

# DIAC and DRA sign MoU to Promote Enforcement of DIAC Awards by the DIFC Courts: A Second Look

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Gordon Blanke (Blanke Arbitration LLC)

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On 20 September 2016, in a somewhat unanticipated move, the Dubai International Arbitration Centre (DIAC) and the Dubai International Financial Centre (DIFC) Dispute Resolution Authority (DRA) – which comprises both the DIFC Academy of Law and the DIFC Courts, the autonomous common law judiciary based in the DIFC – signed a Memorandum of Understanding to promote their mutual co-operation, including in particular the recognition and enforcement of DIAC awards by the DIFC Courts (see Memorandum of Understanding Between Dubai International Financial Centre And DIFC Dispute Resolution Authority For Mutual Cooperation Including Enhancing the Recognition and Enforcement of DIAC Arbitration Awards by the DIFC Courts and regarding Training, Research and Developments of Programmes, For the benefit of the Legal Community in the Middle East, dated 20 September 2016, available online on the official website of the DIFC Courts at <http://difccourts.ae/memorandum-understanding-diac-dra/mou-between-dra-and-diac-20-september-2016/>).

Previous reporting has discussed the adoption of the MoU, an adoption, that deserves further discussion. The MoU envisages different forms of co-operation between the DIAC and the DRA at a number of levels, including more specifically the development and dispensation of joint training programmes to the legal profession in the Middle East, the joint marketing of their services, the organisation of joint conferences and seminars on matters of common interest to both institutions, joint research and academic writing (see in particular para. II.A.b., MoU). Given DIAC's main focus on arbitration as an alternative form of dispute resolution, the MoU's focus is equally on arbitration. As its title suggests, the main objective of the MoU is to enhance the recognition and enforcement of DIAC awards by the DIFC Courts. In the words of the MoU (see para. II.A.a, MoU):

The Parties have agreed to enter into this MOU in order to execute, consult, cooperate and exchange information with each other in areas of mutual interest that will further enhance their respective strategic interests and objectives, specifically:

1. the expedited recognition, ratification and/or enforcement of DIAC arbitration awards by the DIFC Courts. For this purpose, the Parties will exchange information regarding the applicable procedures, rules, regulations and laws (including the DIFC Courts' Rules Part 45) relevant to the recognition, ratification and/or enforcement of a DIAC award by the DIFC Courts. The [P]arties will work together to identify ways to ensure parties electing to arbitrate under the DIAC rules/deciding to include the model clause in a contract, are aware of the options available

to them in Dubai when determining the seat of arbitration. In addition, the Parties will discuss with each other the possibility of amending the current DIAC rules for consideration by the Board of Trustees of DIAC to include provisions for the expedited recognition, ratification and enforcement of DIAC arbitral awards by the DIFC Courts.

At first glance, it is not clear from the wording of the MoU what shape the enhancement of the recognition and enforcement of DIAC awards by the DIFC Courts is intended to take. Given that the choice of a jurisdiction for enforcement of an arbitral award usually depends on the location of the award debtor's assets, it is questionable whether there is any sense at all in aiming for enhancing the co-operation in enforcement by the DIFC Courts unless a significant proportion of award debtors were to have assets in the DIFC, which – in our experience – is simply not the case. Further, the suggestion that this may all be down to the drafting of the arbitration clause is misdirected: A simple amendment of the existing DIAC Rules of Arbitration to make provision for the expedited recognition and enforcement of DIAC awards by the DIFC Courts would go beyond the powers accorded to the DIAC in administering arbitration services as well as the powers accorded to the contracting parties in their submission to arbitration.

This being said, the DIFC Courts have established a discernible track record as a host or conduit jurisdiction, entertaining actions for the recognition and enforcement of both domestic and foreign arbitral awards in mainland Dubai for onward execution elsewhere onshore, even absent any geographic nexus to the DIFC. Such awards have more specifically included awards rendered under the DIAC Arbitration Rules in arbitrations seated in onshore Dubai. It bears mentioning in this context that the DIFC Courts' recently acquired status as a host jurisdiction has been criticized by some as a form of creeping jurisdiction, acquired through the increasingly expansive scope of DIFC judge-made law. The expansion of the DIFC Courts' jurisdiction has, in turn, given rise to considerations of conflicts of jurisdiction between the onshore Dubai and offshore DIFC Courts. So far, any such conflicts had been understood to have been resolved in favour of the court first seized, in terms promotive of and facilitated by the free movement of judgments, orders and ratified awards between the Dubai and the DIFC Courts by virtue of the regime of mutual recognition established by Art. 7 of the Judicial Authority Law as amended. In order to meet any residual jurisdictional concerns, the Ruler of Dubai has recently established the Dubai-DIFC Judicial Committee, which is entrusted with the determination of conflicts of jurisdiction between the Dubai and DIFC Courts (see Decree No. (19) of 2016 forming the Judicial Committee of the Dubai Court and the DIFC Courts, dated 9 June 2016). Importantly, it has been reported that one such jurisdictional conflict is presently pending for consideration by the Committee.

With this background in mind, it remains questionable how co-operation between the DIAC and the DRA could possibly contribute to the recognition and enforcement of DIAC awards, other than to confirm and hence strengthen the DIFC Court's acquired status as a host jurisdiction for domestic DIAC awards. The DIAC itself does not have the power to direct the recognition and/or enforcement of its awards by any courts. Nor can the choice of DIAC arbitration affect the discretion of an enforcing court to recognize and/or enforce a resultant award or indeed predetermine the ultimate court of enforcement of a resultant award: The only court that may be predetermined by choice of arbitration is the curial court in charge of supportive measures of the arbitration or actions for nullification: This, however, will typically be the court at the seat of arbitration. For the avoidance of doubt, choice of mainland Dubai as the seat of the arbitration will import the curial competence of the onshore Dubai Courts, choice of the DIFC that of the offshore DIFC Courts. There is also little more sense to be gained from the intended *expedition* of the DIFC recognition and enforcement process: As far as we are aware, on previous occasions, the DIFC Courts have readily ratified and enforced DIAC awards, no particular (time-consuming) obstacles having been identified as slowing down, not to mention impeding the enforcement process.

This discussion brings to mind the recent decision of the DIAC to open a branch in the DIFC on the pretext that awards rendered in a DIFC DIAC forum would be more easily enforceable before the DIFC Courts (although interestingly, there is no mention in the MoU of the opening of the DIAC in the DIFC): As has been seen above, neither the seat of the arbitration nor the seat of the arbitration institution will affect the enforceability of a resultant award. If anything, given the arbitration-friendliness of the DIFC Courts and the arbitration maturity of the DIFC judiciary, the designation of the DIFC as the seat of arbitration may assist in protecting a resultant award from frivolous challenges. With this objective in mind, DIAC may wish to amend its model arbitration clause for use in the DIFC by making the DIFC a mandatory seat of the arbitration. Bearing in mind the wording of the MoU on the subject, a like-worded DIAC DIFC Model Arbitration Clause may be a viable proposition.

Taken in the round, the MoU is predicted to have positive effects on the relations between onshore and offshore Dubai in matters of arbitration. It is to be hoped that the various forms of co-operation undertaken by the DIAC and the DRA will promote the complementarity of a civil and common law arbitration offering in the UAE, for choice by the contracting parties. For the reasons discussed above, it is unlikely though that it will have any impact on the enforceability of DIAC awards before the DIFC Courts, a subject-matter that, in any event, has already been decided in the affirmative. No doubt good reason for taking a second look!