

Is regional arbitration fit for purpose?

Reed Smith's Michelle Nelson and Alison Eslick take a closer at the arbitration in the MENA and offer their thoughts on the success factors that are critical for a thriving regional offering.

The world of arbitration is busier than ever. Historically, periods of uncertainty have provided fertile ground for legal disputes and the latest global crisis only seems to have cemented that phenomena. This is also evident from the global rise of third-party funding of litigation and arbitration proceedings, which is reportedly set to increase in 2023 as the economy slows. Perhaps this is unsurprising given the level of uncertainty faced globally. Indeed, the fact that Collins Dictionary's word of the year in 2022 was "permacrisis", defined as, "An extended period of instability and insecurity, especially one resulting from a series of catastrophic events" perhaps supports this.

Looking inward to the MENA region, and arbitration specifically, are regional arbitration centres and seats ready to capitalise on the projected rise in disputes? Have the region's arbitration laws, and local courts gained the full confidence of arbitration users, who will depend on them in times of crisis for their business?

REGIONAL ARBITRATION AT A GLANCE

Arbitration is common and well established in the MENA region as a dispute resolution mechanism of choice. The statistics support this sentiment:

- » The ICC's 2020 report showed that 19 per cent of parties in ICC cases that year were from the Middle East and Africa. The UAE, Saudi and Qatar "are the most frequent nationalities among parties, representing respectively 3.59 per cent, 2.55 per cent, and 1.87 per cent of the total number of parties in 2020 filings".
- » In 2021, the UAE ranked the 4th biggest user of the ICC and the United States, Brazil and Spain ranking 1st to 3rd respectively.
- » In 2021, Dubai ranked in the top 10 of the most preferred arbitration seats globally

(10th place according to the Queen Mary London University 2021 International Arbitration Survey).

» For international construction disputes in 2019, Dubai was ranked as the 3rd most popular arbitral seat after London and Paris, ranked 1st and 2nd respectively.

In addition, and notably, the MENA region also houses a significant number of regional arbitration centres including those in Dubai, Abu Dhabi, Oman, Saudi Arabia, Bahrain, Qatar and Cairo.

These institutions have varying degrees of popularity in terms of appeal and usability. Indeed, it is fair to say that until its abolition pursuant to Dubai Decree 34 of 2021, the DIFC-LCIA Arbitration Centre had established itself as one of the pre-eminent arbitration centres in the region. Since then, the Dubai International Arbitration Centre ("DIAC") has and continues to undergo a period of change, while new entrants emerge, such as the Saudi Centre for Commercial Arbitration ("SCCA"), which is pushing forward its prominence, even establishing a branch office in the DIFC last month.

Credit should certainly be given to the region, which has essentially built its arbitration infrastructure from the ground up, in a short space of time. The MENA's bustling and vibrant arbitration community is proof that the region's arbitration offering is considerable and full of options. But is it 'fit for purpose' and/or could it do more?

CRITICAL SUCCESS FACTORS FOR A THRIVING REGIONAL OFFERING

Whilst it is important to celebrate the region's arbitration success stories, the ICC remains the region's centre of choice. Its popularity is closely followed by the LCIA and SIAC. Non-MENA arbitration seats, such as London, Paris, Geneva, Singapore and others, continue to dominate parties'



choices, while regional seats, apart from Dubai, fall outside the 'top 10'.

Why is this the case?

In our experience, in-house counsel will rarely be criticised for choosing the ICC, LCIA or other well-known institutions such as SIAC for their arbitrations. As such, in order to consider lesser known regional options, counsel and clients must trust that the fundamental requirements of arbitration are met and moreover that regional choices provide some form of advantage over their international counterparts. Some areas where regional arbitration centres could lead further development of arbitration in the region are as follows:

1. Independence and impartiality

Because Middle Eastern political structures tend to differ from Western-style democracies, the region's arbitral institutions, and its local courts, must consistently demonstrate a robust commitment to independence and impartiality to gain trust from the international business community. In the past two years we have seen both DIAC and the SCCA launch new administrative courts. Ensuring those courts retain a deeply credible line-up of talent, whose ethical standards are beyond reproach, and avoiding any impression of a 'closed club' will be key to these courts' success.

2. Proven track record

Despite the local arbitration community

being cautiously optimistic about a reinvigorated DIAC, over one-year after Dubai's Decree 34 of 2021 it is generally accepted that the well-intentioned move to streamline arbitration in Dubai did have an effect on the increasing confidence in the UAE as a pro-arbitration jurisdiction. In fact, the highly publicised Decree prompted many clients to proactively reconsider their regional arbitration clauses. Reasonable certainty in a centre's rules and procedures, and a proven track record for enforcement of awards, are critical to maintaining users' confidence. Therefore, regional arbitral centres that invest in year-on-year statistical studies demonstrating both their growing popularity and a positive local enforcement climate, will gain users' confidence.

3. Pre-competitive collaboration

Just one year after the closure of the DIFC-LCIA, the SCCA has made moves to compete with the UAE arbitration market by establishing a branch office in the DIFC. This is consistent with its bold aim to be the regional arbitration center of choice by 2030. Healthy competition between centres can certainly incentivise higher quality and efficiency standards, whilst collaborating to solve mutual problems will benefit regional arbitration as a whole. This is because the success of regional arbitration hubs is inextricably linked. For example, a poor enforcement record for arbitral awards in one regional seat may create, albeit unfairly, a negative perception of enforcement in the region more generally. As such, it is hoped

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that the DIAC and SCCA will share thought-leadership and resources for the betterment of regional arbitration, and each other.

4. Robust stakeholder consultation

The regional arbitration community comprises talented local and international law firms, businesses, arbitrators and academics. Since arbitration is a topic of local and international significance, MENA governments and institutions can surely benefit from meaningful stakeholder consultation with a diverse range of parties. This is particularly important when considering major legislation and policy developments. However, regional arbitration centres might also consider establishing an ongoing dialogue with key stakeholders – a ‘think tank’ or ‘thought leadership committee’ that meets regularly. As famously said – it takes a lifetime to build a reputation and five minutes to destroy it. However, stakeholder consultation can help avoid unintended consequences, whilst creating fertile ground for innovation.

5. Industry specific approaches

Dubai’s Decree 34 of 2021 also closed the doors of the Emirates Maritime Arbitration Centre (“EMAC”), established in 2016. For some professionals in the region’s shipping industry, the closure of EMAC entailed the loss of an industry-specific local community and professional network that had flourished around the centre. There is a lesson learned here for the region’s arbitration centres – the appetite for industry-specific arbitration support should not be overlooked. This could potentially come from existing arbitration institutions in the form of industry-specific events, resources and/or targeted efforts to recruit arbitrators with particular industry expertise.

6. Overcoming diversity hurdles

The lack of diverse arbitrators, counsel and experts is a complex challenge in the international arbitration community. Gender diversity is certainly on the regional arbitration radar, with DIAC, the ADGM Arbitration Centre and the SCCA all institutional supporters of the ‘Equal Representation in Arbitration Pledge’. However, regional centres should strongly consider collating, and reporting, their arbitrators’ diversity statistics – be it gender, nationality, ethnicity, age or other indicators. We cannot overcome significant diversity

hurdles without knowing what they are, publically admitting their magnitude and having an honest conversation about the complex barriers to change. Coming to grips with the ‘numbers’ is just the first step. Harder to address are the psychological complexities that lead parties to continually select the most popular arbitrator heavy-weights, whilst overlooking more diverse candidates.

REGIONAL ARBITRATION IN THE DECADE TO COME

Another word that made Collins’ ‘top 10’ words for 2022, is “vibe shift”, defined as “a significant change in a prevailing cultural atmosphere or trend.” Perhaps it is no coincidence that words concerning ‘crisis’ and ‘change’ made Collins’ ‘top 10’ – agility is critical for survival in periods of great adversity, especially when competition is fiercer than ever.

There is certainly an incredible opportunity for regional arbitration seats to thrive going forward, but improvement opportunities must be embraced, not squandered. Otherwise, the ICC and other international centres will increase their hold on the regional arbitration market. Notably, in 2024, DIAC will celebrate 30 years since its establishment. On this significant birthday milestone, will the international arbitration community celebrate its coming of age? Only time will tell. However, a discernible “vibe shift” in favour of regional arbitration – as a highly regarded offering in its own right – requires a steadfast commitment to international best practices and reflection on lessons learned. 📖



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