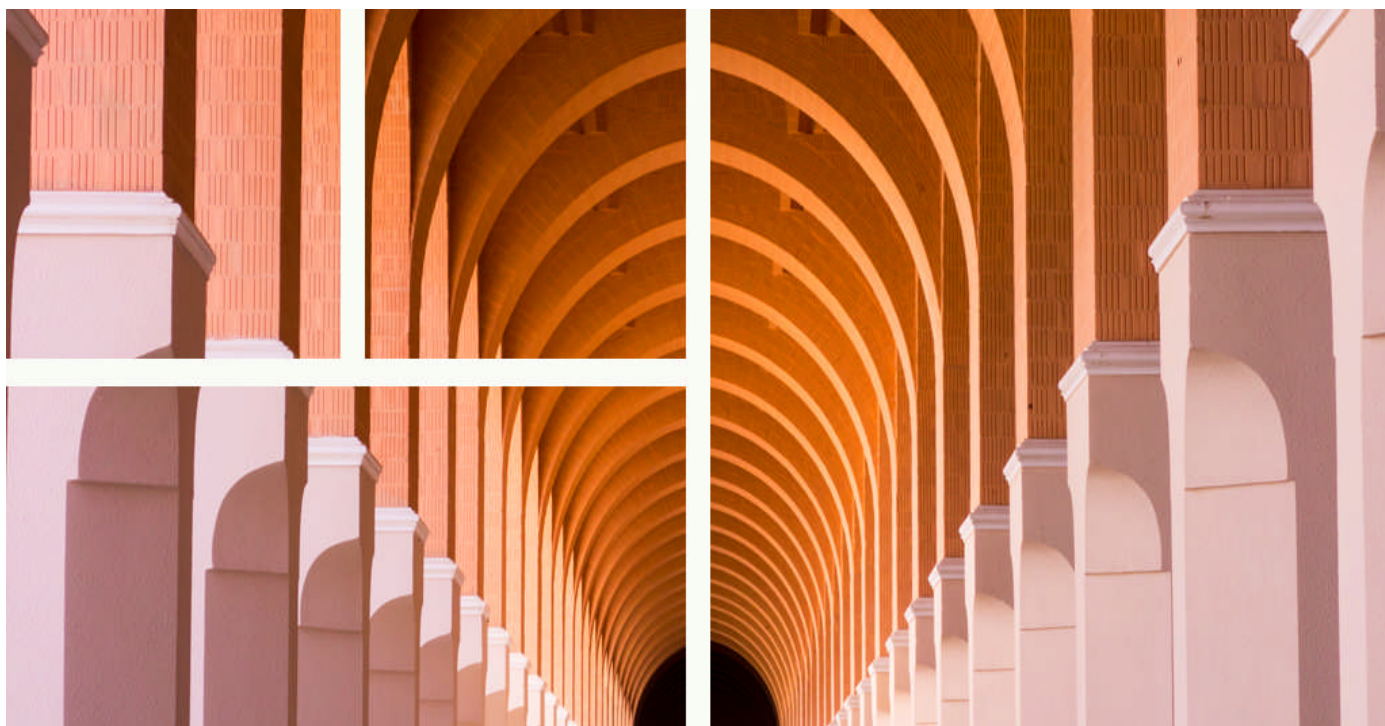
This article considers how the local courts in each of the default seats of the major regional arbitration institutions in the Middle East enforce awards issued locally. It also considers the position in relation to international enforcement of these locally issued awards and, finally, goes on to consider possible future developments.

The four major arbitral institutions in the Middle East region are: the Dubai International Arbitration Centre, Dubai, United Arab Emirates (UAE); the DIFC-LCIA Arbitration Centre based in the Dubai International Financial Centre, Dubai, UAE; the Cairo Regional

Centre for International Commercial Arbitration, Cairo, Egypt; and the Qatar International Centre for Commercial Arbitration, Doha, Qatar.

Although the use of arbitration as a means of dispute resolution in the Middle East is not new, recent developments in the various arbitral institutions and local law indicate a growing recognition of arbitration and arbitral awards and, as such, foreign counterparties are becoming more confident in choosing Middle Eastern seats of arbitrations. Several governments in the Middle East region are in the process of implementing, or already have implemented, new arbitration laws based on international standards in order to encourage greater confidence in their arbitration system, with the intention that this will in turn further encourage foreign investment.

**Mohamed ElGhatit**  
*Senior Associate, Hogan Lovells*



## 2. Dubai International Arbitration Centre (DIAC) Dubai, UAE

### 2.1. Background

DIAC was established in 1994 by the Dubai Chamber of Commerce. Its rules were significantly modified in 2007.

### 2.2 Local enforcement of a DIAC award

As of the date of this article, the UAE has not enacted any legislation specific to arbitration or the enforcement of domestic arbitral awards. However, UAE legislators are in the process of issuing a new Federal Arbitration Law, a draft of which has been in development for some years. This draft federal law is based on the Model Law on International Commercial Arbitration developed by the United Nations Commission on International Trade Law (UNCITRAL Model Law) but is also influenced by a number of principles of Egyptian arbitration law.

In the absence of an enacted federal law, the enforcement of DIAC awards through the local UAE courts is currently governed by the UAE Civil Procedure Code (CPC).<sup>1</sup>

Under the CPC, a DIAC award issued locally must be ratified by the local court before it can be enforced. A DIAC award which is presented for ratification will be considered by the local courts according to the provisions of articles 215 and 216 of the CPC. These articles provide that the local court must be satisfied that:

- there is a valid arbitration agreement;
- the tribunal has not exceeded its jurisdictional limits;
- the award was issued by properly appointed arbitrators; and
- the award and the arbitral proceedings are not invalid.

Once the award has been ratified it becomes equivalent to a judgment of the local court and can be enforced through an application to the execution department of that court. It should be noted that, in addition to the winning party applying to the local court for ratification

of the award, the losing party may also apply to the court for annulment of the award.

### 2.3 When can a local court set aside a DIAC award?

Under the CPC, a local court may refuse to enforce an award for a variety of grounds, including public policy. In practice, the provision of the CPC which has caused the most difficulty when seeking to enforce awards is that relating to the setting aside of an arbitral award on the basis of an invalidity in the award or in the arbitral procedures themselves.<sup>2</sup>

In a controversial judgment<sup>3</sup>, an arbitrator's failure to swear witnesses when providing evidence was relied upon and was accepted by the Dubai Court of Cassation (Court of Cassation) as grounds on which to annul a DIAC award. This decision has been heavily criticised by commentators.<sup>4</sup>

In another case, the Court of Cassation refused to ratify and enforce an ad hoc award on the grounds that, contrary to the requirement under the CPC,<sup>5</sup> the majority opinion of the arbitrators did not make reference to the opinion of the dissenting arbitrator nor was it signed by that dissenting arbitrator, notwithstanding the fact that the dissenting opinion was appended to the majority opinion and that the dissenting opinion was signed by the dissenting arbitrator.

The award discussed immediately above was an ad hoc award rather than one issued under the auspices of DIAC. It is worth noting that the DIAC Arbitration Rules provide that "the signature of the award by a majority of the arbitrators ... shall be sufficient"<sup>6</sup>. It remains to be seen if the parties' submission to the DIAC Arbitration Rules would preclude the Court of Cassation from relying on the CPC and refusing to ratify a majority-decision DIAC award which did not make reference to

<sup>2</sup> Art. 216(1)(c) of the CPC

<sup>3</sup> Court case related to enforcement proceedings instituted in respect of an award involving an international contractor and a UAE Government entity

<sup>4</sup> See also the treatment of this decision by the Paris Court of Appeal referred to in para 2.4

<sup>5</sup> Art. 212 of the CPC

<sup>6</sup> Art. 37.6 of the DIAC Arbitration Rules

<sup>1</sup> Federal Law 11/1992 on Civil Procedure (UAE)

the dissenting opinion. One deciding factor may be whether the courts view as a mandatory rule the CPC requirement that an award bear the signature of all of the arbitrators and refer to any dissenting opinion, which cannot be derogated from by consent of the parties.

Generally, however, both the local courts' application of the CPC and the UAE law concept of "public policy" have become more conservatively consistent in recent years.

As regards the speed of enforcement of DIAC awards in the local courts, following the Court of First Instance's initial decision regarding ratification, the losing party has a right of appeal to the Dubai Court of Appeal if it so wishes and then, subsequently, to the Dubai Court of Cassation. Court of Appeal judgments are enforceable, save for circumstances when the Court of Cassation stays such enforcement.

Parties cannot contract out of this right of appeal and therefore a time-consuming three-tier appeal process may be unavoidable when trying to enforce an award - in some instances this could take two years or more.

#### 2.4 How are DIAC awards enforced internationally?

As the UAE is a signatory to the New York Convention on the Recognition and Enforcement of Arbitral Awards<sup>7</sup>, a DIAC award will, in theory, be enforceable in any signatory state. In addition to the New York Convention, the UAE has also entered into several other treaties which relate to the enforcement of arbitral awards, including:

- the Riyadh Arab Agreement for Judicial Co-operation (Riyadh Convention);
- the Protocol on Enforcement of Judgments, Letters Regulatory and Judicial Notices issued by the Courts of the Member States of the Arab Gulf Co-operation Council (GCC Protocol); and
- bilateral treaties with other states including: Morocco; Syria; Egypt; Jordan; Tunisia; India; France; Somalia; and Sudan.

Although these treaties facilitate the enforcement of DIAC awards overseas, questions have been raised with regard to whether a DIAC award needs to be ratified by the Dubai courts before it can be enforced abroad, especially in respect to any overseas enforcement sought under the Riyadh Convention or the GCC Protocol. The above said, there are

jurisdictions that have taken the view that even if a Dubai Court has refused to ratify and instead had set aside a DIAC award, it is still enforceable in that foreign jurisdiction. For example, the Paris Court of Appeal recognised and enforced a DIAC award<sup>8</sup>, despite the award being annulled by the Dubai Court of Cassation. The Paris Court of Appeal rejected the arguments that (a) it did not satisfy the requirements of the mutual enforcement treaty between the UAE and France or (b) that recognition of the award would be contrary to international public policy. The Paris Court of Appeal instead held that the judicial effect of the Court of Cassation's judgment was limited to the UAE and that the French judiciary was not required to adhere to it when deciding to enforce the arbitral award. This is, of course, not to say that countries such as France, which have traditionally been strongly in favour of enforcing foreign arbitral awards, will always enforce an award even if it is clearly contrary to international public policy.

#### 2.5 Future developments

While the above highlights that the local courts' enforcement of DIAC awards still faces occasional issues, commentators are confident that the trend in the UAE continues to point towards a friendlier local judicial attitude to the enforcement of arbitral awards. There are regular examples of the courts enforcing awards and recognising that they do not have the jurisdiction to consider the merits of the award, and that their review should be limited to circumstances (very narrowly interpreted) set out in the CPC. This is indicative of the development of an increasingly pro-arbitration environment.

Furthermore, it is hoped that a Federal Arbitration Law, once implemented, will bring further clarity as to the mandate of the court when it is asked to recognise and enforce local arbitral awards.

<sup>7</sup> The UAE ratified the NYC on November 19, 2006, by way of Federal Decree 43 of 2006

<sup>8</sup> Subject matter of the controversial Dubai Court of Cassation judgment – court case related to enforcement proceedings instituted in respect of an award involving an international contractor and a UAE Government entity

## 3. DIFC-LCIA Arbitration Centre Dubai International Financial Centre, Dubai, UAE

### 3.1 Background

The DIFC-LCIA Arbitration Centre is a joint venture established in 2008 between the Dubai International Financial Centre (DIFC) and the London Court of International Arbitration (LCIA). It was established under the DIFC Arbitration Law, which is based on the UNCITRAL Model Law.

### 3.2 Local enforcement of a DIFC-LCIA award

#### *DIFC*

The DIFC Court has jurisdiction to recognise and issue enforcement orders in respect of awards issued in proceedings held pursuant to the DIFC-LCIA rules. This is a relatively straightforward process; the party relying on the award will need to present the award and the original arbitration agreement (or certified copies thereof) to the DIFC Courts for recognition, following recognition the award will be “converted” into a DIFC Courts’ judgment and enforceable within the DIFC<sup>9</sup>.

However, if the award is to be enforced against assets situated in onshore UAE (i.e. outside of the DIFC) then the award will need to be enforced through the local, or “onshore”, courts.

#### *Onshore*

Enforcement of DIFC-LCIA awards in the onshore courts is a two-stage process. The first stage is for the DIFC Courts to recognise the award, in the same manner as DIAC awards described above.

Following recognition, the DIFC Courts will issue an enforcement order which can then be enforced through the onshore UAE courts by virtue of the Dubai Law on the Judicial Authority of the DIFC<sup>10</sup> and the Protocol of Jurisdiction between the onshore courts and the DIFC Courts<sup>11</sup> (together, the Protocol of Enforcement).

The order of the DIFC Courts is presented (with an Arabic legal translation) to the execution department of

the local courts who, by virtue of the Protocol of Enforcement, shall, without review or examination of the merits of the award, convert the enforcement order into an order of the Dubai Courts which is enforceable onshore in Dubai (and, in theory, the other Emirates of the UAE, as provided for by UAE Federal Law).

The onshore courts first enforced a DIFC-LCIA award in this manner in 2011, a development which was widely welcomed by practitioners<sup>12</sup>.

### 3.3 When can a DIFC-LCIA award be set aside by the DIFC Courts or the onshore courts?

#### *DIFC Courts*

Under the DIFC Arbitration Law, the DIFC Courts may only refuse to recognise or enforce an award on limited grounds. These grounds are essentially the same as art.V of the New York Convention (NYC) and are set out in art.44(1) of the DIFC Arbitration Law.

#### *Onshore courts*

Under the Protocol of Enforcement and Dubai law the execution judge of the onshore courts has no jurisdiction to examine the merits of a judgment, award or order of the DIFC Courts<sup>13</sup>. In theory, this should mean that the onshore courts cannot set aside awards which have been recognised by the DIFC Courts.

### 3.4 How are DIFC-LCIA awards enforced internationally?

Notwithstanding that the DIFC is a free-zone with a special economic and legal nature, it is considered a jurisdiction within the UAE. Accordingly, a DIFC-LCIA award will be enforceable overseas in the same manner as a DIAC award, i.e. under the NYC or other applicable treaties.

<sup>9</sup> Article 41(1) of the DIFC Court Law

<sup>10</sup> Law 12/2004 (as amended by Law 16/2011) (Dubai)

<sup>11</sup> The Protocol of Enforcement between the Dubai Courts and the DIFC Courts

<sup>12</sup>

[http://difccourts.complanet/en/display/displaymain.html?rbid=2725&element\\_id=4492](http://difccourts.complanet/en/display/displaymain.html?rbid=2725&element_id=4492) [Accessed July 17, 2013]

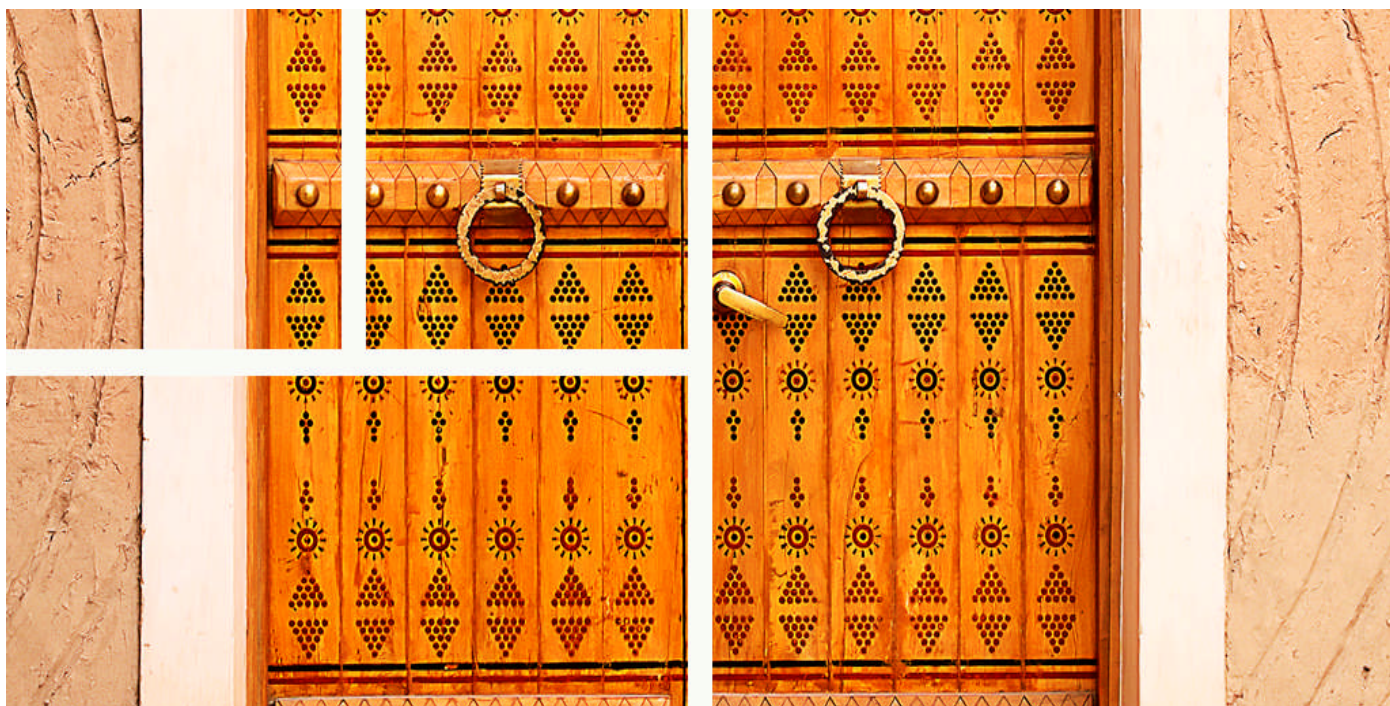
<sup>13</sup> Article 7(3) of Law 12/2004 (as amended by Law 16/2011) (Dubai)



### 3.5 Future developments

Although the DIAC remains the most popular arbitral institution in Dubai, the increased awareness of the DIFC-LCIA Arbitration Centre, coupled with the increased recognition of DIFC-LCIA awards as being a much facilitated method to enforce awards in onshore Dubai and the wider UAE, may lead to users shift from DIAC to the DIFC-LCIA Arbitration Centre.

DIFC-LCIA awards may be preferable to some users because the CPC ratification procedure is avoided by virtue of the DIFC Courts' straightforward recognition procedure, the Protocol of Enforcement and the Federal Decree precluding the onshore courts from examining the merits of the award once it has been ratified by the DIFC Courts.



## 4. Cairo Regional Centre for International Commercial Arbitration Cairo, Egypt

### 4.1 Background

Established in 1979 by virtue of a treaty between Egypt and the Asian African Legal Consultative Committee, the Cairo Regional Centre for International Commercial Arbitration (CRCICA) is one of the first arbitration centres in the Arab world. The introduction of Law 27/1994, which promulgated the law concerning arbitration in civil and commercial matters (Egyptian Arbitration Law), was a welcome development that increased confidence in the choice of Cairo as a seat for international and local arbitration.

Initially adopting and applying the UNCITRAL Arbitration Rules of 1976, CRCICA has continued to develop. In March 2011 it adopted rules based on the UNCITRAL Arbitration Rules 2010 with minor modifications reflecting CRCICA's role as an arbitral institution and appointing authority. In addition to updating its rules in line with international standards, CRCICA has extended its arbitrator list to include prominent international arbitrators.

### 4.2 Local enforcement of a CRCICA award

Before the enactment of the Egyptian Arbitration Law, the enforcement of arbitral awards was subject to the rules and procedures of the arbitration chapter of the Egyptian Civil Procedure Code. The Egyptian Arbitration Law is based on the UNCITRAL Model Law and draws on aspects of local laws. The enforcement of arbitral awards starts with an application lodged with the local courts requesting the issuance of an execution order.

Recently, however, a new initial stage to the enforcement process has been introduced. By virtue of Minister of Justice Decree 8310/2008 (as amended by Minister of Justice Decree 6570/2009), a special commission within the Ministry of Justice, the Technical Office for Arbitration (TOA) was established. Now, a party seeking to enforce an arbitral award must first apply to the TOA to secure "permission for enforcement". TOA "permission for enforcement" will not be granted where awards relate to matters of real estate registration, family or personal status, or other matters if it is determined that they contravene public policy.

Although not falling within the ambit of this article, it is worth mentioning that there are serious concerns as to the arguably judicial role which is exercised by a committee established as part of the executive branch.

Once the TOA has issued the "permission for enforcement" of an arbitral award, the party seeking enforcement can deposit the award with the local courts to seek the issuance for an enforcement order.

### 4.3 When can a CRCICA award be set aside by the local courts?

In terms of procedure, a party against whom an arbitral award was issued can apply to set aside the award within 90 days of formally being served with it. If this 90 day period lapses then an award is, in theory, immune from the setting aside procedure, and could be recognised as enforceable under art.53 of the Egyptian Arbitration Law.

Under the Egyptian Arbitration Law, the grounds for setting aside arbitral awards are similar to the grounds provided in the UNCITRAL Model Law. The ground most frequently invoked is that of public policy. The local courts have in the past decade slowly adopted a very narrow interpretation of public policy.

Unlike in the UAE and Qatar, under the Egyptian Arbitration Law it is the Court of Appeal, rather than the Court of First Instance, that hears applications for the enforcement or setting aside of arbitral awards. This brings the following benefits:

- judges of a greater seniority consider the matter;
- fewer appeals can be made; and
- Egyptian Court of Appeal judgments are enforced upon issuance, allowing the immediate enforcement of an award subject to very limited circumstances where the Egyptian Court of Cassation can grant a stay.





#### 4.4 How are CRCICA awards enforced internationally?

Awards are enforced internationally by way of bilateral regional and international treaties to which Egypt has acceded. These include the following:

- the NYC (since 1959);
- the Convention on the Settlement of Investment Disputes (since 1972); and
- the Arab League Convention on Commercial Arbitration;
- the Riyadh Convention;
- the Egypt and Germany treaty of May 22, 1969, issued by Presidential Decree 1536 of 1969;
- the Egypt and Kuwait treaty of April 6, 1977, issued by Presidential Decree 293 of 1977;
- the Egypt and France treaty of March 15, 1982, issued by Presidential Decree 331 of 1982;
- the Egypt and Bahrain treaty of May 17, 1989, issued by Presidential Decree 260 of 1989; and
- the Egypt and China treaty of April 21, 1994, issued by Presidential Decree 361 of 1994.

#### 4.5 Future developments

The Egyptian local courts have consistently observed international standards in respect of their role and jurisdiction when reviewing arbitral awards. Local courts are reluctant to review the arbitral awards on their merits, preferring instead to only set aside awards when faced with severe procedural irregularity. However, since the onset of the Arab Spring, there have been some anomalies to this previously consistent approach and it remains to be seen what, if any, developments the coming few years will bring in this regard.



## 5. Qatar International Centre for Commercial Arbitration (QICCA) Doha, Qatar

### 5.1 Background

Arbitration in Qatar is dealt with under arts. 190 to 210 of the Civil and Commercial Code of Procedure (Civil Procedure Code) which provides the basic framework for arbitration and its procedure in Qatar. These provisions predominantly are based on the Egyptian Civil Procedure Code.

### 5.2 Local enforcement of a QICCA award

A party seeking to enforce an arbitral award must lodge the award with the local courts within 15 days of its issuance. The judge will then review the award and the arbitration agreement to ensure the award is enforceable in accordance with art.204 of the Civil Procedure Code.

The enforcement proceedings will be suspended if the party whom the award is being enforced against challenges it. The court will need to consider this challenge, and enforcement of the award can only be made if the challenge is rejected.

### 5.3 When can a QICCA award be set aside by the local courts?

In addition to the setting aside of arbitral awards provided for in art.207 of the Civil Procedure Code, arbitral awards are subject to appeal.

Article 205 of the Civil Procedure Code treats arbitral awards as though they were court judgments subject to an appeal process, and this understanding has been highlighted in case law. However, this right to appeal can be waived by the parties' agreement.

As mentioned above, an award may be set aside under the limited grounds set out in art.207 of the Civil Procedure Code, which include:

- the lack of terms of reference;
- if the award transcended the scope of issues included in the arbitration agreement;

- the lack of capacity or good standing of the arbitrator(s); or
- a finding of a procedural error in the appointment of the arbitrator(s).

### 5.4 How are QICCA awards enforced internationally?

Qatar is party to regional and international treaties including:

- the NYC (since 2003);
- the Convention on the Settlement of Investment Disputes (since 2011);
- the GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications; and
- the Riyadh Convention.

Qatar has also concluded several bilateral treaties for the enforcement of arbitral awards including treaties with Tunisia and Jordan.

### 5.5 Future developments

An arbitration law is currently in draft and it is expected to be finalised and put into law some time in 2013. The enactment of a new and dedicated arbitration law is expected to be a significant positive step for practitioners, users of arbitration and Qatar's legal system as a whole.

## 6. Conclusion

It is a well-known fact that alternative dispute resolution mechanisms, such as arbitration, are enshrined in Sharia principles. However, due to a number of early awards given by international tribunals in respect of cases involving the Arab world (states or private enterprises) during the third quarter of the 20th century, a justifiable sense of apprehension in the region towards modern international arbitration arose.

Over the past decade, the scepticism towards international arbitration has receded. With increasing certainty and predictability of the local courts' approach to arbitration, foreign and local companies alike are now increasingly willing to opt for local arbitration centres. There are currently around 400 cases registered with DIAC and even more registered in CRCICA. With further development to relevant laws in Dubai and Qatar pending, and recognition of the benefits of the DIFC-LCIA, the region is likely to see an ever-increasing number of foreign and local enterprises agree to refer any disputes to local arbitration centres.

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### Key contacts



**Richard Kiddell**  
Partner, Dubai

+971 4 377 9388  
richard.kiddell@hoganlovells.com



**Mohamed ElGhatit**  
Senior Associate, Dubai

+971 4 377 9211  
mohamed.elghatit@hoganlovells.com



**Olivia Rose**  
Associate, Dubai

+971 4 377 9323  
olivia.rose@hoganlovells.com





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