ARBITRATION AND INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED ARAB EMIRATES: EMERGENCE, ESTABLISHMENT, REFORMS IN THE CONTEXT OF DIGITALISATION

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Abstract *– The purpose of the research is to analyse the process of formation of the institution of international commercial arbitration, using the example of two free economic zones of the United Arab Emirates – Abu Dhabi and Dubai. The study analyses the key conditions and events that determined the possibility of formation and development of commercial arbitration institutions, which, in a country with a legal system based on Sharia law, are usually subject to the rules of common law. Targeted government policy aimed at improving the first-of-its-kind institutions of justice, including through reforms, enabled the courts over a period of twenty years to go from being established in newly created free economic zones to becoming leaders among all international commercial arbitration institutions.*

Keywords: *arbitration, state jurisdiction, digital dispute, international commercial arbitration, digital assets;*

INTRODUCTION

Shortly after the introduction of huge sanctions packages against the Russian Federation, the Russian business and legal communities began to realise that the usual choice of arbitration institutions had become irrelevant. Therefore, domestic companies involved in foreign economic activity, as well as companies affiliated with Russian beneficiaries, began to choose arbitration institutions from friendly jurisdictions.

The choice in favour of international arbitration courts located in the territory of the United Arab Emirates (hereinafter – the UAE) is becoming relevant. This is dictated, firstly, by the presence of an established Russian-speaking business environment, and secondly, by the relocation of the offices of some Russian companies that were doing business before the imposition of sanctions. In addition, the UAE position their own new economic centres as alternatives to those that were established long before them and have proven their effectiveness.

Thus, in the new digital age, the most important criterion has become the independence and neutrality of the institutions of international justice, its ability to adjudicate a dispute involving persons under sanctions[23].

1. The emergence and establishment of international commercial arbitration in the UAE

In the early 20th century, the eastern coast of the Arabian Peninsula, on the territory of which the UAE is located today, was not divided into the territories of states with such signs of statehood as state borders, a clear apparatus of state power, etc. At that time, the prototypes of modern states were still represented by political unions without administrative-territorial division, central governments and local self-government bodies, as well as judicial authorities [20].

An important driver in the development of statehood and the institutions of state power in the territory of the present-day UAE was the region's involvement in the general international economic and trade processes associated with the development of oil fields and oil trade in the years following the Second World War.

Particular attention should be paid to the legal dispute between the UK oil company Petroleum Development (Trucial Coast) Ltd. and the Sheikh of Abu Dhabi, which was heard in 1952 in an ad hoc

arbitration. Although the UAE emerged two decades later, this case is considered to be the first to involve this state.

The subject matter of the dispute related to the 1939 Concession Agreement, pursuant to which Petroleum Development (Trucial Coast) Limited acquired from the Sheikh of Abu Dhabi the right to produce oil in the region. The Concession Agreement had a term of 75 years.

The case was heard by Lord Asquith, a judge of the Court of Appeal for England, sitting alone.

In resolving the question of the applicable law and denying the Sheikh's application of Abu Dhabi law (which, by the way, boiled down to the fact that the language of the Concession Agreement was Arabic, it was signed and was to be executed in Abu Dhabi), the arbitrator gave his own assessment of local law as "so primitive for which it would be bizarre to suggest that in this very primitive region there is any established body of legal principles applicable to the creation of modern commercial instruments" .

As a result, principles of English law were applied to the dispute and Petroleum Development (Trucial Coast) Ltd. won the litigation.

In the 1950s and 60s, the Arab states lost a series of important arbitrations related to the nationalisation of oil concessions to oil companies – the market leaders of the time – which could not but affect the attitude towards the institution of arbitration in the Arab countries themselves. The decisions created around arbitration an image of an instrument of colonial subjugation [7], which, in turn, predetermined the absence of attempts to implement an institution similar in functionality and efficiency for the purposes of their own sheikhdoms [9].

An important stage in the realisation by the Sheikh governments of the need to rapidly build up the organs of state power, including the judiciary, was the reduction in oil prices, which was decided in 1959 by British Petroleum (BP) virtually unilaterally («the reduction in the price of oil produced in the region was a reasonable and justified market reaction to the increase in the amount of oil produced by the Soviet Union, but this decision, which had important consequences for the budgets of the Sheikhdoms, was taken without any formal consultation with the government of the Sheikhdoms» [25]).

The increasing volume and role of oil production in the region has subsequently led to many disputes involving oil concessions (e.g. Saudi Arabia v. Arabian American Oil Co. [28] and Development Ltd. v. Sheikh of Abu Dhabi).

However, on 18 July 1971, the Constitution of the United Arab Emirates was adopted in Dubai, and on 1 December 1971, the former Treaty of Oman, which united the Sheikhdoms in the territory of the present UAE under the protectorate of the United Kingdom, ceased to exist (the UK declared the cancellation of treaties with the Sheikhdoms). On 2 December 1971, it was announced that the UAE, a federation of monarchies with six emirates with an absolute monarch at the head of each emirate, had been established on the territory of the Arabian Peninsula. The seventh emirate, Ras al-Khaimah, joined on 10 February 1972.

Over the next quarter of a century, thanks to a competent policy in the field of economy and legal regulation, the UAE has become one of the leading states in the region, which, due to the oil revenues properly distributed in the infrastructure and social sphere, was able to create a favourable environment for the development of international business, including the attraction of investments.

In 2020, the Doing Business project ranked the UAE 16th among 190 countries in terms of favourable business environment. The establishment of free economic zones in the UAE played a huge role in this.

2. REFORMS

The application of national law as it was laid down in the Code of Civil Procedure for the needs of the domestic market in the first place led to a large number of abuses in situations where one of the parties was not interested either in resolving the dispute within a reasonable time or in ending the litigation in principle, while trying to avoid the unfavourable consequences of a losing arbitral award.

In the late 1990s and early 2000s, the leadership of the UAE took the momentous decision to establish free economic zones. The first step was «the amendment of 10 January 2004 to article 121 of the Constitution of the UAE» [32].

Further implementation of this constitutional reform implied that the head of each individual sheikhdom would decide at his discretion whether to create free economic zones or not, how many there would be, what law they would apply, and what goals such reforms would pursue.

The decision to create new free economic zones should be formalized by a special normative legal act.

Hereinafter, reference will be made to the two arbitral jurisdictions located in Abu Dhabi and Dubai, «the total number of free zones in the Emirates is 45» [1].
Dubai is home to:
- «Dubai International Financial Centre Courts (DIFC Courts)» [30];
- «Dubai International Arbitration Centre (DIAC)» [29].
Abu Dhabi is home to:
- «ADGM Courts, an integrated digital court platform that is an independent common law court system within ADGM» [5].

3. ADGM Financial Free Zone

The ADGM is a free economic zone established under Federal Decree No. 15 of 2013 Concerning Establishing a Financial Free Zone in the Emirates of Abu Dhabi [14], which is characterised by a broader application of common law.
Its activities are regulated by the Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015 [4].
Also included in the list of normative sources of activity of ADGM Courts are:

- ADGM Courts Procedure Rules 2016 [2];

- ADGM Courts Litigation Funding Rules 2019) [3];

- Judicial Conduct (Judicial Office Holders) Rules 2015) [21].

The judicial system has two levels of courts, first instance and appeal, the second being final and its decisions not subject to appeal.
The legal systems of both DIFC and ADGM are based on common law. It is in the ADGM that it is most fully represented, sometimes by direct reference to specific statutes and their application (this is the case, for example, of the doctrines of maintenance and champerty), resulting in the Middle East effectively becoming a territory applying English law "as it is" (much like Singapore or Hong Kong).
Thus, by the early 2020s, two of the most developed and economically attractive free economic zones – Dubai International Financial Centre and Abu Dhabi Global Market – had been established in the UAE, with each of them having its own justice system independent of the courts of the Emirates.
However, the late 2010s and early 2020s were marked by numerous reforms that affected the Dubai Free Economic Zone court system directly.
Thus, the activity of the International Commercial Arbitration Court DIFC –LCIA from 2015 to 20 September 2021 was highly appreciated by the professional community; such evaluation was witnessed in the constant increase in the number of court cases in the DIFC–LCIA. Thus, as of mid-2021, the DIFC–LCIA had handled approximately 180 court cases. There were several key factors that ensured this constant increase un the use of the court, such as the DIFC–LCIA arbitration rules, which adapted to modern realities, and the law on arbitration in the DIFC itself. This was closely interrelated with the models proposed by the UN Commission on International Trade Law (UNCITRAL), which enable comparisons in the way the legislation on international arbitration is implemented in some countries of the Asia-Pacific region, such as China (Law on Arbitration of the People's Republic of China dated 31 August 1994) [11].
The Clyde & Co study found that DIFC Courts remain attractive, attributing this in part to the international recognition of DIFC-LCIA: "Arbitration with DIFC-LCIA rules being the most popular form of dispute resolution for both mergers and acquisitions, and joint ventures" , adding that along with DIFC Courts, DIFC-LCIAs were seen as "typically among the most predictable and reliable for resolving disputes" [6].
The autonomy of each free zone is an important achievement. Zones have the right to choose the legal framework by which to regulate civil and commercial relationships and can also provide a choice of arbitral tribunal. Companies can choose between DIFC Courts, which review cases unless the parties have agreed otherwise, and DIAC Courts.
By the beginning of the third decade of the 20th century, the DIFC–LCIA arbitration had become the principal seat of arbitral dispute resolution in the region, far outstripping other tribunals in terms of the number and value of cases.

However, Decree No. (34) of 2021 Concerning the Dubai International Arbitration Centre [10] abolished the DIFC–LCIA and the Emirates Maritime Arbitration Centre, which were subsequently renamed Abolished Arbitration Centres.

As an aside, it should be noted that such co-operation offered the international community a new, unique format for creating a new international judicial institution in the shortest possible time. In less than 20 years of operation, it gained such a high profile that it was included in virtually all thematic reviews and statistical reports and consistently ranked among the most authoritative, "classic" Western institutions.

The new international commercial arbitration court was located in a territory that itself became independent less than half a century ago and which, as recently as the 1950s, had, in the opinion of Western arbitrators, only scattered and unsystematised legislation, the application of which was excluded to international commercial disputes of the time (as detailed at the beginning of this article). Despite this, using the judicial "brand" of one of the European centres of justice, which had proven itself over many decades, the new court was able to achieve international commercial arbitration.

Thus, the experience of organising the joint functioning of the DIFC–LCIA court on the basis of the concluded agreement can be considered extremely successful: compared to the ADGM, the DIAC handles a much larger number of cases and for much greater amounts.

Given that the reasons for the abolition of the DIFC–LCIA were not disclosed by legislative acts or statements from Dubai politicians, it can be assumed that it was the Arab side that fully or mostly achieved the original objectives of cooperation.

The transfer of rights to all property related to ensuring the activities of the abolished judicial bodies - movable and immovable property, technical equipment and other things - is also fixed. This description of the transition period suggests that outwardly the structural changes will look like a simple change of the signboard on the court building.

The next article of the Decree regulates the application of arbitration clauses already concluded in relation to the abolished court - if they exist, disputes will be subject to the jurisdiction of DIAC [10].

As for the proceedings already initiated by the abolished court, they will continue in the already reorganised court without interruption or adjournment.

Article 7 of the Decree enshrines that " Dubai Courts and the DIFC Courts will, in accordance with the respective procedures and standards adopted by them in this respect, continue to consider any claim, application, or appeal relating to any award issued or arbitration measure taken by the arbitration tribunals of the DIAC and the Abolished Arbitration Centres" [10].

The DIAC Annual Report 2022, published in the summer of 2023, confirms the continuity of the arbitration practice and the international importance of the court: in the report, the DIAC described its development strategy and the reforms undertaken, and detailed the previous year’s case statistics.

According to the statistics cited, the DIAC registered 340 new cases in 2022, of which 44 per cent were international. Construction provided the largest number of disputes (49 per cent) related to construction, with commercial disputes (27 per cent) coming second.

The disputes involved parties from 48 countries from all continents. The total value of cases pending before DIAC was USD 3.1 billion.

The recent changes in the structure of the DIFC courts deserve special attention: in 2021, the Digital Economy Court (DEC) was established, and the first judgements from it appeared in 2022 [12]. It is important that this court (although, following the structure of the DIFC courts and the place of the DEC in it, it is more correct to say the court branch, because, pursuing similar goals of creating dispute resolution bodies with strict specialisation, other countries create bodies separate from traditional justice bodies, such as the Financial Dispute Resolution Centre in Hong Kong [26; 27]) is the first in the world created with strict specialisation specifically for transactions in the digital environment.

Chapter 58 (Part 58 Digital Economy Court) was included in the rules of the DIFC courts to define the place of the DEC court in the DIFC courts system, as well as the disputes within its jurisdiction. Article 58.3 establishes that the Digital Economy Court is a specialised division of the DIFC court, and Article 58.7 defines the jurisdiction of disputes. Thus, this court may be applied for judicial protection in cases where the dispute relates to such forms of activity as:

(1) fintech;

(2) digital assets, including the digital environment, platform or system in which a digital asset exists or may exist;

(3) distributed ledger technology and blockchains including applications based on blockchain technology;

(4) substantial or complex databases;
(5) artificial intelligence and any devices or components of devices whether integrated or not that are dependent on or controlled by artificial intelligence;
(6) data stored digitally including on cloud or other remote platforms, including distributed ledger technology;
(7) e-commerce, online intermediaries, digital payment platforms or marketplaces which include virtual asset service providers in relation to: exchange between virtual currencies; exchange between virtual and fiat currencies; the safe-keeping or administration of virtual assets; or, enabling participation in financial services connected to the offer or sale of virtual assets;
(8) interactions and transactions within virtual reality and the Web3 economy, including digital peer-to-peer transactions;
(9) the application of automatic dispute resolution processes;
(10) decentralised autonomous organisations (DAOs), decentralised finance vehicles (DeFi) and decentralised applications (DApps);
(11) the validity of digital signatures and digital identification and verification systems;
(12) the design, supply and /or installation of computers, computer software and related network and information technology systems and services;
(13) cyber-physical systems such as unmanned aerial vehicles, 3D printing technologies, and robotics;
(14) intellectual property claims arising out of or in relation to any of the above claims;
(15) insurance claims arising out of or in relation to any of the above claims;
(16) claims under the DIFC Data Protection Law (Law 5 of 2020); and
(17) any combination of the above claims [31].
Such a detailed but closed list of grounds for applying specifically to the DEC can be attributed both to an attempt to develop a certain practice in the coming years and to avoid overloading arbitrators (for example, Article 58.16 directly obliges the party seeking judicial protection to attach to the statement of claim a justification of why the claim is within the jurisdiction of the DEC).
The DEC extends its jurisdiction to both domestic disputes and international disputes, it has jurisdiction over both civil and economic cases, while "court sessions are held remotely and documents are exchanged using e-mail addresses or social networks" [22; 13; 31; 16; 17; 18].
Summarizing the results of the reforms, it is worth noting the established clear structure of justice bodies, which includes the DIFC courts proper, on the one hand, and the international commercial arbitration court DIAC, on the other. The issue of the division of roles of the former DIFC - LCIA and DIAC, as well as their unformed competition, has gone off the agenda. Now we can talk about the finalisation of the structure of the judicial bodies on the territory of the DIFC.

CONCLUSION

In less than a quarter of a century, the government of the United Arab Emirates has managed to go from constitutional reform to formalising new free economic zones that have become leaders in the region.
The Middle East region has been able to do more than just introduce two new platforms for the international asset management industry. Through deliberate and in some cases ingenious policies, two new jurisdictions, DIFC Courts and ADGM Courts, have been created, each of which now has one alternative dispute resolution institution, DIAC and ADGMAC.
Thanks to the above-mentioned institutions of state power, English law has been able to establish itself firmly in the Arabian Peninsula, which in turn has attracted authoritative legal professionals and representatives of major international corporations to the region.
The development of internal specialisation in the DIFC courts and the widespread use of digital technologies in court proceedings prove that the IAE authorities are not only striving to "keep up with the times", but also to consolidate their position as leaders among the free economic zones whose judicial system can claim to be the most technologically advanced.

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