

Kluwer Arbitration Blog

Navigating Arbitration in the UAE with Dr. Gordon Blanke

Gordon Blanke (Blanke Arbitration LLC) · Friday, December 13th, 2019

This year, I had the extraordinary pleasure of speaking at the [Emirate Maritime Arbitration Centre](#) (the “EMAC”) inaugural event of [Dubai Arbitration Week 2019](#) (for the full presentation, see [here](#)). The EMAC, as readers may know, is the only arbitration institution specialized in the administration of maritime disputes through arbitration in the UAE and the wider Middle East (the [recently established](#) CIAMA sharing its focus between maritime and aviation dispute). The EMAC is headquartered in the Dubai International Financial Centre (the “DIFC”), but open to the administration of maritime disputes both onshore and offshore. The EMAC embraces the UAE’s unique positioning on the regional and international arbitration landscape as a hybrid civil and common law jurisdiction that has created a fully integrated common/civil law system that allows parties from differing legal traditions to resolve disputes in a common or civil law environment or in a combination of the two in the heart of the Middle East.

In this sense, the UAE offers unique opportunities for forum shopping between onshore and offshore arbitral seats and onshore and offshore enforcement fora. Whereas other jurisdictions, such as Qatar and Bahrain, have experimented with the concept of offshore free zone jurisdictions embedded within a wider civil law environment, the UAE is the only jurisdiction in the world so far that has succeeded in the full functional integration onshore/offshore: In this sense, both Dubai and Abu Dhabi constitute genuine hybrid civil/common law legal systems. Their success has in fact been such that the system has more recently been exported to other developing economies that are intent on providing a safe legal environment for attracting foreign direct investment. One such example is the Astana International Financial Centre in Kazakhstan, which has been closely modeled on the DIFC free zone.

In the following, I discuss in detail the UAE arbitration landscape, explaining the differing legal, judicial and institutional framework of the onshore and offshore systems. In doing so, I will highlight in particular the onshore/offshore area of free movement of judicial instruments, including ratified awards, between the onshore and offshore courts and the role of the offshore UAE courts as a conduit for the enforcement of onshore awards for onward execution onshore.

The UAE Arbitration Landscape: Mainland v. Free Zone Arbitration

Arbitrations in the UAE can be seated onshore (i.e., in mainland UAE, typically onshore Dubai or Abu Dhabi) or offshore, i.e., within a judicial free zone. The UAE hosts two judicial free zones, the DIFC and the [Abu Dhabi Global Market](#) (“ADGM”). Both constitute autonomous, stand-alone

jurisdictions that operate on the English common law model. Both have their own courts, the DIFC and the ADGM Courts respectively, each staffed by their own English-speaking judiciary sourced from leading, arbitration-friendly common law jurisdictions worldwide and local judges. The DIFC common law jurisdiction is carved out of mainland Dubai and the DIFC Courts exist side by side with the Dubai civil law courts. Likewise, the ADGM common law jurisdiction is carved out of mainland Abu Dhabi and the ADGM Courts exist side by side with the Abu Dhabi civil law courts. Importantly, constitutionally speaking, there is no judicial hierarchy between the onshore and offshore courts, both form an integral part of the UAE family of courts. In this sense, both the DIFC and the ADGM form a jurisdiction within a jurisdiction, one common law (the DIFC and the ADGM), the other civil law (local courts).

Both the DIFC and the ADGM have their own body of substantive laws, which are modeled on English common law and statute. At the risk of oversimplification, the ADGM, more specifically, has incorporated English common law and statute wholesale by reference, which turns it into a “little England and Wales” in the heart of the Middle East. From a comparative law perspective, therefore, the DIFC and the ADGM serve as a common law legal transplant fully integrated in the civil law environment of onshore UAE and have, as such, metaphorically been likened to “common law islands in a civil law ocean” by the former Chief Justice of the DIFC Courts, Michael Hwang SC.

The Legislative and Judicial Framework of Arbitration in the UAE: Onshore v. Offshore

Each free zone has adopted its own arbitration law, the [2008 DIFC Arbitration Law](#) and the [2015 ADGM Arbitration Regulations](#), each modeled on the UNCITRAL Model Law. Seating an arbitration in the DIFC or the ADGM will trigger the application of the DIFC Arbitration Law or the ADGM Arbitration Regulations as the procedural law of the arbitration and engage the competent free zone courts as the curial courts of the arbitration. In this way, the free zones support and facilitate common law style arbitration in the heart of the Middle East.

It is worth mentioning that the DIFC Courts more specifically have also adopted a couple of practice directions that make use of the availability of free zone arbitration: PD 2/2015 enables the enforcement of DIFC Court money judgments through arbitration (by dint of conversion into a DIFC-LCIA award that in turn will be enforceable internationally under the New York Convention); PD 1/2017 provides for cost sanctions against recalcitrant award debtors and empowers the DIFC Courts to issue securities in the amount of the awarded debt pending an action for enforcement.

Hence, free zone arbitrations seated offshore offer a viable alternative to arbitration onshore, that is arbitrations seated in mainland Dubai or Abu Dhabi. Seating an arbitration onshore will trigger the application of the [UAE Federal Arbitration Law](#) (the “FAL”), which entered into force on 16 June 2018, and engages the curial competence of the onshore local, e.g. Dubai or Abu Dhabi, courts, which in turn operate in Arabic and source their judiciary from other countries in the MENA region, in particular Egypt. The FAL replaces the arbitration-relevant provisions of the UAE Civil Procedures Code, also known as the UAE Arbitration Chapter. The FAL is in part based on the [UNCITRAL Model Law](#) and as such codifies best arbitration practice and procedure. That said, it retains some of the procedural idiosyncrasies that made the arbitral process under the former UAE Arbitration Chapter unreliable (for a comparison of the provisions of the FAL and the free zone

arbitration laws, see [The Procedural Acquis of UAE Arbitration: Onshore v. Offshore, here](#)).

Needless to say, arbitration users that are looking to seat their arbitration in the UAE, are free to shop between a common and a civil law forum, a truly unique proposition that is on offer nowhere else in the world.

The Institutional Framework of Arbitration in the UAE: Onshore v. Offshore

The institutional framework of arbitration in the UAE mirrors the common/civil law offering that lies at the heart of the UAE's hybrid legal system. Thus, arbitration users have a choice between onshore and offshore arbitral institutions, each of which administer arbitration under their own set of procedural rules. The better-known institutions are headquartered in Dubai and Abu Dhabi, whether onshore or offshore.

The [Dubai International Arbitration Centre](#) (“DIAC”) is the longest-serving onshore institution. The [Abu Dhabi Commercial Conciliation and Arbitration Centre](#) (“ADCCAC”) follows suit and is primarily used for resolving disputes involving Abu-Dhabi based governmental entities. The DIAC has ventured offshore with a DIFC-DIAC representative office and has entered into a Memorandum of Understanding with the offshore Dispute Resolution Authority (“DRA”) with the objective to enhance the enforcement of DIAC awards in the DIFC. The DIFC hosts the [DIFC-LCIA](#), the sister organization of the London Court of International Arbitration (“LCIA”). The DIFC-LCIA Rules are identical to the [LCIA Rules](#) bar the default seat being the DIFC rather than London (as provided for under the LCIA Rules). Importantly, all administrative decisions under the DIFC-LCIA Rules, such as in relation to the default-appointment and the challenge of arbitrators, are taken by the LCIA Court in London. In this sense, opting into the DIFC-LCIA Rules with a seat in the DIFC allows the parties to stage an LCIA-style arbitration locally, i.e., in the UAE. As mentioned previously, EMAC also operates offshore and administers its own, maritime-specific set of rules from within the DIFC, default-seating EMAC arbitrations in the DIFC.

By contrast, the Abu Dhabi judicial free zone, the ADGM, does not host any fully operating arbitration institutions. For now, it has opted for hosting ad hoc arbitrations, championing a model of representative offices that operate from within the ADGM. The first one such office is the ADGM-ICC, which operates as a regional arm of the Paris-based arbitration division of the International Chamber of Commerce. For the avoidance of doubt, disputes continue to be administered by the Middle Eastern case teams operating from Paris. Other international arbitration institutions are currently contemplating setting up representative offices within the ADGM. In addition, the ADGM Arbitration Centre (“ADGMAC”) serves as an arbitration logistics provider and arbitration venue, offering state-of-the-art hearing facilities for domestic and international arbitration in the heart of the ADGM. More recently, the ADGM has promulgated the [ADGMAC Arbitration Guidelines](#) to assist arbitrators and parties in the conduct of the arbitral proceedings locally and internationally.

The Onshore/Offshore Area of Free Movement

In order to achieve the full functional integration of the offshore common law free zones and the

onshore civil law jurisdiction into one hybrid legal system, the Emirati legislator has created an area of free movement of judicial instruments, including ratified awards, onshore/offshore and vice versa. This area of free movement is based on a system of mutual recognition and builds on the mutual trust between the onshore and the offshore courts. This is, no doubt, supported by the equal constitutional status accorded to the onshore and offshore courts within the UAE legal system, absent any judicial hierarchy between them. More specifically, according to Article 7 of the Judicial Authority Law (as amended) and the corresponding provisions of the [Memorandum of Understanding between the Abu Dhabi Judicial Department and the ADGM Courts](#), the onshore courts are required to accept offshore orders for recognition and enforcement of an award for execution onshore without any examination on the merits and vice versa. In this context, it is, of course, important to note that both onshore and offshore courts are subject to the same principles of UAE public policy.

Importantly, conflicts of jurisdiction between the onshore Dubai and the offshore DIFC Courts, e.g., in relation to parallel proceedings between the same parties for a challenge of an arbitral award before the onshore Dubai Courts and for enforcement before the offshore DIFC Courts, are presently dealt with by a Dubai-DIFC Joint Judicial Tribunal, which was established by Ruler's Decree in 2016 and which is composed of a mix of Dubai and DIFC Court judges. It is proposed that conflicts of jurisdiction within this context could be more efficiently addressed by the introduction of a legislative framework based on a first-seized rule and/or requiring the exhaustion of any moratorium for a challenge by an award debtor before the courts at the seat (e.g. 30-day pursuant to Art. 54 FAL) before initiation of any enforcement action by the award creditor offshore and vice versa.

The Free Zone Courts as a Conduit

Last but not least, the free zone courts have actively served as so-called conduits for the enforcement of both domestic non-free zone and foreign awards for onward execution onshore, even absent any assets in or any other geographic nexus to the relevant free zone. This essentially allows domestic and international award creditors to enforce their awards through multiple fora. This, in turn, enhances the overall choice of enforcement fora open to an award creditor that is seeking to execute an award in the UAE, whether onshore or offshore. The role of the both onshore and offshore courts as a conduit is facilitated by the existence of the area of free movement onshore/offshore between the onshore Dubai/Abu Dhabi and the offshore DIFC/ADGM Courts. For the avoidance of doubt, like the onshore courts, the free zone courts are bound by the terms of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards with respect to any foreign award, whether Convention or non-Convention, given the fact that the UAE did not enter into the reciprocity reservation.

Conclusion

The UAE are uniquely placed in offering arbitration services across a fluid spectrum of civil and common law jurisdictions from a fully integrated civil/common law platform. This enables domestic and international users of arbitration to shop for a common/civil law seat for their arbitration and for multiple civil/common law fora of enforcement, as best suits their needs,

without having to look outside the Middle East. The EMAC more specifically serves as a welcome institutional catalyst in maritime dispute resolution between onshore and offshore, offering its services irrespective of the location of the arbitral seat, i.e. whether onshore or offshore.


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