

Scholar's Report on the completion of The Worshipful Company of Arbitrators' Travelling Scholarship to Dubai, 2018

Aims of The Worshipful Company of Arbitrators' Travelling Scholarship

In January 2018, I was awarded the wonderful opportunity of a Worshipful Company of Arbitrators' Travelling Scholarship to gain first hand experience with Alternative Dispute Resolution (ADR) processes in Dubai. I proposed to examine these ADR processes with a focus on Dubai with some additional references to the wider United Arab Emirates (UAE) and Gulf Cooperation Council (GCC) region. I used the funding award to travel twice to Dubai, the first trip taking place in May 2018 and a second trip in November 2018. These dates were chosen to accommodate three different focal points' events that would provide the greatest insights into the field. The first trip was centred on my observing a full hearing in an international construction arbitration. The second trip was focused on Dubai Arbitration Week 2018 and attendance on the inaugural RICS evaluative mediation training. The combination of these core experiences supplemented with additional interviews and events, ensured that I gained first hand experience and knowledge of diverse aspects of both arbitration and mediation practice as well as an acquaintance with both the onshore and offshore UAE jurisdictions.

Originally, as part of this research inquiry, I had planned to visit Qatar in addition to Dubai; however, recent travel restrictions made that side trip additionally challenging and it was decided to stay in the UAE, given that a month is only a short time in the region. By the conclusion of my second visit to the UAE, I was able to visit 6 of the 7 emirates, including Ajman, Dubai, Fujairah, Ras Al Khaimah, Sharjah and Umm Al Quwain.

Experiencing Arbitration in the UAE

In the UAE there are currently three concurrent, yet separate arbitration laws and distinct legal regimes. The first is the law application to the entire country or commonly, local arbitration law. The second is the offshore law that applies to the Dubai International Financial Centre, DIFC. The third is the offshore law of the Abu Dhabi Global Market, ADGM System. During my research visits to the UAE I had the opportunity to visit Dubai and learn more about the operation of the former two arbitration laws.

With respect to national arbitration law, 2018 was a particularly exciting time to visit Dubai. The UAE President signed the new Federal Law No. 6 of 2018 on Arbitration on May 3, 2018. The Arbitration Law will come into force one month and one day from its publication in the Official Gazette and repeals Articles 203 to 218 of the UAE Civil Procedure Code (Federal Law No. 11 of 1992) applicable to arbitration. This new law is roughly framed around the 2006 Revised UNCITRAL Model Law with some exceptions. The offshore jurisdiction DIFC Law was already based on the UNCITRAL Model Law.

Resultantly, it is expected that the new law will help provide a better and more predictable structure for UAE seated arbitrations and also better harmonizes the local arbitration law with that of the DIFC.

On the practical side, I was very fortunate to have the opportunity to shadow Alec Emmerson, a former Partner of Clyde and Co. in Dubai and Liveryman of the Worshipful Company of Arbitrators. Mr. Emmerson has recently established a successful practice as an international arbitrator with Emmerson Arbitrator¹ and is currently sitting on several international arbitrations. I had the chance to speak with Mr. Emmerson extensively about the operation of his arbitration business in Dubai and observe some of his extensive preparatory work for an upcoming site visit and arbitration hearing. Observing Mr. Emmerson and his arbitration practice provided an excellent working example of the duties and role of an arbitrator working in the region, as well as some of the challenges of running a business entity in the field of arbitration. My visit to the Gateley's office of Dr. Mark Hoyle also provided valuable additional context in understanding the parameters of marketing an international arbitration practice in the GCC. It was particularly interesting to become acquainted with the wide variety of commercial fields and countries in which Dr. Hoyle has been instructed to work from his base in Dubai.

During my first visit to Dubai, in May 2018, I observed the entirety of a construction arbitration site visit and hearing. The parties had graciously granted permission for me to observe Mr. Emmerson in his role of chair in their international construction arbitration. I was given the rare opportunity to experience the site visit of the arbitrators and experts. I had never previously had the chance to observe a working site visit and it was fascinating to watch the interaction of the parties, experts, and arbitrators, as they sought to establish reference points and a first hand understanding of key facts. Obviously, due to the confidential nature of these proceedings, these insights cannot be shared in this report.

During this first trip, I was also able to visit and speak with the staff of DIFC-LCIA Arbitration Centre and visit the DIFC Courts. The staff DIFC-LCIA provided me with insight into their growing caseload and vision for the future. It seems that there has been a noticeable shift in favour of the number of cases administered by the DIFC-LCIA in comparison to trends at DIAC. Resultantly, DIFC-LCIA has had to grow its capacity to handle cases and increase its staffing arrangements. Without question, the DIFC-LCIA is offering state of the art arbitration services to parties. Although the DIFC-LCIA has also propagated mediation rules, they have not yet had any extensive use.

I was also able to attend events organised in conjunction with Arbitral Women, which brings together female arbitration practitioners. At these events I spoke with some emergent leadership in this movement. There is a real push to have more diverse arbitrators available in the GCC region. It is encouraging that several women based in the UAE have taken on prominent roles in the

¹ <http://emmersonarbitrator.com/>

arbitration field and are rapidly becoming experienced international arbitrators. I also observed that The Alliance, which seeks to promote greater diversity in arbitration, has recently become active in the region and is gaining interest amongst some practitioners. It was inspiring that these diversity events were so well attended by both men and women and there was so much momentum behind them, particularly during Dubai Arbitration Week. It was also very encouraging to see that diversity is being given a wide interpretation at these events and discussions were had about how to ensure diversity in the arbitrator's role - well beyond gender.

I also completed the Academy of Law program in DIFC contract law during my first trip in Dubai. In addition to learning about development of a separate common law based contract law in the DIFC jurisdiction, I made the acquaintance of several legal educators at the Academy. I was able to interview the course director as well as one of the directors of programming about the development of dispute resolution oriented education in Dubai. During these interviews I learned that RICS has been actively seeking to establish its mediation training in the region. Many of the staff of the Academy of Law and DIFC courts had already been trained in the RICS' mediation methodology. I was also informed about a new partnership between the Academy of Law and the RICS that is seeking to innovate mediation teaching and training in the region. It is on the basis of this new information that I planned my return to Dubai in November to coincide with the launch of RICS's pilot course on mediation and mediator roster for the region.

Mediation Research in the UAE and the GCC Region

The primary focus of my research interest in the Dubai region was to investigate the use or rather "non-use" of "modern" mediation practice in legal disputes. I also sought to discern the nature and extent of the historical usage of mediation practices in the GCC region. I desired to understand the juxtaposition of the historical usage with the relative absence of mediation use on the current legal scene. Lastly, I desired to come to an understanding of the efforts to create, establish, and teach mediation in Dubai with a view to how usage may change and develop in the region.

In contrast to the development of arbitration in Dubai, neither of the offshore jurisdictions nor the Dubai or UAE Federal Law have any form of comprehensive mediation law.² There is no single statute in the UAE covering mediation and the DIFC has not developed extensive case law in this area, largely because the comparatively low volume of mediations occurring in the

² See, <https://www.imimmediation.org/2018/09/27/mediation-and-conciliation-in-uae/>. UAE Federal Law Number 17 of 2016 (the Mediation Centre Law) Article 3 makes mediation available in certain civil disputes, UAE Federal Law Number 26 of 1999 (the Conciliation Committee Law) provides for the establishment of conciliation and reconciliation committees at the Federal Court, UAE Federal Law Number 8 of 1980 (the UAE Labour Law) provides provisions to resolve labour dispute amicably, UAE Federal Law Number 28 of 2005 (the Personal Status Law) allows for referral to a type of conciliation.

UAE is unlikely to give rise to the sorts of questions that have come before the courts of other jurisdictions.³ It is therefore entirely speculative what effects core mediation concepts such as confidentiality and mediator neutrality might have in relation to arbitration and litigation, besides being contractually binding. The lack of a mediation law also precludes the possibility for directly enforceable homologated settlement agreements as is available in many European civil law jurisdictions with a developed mediation law.⁴ It is therefore more challenging for mediation to be marketed as a viable alternative process with distinct advantages over arbitration, when some of the key typical incentives to mediate remain ambiguous and unregulated.

It is true that the local mediation landscape is still comparatively underdeveloped in an institutional and legal sense when compared to Europe, North America and Australasia. However, as noted above,⁵ while there is no comprehensive mediation law, there are parts of existing UAE and Dubai laws that allow for and encourage mediation. Additionally, Part 27 of the Rules of the DIFC court makes provision for mediation in “encouraging parties to consider the use of alternative dispute resolution (such as but not confined to mediation and conciliation) as an alternative means of resolving disputes or particular issues.” Part 27 has even been invoked in several cases before the court where mediation has been ordered.⁶ The DIFC Small Claims Tribunal also has a process known as “Consultation” which in practical terms functions similar to a “mediation type” event with a tribunal judge who has been trained in mediation methods.⁷ In fact, many cases can be settled at the consultation stage of proceedings. Additionally the DIFC-LCIA Arbitration Centre has the capacity for mediation and has propagated mediation rules⁸ and DIAC’s rules include conciliation provisions,⁹ even though they are not yet widely known or utilised. Both the Chartered Institute of Arbitrators Dubai and RICS have rosters of mediators for the GCC region and have actively trained and certified new mediators in both Dubai and Qatar.

Many scholarly works have been published which affirm and highlight the longstanding and deep cultural affiliation between the Arab world and mediation related practices.¹⁰ These works often refer to sulha practices that have been used in Arabia for centuries. Even if critics might not classify these

³ See *Supra*, note 2.

⁴ Dubai Law Number 16 of 2009 (the Amicable Centre Law) provides for a centre with the power to mediate certain disputes, which if mediated by the centre, can be homologated to have the same force as a judgment. This possibility is limited to those disputes within the jurisdiction of and handled by this one centre.

⁵ See, *Supra* note 2.

⁶ See, *Dr Aziz Kurtha v. Bin Shabib & Associates (BSA) LLP & ORS (CFI 004/2008)* and *BGC Brokers L.P. v. Mourad Abourahim (CFI 027/2013)*. See also, <http://brickcourtmediators.co.uk/the-role-of-mediation-in-the-difc-courts/>

⁷ See, <https://www.difccourts.ae/small-claims-tribunal/>, NB: The CV documents for the individual justices indicate their respective mediation experience and prior training. See also, <https://sct.difccourts.ae/whats-on/top-tips-for-preparing-for-a-sct-consultation/>

⁸ <http://www.difc-lcia.org/mediation.aspx>

⁹ <http://diac.ae/idias/rules/1994/>

¹⁰ See e.g., Pery, Dora, *Muslim/Arab Mediation and Conflict Resolution: Understanding Sulha*, (Israeli History, Politics and Society Book 59) 1st Edition. See also, Abedi, Pashtana, *Mediation and Islam*, Amazon Digital Services, 2017.

historical ADR processes as mediation *strictu sensu*, they are still *alternative, informal* processes that rely upon voluntary participation in dialogue facilitation with the goal of settlement. The mere existence of this historical usage provides a valuable reference point for helping clients recognize the value of facilitated or mediated alternative processes for settlement. Certainly, sulha practices provide a stronger cultural selling point and building block when contrasted to any historical precedents available in Western Europe.

During my first trip to Dubai in May 2018, I sought to interview numerous practitioners about their experiences with mediation in Dubai and the wider GCC region. I was able to speak to several partners and associates in the dispute resolution and corporate areas within leading international commercial law firms with a presence in Dubai. Most of these practitioners had their focus on matters within the DIFC jurisdiction. I was also fortunate to be invited to several Chambers events in Dubai and was able to expand my research exercise to include the opinions of several barristers from England and Wales. Although mine was a qualitative and not a quantitative study, almost without exception these practitioners had never recommended mediation as a possible alternative means to resolve contentious matters in the region.

Most international practitioners referred to a presumed sentiment that local clientele were supposedly not familiar with mediation products and would neither recognize nor appreciate the potential benefits of mediation. Amongst some attorneys, there was also a concern as to how to initiate the process when it is neither institutionalised nor regulated by law and/or where there is no stepped or progressive dispute resolution clause present in the contract that requires mediation as a step in a dispute's progression. Agreeing and appointing a mediator and navigating the process would also be unfamiliar territory in Dubai. It was felt mediation would be unworkable without a prerequisite client familiarity with its potential as a "credible" dispute solving process. That being said, most practitioners I spoke with stated that they had not actually brought up the subject of mediation with any of their regional clients.

A few international practitioners felt that the problem with mediation as a discipline taking hold in the region, particularly the facilitative model, is that it is perceived to lack the "authority" needed to resolve disputes. They cited the belief that the culture of the region required some "authority" to be present to opine on and direct the outcome of disputes. It was felt by a few persons that what scholars perceive as a history of mediation in the region was not "really" mediation in the modern sense but rather a form of dispute settlement more analogous to a settlement conference with a judge, where an authority exerts a lot of pressure on parties to settle the dispute; in essence, where the parties feel coerced into agreeing to a settlement because of the authority of this figurehead whether an elder, judge, or tribal superior. It did not seem to be widely appreciated, perhaps because of the highly facilitative home jurisdictions of most international practitioners, that more directive or evaluative forms of mediation could be used to fulfil a similar function or that conciliation or non-binding early neutral evaluation might offer other viable

alternatives which, if the cultural paradigm presented were true, could provide better pathways to resolution.

In order to discern a wider market perspective, however to a comparatively smaller extent, I was also able to consult with some attorneys in firms that are of local origin. Some of these local firms have an international orientation while others have a strictly local law focus. Many of these local firms work alongside the large international firms to handle local matters that arise in relation to both international arbitration and litigation. Interestingly, some practitioners in these firms offered a different perspective as to why mediation was not being widely used in legal disputes in the Emirates. For the most part these practitioners were of the opinion that mediation in the modern sense had not yet become sufficiently developed and established in an institutional and legal sense to offer a saleable alternative. Some individuals thought that there was both a lack of developed mediation providers and a lack of locally qualified mediators offering specialist knowledge mediation services in the region. Most local practitioners with whom I spoke, viewed the future possibility of mediation taking hold as a viable product on the regional ADR marketplace with great optimism. In particular, some practitioners intimated that local legal community would welcome a more evaluative style mediation that would offer “added value” to the resolution of disputes within a particular subject area, such as oil and gas law or construction matters.

One thing common to all of the lawyers interviewed was that almost none of them had any direct experience using mediation with their clients in Dubai. A few practitioners had experience using mediation in contexts where it was mandated by the dispute resolution clause, but none had recommended it as an alternative for clients to contemplate, where it was not otherwise legally, procedurally, or contractually required. While the institutional and legal framework may, as of now, be less developed, it is certainly far from absent and the regional history weighs highly in favour of a mediation product being well received.

The opinions I canvassed led me to the conclusion that the main detriment to the progress of mediation is in fact the unwillingness of international counsel to place mediation front and centre as a viable and valuable option for the benefit of their local clients. However, the proximate cause of this marked lack of promotion of mediation options may be debated. Firstly, it may be because of lack of experience and knowledge of counsel operating in the region. Secondly, there is generally a lack of consequential ethical guidelines and norms for many international lawyers in the Emirates. Some attorneys have no ethical guidelines back home and even those international practitioners who are bound by ethical codes of conduct are bound to varying degrees - often with widely varied standards. Resultantly, the ethical obligation to, when appropriate and potentially in their best interests, present mediation to clients - may be ignored or simply does not form part of the ethical norms applicable to that attorney in their home jurisdiction. The lack of a coherent legal ethical structure applicable to all international attorneys operating in Dubai that references ADR, might lead some to speculate that the old lawyers’ adage that ADR stands for “astounding decline in revenue” may be at the forefront of

reasons why mediation is consistently neglected. Thirdly, there may be a sincere belief amongst some lawyers that the lack of local rosters and familiar mediators coupled with the fear of local antipathy are good reasons for staying away from mediation.

Whatever the motivation, the fact remains that most international counsel do not appear to be marketing mediation products as a part of their legal repertoire. Without international counsel placing the requisite importance on the value of mediation as an alternative process, there is no taper down effect that might eventually normalize it as a standard disputes product for use across the UAE and the GCC region. If attitudes among international counsel were to change, to not only view mediation favourably in a general sense, but also to actively introduce and recommend it - even when mediation runs counter to interests of legal business - than emulation of these best practices by local firms and increased uptake by regional clients will almost be certain to follow.

After hearing about RICS' commitment to mediation in the region, I was eager to learn more about RICS's efforts to promote high-level mediation training and bring their roster management and quality assured mediation standards to mediations. Prior to RICS' regional commitment, only the CIArb, Dubai Branch had offered any quality commercial mediation training in the region. Most of the staff members of the Academy of Law as well as the Small Claims Branch of the DIFC Courts have become RICS certified as a result of these previous RICS' training initiatives. After continued contact with the Academy of Law, I learned that after extensive market research, RICS had decided to change its regional teaching program to certify competence in "evaluative mediation." I was graciously invited to attend and provide feedback on the pilot regional evaluative mediation training held in Dubai in November 2018.

The November 2018 pilot course¹¹ was predicated on RICS's belief in the fundamental compatibility of mediation with the regional culture of the GCC combined with the recognition of the need for more specialist mediators who could take an evaluative stance that would "add value" to parties' ability to resolve disputes in the built environment.¹² The training delivered exactly on these stated goals. It was expertly led by RICS Dispute Resolution Service Director John Fletcher, who provided practical guidance on RICS' pioneering evaluative mediation model. Participants came from the entire GCC region. RICS provided assessment opportunities for all participants. The assessments were conducted at a very high level as the first part of the essential quality control RICS performs in maintaining its mediation rosters. Only mediators who are successful in these assessments will be invited onto a new President's Panel roster for the Middle East and North Africa, (MENA) region. This panel is already available for international practitioners to make appointments from and may begin to remedy the lack of readily available

¹¹ <https://www.rics.org/globalassets/rics-website/media/training--events/training-courses/mena/mediation-programme-brochure.pdf>

¹² Given the that origin of many, if not most, international disputes taking place in the MENA region concern some aspect of the built environment, RICS is uniquely poised to train mediator's in what is there established area of expertise.

quality controlled mediator choice, a fact that up to now might be partially responsible for the stymied growth of mediation in the GCC. On January 24, 2019, I was informed that I succeeded in these assessments and will be eligible for inclusion on this roster. Hopefully, this success will enable me to continue to work towards the growth of mediation practice in the region.

Besides both the RICS and CI Arb. training initiatives for the built environment and commercial mediation, Middlesex University Dubai recently introduced a family mediation course for the region that launched in January 2019 and was delivered by the Eriksson Mediation Training Institute.¹³ There was much excitement leading up to this course and I am led to understand it was a great success. Assuredly, Middlesex's initiative will help to bring much needed local expertise to family law mediation. Hopefully, these newly trained persons will incentivize the creation of rosters in social law fields and lead to an increasing use of the provisions in the pre-existing Dubai and UAE Federal laws that permit mediation as an alternative form of settlement.

Conclusion

The Travelling Scholarship of the Worshipful Company of Arbitrators allowed me to make two visits to Dubai in which I gained a rich and varied understanding of alternative dispute resolution practice in the GCC region. The site visit and full hearing provided me with a very comprehensive introduction to arbitration practice in the region in the most practical sense. My conversations with practitioners were most elucidating and really helped me to understand the root causes of the slow growth of mediation in the region. These interviews have provided a vast set of data points that I will be able to incorporate in future research work and planned comparative articles. Lastly, the training opportunities with both Academy of Law and RICS allowed me to build my knowledge of regional practice and to gain an accreditation that may allow me to have a continuing relationship with the region as a MENA roster mediator for disputes in the built environment. I remain most grateful to The Worshipful Company of Arbitrators and its Education Committee, Master, Wardens, Liverymen and Freemen for affording me this incredible, experiential opportunity to travel to Dubai in connection with my work and research in alternative dispute resolution.

Most sincerely yours,

David Lewis

David Lewis, January 29, 2019

¹³ <https://www.mdx.ac.ae/familymediationtraining>