

# Kluwer Arbitration Blog

## Key Developments in Relation to Arbitration in Dubai

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The International Bar Association annual conference in Dubai in November put the spotlight on the arbitral regime in Dubai. Several “hot topics” were discussed, including the possibility that counsel representing parties in arbitrations in Dubai would be charged a hefty fee by the Dubai government and the prospect of a new United Arab Emirates (UAE) federal arbitration law based upon the UNCITRAL Model Law. We learned that the former was not a real concern for lawyers not based in the country full-time; while the latter is apparently back on the table after it was first raised in 2008.

Questions regarding arbitration in Dubai usually focus on enforcement in general, and, particularly, the interrelation between the civil law “onshore” regime and the common law “offshore” jurisdiction of the Dubai International Financial Centre (DIFC). Certain key developments in relation to these regimes from the last few years are set out below.

### **I. BACKGROUND: THE ARBITRAL REGIME OF THE DIFC**

The DIFC is an example of ‘a jurisdiction within a jurisdiction’, a construct adopted in several Middle Eastern countries and adapted to provide certainty and familiarity to international business in an attempt to attract investment.

The DIFC is a financial free zone, located in the Emirate of Dubai (known as “offshore” and “onshore” Dubai respectively). In spite of its location in the centre of a civil law jurisdiction, the DIFC is an autonomous common law jurisdiction, empowered, pursuant to UAE law, to enact its own legal and regulatory framework for all civil and commercial matters. The language of the supervisory court, the DIFC Court,<sup>1)</sup> is English.

The DIFC Arbitration Law is modelled on the UNCITRAL Model Law, as amended in 2006, and entered into force in 2008. Pursuant to this law, there is no requirement for parties to have any connection with the DIFC in order to provide for an arbitration to be seated in the jurisdiction.<sup>2)</sup> In contrast, arbitrations seated in “onshore” Dubai are governed by Articles 203-218 of the UAE Code of Civil Procedure 1992, largely based on the former Egyptian Civil Procedure Law.<sup>3)</sup>

In February 2008, the DIFC inaugurated the DIFC-LCIA Arbitration Centre (the Centre), which is the product (as the name suggests) of a joint venture between the London Court of Arbitration (LCIA) and the DIFC. The DIFC-LCIA Arbitration Rules (the Rules) are closely modelled on the

LCIA Arbitration Rules. The Centre functions with the assistance of the LCIA Secretariat and has full access to its expertise and general systems.

## II. THE ENFORCEMENT REGIME: AN UPDATE

### A. Enforcement in “Onshore” Dubai

#### 1. Awards rendered in Dubai

Pursuant to Article 215 of the UAE Code of Civil Procedure, a “domestic” arbitration award must be recognised by the local court, with the effect of converting it to a court judgment. As there is no system of precedent nor comprehensive court reporting system in the UAE, there is no consistent barometer of the Dubai Courts’ attitude to domestic awards. However, key cases are often reported at conferences or are the subject of publications by counsel. Concerns regarding the Dubai Courts’ attitude to enforcement of awards have a long history, harking back to the widely reported case of *Bechtel v. the Department of Civil Aviation of the Government of Dubai* in 1994, in which the Dubai Court of Cassation refused to enforce a US\$ 25 million award in favour of the Claimant on the grounds that the arbitrator had failed to require the witnesses to swear an oath in the manner prescribed by the UAE Civil Procedure Code. Since 1994, arbitration practitioners in the region have developed a list of “dos and “don’ts”, in an effort to minimise the risk of annulment.<sup>4)</sup> Practitioners are periodically reminded of the need to follow this list. In 2009, for example, the Court of Cassation was faced with an appeal of a Court of Appeal decision to set aside an award on the basis that the arbitrator had not signed each page of the award. The Court of Cassation’s judgment confirmed that an award could be set aside if the signature of the arbitrator (or majority of the tribunal) did not appear on the pages of the award containing the final relief granted and the tribunal’s reasons for granting that relief. In this particular case, the arbitrator had signed the page setting out its decision and part of the reasoning for its decision. The Court of Cassation deemed this sufficient to uphold the validity of the award and proceeded to reverse the decision of the Court of Appeal.<sup>5)</sup>

Recently, local practitioners have expressed confidence that the Dubai Courts’ attitude towards arbitration awards has changed since *Bechtel*.<sup>6)</sup> It is worth noting that, awards rendered under the rules of the Dubai International Arbitration Centre (DIAC) are almost always seated in Dubai, and when compared with DIAC’s large caseload, the discussion of enforcement “scare” stories is limited.

However, a new arbitration law, based upon the UNCITRAL Model Law, would obviously provide greater certainty as to the boundaries of the Dubai Courts’ authority to set aside awards.

#### 2. Awards Rendered in the DIFC

Further to Article 43 of the DIFC Arbitration Law, a party may apply for an order of the DIFC Courts recognising an arbitration award rendered in the DIFC.

Article 7 of Dubai Law No 12 of 2004 (Article 7), states that any judgment “ratified” by the DIFC Courts will be enforceable in “onshore” Dubai (and thereafter, in the other Emirates, pursuant to Federal Law No (11) of 1973 Regulating Judicial Relations between Member Emirates in the Federation) without any further review by the Dubai Courts, provided the judgment is final, has

been translated into Arabic and is “appropriate for enforcement”.<sup>7)</sup>

“(…)

(2) Should the subject of execution fall outside the Centre (the DIFC), judgments, awards and orders issued by the Courts and Arbitral Awards ratified by the Courts shall be enforced by an executive judge at the Dubai Courts, subject to the following: (a) the judgment, award or order is final and is appropriate for enforcement; and (b) the judgment, award or order has been translated into Arabic.

(3) The executive judge at Dubai Courts has no jurisdiction to review the merits of a judgment, award or order of the Courts.” Recognition pursuant to Article 43 of the DIFC Arbitration Law qualifies as “ratification” for the purposes of Article 7.<sup>8)</sup> To date there has been no judicial guidance as to the meaning of “appropriate for enforcement”. The 2009 Protocol on Enforcement between the DIFC Courts and the Dubai Courts signed in April 2009 (the Protocol), reiterates the contents of Article 7, particularly that the Dubai Execution Court is to enforce a DIFC judgment without re-reviewing the case, and sets out the procedure by which enforcement pursuant to Article 7 is to take place.

Two key developments occurred in 2011 in relation to Article 7 and the Protocol. The first arbitration award rendered in a DIFC-seated arbitration and recognised by the DIFC Courts pursuant to Article 43, was enforced “onshore” pursuant to Article 7 and the Protocol. At the time in question, approximately 40 DIFC court judgments or orders had already been enforced pursuant to the Protocol. This sets an important precedent, and allows for tentative advice to be provided as to the practice, rather than simply the theory, of “onshore” enforcement of an “offshore” award. The award in question, *Property Concepts FZE and Lootah Network Real Estate & Commercial Brokerage*, was ratified by the DIFC Court of First Instance on 19 October 2010 and ordered the Defendant to pay damages of approximately US\$ 7.2 million plus interests and costs.<sup>9)</sup>

Secondly, on 31 October 2011, Dubai Law No 16 of 2011 (Law No 16), passed primarily to expand the jurisdiction of the DIFC Courts, also amended Article 7. The test for enforcement remains the same, but the procedure for enforcement as set out in the Protocol is now enshrined in law. It is worth noting that the phrase “final and appropriate for enforcement” (as per the English translation of Article 7 and the Protocol) is worded as “final and executable” in the English translation of Law No 16. However, the phrase in Arabic is the same in all three instruments, and the test therefore appears unchanged.

### ***3. Foreign Arbitration Awards: Enforcement under the New York Convention***

Following the UAE’s accession to the New York Convention (the Convention) in 2006, any arbitration awards rendered in the UAE will be enforceable in the 146 states party to the Convention subject to the limitations specified in its Article V. Conversely, the UAE has an obligation to enforce foreign arbitration awards in accordance with the terms of the Convention. Even though the focus of this discussion is Dubai, it is worth noting that the first foreign arbitration awards enforced in the UAE under the Convention were enforced by the Fujairah (one of the seven Emirates that make up the UAE) Courts in late 2010. Two London Maritime Arbitration Association awards, rendered in 2007, were enforced “in absentia” on the basis of “documents-only”. The defendant did not contest the enforcement.

Decisions of the Dubai Courts are not systematically reported. However, the existence of two enforcement actions under the Convention before the Dubai Courts are generally known amongst the local arbitration community. In the first, the Dubai Court of First Instance refused to enforce a Stockholm Chamber of Commerce award with no reasons. The decision is being appealed. The second enforcement action, in respect of an award in a dispute between a subsidiary of Macsteel International, incorporated in the Jebel Ali Free Zone, and a Dubai-incorporated company, rendered under the Rules and seated in London, was upheld by the same court. As a contested action, the decision has been hailed as a key “step forward”. It is generally understood that the disputing party relied upon technical arguments that drew upon the pre-Convention enforcement regime. It is notable that not only did these arguments not prevail in the Dubai Court of First Instance, but that the Fujairah court, in its judgment, made no reference to the pre-Convention regime.

## **B. Enforcement in “Offshore” Dubai**

As there are limited or no relevant precedents, the legal regime set out below is discussed on more of a theoretical basis, simply to complete the picture.

### ***1. DIFC Arbitration Awards***

As set out above, a DIFC award is recognised pursuant to Article 43 of the DIFC Arbitration Law (as occurred in *Property Concepts FZE and Lootah Network Real Estate & Commercial Brokerage*). The DIFC Courts will then proceed to enforce the award.

Subject to the parties’ agreement and any request for interpretation or correction of an award, an application for an award to be set aside (and therefore any attempt to resist recognition on this basis) must be made within three months of the applicant receiving the award.<sup>10)</sup> The grounds on which an application to set aside can be made are adopted from the UNCITRAL Model Law, as amended in 2006, and are largely limited to safeguarding the procedural integrity of the process, for example, relating to violation of due process rights. In addition, the DIFC Courts may set aside an award on their own volition if they deem that the dispute is not arbitrable under DIFC Law or the outcome of the award is contrary to the public policy of the UAE.<sup>11)</sup>

### ***2. “Onshore” Dubai Arbitration Awards***

Arbitration awards rendered in “onshore” Dubai would, theoretically, be enforced in accordance with Law No 16, following ratification by the Dubai Courts (Law No 16 operates equally in respect of Dubai court judgements being enforced in the DIFC as for DIFC judgments being enforced in Dubai, subject to slightly different formalities). No relevant precedent has yet been reported.

### ***3. Foreign Arbitration Awards***

The DIFC, as a financial free zone, has an obligation to comply with the international obligations of the UAE.<sup>12)</sup> As part of the UAE, awards rendered in the DIFC also benefit from rights granted to the UAE under international law.

It has been suggested that a more certain way of enforcing foreign arbitration awards in “onshore” Dubai, rather than to seek direct enforcement under the Convention before the Dubai Courts, is to

combine two of the enforcement routes described: (i) firstly, obtaining recognition of a foreign award under the Convention before the DIFC Courts where the judges are more familiar with the UAE's international obligations under the Convention and where the grounds for refusing enforcement are drafted in line with those under the Convention (they mimic the grounds for setting aside domestic arbitration awards set out above); and (ii) secondly, enforcing the DIFC-ratified award in "onshore" Dubai pursuant to Law No 16. The developments described above would appear to support this view.

### III. CHOOSING THE DIFC AS AN ARBITRAL SEAT

In light of recent developments and its geographical location, the DIFC is likely to be viewed as an attractive seat of arbitration, whether as a neutral seat for two non-UAE parties or for disputes involving one or more UAE parties. In fact, lawyers often enquire about the possibility of seating any arbitration with a Middle East connection in the DIFC. However, given the DIFC's position as a second jurisdiction within the Emirate of Dubai, and further to a judgment rendered by the (as he then was) Deputy Chief Justice of the DIFC Courts, Michael Hwang, in July 2009, parties wishing to choose the DIFC as the juridical seat of their arbitration should be reminded of the need to express their intention in specific terms.

The case in question, *Amarjeet Singh Dhir v. Waterfront Property Investment Limited and Linarus FZE*,<sup>13)</sup> was the first case heard by the DIFC Courts in connection with the DIFC Arbitration Law and the Centre. In spite of the Claimant's arguments to the contrary, Michael Hwang considered that, in the circumstances and given the parties' knowledge of the different jurisdictions, the arbitration was seated in "onshore" Dubai, pursuant to an arbitration clause which specified: (i) the applicable law as the "laws of the Emirate of Dubai"; (ii) any dispute (following a period for amicable settlement) to be resolved through arbitration conducted in accordance with "the DIFC-LCIA rules of arbitration applicable to the Dubai International Financial Centre"; and (iii) the place of arbitration as "Dubai". In essence, the choice of the Rules will not protect a party that has not expressly stated the DIFC as the arbitral seat. Michael Hwang summarised the position as follows:

The moral of this case is that, if parties want the DIFC Arbitration Law to apply and the DIFC Court to have jurisdiction over an arbitration, they should expressly select the DIFC as the seat in their arbitration agreement.<sup>14)</sup>

### IV. THE DUBAI WORLD TRIBUNAL

No discussion of arbitration in the UAE would be complete without mention of one recent decision of the Special Tribunal to decide Disputes related to the settlement of the financial position of Dubai World and its subsidiaries (the Dubai World Tribunal or DWT). Although the DWT and its rulings in respect of arbitration clauses require their own blog entry to be developed fully, we set out the ruling in a recent case that exemplifies its policy in respect of arbitration agreements. The DWT is composed of three DIFC judges,<sup>15)</sup> and, therefore may also be informative as to the line such judges will take in the DIFC Courts.

By way of introduction, the DWT was established pursuant to Dubai Decree No 57 of 2009, as amended by Dubai Decree No 11 of 2010 (the Decrees), to hear disputes brought by or against

Dubai World and its subsidiaries in the aftermath of Dubai World's restructuring first announced in late 2009. The DWT formed part of a legislative insolvency package aimed at offering Dubai World's many creditors a degree of certainty and a neutral forum to pursue their claims. The Decrees had the effect of mandatorily excluding the jurisdiction of the Dubai Courts (including the DIFC Courts) in respect of these claims. The DWT's jurisdiction and decisions draw upon the laws of various jurisdictions: it is seated in the DIFC; many of the claims brought before the DWT arise out of contracts governed by UAE law;<sup>16)</sup> and the court procedure was determined, prior to October 2011, by the Rules of the DIFC Courts (modeled largely on the English Civil Procedure Code) and since October 2011, in accordance with the Rules of the DWT (a variation on the Rules of the DIFC Courts). Its decisions are final and not subject to appeal.

In its judgment dated 11 July 2011, in the case of *Hedley International Emirates Contracting LLC v. Nakheel PJSC*,<sup>17)</sup> the DWT upheld its "policy" position towards arbitration clauses, to "respect and enforce arbitration agreements made between the Corporation and its creditors" and to expect parties to continue with pending arbitration proceedings in accordance with the terms of the relevant contract.<sup>18)</sup> The DWT dismissed jurisdiction in the case on the basis that the claim in question was subject to an arbitration clause. In its decision, the DWT noted that it was bound by Article II(1) of the Convention, which prescribed that it must recognise binding arbitration agreements. More telling was the warning, in the final paragraph of its decision, that applicants in future claims presented to the DWT, but dismissed for lack of jurisdiction because they are governed by a binding arbitration agreement, would find themselves faced with an adverse costs award on an indemnity basis.

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## References

- The DIFC Court was established under Dubai Law No 9 of 2004 in respect of the Dubai International Financial Centre and Dubai Law No 12 of 2004 in respect of the Judicial Authority at Dubai International Financial Centre.
- ?1 The DIFC Arbitration Law (DIFC Law No 1 of 2008) repealed DIFC Law No 8 of 2004.
- ?2 Essam al Tamimi (ed.), *The Practitioner's Guide to Arbitration in the Middle East and North Africa* (JurisNet, LLC, 2009), at page 486.
- ?3 For an overview of arbitration in the UAE and the main formalities required by the UAE Civil Procedure Code, see Habib Al-Mulla's "Overview of arbitration in the UAE 2011", particularly paragraphs 29-40, available [here](#).
- ?4 Suzanne Abdallah, Al-Tamimi and Co., "Arbitration in the UAE: the Formalities of an Arbitration Award", dated 1 March 2011, available [here](#).
- ?5 Comments of Essam Al-Tamimi at the DIFC-LCIA Symposium, held on 31 October 2011. Article 7 of Dubai Law No 12 of 2004 states:  
 "(...)  
 (2) Should the subject of execution fall outside the Centre (the DIFC), judgments, awards and orders issued by the Courts and Arbitral Awards ratified by the Courts shall be enforced by an executive judge at the Dubai Courts, subject to the following: (a) the judgment, award or order is final and is appropriate for enforcement; and (b) the judgment, award or order has been translated into Arabic.  
 (3) The executive judge at Dubai Courts has no jurisdiction to review the merits of a judgment, award or order of the Courts."
- ?6 As per Article 42(4) of the DIFC Arbitration Law.
- ?7 A copy of the order is available [here](#).
- ?8 Article 41 of the DIFC Arbitration Law.
- ?9 Article 5 of Federal Law No 8 of 2004.
- ?10, ?11 *Amarjeet Singh Dhir v. Waterfront Property Investment Limited and Linarus FZE* (Claim No CFI 011/2009), Grounds of Decision, 8 July 2009, available [here](#).
- ?12
- ?13

- ?14 *Amarjeet Singh Dhir v. Waterfront Property Investment Limited and Linarus FZE* (Claim No CFI 011/2009), Grounds of Decision, 8 July 2009, at para 92.
- ?15 Sir Anthony Evans, Michael Hwang and Sir John Chadwick.  
The DWT is bound by Dubai Decree No 57 of 2009, at Article 4, to decide dispute in accordance with the DIFC Insolvency Law and Regulations, the DIFC Law No 10 of 2004,
- ?16 UAE Law, commercial custom and principles of justice, and rules of righteousness and equity. DIFC Law No 10 of 2004 provides for application of DIFC Laws and any law agreed by the parties.
- ?17 *Hedley International Emirates Contracting LLC v. Nakheel PJSC* (Claim DWT/0017/2011), Reasons for Judgment dated 11 July 2011, available [here](#).
- ?18 See DWT Practice Direction No 1/2010, dated 30 March 2010, available [here](#).  
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