

The UAE's Pilgrimage to International Arbitration Stardom – A Critical Appraisal of Dubai as a Centre of Dispute Resolution Aspiring to be a Middle East Business Hub

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Abstract

The last two decades have witnessed a growing interest and participation of the Gulf Cooperation Council (GCC) states in international arbitration as they have also joined the New York Convention and the Washington Convention. Still, scepticisms abound as to the efficacy of international arbitration in the GCC states. However, Dubai is considered to have the potential of being a Middle East business hub as it is modernising its arbitration law and practice in light of international developments. Forward thinking and innovative pro-arbitration institutions like the Dubai International Arbitration Centre (DIAC) - the leading arbitration centre in the UAE; the Dubai International Financial Centre (DIFC) - a common law free zone within Dubai with its own sets of laws, including the DIFC Arbitration Law, and its own court system (DIFC Courts) both of which are separate from Dubai and UAE laws and judicial systems; and the DIFC-LCIA Arbitration Centre, have turned Dubai into a growing propitious arbitration hub (i.e. a pro-arbitration and pro-enforcement jurisdiction) in the Middle East. While doubts continue to be raised with regard to the role and influence of the Shari'a on the arbitration process and on the enforceability of arbitral awards in Dubai, an examination of recent developments and trends in the arbitration rules and case law in Dubai reveals a promising environment for international arbitration, except for a few cases that followed formalistic grounds for denying enforcement. Recent cases from the UAE, and especially from Dubai, reveal a new attitude pervading the UAE judiciary that is more welcoming of the New York Convention and that is less likely to interfere with the merits of an arbitral award. However, the new UAE

Draft Federal Arbitration Law is yet to be enacted. The article provides a critical appraisal of the recent legislative and institutional developments and international arbitral practice in the UAE and assesses Dubai's prospect to be a Middle East business hub.

Keywords: Dubai International Arbitration Centre, Dubai International Financial Centre, enforcement, foreign arbitral award, international arbitration, public policy, setting aside, Shari'a, United Arab Emirates

“Does running water stop when it reaches a rock? Of course not. It turns either left or right, and continues its way. Likewise, a positive person is confident that no challenge will stand in the way of achieving his or her goal.”

-Sheik Mohammed bin Rashid Al Maktoum, Ruler of Dubai
in *Flashes of Thought* (Motivate, 2013)

I. Introduction

Arbitration is fundamental to the world of business because it allows for the settlement of trade disputes through cost and time effective means while retaining some control over the process. Therefore, most parties in a commercial or investment dispute resort to arbitration, recognizing the practical advantages in comparison to litigation.¹ The sheer volume of international commercial transactions² and investments in the Middle East has made it inevitable for international arbitration to play a role in the resolution of commercial and investment disputes. Despite scepticism from the international community on the growth of international arbitration in the region, much progress has been made in the Middle East and especially among the Gulf Cooperation Council (GCC) countries, all of which are signatories to the New York Convention and the Washington or ICSID Convention.³ The last twenty years have shown a heightened interest and participation among the GCC countries in international arbitration.⁴ In the UAE,

¹ Jonathan Lawrence, Peter Morton and Hussain Khan, ‘Dispute Resolution in Islamic Finance’ (2012) *Global Islamic Fin. Rep.* 1-7.

² As an example, Dubai's total non-oil foreign trade in the first 10 months of 2012 crossed Dh1 trillion mark. ‘Dubai Non-Oil Foreign Trade Crosses Dh1 Trillion Mark for the First Time’, *Emirates* 24/7 <www.emirates247.com/business/economy-finance/dubai-non-oil-foreign-trade-crossed-Dh1-trillion-mark-for-the-first-time-2012-12-12-1.487071?ot=ot.PrintPageLayout> (10 December 2013).

³ Many Middle East countries have also adopted the UNCITRAL Model Law, or portions of it, and have established arbitration centres. *See* Lawrence, Morton, and Khan, *supra* note 1, p. 2.

⁴ Mark Beswetherick and Keith Hutchison, ‘Enforcement of Arbitration Awards: Moving in the Right Direction’, Clyde and Co., 7 May 2012 <www.clydeco.com/insight/updates/enforcement-of-arbitration-awards-moving-in-the-right-direction>(27 December 2012) (noting the “significant” growth of domestic and international arbitration in the UAE).

according to Beswetherick and Hutchison, more than 500 arbitrations take place in the top three arbitration centres alone, and many of these arbitrations are international in nature in that they involve at least one party that is “based outside of the UAE.”⁵

The beacon for the growth of international arbitration in the GCC could arguably be Dubai⁶ with its creation of arbitration centres like the Dubai International Arbitration Centre (DIAC) and the Dubai International Financial Centre – London Court of International Arbitration (DIFC-LCIA). Still, scepticisms abound regarding the success of international arbitration in Dubai, perhaps understandably so because of the infancy of the arbitral institutions in Dubai compared to those in Paris and London, and because of the relative length at which the United Arab Emirates has taken in passing a Federal Arbitration Act. Concerns continue to be raised regarding the impact of Islamic law on the arbitration process, and the enforceability of arbitral awards in Dubai, although recent cases in the UAE are encouraging.

This article does not aim to provide a comprehensive answer to these questions or to settle any doubts about the efficacy of international arbitration in Dubai and the UAE. Instead, what this article aims to accomplish is to provide a current overview and critical appraisal of the developments of international arbitration as regards commercial and investment disputes in Dubai by reviewing recent cases and data on arbitration. This article ultimately hopes to examine whether Dubai is truly on its way to living up to its promise of becoming a successful international centre for arbitration.

This article begins with an analytical framework for analyzing the success of Dubai as an international centre for arbitration (Part II). The article then discusses the role of arbitral centres in Dubai and UAE arbitration in part three with a focus on DIFC Free Trade Zone, the DIFC Court, the DIFC-LCIA Arbitration Centre, and the DIAC (Part III). In Part IV, the article discusses the specificities of the UAE Civil Procedure Rules on Arbitration and the New Draft UAE Federal Arbitration Law, which has yet to be promulgated by the UAE and remains in draft form. In Part V, the article discusses the enforcement of arbitral awards in the UAE and Dubai, including the enforcement of domestic awards, foreign awards, the public policy exception, the recent trend in the UAE in favour of enforcement of foreign arbitral awards, and the setting aside

⁵ The volume of arbitrations occurring in the UAE has increased. *See* Beswetherick and Hutchison, *supra* note 4.

⁶ According to Luttrell, part of Dubai’s growth toward becoming a Middle East business hub can be attributed to its emergence, due largely to the UAE’s stability and neutrality, as the preferred site for non-Arabs negotiating oil and gas agreements in the GCC in the late 1990’s., Sam R. Luttrell, ‘Choosing Dubai: Arbitration and the Arbitration Law of the DIFC’ (2008) 9 *Bus. L. Int’l* 254, 254-25.

of arbitral awards in the UAE including the grounds for which an arbitral award may be set aside.

II. Analytical Framework

The first task is to determine a framework for analyzing the success of Dubai as an international centre for arbitration. In this respect the threshold question is: at which point of the arbitration process should success be determined? Should it be determined: (i) at the beginning of the process by looking at the likelihood that counsel may advise a client on choosing Dubai as an arbitral seat, (ii) at the middle of the arbitration process by looking at the extent to which parties challenge or appeal an arbitral award, or, (iii) at the end of the process by looking at the extent that parties to an arbitration proceeding express satisfaction with the outcome of the arbitration *vis-à-vis* primarily the enforcement stage?

An analysis of the enforcement stage, or the end of the process, seems to immediately pose practical difficulties in measuring satisfaction primarily because of the confidential nature of arbitral proceedings and arbitral awards. The success of enforcing an arbitral award is the ultimate end of any arbitration proceeding, assuming of course that one measures success in the viewpoint of the enforcing party. The success of an arbitration system ought to be viewed by keeping in mind both the prevailing party and the losing party to the arbitration. Regardless of how one measures the success of arbitration at the enforcement stage, there is simply a lack of a comprehensive data on arbitral awards that have been enforced in Dubai and the UAE.

An analysis of the arbitration proceeding, or the middle stage, also poses challenges related to the motivation for challenging or appealing an arbitral award based on the proceedings. In the end, a lawyer will likely challenge an arbitral award whether or not the lawyer or the client viewed the arbitration process positively. The goal after all is to avoid paying on a judgment. It is likewise difficult to measure whether parties and their counsel view the arbitration process positively during the arbitration process, and any measure of the arbitration proceeding at the enforcement stage will likely be influenced by the outcome of the arbitration. It is, however, possible to examine the type of challenges posed and measure the efficacy of the arbitration proceedings by measuring challenges aimed at the process. Examples of these types of challenges could include the neutrality of the arbitrator, due process challenges, and errors in the arbitration process based on formalities. Unfortunately, there is no formal system for publishing

cases in Dubai and the UAE as a whole. The arbitral institutions also do not maintain data on successful enforcement of arbitral awards, much less the challenges lodged against those awards. It is, therefore, difficult to determine with statistically sound data the efficacy of the arbitration proceedings based in the types of challenges aimed at the arbitration process.

The most practical approach therefore seems to be to look at the beginning stage of the arbitration, or in other words to look at the likelihood that counsel will advise a client to choose Dubai as the seat of arbitration.⁷ Stating as a caveat the remaining fact that international arbitration in Dubai is relatively at its infancy, and recent developments discussed in this article will not likely be taken into account when considering the choice of the arbitral seat, this approach seems to provide the best opportunity for measuring the qualitative factors in determining the success of international arbitration in Dubai. Based largely on a survey conducted by Professor Loukas Mistelis of the International School of Arbitration,⁸ the measure for success weighs the factors that motivate corporate counsel when choosing the arbitral seat.⁹ The survey shows that three factors substantially impact a corporate attorney's choice of an arbitral seat: (a) the formal legal infrastructure, (b) the governing substantive law, and (c) practical convenience.¹⁰

Formal legal infrastructure includes factors like (1) neutrality and impartiality of the jurisdiction, (2) arbitration friendliness including the track record in enforcing the arbitral agreement and award, and (3) membership of the New York Convention. As to the governing substantive law, the stability and reliability of a country's contract law seems to impact the preference for an arbitral seat. According to Sornum, the key factors that influence the decision regarding the governing substantive law "are the perceived neutrality and impartiality of the legal system, the appropriateness of the law for the type of contract in issue and the party's familiarity with the law, for instance, whether the law is similar to their own law. When deciding whether the law is appropriate for the contract concerned, parties usually seek effectiveness, technical appropriateness and also consider other strategic points, for example, the issue of

⁷ See e.g., Danisha Sornum, 'An Analysis of Mauritius as an Arbitral Seat for International Commercial and Investment Dispute Resolution', 30 September 2011 <ssrn.com/abstract=1977247> (9 October 2012).

⁸ School of International Arbitration, '2010 International Arbitration Survey: Choices in International Arbitration' (University of London 2010) p. 8 <www.arbitrationonline.org/research/2010/index.html> (10 December 2013) [hereinafter "SIA Survey"], cited by Sornum, *supra* note 7.

⁹ Sornum, *supra* note 7.

¹⁰ Sornum, *supra* note 7 ("formal legal infrastructure tops the list with 62%, followed by the law governing the substance of the dispute at 46% and finally the convenience aspect accounting for 45%").

directors' liability, corporate governance in joint venture agreements or the limited latent defects period when parties are entering into a construction contract.”¹¹ The decision regarding the practical convenience of the potential seat of arbitration includes “the efficiency and promptness of court proceedings, language and culture, established contacts with lawyers in the jurisdiction, location, and familiarity with the seat of arbitration.”¹² There are, of course, additional factors such as costs, physical infrastructure, language, and human resources that influence the choice of an arbitral seat. This article, however, will focus mainly on the first three factors (formal legal infrastructure, governing law, and practical convenience) since the remaining ones (cost, physical infrastructure, language and human resources) suggest features that are largely determined by the arbitral institution, a topic beyond the scope of this article, and not by the arbitration system of a country.

Looking at the beginning stage of arbitration, this article will argue that Dubai has successfully created an attractive atmosphere and infrastructure for arbitration that takes into consideration the needs of the international business community.¹³ Dubai has done so primarily through the creation of the DIFC free trade zone and the DIFC arbitration system¹⁴ that since 2008 has only made itself more compatible with international standards. Additionally, the performance of the DIAC as an arbitration centre since 2004 shows the growing trend in using DIAC as an arbitral institution. It is through the rules of the DIAC and the DIFC-LCIA arbitration centres that one could say that Dubai's arbitration process, at least through these centres, is consistent with international standards because these centres' rules are based on the UNCITRAL Model Law. Thus, with regard to the beginning and middle stages of arbitration, Dubai has performed successfully. This article will, therefore, explain the roles of the arbitral centres in Dubai and clarify the rules and enforcement of DIFC-LCIA and DIAC awards.

The remaining stage, the enforcement stage, promises the most significant room for improvement for the UAE. Specifically, improvements could be made as to the enforcement of arbitral awards by eliminating the lengthy process of enforcement due to the UAE Civil Procedure Code, which requires ratification of an arbitral award prior to enforcement, a process

¹¹ Sornum, *supra* note 7 (citing SIA Survey, *supra* note 8).

¹² Sornum, *supra* note 7.

¹³ Luttrell, *supra* note 6, p. 254 (stating that the process of economic diversification in Dubai was accelerated by sound planning at the federal and emirate level).

¹⁴ *Ibid.*, p. 254 (stating that “the creation in 2004 of the Dubai International Financial Centre (DIFC), a free financial zone within Dubai city, represents a recent step towards economic diversification”).

that could involve all levels of courts in the judiciary. Although the UAE has been a signatory to the New York Convention, the lengthy process is often applied in practice to foreign awards. There are, however, promising signs that the courts in Dubai and Fujairah are turning towards a pro-enforcement attitude. Additionally, the enforcement of arbitral awards from the DIFC and in the DIFC has become easier with promulgations of new rules that favour enforcement. Practitioners like Emmerson and Hutchison predict that more investors will likely choose the DIFC as the arbitral seat because of advantages at the enforcement stage as opposed to the enforcement of domestic arbitral awards.¹⁵ The promulgation of the long awaited New Draft UAE Federal Arbitration Law [2012], which is yet to be adopted and remains in draft form as of the writing of this article, will likely reinforce Dubai's and the UAE's commitment to arbitration.¹⁶ Overall, this article argues that Dubai (and the UAE as a whole) is on the verge of achieving its goal of becoming an international centre of arbitration.¹⁷

III. The Role of Arbitral Centres in Dubai and UAE Arbitration

The United Arab Emirates (UAE) has been undergoing a fundamental transformation of its arbitration law at several different levels. The UAE became the 138th state to adopt the New York Convention in 2006.¹⁸ “In 2008, three additional significant developments occurred: (1) the UAE federal government drafted a new arbitration law, which has been published for comment; (2) the Dubai International Financial Centre enacted a comprehensive and jurisdictionally inclusive new arbitration law; and (3) the Dubai International Financial Centre and the London Court of International Arbitration became partners to create the DIFC – LCIA Arbitration Centre. These three events have significantly strengthened Dubai's position in its bid to become an international centre for arbitration.”¹⁹

¹⁵ Alec Emmerson and Keith Hutchison, ‘The UAE Enforcement Saga: A New Dawn’, Clyde & Co, 8 November 2012 <www.clydeco.com/insight/updates/the-uae-enforcement-saga-a-new-dawn> (12 January 2013).

¹⁶ Rumours regarding the Model Law's promulgation have circulated for some time. In February 2008, the UAE Ministry of Economy announced that it had completed a draft Federal Arbitration Law based on the UNCITRAL Model Law. Luttrell, *supra* note 6, p. 255.

¹⁷ Emmerson and Hutchison, *supra* note 15 (stating that “on balance there has been significant progress in the Dubai legal system with the courts working to find their feet in supporting the increasing popularity of arbitration in the region”).

¹⁸ Beswetherick and Hutchison, *supra* note 4; Luttrell, *supra* note 6, p. 255.

¹⁹ George A. Smith and Matthew A. Marrone, ‘Recent Developments in Arbitration Law in the Middle East’ <www.wwhgd.com> (10 December 2013).

The UAE, however, still faces many challenges in modernizing its current arbitration rules. Despite its reputation and posturing as a global commercial centre, the UAE at present does not have a common arbitration law and so relies instead on Articles 203-218 of the Civil Procedure Code.²⁰ However, the UAE is currently working on a draft federal arbitration law modelled after the UNCITRAL Model Law, which has yet to be enacted. In addition, the development of financial free trade zones has created a separate body of arbitration law, independent from UAE arbitration laws. A further look is necessary in the UAE regarding the growing role of institutional arbitration,²¹ especially in Dubai²² with the DIAC, the DIFC seated arbitration,²³ and the DIFC-LCIA.²⁴

A. The DIFC Free Trade Zone, the DIFC Court, and the DIFC-LCIA Arbitration Centre

The DIFC is in essence a jurisdiction within a jurisdiction,²⁵ or “seat within a seat.”²⁶ So, to better understand the dynamics of arbitration from and within the DIFC, it is necessary to explain the concept of the DIFC Free Zone, the DIFC Court, and the DIFC-LCIA Arbitration Centre or DIFC seated arbitration.

1. The DIFC Free Trade Zone

²⁰ These Articles are available in English. See DIAC Website <www.diac.ae/idias/rules/uae/chapter3/> (10 December 2013).

²¹ There are four arbitration centres in the UAE: (1) DIAC, (2) DIFC-LCIA Arbitration Centre, (3) Abu Dhabi Chamber of Commerce & Industry, and (4) International Islamic Centre for Reconciliation and Arbitration (IICRA). Lawrence, Morton and Khan, *supra* note 1, p. 5.

²² See Beswetherick and Hutchison, *supra* note 4 (noting that the three main arbitration centres in the UAE are the DIAC, the DIFC-LCIA Arbitration Centre, and the Abu Dhabi Commercial Conciliation and Arbitration Centre (“ADCCAC”), part of the Abu Dhabi Chamber of Commerce). The ADCCAC recently issued its new rules, bringing it in line with international practice. See Graham Lovett, James Abbott and Paul Coates, ‘The new ADCCAC arbitration rules – bringing ADCCAC in line with international practice’, 22 October 2013 <http://www.cliffordchance.com/publicationviews/publications/2013/10/the_new_adccac_arbitrationrulesbringingadcca.html> (17 January 2014); Gordon Blanke, ‘The New ADCCAC Arbitration Rules: Evolution or Revolution?’, 8 October 2013 <<http://kluwerarbitrationblog.com/blog/2013/10/08/the-new-adccac-arbitration-rules-evolution-or-revolution/>> (17 January 2014).

²³ Nigel Duffield, ‘International Arbitration in the UAE - Dubai, A Two-Seater City’, 11 October 2012 <www.claytonutz.com/publications/edition/11_october_2012/20121011/international_arbitration_in_the_uae-dubai_a_two-seater_city.page#page=1> (11 January 2013) (stating that “the Dubai International Financial Centre is currently gaining popularity as the nominated seat of arbitration for contracts entered into” in the UAE).

²⁴ Smith and Marrone, *supra* note 19.

²⁵ The DIFC itself was designed as a city within a city. See DIFC Website, ‘Discover DIFC’ <www.difc.ae/discover-difc> (11 January 2013).

²⁶ Luttrell, *supra* note 6, p. 255.

The UAE is a federal system consisting of seven Emirates.²⁷ The creation of the DIFC financial free trade zone as it exists today in Dubai was largely motivated by the UAE's overall scheme for attracting foreign investment and positioning itself as the Middle East business hub. In short, it all began when the UAE amended its Constitution in 2004,²⁸ allowing each Emirate Government to create and govern its own financial free trade zone. The Dubai International Financial Centre (DIFC)²⁹ is the most prominent of these financial free trade zones.

The Emirate of Dubai created³⁰ and governs the DIFC Free Trade Zone within the Emirate of Dubai. Under the Presidency of Sheik Maktoum Bin Mohammed Bin Rashid Al Maktoum,³¹ the DIFC has a governor, H.E. Essa Abdulfattah Kazim, who oversees the three branches of the DIFC: the DIFC Court, the DIFC Authority which is the management or executive arm of the DIFC, and the Dubai Financial Services Authority which regulates banking and finance.³² Roughly speaking, the DIFC created the governing trinity of judiciary, executive, and legislative branches. To further attract foreign investment, however, Dubai took a step further and gave the DIFC Free Trade Zone complete autonomy to create their own body of civil and commercial laws and regulations³³ apart from the laws of Dubai and the UAE. In essence, the DIFC is an area physically located within Dubai, where, however, the laws of Dubai and the UAE do not generally apply, or where DIFC law takes precedence over Dubai and UAE laws.

2. The DIFC Court

Pursuant to the Judicial Authority Law³⁴ and the DIFC Court Law,³⁵ the DIFC Court, a common

²⁷ The UAE consists of the Emirates of Abu-Dhabi (the capital), Dubai, Sharjah, Ajman, Um El-Qiwan, Fujairah, and Ras El-Kheimat. Luttrell, *supra* note 6, p. 256; Abdul H. El-Ahdab, 'The New Arbitration Act of the State of the United Arab Emirates' (1996) 11:8 *Mealey's Int'l Arb. Rep.* 1, 3.

²⁸ Craig Shepard, 'Dubai as a Middle East Business Hub: Extending the Jurisdiction of the Courts of the Dubai International Financial Centre' (2012) *Asian Disp. Res.* 11-13.

²⁹ UAE Federal Law No. 35 of 2004 established the DIFC as a financial free trade zone in the Emirate of Dubai.

³⁰ Dubai Law No. 9 of 2004 effectively created the DIFC.

³¹ His Highness Sheik Maktoum Bin Mohammed Bin Rashid Al Maktoum, the Deputy Ruler of Dubai and Prime Minister of the UAE, is also the President of the DIFC. See DIFC Website, 'Discover DIFC' <www.difc.ae/discover-difc> (11 January 2013).

³² See DIFC Website, 'DIFC Governor' <www.difc.ae/difc-governor> (10 December 2013).

³³ The DIFC also has a financial risk regulator, the Dubai Financial Services Authority (DFSA), which "grants licenses and regulates the activities of all banking and financial institutions in the DIFC." See DIFC Website, 'Discover DIFC' <www.difc.ae/discover-difc> (11 January 2013).

³⁴ Dubai Law No. 9 and Dubai Law No. 12 of 2004; Shepard, *supra* note 28, p. 13.

³⁵ DIFC Law No. 10 of 2004.

law jurisdiction,³⁶ acts as the independent judiciary of the DIFC with very learned common law judges on the bench.³⁷ That the DIFC is a common law jurisdiction within the UAE and the Emirate of Dubai might at first glance seem troublesome especially when taking into account the influence of the Shari'a, any conflict between the UAE law and the DIFC common law could most likely be resolved by choice of law rules. It is clear that the DIFC Court's jurisdiction is limited to resolving disputes involving DIFC transactions³⁸ by interpreting and applying DIFC laws and regulations,³⁹ with the large exception of arbitral awards not connected with the DIFC in any way except that the arbitration is seated in the DIFC and which the DIFC Court can thus enforce. The DIFC Court's jurisdiction is expressly provided in Article 5 of Dubai Law No 12 of 2004.⁴⁰ With regard to arbitration, the DIFC Court interprets the DIFC Arbitration Law,⁴¹ which

³⁶ Claudia T. Salomon and James P. Duffy, 'The New Dubai International Arbitration Law' (18 November 2008) *New York Law Journal* <www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202426297155> (14 September 2012); Ghada Q. Audi and Alessandro Tricoli, 'Updates on the Ratification and Enforcement of Arbitration Awards in the UAE and DIFC Courts', 30 August 2012 <www.fichtelegal.com/en/news_article.php?news_id=195> (10 December 2013); Rodney Q. Smith and Omar Ibrahim, 'Arbitrating at the Crossroads of East and West: An Overview of Prominent Arab National Arbitration Laws', Working Paper Series <papers.ssrn.com/sol3/papers.cfm?abstract_id=1654008> (10 December 2013) (also noting that "the official language in the DIFC is English" and not Arabic); Shepard, *supra* note 28.

³⁷ See Smith and Ibrahim, *supra* note 36 (stating that DIFC "judges have extensive experience as judicial officers and advocates in other common law jurisdictions", citing as an example, the Chief Justice of the DIFC Courts, Sir Anthony Evans, who "previously served as a High Court Judge from 1984 to 1992 in England and Wales, and subsequently served as a Lord Justice of Appeal from 1992 until his retirement in 2000"). See 'Biography of Sir Anthony Evans' <www.difccourts.ae/about_the_courts/structure/judges> (10 December 2013). The Deputy Chief Justice, Michael Hwang was previously Senior Counsel of the Supreme Court of Singapore in 1997 and served as Commissioner of United Nations Compensation Commission (UNCC) from 200-2003.

³⁸ The DIFC's "coffee shop" jurisdiction was clarified by Article 3 of the Protocol of Jurisdiction between the DIFC and Dubai Courts as applicable only when (1) one of the parties was based in the DIFC, (2) it involves a contract which had been performed in whole or in part in the DIFC, and (3) the transactions took place in whole or in part within the DIFC. Shepard, *supra* note 28.

³⁹ Audi and Tricoli, *supra* note 36; Smith and Ibrahim, *supra* note 36; Shepard, *supra* note 28.

⁴⁰ Article 5 of Dubai Law No. 12 of 2004 limits the DIFC Court's jurisdiction to be exclusive to "a. civil or commercial cases and disputes involving the Centre or any of the Centre's Bodies or any of the Centre's Establishments; b. civil or commercial cases and disputes arising from or related to a contract that has been executed or a transaction that has been concluded, in whole or in part, in the Centre or an incident that has occurred in the Centre; c. objections filed against the decisions made by the Centre's Bodies which are subject to objection in accordance with the Centre's Laws and Regulations; or d. any application over which the Courts have jurisdiction in accordance with the Centre's Laws and Regulations." Parties can opt out of the DIFC Court's jurisdiction under a, b, and d. See Alec Emmerson, 'Jurisdictional Developments in the DIFC Courts', 23 April 2012 <www.clydeco.com/insight/updates/jurisdictional-developments-in-the-difc-courts> (11 January 2013) (discussing the expansive interpretation by the DIFC Court of Appeal in *Corinth Pipeworks SA v. Barclays Bank PLC*, DIFC CA 002/2011, 22 January 2012, of the original jurisdiction of the DIFC Courts under Article 5 of Dubai Law No. 12 of 2004 by its broad interpretation of the phrase "Centre Establishment" under Article 5(A)(1)(a) of Dubai Law No. 12 of 2004). In *Al-Khorafi v. Bank Sarasin*, DIFC CA 003/2011, 5 January 2012, the DIFC Court rejected the Appellants' contention that, "there no longer being any reference in the New Law equivalent to former Article 5(A)(2) of the original Judicial Authority Law, it was no longer permissible for parties to "opt out" of the DIFC Court's exclusive jurisdiction, i.e. for parties to choose or contract to submit their disputes to be heard in other fora." See Fiona Campbell, 'Effectiveness of Arbitration and Jurisdiction Clauses in the Courts of Dubai: Welcome to the

governs arbitrations seated in the DIFC, instead of the UAE Civil Procedure Code. Additionally, the DIFC Court, “as the supervisory court for DIFC seated arbitration,”⁴² also plays a role in the ratification, and in turn the enforcement and execution, of such DIFC seated arbitral awards.

On 1 September 2008, the 2004 DIFC Arbitration Law⁴³ was repealed⁴⁴ by the 2008 DIFC Arbitration Law⁴⁵ to reflect the newly revised UNCITRAL Model Law.⁴⁶ Prior to the 2008 DIFC Law, “arbitrations conducted in the DIFC were limited to disputes only connected with the DIFC.”⁴⁷ With this amendment, the DIFC Court was given a wider jurisdictional reach in Dubai with regard to arbitration when the DIFC Court was opened to cover arbitration disputes that are outside of the DIFC zone regardless of whether the dispute or the parties have any connection with the DIFC, so long as the parties hold their arbitration in the DIFC.⁴⁸ In other words, parties, whether foreign or domestic, may arbitrate disputes in the DIFC even without a connection to the DIFC⁴⁹ by expressly submitting to the jurisdiction of the DIFC.⁵⁰ Dubai Law No. 16 of 2011, which was promulgated to amend certain provisions of Dubai Law No 12 of 2004,⁵¹ extended the DIFC Court’s jurisdiction to extend to cases in which the parties expressly agree,⁵² whether before or after the dispute arose, to submit their claims to the jurisdiction of the DIFC Courts.⁵³ Moreover, “claimants no longer need to establish a direct nexus to the DIFC in order for the

Hotel Courts of Dubai...you can check out anytime you like, but can you ever leave?’, March 2012 <www.tamimi.com/en/publication/publications/section-3/march-1/effectiveness-of-arbitration-and-jurisdiction-clauses-in-the-courts-of-dubai.html> (12 January 2013).

⁴¹ See DIFC Law No. 8 of 2004 and DIFC Law No. 1 of 2008 (2008)

<www.difc.ae/laws_regulations/laws/enacted_laws.html> (10 December 2013).

⁴² Audi and Tricoli, *supra* note 36.

⁴³ DIFC Law No. 8 of 2004.

⁴⁴ See DIFC-LCIA Website, ‘FAQ’ <www.difcarbitration.com/base/faqs/index.html> (11 January 2013).

⁴⁵ DIFC Law No. 1 of 2008.

⁴⁶ Dubai Law No. 9 and Dubai Law No. 12 of 2004; Shepard, *supra* note 28, p. 13; see also DIFC-LCIA Website, *supra* note 44 (stating that “the new law is based on the UNCITRAL Model Law”); Duffield, *supra* note 23 (stating that “a disadvantage of DIFC as a seat of arbitration is its relative newness”).

⁴⁷ Phil Appenzeller and Steve Harr, ‘An American in Dubai - An Overview of Dubai’s Arbitration System’, 16 August 2011 <<http://www.terralex.org/publication/p653857f06d/an-american-in-dubai-an-overview-of-dubai-s-arbitration-system>> (10 October 2012).

⁴⁸ Philip Punwar, ‘DIFC Arbitration Law 2008 Enters into Force and Replaces DIFC Arbitration Law 2004’, *Modern Arbitration*, September 2008 <www.tamimi.com/files/articles/Dispute%20Resolution/Modern_Arbitration_Sept08.pdf> (10 December 2013);

Smith and Marrone, *supra* note 19; Audi and Tricoli, *supra* note 36; Shaheen Pasha, ‘DIFC Courts’ judgments mustn’t face enforcement challenges’, 9 February 2012 <mideast.legalbusinessonline.com/site-search/difc-courts-judgments-mustnt-face-enforcement-challenges/107831> (28 December 2012).

⁴⁹ See DIFC-LCIA Website, *supra* note 44.

⁵⁰ Shepard, *supra* note 28.

⁵¹ Dubai Law No. 12 of 2004.

⁵² Dubai Law No. 16 of 2011 requires that the agreement must so state in "a clear and explicit special provision."

⁵³ Emmerson, *supra* note 40.

DIFC Courts to accept jurisdiction.”⁵⁴ In *Al-Khorafi v. Sarasin*, the DIFC Court of Appeals further shed light on the scope of its recently extended jurisdictional reach by citing the doctrine of *forum non conveniens* to refuse enforcement of a Swiss forum selection clause, ruling in effect that a Swiss forum would be inappropriate with regards to a DIFC registered entity.⁵⁵ The *Sarasin* case signals that the DIFC Court may assert jurisdiction despite the existence of a clear foreign forum selection clause that the parties to the dispute have previously agreed to.⁵⁶ It is still important, however, as indicated by the ruling in *Amarjeet Singh Dhir v. Waterfront Property Investment Limited and Linarus FZE*, that parties “expressly select the DIFC as the seat of arbitration,”⁵⁷ as the DIFC Court has refused to apply DIFC rules to a case, where the parties chose DIFC-LCIA rules and Dubai as the place of arbitration (but not the DIFC as the seat of arbitration) and “the laws of the Emirate of Dubai” as the applicable law.⁵⁸

The 2008 DIFC Law also clarifies that the DIFC Courts are “bound by the New York Convention and that awards made within the jurisdiction of the DIFC are to be enforced by Dubai courts without further review of the tribunal’s decision.”⁵⁹ Further, the DIFC Court can order the enforcement of arbitral awards inside and outside the DIFC zone, as long as the arbitral award was issued in the DIFC⁶⁰ under Dubai Law No. 16 of 2011.

It is noteworthy to mention that in a recent case decided by a DIFC Court, *Injazat Capital Limited and Injazat Technology Fund B.S.C. v. Denton Wilde Sapte & Co*,⁶¹ the DIFC Court of First Instance attracted much criticism from the arbitration community when it refused to grant a stay to the applicant Denton Wilde Sapte (DWS), which claimed that the proceedings in the DIFC court should be stayed since there existed terms of business that were attached to an engagement letter that gave the parties the option to “refer the claim, dispute or difference to

⁵⁴ Christopher Hall, Imran Sharif and Philip Clifford, ‘New Dispute Resolution Options in the DIFC Courts’, Latham Watkins Client Alert No. 1420, 18 October 2012 <www.lw.com/thoughLeadership/dispute-resolution-options-difc-courts.html> (10 December 2013); *Corinth Pipeworks SA v. Barclays Bank PLC*, DIFC CA 002/2011, 22 January 2012.

⁵⁵ *Al-Khorafi v. Bank Sarasin*, DIFC CA 003/2011, 5 January 2012; Hall, Sharif and Clifford, *supra* note 54.

⁵⁶ Hall, Sharif and Clifford, *supra* note 54.

⁵⁷ *Amarjeet Singh Dhir v. Waterfront Property Investment Limited and Linarus FZE*, Claim No. CFI 011/2009, Grounds of Decision, 8 July 2009, para. 92.

⁵⁸ *Ibid.*; Merryl Lawry-White, ‘Key Developments in Relation to Arbitration in Dubai’, 13 Jan 2012 <kluwerarbitrationblog.com/blog/2012/01/13/key-developments-in-relation-to-arbitration-in-dubai/> (10 December 2013).

⁵⁹ See DIFC-LCIA Website, *supra* note 44.

⁶⁰ Audi and Tricoli, *supra* note 36.

⁶¹ *Injazat Capital Limited and Injazat Technology Fund B.S.C. v. Denton Wilde Sapte & Co*, CFI 019/2010

arbitration in London before a single arbitrator.”⁶² After relying on English common law to determine that the DIFC Court had, pursuant to its inherent jurisdiction, the power not to decide whether to grant a stay,⁶³ Judge Sir David Steel’s decision to refuse to grant a stay was alternatively based on DWS’s position that non-DIFC law applied, and in so construing, Judge Steel found that the arbitration clause was nevertheless manifestly invalid as a matter of non-DIFC law because the clause was not signed on its page. To hold that UAE law strictly required writing and signature on an arbitration clause, Judge Steel relied on UAE Civil Procedure Code Article 203(2) of Law No. 11 of 1992, which provides that an “arbitration agreement may be proved only in writing” and an article by a law firm, Bin Shabib & Associates, entitled “*Arbitration Clauses incorporated by reference to other documents,*” which stated that “an indirect attempt to include an arbitration clause located in an external document (e.g. a company’s terms and conditions) which is unsigned and – in theory – liable to unilateral modification at any time, will not suffice.”⁶⁴ What seems interesting about the *Injazat Capital Limited* case is that an English judge sitting on the DIFC Court gave the UAE Civil Procedure Code’s writing and attestation requirement a severely strict interpretation.

The *Injazat Capital Limited* case is also noteworthy because the court held that it had no statutory obligation, whether under the DIFC Arbitration Law⁶⁵ or other DIFC statute, to stay the proceedings, a ruling and interpretation of the DIFC Arbitration Law that potentially placed the UAE in breach of its New York Convention obligations.⁶⁶ In October 2012, the DIFC Court of First Instance in *International Electromechanical Services v. Al Fattan*, though agreeing with the *Injazat Capital Limited* case ruling that it had no statutory obligation, held that it nevertheless had an inherent jurisdiction to stay where the jurisdiction was not expressly excluded by

⁶² *Ibid.*; Emmerson and Hutchison, *supra* note 15.

⁶³ Judge Steel relied on *Al-Naimi v. Islamic Press* (2000) 1 Lloyds Rep. 522; *Birse Construction Ltd. v. St. David Ltd.* (1999) BLR 194, and *Albon v. Naza* (No. 3) [2007] 2 All. E. R. 1075. See Duffield, *supra* note 23 (stating that “the decision by Justice Sir David Steel was based on a glitch in DIFC law rendering such orders impossible to make”).

⁶⁴ *Injazat Capital Limited and Injazat Technology Fund B.S.C. v. Denton Wilde Sapte & Co*, CFI 019/2010, para. 33.

⁶⁵ *DIFC Arbitration Law*, Articles 7 and 13, Law No. 1 of 2008 (only obligate a stay of proceedings for DIFC seated arbitration); see Khalil Mechantaf, ‘Overriding an agreement to arbitrate, a DIFC Court of First Instance rejects an application to grant a stay’, 15 May 2012 <kluwerarbitrationblog.com/blog/2012/05/15/overriding-an-agreement-to-arbitrate-a-difc-court-of-first-instance-rejects-an-application-to-grant-a-stay/> (11 January 2013); Khalil Mechantaf, ‘A Quick Course Correction by a DIFC Court on the Application of the New York Convention’, 1 December 2012 <kluwerarbitrationblog.com/blog/2012/12/01/a-quick-course-correction-by-a-difc-court-on-the-application-of-the-New-York-Convention/> (2 December 2012).

⁶⁶ Emmerson and Hutchison, *supra* note 15; Mechantaf, *supra* note 65 (stating that the court could have granted a stay pursuant to Article II(3) of the New York Convention but instead relied on Article 13 of the DIFC Arbitration Law).

statute.⁶⁷ The *Al Fattan* court declined to follow the holding in *Injazat Capital Limited*, and ordered a stay of DIFC proceedings, thereby allowing the foreign non-DIFC seated arbitration to continue under the parties' arbitration agreement.⁶⁸

However, this lack of a statutory obligation to stay has now been remedied by the most recent amendments to Articles 7 and 13 of the DIFC Arbitration Law,, putting the DIFC Court in line with the New York Convention by obligating it,, when the seat of the arbitration is not the DIFC or is undesignated, to dismiss or stay an action that is subject to an arbitration agreement upon request of a party unless the court finds that the arbitration agreement is null and void, inoperable, or incapable of being performed.⁶⁹

3. DIFC-LCIA Arbitration Centre

Prior to the 2008 DIFC Law, arbitrations in the DIFC were conducted largely pursuant to the 2004 DIFC Arbitration Law, lacking any formal DIFC arbitral institution partnership. On 17 February 2008,⁷⁰ the DIFC partnered⁷¹ with the London Court of International Arbitration (LCIA) to create the DIFC-LCIA Arbitration Centre.⁷² According to His Highness Sheik Mohammed, “the establishment of the DIFC-LCIA Arbitration Centre is part of a strategy to position Dubai as an international arbitration jurisdiction. This is a landmark step for Dubai, reaffirming its status as one of the world’s leading business hubs and creating an efficient working environment for local and international companies to prosper.”⁷³ According to Appenzeller and Harr, the partnership made by the DIFC with the LCIA, gave the centre more international respect and credibility since the newly formed DIFC-LCIA, which follows the

⁶⁷ *International Electromechanical Services Co LLC v. Al Fattan Engineering LLC (First Defendant) and Al Fattan Properties LLC (Second Defendant)*, CFI 004/2012; Emmerson and Hutchison, *supra* note 15.

⁶⁸ *International Electromechanical Services Co LLC v. Al Fattan Engineering LLC (First Defendant) and Al Fattan Properties LLC (Second Defendant)*, CFI 004/2012.

⁶⁹ Article 7 and 13(1) of the DIFC Arbitration Law; DIFC Law No. 6 of 2013 (the implementing legislation); Gordon Blanke, ‘Amendment to DIFC Arbitration Law brings DIFC into line with the New York Convention’, Kluwer Arbitration Blog (12 January 2014) <<http://kluwerarbitrationblog.com/blog/2014/01/12/amendment-to-difc-arbitration-law-brings-difc-into-line-with-the-new-york-convention>> (13 January 2014). Amendments to the Rules of the DIFC Courts were also made and affect rules on service and enforcements, among others. Michael Turrini, Abdulwahib Alulama, Mark Davison, ‘DIFC Courts Open Consultation Regarding Amendments to the Rules of the DIFC Courts’, October 2013 <<http://www.whitecase.com/alerts-10072013/#.Utf9otIW0m8>> (17 January 2014).

⁷⁰ Beswetherick and Hutchison, *supra* note 4 (calling the partnership a “joint venture”).

⁷¹ See DIFC-LCIA Website, *supra* note 44.

⁷² Appenzeller and Harr, *supra* note 47.

⁷³ See DIFC-LCIA Website, *supra* note 44.

LCIA rules very closely, was able to piggy-back on the long history of LCIA.⁷⁴

In terms of enforcing a DIFC-LCIA arbitral award, it is now common practice⁷⁵ that the DIFC Court will ratify DIFC-LCIA awards, or convert the award into a DIFC Court judgment,⁷⁶ which can then be endorsed by the Dubai Courts under the Protocol of Enforcement between the DIFC Courts and the Dubai Courts.⁷⁷ There is no need for the Dubai Courts to ratify the DIFC-LCIA award.⁷⁸ The case of *Property Concepts FZE v. Lootah Network Real Estate & Commercial Brokerage* on 19 October 2010 was the first example of a DIFC-LCIA arbitral award that was then ratified by the DIFC Court and consequently executed directly by the Dubai Courts under the aforementioned Protocol of Enforcement.⁷⁹ In *Property Concepts*, the Dubai Court of First Instance ratified the DIFC-LCIA award and ordered the Defendant to pay damages of US\$ 7.2 million plus interests and costs.⁸⁰

4. DIFC Seated Arbitration Under a Non-DIFC Arbitral Institution

Under Article 27(1) of the 2008 DIFC Arbitration Law, if parties to an arbitration fail to agree as to the seat of arbitration and the “dispute is governed by DIFC Law, the Seat of the Arbitration shall be the DIFC.”⁸¹ According to Audi and Tricoli, if the arbitration clause identifies the DIFC as the seat of arbitration, but without any reference to the DIFC-LCIA, the tendency in practice is to assume that the DIFC-LCIA rules apply since it is the only arbitral institution based within the DIFC.⁸² Parties are otherwise free to choose any other arbitral institution rules to govern the dispute as long as the arbitration is seated in the DIFC. In other words, just as DIFC arbitration proceeding is no longer conditioned on having a connection with the DIFC, as long as it is seated in the DIFC, and just as DIFC substantive law is not required to govern the dispute, there is also

⁷⁴ Appenzeller and Harr, *supra* note 47.

⁷⁵ Audi and Tricoli, *supra* note 36 (calling the practice “tried and tested”).

⁷⁶ Reema Ashraf, Jonathan Brown and Valeria Lysenko, ‘Enforcement of Foreign Arbitral Awards Against UAE Counterparties: DIFC-LCIA Awards Versus New York Convention Awards’, 12 March 2012 <www.hadefpartners.com> (22 December 2012).

⁷⁷ Protocol of Enforcement, 7 December 2009; Audi and Tricoli, *supra* note 36.

⁷⁸ Ashraf, Brown and Lysenko, *supra* note 76.

⁷⁹ Lawry-White, *supra* note 58; Audi and Tricoli, *supra* note 36, fn. 3; DIFC Press Release, ‘DIFC Courts and Dubai Courts Achieve New Arbitration Enforcement Landmark’, 29 March 2011 <difccourts.com/plinet.com/en/display/display_main.html?rbid=2725&element_id=4492&record_id=4848> (12 October 2012).

⁸⁰ Lawry-White, *supra* note 58.

⁸¹ Article 27(1) of DIFC Law of 2008. According to Appenzeller and Harr, “the seat of the arbitration is the jurisdiction where the arbitration takes place.” Appenzeller and Harr, *supra* note 47.

⁸² Audi and Tricoli, *supra* note 36.

no requirement that the rules of the DIFC-LCIA be applied, since *ad hoc* arbitration is also possible in the DIFC.⁸³ It is, therefore, possible to hold the arbitration in the DIFC but using a non-DIFC arbitral institution like the International Chamber of Commerce (ICC),⁸⁴ and still have the award enforced by the DIFC Court inside and outside the DIFC zone.⁸⁵

Furthermore, the DIFC Arbitration Law even allows that the venue for the arbitration could be outside of the DIFC as long as the DIFC is the seat of arbitration (*i.e.* the juridical seat). “Seat” is defined in the Schedule to the DIFC Arbitration Law as “the juridical seat which indicates the procedural law chosen by the parties to govern their arbitration awards.”⁸⁶ Under Article 27(2) of the 2008 DIFC Arbitration Law, “the Arbitral Tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.”⁸⁷ It is clear from these provisions that the DIFC Arbitration Law is delocalised,⁸⁸ which means that parties only identify the DIFC Arbitration Law as the law governing recognition and enforcement, even if the arbitration occurs outside of the DIFC zone, or the UAE for that matter. In this sense, Luttrell suggests that foreign investors should take advantage of the DIFC Arbitral Law’s delocalisation by “splitting” the *lex arbitri* with (1) choosing a body of foreign or transnational law like the UNCITRAL Model Law to govern the process of the arbitration and (2) using the DIFC Arbitration Law to govern the award.⁸⁹

⁸³ *Ibid.*

⁸⁴ *Ibid.* (stating that arbitral awards made under institutional rules other than the DIFC-LCIA can be enforced by the DIFC Courts as long as they are seated in the DIFC); Shepard, *supra* note 28 (stating that “it is perfectly possible to conduct other arbitral institutions in the DIFC, most notable ICC arbitrations, but the LCIA is the institution which in the writers’ experience, is most commonly used”).

⁸⁵ Audi and Tricoli, *supra* note 36.

⁸⁶ Schedule, DIFC Arbitration Law; Sam R. Luttrell, ‘The Arbitration Law of Dubai International Finance Centre’ (2008) 3 *J. of Int’l Comm. L. and Tech.* 174.

⁸⁷ Article 27(1) of DIFC Law of 2008. *See also* Stephen J. Toope, *Mixed International Arbitration* (Grotius 1990) 30-32 (citing *Naviera Amazonica Peruana SA v. Compania Internacional de Seguros del Peru*, Court of Appeal, 10 November 1987, reprinted in (1988) 13 *Y.B.C.A.* 156, 160 (UK) for the proposition that parties can agree to hold an arbitration in one country but subject to the procedure of another country, or that the law of the *situs* need not necessarily govern the procedure).

⁸⁸ Luttrell, *supra* note 86, p. 174 (explaining delocalisation theory as holding that “there should only be one point at which national control is asserted over the arbitral process” and “that single procedural point of control should be the state in which enforcement is sought”).

⁸⁹ *See* Luttrell, *supra* note 6, p. 256 (arguing that splitting the *lex arbitri* makes the DIFC the seat of arbitration while at the same time avoiding the uncertainties of the DIFC Arbitration Law).

5. Enforcement and Execution of DIFC Arbitral Awards and non-DIFC Arbitral Awards

a. DIFC Arbitral Awards

Article 42(1) and (2) of DIFC Law No 10. of 2004, or the DIFC Court Law, governs the enforcement of arbitral awards issued or ratified by the DIFC Court. The Article differentiates enforcement “within” or “outside” the DIFC zone, each governed by separate rules.

i. Enforcement of DIFC Awards Within DIFC

Enforcement and execution “within” the DIFC falls under Article 43 of the Rules of Court of the DIFC, also called the Rules of DIFC Courts. Article 42(1) of the DIFC Court Law is complemented by Article 7(1) of the Judicial Authority Law, Dubai Law No. 12 of 2004, which states that execution within the DIFC falls under the Rules of Court. Once an award is recognised under Article 43, then the DIFC Court will move to enforce the award.⁹⁰

Parties can move to set aside the DIFC Award within three months under Article 41 of the DIFC Arbitration Law.⁹¹ The DIFC rules are based on the UNCITRAL Model Law, as amended in 2006,⁹² and the grounds upon which awards may be set aside are consistent with the UNCITRAL Model Law; they therefore also mirror the grounds for non-enforcement under the New York Convention.⁹³ Thus, DIFC awards may be set aside for violation of due process,⁹⁴ arbitrability under DIFC Law, or violation of UAE public policy.⁹⁵

ii. Enforcement of DIFC Awards Outside DIFC

One must bear in mind that DIFC is a free zone where the civil and commercial laws of Dubai are not applicable, and as such the DIFC is considered an “offshore” jurisdiction, or enclave regime, from the point of view of Dubai civil and commercial law.⁹⁶ The enforceability of

⁹⁰ Lawry-White, *supra* note 58.

⁹¹ *Ibid.*; Article 41 of the DIFC Arbitration Law.

⁹² Lawry-White, *supra* note 58.

⁹³ *Ibid.*

⁹⁴ *Ibid.*, this includes grounds that are aimed at safeguarding the integrity of the process.

⁹⁵ Lawry-White, *supra* note 58.

⁹⁶ James Martin and Caroline Cheney, ‘GCC Update: Recent Developments in Enforcement of Arbitral Awards in the United Arab Emirates’, May 2011

<www.linklaters.com/Publications/GCC/May/Pages/Recent_Developments_Enforcement_Arbitral_Awards_United_Arab_Emirates.aspx> (10 December 2012).

“offshore” DIFC arbitral awards against UAE companies incorporated “onshore” in Dubai and thus outside the DIFC zone became a much talked about issue in the DIFC arbitration circles.⁹⁷ Enforcement “outside” the DIFC, but within Dubai, falls under Article 7(2) of the Judicial Authority Law. Under Article 7(2) of the Judicial Authority Law, Dubai Courts (“onshore”) will enforce⁹⁸ an arbitral award rendered or ratified by a DIFC Court (“offshore”) if three conditions are met: (1) the award is final and executory, (2) the award is translated into Arabic, and (3) the award is certified by the DIFC Courts for execution and has a formula of execution affixed by the Courts.⁹⁹ Recognition and enforcement of DIFC awards before the Dubai courts is facilitated by reference to the 2009 Memorandum of Understanding Between Dubai Courts and DIFC Courts (which entered into force as from 16 June 2009) and the related Protocol of Enforcement between Dubai Courts and DIFC Courts, provided the awards are final and certified by the DIFC court.¹⁰⁰ The Executive Judge of the Dubai Courts has no jurisdiction to review the merits of a DIFC award or order prior to its enforcement.¹⁰¹ The first step in enforcement of a DIFC award is for the DIFC Courts to recognise the award.¹⁰² Under Article 43 of the DIFC Arbitration Law, recognition of an award qualifies as “ratification” for the purposes of Article 7 of the Judicial Authority Law.¹⁰³ An example of an “offshore” award ratified by the DIFC Court and enforced “onshore” by a Dubai Court is the *Property Concepts* case discussed above with regard to a DIFC-LCIA award enforced by a Dubai Court. At the time of the *Property Concepts* case, 40

⁹⁷ Martin and Cheney, *supra* note 96.

⁹⁸ Prior to amendment of the Judicial Authority Law, Article 3 stated that the Dubai court is to enforce the DIFC award without further review. This provision has been removed after the amendment under Dubai Law No. 16 of 2011. *See* Lawry-White, *supra* note 58 (stating that “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”). One practitioner views the process as involving two steps: recognition in the DIFC Courts and ratification in the Dubai courts; whereas under Article 43 of the DIFC Arbitration Law, recognition by a DIFC court also constitutes ratification. *See* Duffield, *supra* note 23.

⁹⁹ Article 7(2) of Dubai Law No. 12 of 2004; *see also* Audi and Tricoli, *supra* note 36, fn. 2; Lawry-White, *supra* note 58.

¹⁰⁰ Habib Al Mulla and Gordon Blanke, ‘Commercial Arbitration: UAE’ *Global Arb. Rev.*

<www.globalarbitrationreview.com/know-how/topics/61/jurisdictions/33/united-arab-emirates/> (25 September 2012). Prior to amendment of Judicial Authority Law, Article 7(2) required that the award be “appropriate for enforcement.” The meaning of the phrase “appropriate for enforcement” was never defined by the courts or the DIFC bodies. Lawry-White, *supra* note 58 (“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 text therefore appears unchanged.”). The phrase has since been deleted in the recent amendments. *See* Article 7 of the Judicial Authority Law.

¹⁰¹ Beswetherick and Hutchison, *supra* note 4.

¹⁰² *Ibid.*

¹⁰³ Article 42(4) of the DIFC Arbitration Law; Lawry-White, *supra* note 58.

DIFC awards or orders had already been enforced “onshore” by Dubai Courts, making the *Property Concepts* case the first DIFC arbitral award enforced “onshore.”¹⁰⁴

iii. Enforcement of DIFC Awards in Emirates other than Dubai and Overseas

For DIFC arbitral awards to be recognised and enforced in the UAE, but not in Dubai Courts, it is likely to be treated as a foreign judgment through a DIFC Court order,¹⁰⁵ or pursuant to Federal Law No. 11 of 1973 Regulating Judicial Relations between Member Emirates in the Federation.¹⁰⁶ Alternatively, once a DIFC arbitral award has been ratified by a Dubai Court and thus converted into a Dubai Court Judgment under Law No. 16, it could be enforced in other Emirates through a process called “referral” under Article 221 of the UAE Civil Procedure Code.¹⁰⁷ According to DIFC Court Judge Shamlan Al Sawalehi, judgments by the DIFC Courts will not likely face challenge from the other Emirates because of a series of memoranda of understanding signed between the DIFC Courts and the courts of other Emirates.¹⁰⁸

With regard to a GCC-wide enforcement of a DIFC arbitral award that has been converted into a Dubai Court Judgment, the GCC Convention for the Enforcement of Judgments and Judicial Notices and Delegations¹⁰⁹ [hereinafter “GCC Convention”] will likely play a vital role.¹¹⁰ According to Hall, Sharih, and Clifford, the GCC Convention is “a treaty based instrument which should support pan-GCC enforcement and which provides that all member states shall ensure that their domestic courts enforce the final judgments of the courts of other member states.”¹¹¹ Questions remain, however, whether a challenge could be launched against

¹⁰⁴ Lawry-White, *supra* note 58; Hall, Sharih, and Clifford, *supra* note 54 (stating that “as an empirical matter, it has been reported that the Dubai Courts have to date converted and enforced several DIFC Court judgments”).

¹⁰⁵ Al Mulla and Blanke, *supra* note 100 (noting that under the Judicial Authority Law, Article 7(2) of Law No. 12 of 2004, the award is likely enforceable in the UAE as a foreign judgment). A DIFC court order is obtained by applying in a DIFC court for the recognition and enforcement of an arbitral award, which when granted, will result in the DIFC Court issuing an order for the enforcement of the award.

¹⁰⁶ Lawry-White, *supra* note 58.

¹⁰⁷ See Hall, Sharih, and Clifford, *supra* note 54.

¹⁰⁸ Pasha, *supra* note 48; see also, Hall, Sharih, and Clifford, *supra* note 54.

¹⁰⁹ The UAE, Bahrain, Qatar, Kuwait, the Kingdom of Saudi Arabia and the Sultanate of Oman are signatories to the GCC Convention. GCC Convention for the Enforcement of Judgments and Judicial Notices and Delegation, available at DIAC Website Rules <www.diac.ae/idias/rules/GCC/> (10 December 2013) [hereinafter “GCC Convention”].

¹¹⁰ GCC Convention, *supra* note 109; Hall, Sharih, and Clifford, *supra* note 54.

¹¹¹ Hall, Sharih, and Clifford, *supra* note 54.

such enforcement based on public policy or public order.¹¹² Thus far, Kuwait has already recognized a DIFC court order in *Global Strategies Group (Middle East) FZE v. Aqeeq Aviation Holding Company LLC*¹¹³ (DIFC Arbitration 002/2010), a positive sign for enforcement of arbitral awards in the GCC and the Middle East. As for enforcement in other Middle Eastern and North African countries, one could seek enforcement under the Riyadh Arab Agreement for Judicial Cooperation [hereinafter “Riyadh Convention”],¹¹⁴ a treaty governing reciprocal enforcement of judgments and arbitral awards, to which the UAE is a signatory.¹¹⁵

Furthermore, a DIFC Court White Paper advises that for enforcement of DIFC awards in the rest of the UAE outside Dubai and overseas, seeking an enforcement order from the Dubai Courts under the Protocol of Enforcement is recommended because some jurisdictions may be slow to recognise that the DIFC is part of the legal system of Dubai, or because the DIFC operates under the common law while other jurisdictions operate under the civil law system and/or Shari’a principles.¹¹⁶ Though there is still no case law to demonstrate the matter, the DIFC White Paper notes that such DIFC awards may also be enforceable under the New York Convention, the Riyadh Convention, and the GCC Convention, all of which the UAE has ratified.¹¹⁷ According to Beswetherick and Hutchison,

a DIFC award is equivalent to a UAE award, since the DIFC is a legal jurisdiction within the UAE and the DIFC Courts are part of the Dubai courts system. Given that the UAE is a signatory to the New York Convention, a UAE award will, in theory, be enforceable in any state which is a party to the New York Convention.¹¹⁸

Beswetherick and Hutchison also pointed to an additional unresolved issue of whether ratification of the arbitral award under the UAE Civil Procedure Code applies equally to the enforcement of domestic awards and the enforcement of UAE awards outside the UAE.¹¹⁹ The UAE Code of Civil Procedure remains unclear on this issue, and lacking any case law, it is likely

¹¹² *Ibid.*

¹¹³ *Global Strategies Group (Middle East) FZE v. Aqeeq Aviation Holding Company LLC*, DIFC Arbitration Case No 002/2010.

¹¹⁴ Hall, Sharih, and Clifford, *supra* note 54; GCC Convention, *supra* note 109.

¹¹⁵ The Riyadh Convention covers twenty signatory states in the Middle East and North Africa.

¹¹⁶ Association of Corp. Counsel, ‘Developments in enforcement of judgments and awards: United Arab Emirates’, 25 April 2012 <www.lexology.com/library/detail.aspx?g=7b1c9bcd-4768-4196-b56a-e37b5e83adad> (11 January 2013).

¹¹⁷ *Ibid.*; Duffield, *supra* note 23.

¹¹⁸ Beswetherick and Hutchison, *supra* note 4.

¹¹⁹ *Ibid.*

that the courts of countries where enforcement is sought will influence the answer to whether ratification is also required for the enforcement of UAE awards outside of the UAE.¹²⁰

b. Non-DIFC Arbitral Awards

For non-DIFC arbitral awards, under Article 7 of the DIFC Arbitration Law of 2008, Part 4, Articles 14 and 15, and the Schedule, apply to arbitrations seated outside the DIFC. A Dubai (and not a DIFC) court judgment enforcing an arbitral award can be executed in the DIFC under Article 7(4) of the Judicial Authority Law as long as three conditions are met: (1) the award is final and executory, (2) the award is translated into English, and (3) the Dubai Courts affix a formula of execution on the judgment, decision, or order. According to Lawry-White, though no case law has yet been reported on the issue,

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).¹²¹

Likewise, under Article 7(6) of the Judicial Authority Law, a judgment by any court other than Dubai Courts enforcing an arbitral award that was rendered outside the DIFC shall be executed under the Rules of DIFC Courts. Non-DIFC arbitral awards can thus be (1) recognized by a DIFC Court under the DIFC Arbitration Law and the New York Convention, (2) enforced within the DIFC, and (3) once recognized (and hence ratified via Article 43 of the Judicial Authority Law), enforced outside the DIFC zone in “onshore” Dubai under Dubai Law No. 16, or in other Emirates under Federal Law No. 11 of 1973. According to Lawry-White,

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);

¹²⁰ *Ibid.*

¹²¹ Lawry-White, *supra* note 58.

and (ii) secondly, enforcing the DIFC-ratified award in “onshore” Dubai pursuant to Law No 16.¹²²

It should be noted that the UAE and the DIFC are equally bound by the terms of the New York Convention.¹²³

The suggestion of enforcing a foreign arbitral award in Dubai Courts via recognition and ratification in a DIFC Court¹²⁴ (which could then be enforced rapidly in Dubai courts and potentially in other UAE courts) must be taken with extreme caution due to a lack of guidance from DIFC Courts and Dubai Courts. Assuming such practice becomes common in the DIFC and Dubai Courts, a time could arrive when a DIFC Court recognises a foreign arbitral award under the New York Convention while a Dubai Court may refuse enforcement of the very same award under the Convention, perhaps on a different interpretation of public policy. Such a situation could create a jurisdictional conflict between Dubai Courts and DIFC Courts. The question arises then as to whether and to what extent the Dubai Courts have power to review DIFC Court decisions in view of Article 7(2) of the Judicial Authority Law.¹²⁵ It should be noted with caution that the old version or the “Original Law” of the Judicial Authority Law under Article 7(3) provides that “the executive judge at Dubai Courts has no jurisdiction to review the merits of a judgment, award or order of the Courts.”¹²⁶ The amendments made by Dubai Law No. 16 of 2011 eliminated the said language of the Original Law under the former Article 7(3). This could imply that Dubai Courts now have jurisdiction to review the merits of DIFC recognised and ratified arbitral awards.

B. The DIAC

In 1994, the Dubai Government created the Conciliation and Commercial Arbitration Centre of the Dubai Chamber of Commerce and Industry (CCAC).¹²⁷ The CCAC was replaced ten years

¹²² *Ibid.*

¹²³ Duffield, *supra* note 23.

¹²⁴ *Ibid.*; Lawry-White, *supra* note 58.

¹²⁵ Dubai courts may even undergo a ratification process under the existing UAE Civil Procedure Code despite the language of Article 7(2) of the Judicial Authority Law and the 2009 Protocol on Enforcement between the DIFC Courts and the Dubai Courts signed in April 2009. *See* Duffield, *supra* note 23 (suggesting that enforcement of DIFC awards required ratification from Dubai courts).

¹²⁶ Article 7(3) of the Judicial Authority Law, Dubai Law No. 12 of 2004 (“Original Law”) prior to the amendment made under Dubai Law No. 16 of 2011.

¹²⁷ Appenzeller and Harr, *supra* note 47; Ishita Shome, ‘Evolution of Arbitration in Dubai’ (2011) *India Bus. L. J.* 56.

later by the creation of the Dubai International Arbitration Centre (DIAC.)¹²⁸ It is without question today that DIAC plays a vital role in arbitration in Dubai and the UAE.¹²⁹ DIAC is arguably the “best known and busiest”¹³⁰ arbitration centre in the UAE and the GCC. According to the available DIAC data, 182 new arbitration cases¹³¹ with an approximate value of \$626 million were filed with DIAC in the first half of 2010 alone.¹³²

DIAC’s rules transformed over time until it was amended in 2007 to bring DIAC rules in line with other international arbitration centres.¹³³ According to Appenzeller and Harr,

DIAC rules were initially drafted based on the UNCITRAL Model Law, but the final rules are combinations and derivatives of International Chamber of Commerce (“ICC”), World Intellectual Property Organization (“WIPO”), American Arbitration Association (AAA), Stockholm Chamber of Commerce Arbitration Institute, and LCIA rules.¹³⁴

If arbitration proceedings occur before the DIAC, then DIAC rules will apply to the proceedings.

DIAC is the main arbitration centre in Dubai outside of the DIFC,¹³⁵ and is used most commonly by parties to an arbitration agreement or with arbitration clause in the contract and the governing law is that of the UAE.¹³⁶ Unlike the DIFC, DIAC is governed by UAE law, which mainly follows a Shari’a influenced civil law system, including the UAE Civil Procedure Code.¹³⁷ Additionally, DIAC arbitral awards are not automatically binding and enforceable in the UAE.¹³⁸ According to DIAC, “arbitral awards made under DIAC have the same effect as final and conclusive judgments awarded by courts under the law.”¹³⁹ Enforcement of a DIAC award,

¹²⁸ Shome, *supra* note 125, p. 56; Beswetherick and Hutchison, *supra* note 4 (describing the DIAC as an “arbitration off-shoot” of the Dubai Chamber of Commerce).

¹²⁹ Nick Carnell, ‘Arbitrating in Dubai’, 31 December 2012 <www.lexology.com/library/detail.aspx?g=1a6ff022-e4dc-4501-a7bf-675e55d89ea7.htm> (11 January 2013) (stating that many contracts name DIAC as the body whose rules govern the arbitration).

¹³⁰ Lawrence, Morton and Khan, *supra* note 1, p. 3.

¹³¹ Of the 186 DIAC cases, 105 involved real estate disputes, 41 involved construction cases, while 40 involved other commercial cases. ‘DIAC Biannual Statistics 2010’ <www.diac.ae/idias/resource/photo/diac_biannual.pdf> (8 December 2012).

¹³² Duffield, *supra* note 23.

¹³³ Appenzeller and Harr, *supra* note 47; Beswetherick and Hutchison, *supra* note 4 (the new rules were drawn up by DIAC trustees, “the majority of whom are eminent foreign international arbitrators”).

¹³⁴ Appenzeller and Harr, *supra* note 47.

¹³⁵ Lawrence, Morton and Khan, *supra* note 1, p. 3.

¹³⁶ Herbert Smith LLP, ‘Guide to Dispute Resolution in the Middle East: United Arab Emirates’, 2010/2011 93 <ghazzawilawfirm.com/files/Guide_to_dispute_resolution_in_the_Middle_East.pdf> (10 December 2013).

¹³⁷ Francis Ho, ‘Disputes in the UAE: Arbitration Options’, 29 September 2009 <www.building.co.uk/disputes-in-the-uae-arbitration-options/3149836.article> (10 December 2013); Appenzeller and Harr, *supra* note 47.

¹³⁸ Ho, *supra* note 137.

¹³⁹ DIAC, ‘Advantages of Arbitration at DIAC’ <www.diac.ae/idias/services/diac/advantages> (8 December 2012).

however, requires certification by a UAE court, which can lead to hearings and appeals in each of the three levels of Dubai's local court system.¹⁴⁰

DIAC Tribunals, at the request of a party, may issue any provisional orders or take other interim or conservatory measures it deems necessary, including injunctions and measures for the conservation of goods that form part of the subject matter in dispute, such as an order for deposit with a third person or for the sale of perishable goods.¹⁴¹ A Tribunal may make the granting of such measures subject to appropriate security being furnished by the requesting party.¹⁴²

IV. The Specificities of the UAE Civil Procedure Rules on Arbitration and the New Draft UAE Federal Arbitration Law

A. The UAE Civil Procedure Code

The UAE's current arbitration rules can be found within the UAE Civil Procedure Code.¹⁴³ Outside of the financial free trade zones, therefore, Articles 203-218 of the UAE Civil Procedure Code govern arbitration.¹⁴⁴ The UAE Civil Procedure Code, however, has proven inadequate in the context of modern international commercial arbitration.¹⁴⁵ The UAE Civil Procedure Code requires that a valid arbitration agreement must be evidenced in writing with the subject matter clearly defined.¹⁴⁶ For example, in Dubai Court of Appeal No. 44/2008 of 22 April 2008, the Court held that if a verbal agreement was reached to perform services, there is no implied arbitration clause that can be enforced despite the existence of prior contracts between the same parties to this effect.¹⁴⁷ According to Smith and Marrone, "the UAE will not uphold the validity of an arbitration clause contained in the general conditions of an insurance policy, or on the back of an invoice [or receipt]."¹⁴⁸ An arbitration clause by reference is generally valid in the UAE as

¹⁴⁰ Ho, *supra* note 137; Appenzeller and Harr, *supra* note 47.

¹⁴¹ DIAC Arbitration Rules of 2007, Article 31.1.

¹⁴² *Ibid.*

¹⁴³ Saloni Kantaria, 'The Enforcement of Domestic and Foreign Arbitral Awards in the UAE under the Civil Procedure Code and Proposed Arbitration Law' (2012) 2 *Int'l Arb. L. R.* 61.

¹⁴⁴ See The UAE Civil Procedure Code, Federal Law No. 11 of 1992, Chapter III <www.diac.ae/idias/rules/uae/chapter3/> (28 June 2012); Smith and Ibrahim, *supra* note 36.

¹⁴⁵ According to Luttrell, "the provisions that concern arbitration are not sufficient to prevent the default application of Shari'a principles by Dubai courts." Luttrell, 'Choosing Dubai', *supra* note 6, p. 263.

¹⁴⁶ Smith and Marrone, *supra* note 19.

¹⁴⁷ Dubai Court of Appeal No. 44/2008, 22 April 2008; Zane Anani and Eric Teo, 'Arbitration Agreement in Construction Contracts', June 2009 <www.tamimi.com/en/publication/publications/section-2/june-3/arbitration-agreement-in-construction-contracts.html> (21 November 2012).

¹⁴⁸ Smith and Marrone, *supra* note 19.

long as the clause is contained in a “standard unchangeable document,”¹⁴⁹ but once the clause is contained in an external document like a company’s terms and conditions which is unsigned and could therefore be changed at any time, the arbitration clause by reference is invalid.¹⁵⁰ Additionally, only parties who are legally entitled to dispose of the disputed rights may resort to arbitration.¹⁵¹

The Code provides for frequent court intervention during the course of arbitration¹⁵² and allows essentially a *de facto* review of the arbitral award.¹⁵³ UAE domestic courts are often allowed to intervene and supervise arbitration proceedings, a policy that too often limits and undermines the power of arbitrators. In the UAE, for instance, “courts have the power to dismiss an arbitrator, hear preliminary issues, grant interim measures, make evidentiary decisions on commission, extend the time for the arbitration and to approve, correct, enforce or even nullify awards.”¹⁵⁴ Arbitrators’ powers are also very limited especially with regard to the enforcement of arbitral awards and compelling parties to act. Arbitrators in the UAE lack “the powers to impose fines, to compel any party to act or to require the production of documents and other information necessary for the arbitration award.”¹⁵⁵ An arbitrator will have to stop the arbitration proceedings and refer the case to a court in order to compel the parties to the arbitration to act.

According to Smith and Marrone,

[t]here are also specific requirements in the UAE on the appointment and qualifications of an arbitrator. Under the UAE Code, the number of arbitrators must be odd and they can be appointed in one of three ways: (1) nomination by the parties in accordance with the terms of the arbitration agreement; (2) nomination by an arbitral institution, provided that the parties, have submitted their dispute to the rules of an arbitration institution that provide for the institution to appoint an arbitrator in the absence of an agreement between the parties; and (3) nomination by the competent court at the seat of the arbitration, at the request of any party. Arbitrators are authorized to act only if they are specifically named and empowered to act in the arbitration agreement or in a subsequent agreement.¹⁵⁶

¹⁴⁹ Bin Shabib & Associates, ‘Arbitration Clauses Incorporated by Reference to Other Documents’ <www.bsa.ae/pdf/BSA_LL_P_ratifcation_of_arbitral_award_article_2.pdf> (22 November 2012).

¹⁵⁰ Smith and Marrone, *supra* note 19.

¹⁵¹ *Ibid.*

¹⁵² *See* Articles 207 and 209, UAE Civil Procedure Code.

¹⁵³ *See* Articles 214 and 215, UAE Civil Procedure Code.

¹⁵⁴ Smith and Marrone, *supra* note 19.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

That arbitrators must be named poses practical problems, for example, when the named arbitrator becomes mentally or physically incapacitated or passes away.

The UAE currently therefore has a problematic arbitration regime under the Civil Code. As observed by Smith and Marrone, “[t]he limited number of provisions pertinent to arbitration under the UAE Code and the lack of certainty as to how those provisions will be applied have led to unanimous agreement that the UAE Code does not provide an adequate framework for arbitration.”¹⁵⁷ So, while the UAE seems poised to meet international arbitration standards, it is still being held back from the finish line because of its failure to update the UAE Civil Procedure Code.

B. The New Draft UAE Federal Arbitration Law

In the process of modernization of arbitration in the UAE the most disturbing episode so far is its failure to have enacted its proposed new Federal Arbitration Act,¹⁵⁸ though it is expected to be enacted in the very near future.¹⁵⁹ The UAE has drafted this new arbitration law in response to the shortcomings of its Civil Procedure Code. The new law is mainly based on the UNCITRAL Model Law¹⁶⁰ and in its most recent February 2012 draft it includes the 2006 UNCITRAL Model Law amendments.¹⁶¹ However, like Egyptian Law No. 27, some alterations to the Model Law have been proposed. Some differences between the new draft arbitration law and the UNCITRAL Model Law merit mentioning here.¹⁶²

First, the Draft Law expands the scope of application of the Model Law by providing that the law applies to domestic and international commercial arbitrations, with a more expansive scope of what constitutes commercial arbitration. However, Article 42 of the Draft Law limits the wide scope of application by finding void any agreement to arbitrate disputes in connection

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*; Medilyn Manibo, ‘UAE Ministry of Economy Completes Draft Federal Law on Arbitration’ *AME Info*, 2 February 2008 <www.ameinfo.com.145430.html> (28 December 2012).

¹⁵⁹ Lawrence, Morton and Khan, *supra* note 1, p. 3.

¹⁶⁰ The current arbitration laws of the UAE are not based on the UNCITRAL Model Law. Lawrence, Morton, and Khan, *supra* note 1, p. 4.

¹⁶¹ Kantaria, *supra* note 143, p. 65. It remains to be seen to what extent the Draft Law will adopt the 2006 Amendments to the Model Law, specifically relating to interim measures.

¹⁶² For a comprehensive analysis of the draft law see James Loftis and Mark Beeley, *International Dispute Resolution: Preliminary Analysis of the Draft UAE Arbitration Law* 7 February 2008 <www.velaw.com/mcso/shared/pdf/resources/White%20Paper%20-%20Analysis%20of%20the%20Draft%20UAE%20Arbitration%20Law-Loftis-2008_02_06.pdf> (13 December 2012).

with employment contracts. Second, Article 3 of the Model Law is modified to take into account e-mail and facsimile as a form of written communication. Further, Article 3(1)(b) of the Draft Law provides that communications received by 6:00 p.m. are considered received on the day they are sent. Otherwise communications will be deemed to have been received the following day. Third, Article 39 of the Draft Law places a duty of confidentiality on all parties, with respect to arbitration awards, including materials created for the purpose of the arbitral proceeding.¹⁶³

Finally, in terms of the recognition and enforcement of an award, Article 36 of the Draft Law contains the same grounds as provided for in the Model Law. This means that the grounds for setting aside both domestic and foreign awards would be based on the New York Convention.¹⁶⁴ According to El-Ahdab, enforcement under the Draft Law would be much easier.¹⁶⁵ However, Article 36 of the Draft Law provides that a party cannot rely on the grounds listed in Article 36, if those grounds were available to the party at the time it was possible to have the award set aside, so no second bite of the cherry.

V. The Enforcement of Arbitral Awards in Dubai

While there are signs of a pro-enforcement attitude in recent cases from Dubai and Fujairah, as discussed in the following, it remains unclear whether courts in Dubai have truly begun to favour enforcement of arbitral awards, especially with very recent rulings that set aside an arbitral award based on public policy. This section will discuss the developments in Dubai and the UAE at large with regard to the enforcement of arbitral awards.

A. The Enforcement of Domestic Awards

As of the writing of this article, the enforcement of domestic arbitral awards in the UAE is governed by the UAE Civil Procedure Code.¹⁶⁶ For a domestic award to be enforceable under the UAE Civil Procedure Code, the award must meet a set of conditions. Under Article 212(5) of the UAE Civil Procedure Code,¹⁶⁷ the award, issued by a majority, must be signed by all the arbitrators, stating the reasoning of the ruling and if applicable the dissenting opinion. Absent

¹⁶³ Of course, this is subject to disclosures that a party may be under a legal obligation to perform.

¹⁶⁴ Kantaria, *supra* note 143, p. 66.

¹⁶⁵ Abdel H. El-Ahdab, *Arbitration in Arab Countries* (Kluwer 1998) 818-819.

¹⁶⁶ Articles 203-218 of the UAE Civil Procedure Code, UAE Federal Law No. 11 of 1992, March 1992.

¹⁶⁷ Article 212(5) of the UAE Civil Procedure Code.

any agreement to the contrary, the award must have been made by the arbitrators within six months of the first hearing.¹⁶⁸ It must also include a copy of the arbitration agreement, a summary of the parties' submissions and evidence, and the date and place of issue.¹⁶⁹ Finally, under Article 212(6),¹⁷⁰ the award must be in Arabic.

Assuming the award meets the above conditions, a party seeking to enforce the award must seek ratification of the award under Article 215 of the Civil Procedure Code¹⁷¹ from a UAE court,¹⁷² a process that entails the same procedures as litigation before the Court of First Instance.¹⁷³ The procedure requires the filing of a statement of claim, which must meet the requirements of Article 42 of the Civil Procedure Code, including accompanying documents, filing with the court and service upon the opposing party.¹⁷⁴ This ratification process has been criticised widely as “unpredictable and time-consuming”¹⁷⁵ and a “frustrating undertaking.”¹⁷⁶ Because the award by the Court of First Instance is subject to appeal to the Court of Appeals and ultimately to the Court of Cassation, the process may take up to 18 months.¹⁷⁷ Smith and Ibrahim note, “the Code provides for frequent court intervention during the course of arbitration and essentially a *de facto* review of the arbitral award,”¹⁷⁸ especially under Article 216(1)(c),

¹⁶⁸ Union Supreme Court, 873/Judicial Year 3 at para. 3; Kantaria, *supra* note 143, p. 62. After six months, either party may continue the case before a regular court, as if it was initially filed there, under Article 210(1).

¹⁶⁹ *Supra* note 167. A refusal to sign must be noted in the award.

¹⁷⁰ Article 212(6) of the UAE Civil Procedure Code.

¹⁷¹ Article 215 of the UAE Civil Procedure Code; Beswetherick and Hutchison, *supra* note 4 (once the award is ratified, it becomes equivalent to a court judgment and can be enforced via the execution department).

¹⁷² This double *exequatur* requirement has been eliminated from the New York Convention but continues in practice in the UAE.

¹⁷³ Article 213(3), 214, and 215(1) of the UAE Civil Procedure Code; Kantaria, *supra* note 143, p. 63; Gabriel Moens and Roger Jones (2009) *International Trade and Business Law Review*, vol 12, 156; Beswetherick and Hutchison, *supra* note 4 (stating that the ratification procedure is “almost identical” to the process for making a regular claim in the courts); Essam Al-Tamimi, *A Practical Guide to Litigation and Arbitration in the United Arab Emirates* (1st ed. Kluwer Int'l 2003) 153. In comparison, ratification is not required in England and Wales.

¹⁷⁴ Union Supreme Court, 873/Judicial Year 3 at para. 3; Kantaria, *supra* note 143, p. 62; Beswetherick and Hutchison, *supra* note 4.

¹⁷⁵ Kristin Roy, ‘The New York Convention and Saudi Arabia: Can a Country Use The Public Policy Defence To Refuse Enforcement of Non-Domestic Arbitral Awards?’ (1995) 18 *Fordham Int'l L.J.* 920, 923-924; Shome, *supra* note 127, p. 56. *But see* Duffield, *supra* note 23 (stating that “an advantage of UAE arbitration law is that it is tried, tested, reasonably robust and internationally recognised. Plus there are a number of judgments from the highest court in the UAE, the Court of Cassation, which while having no precedent value, do provide useful guiding principles for practitioners”).

¹⁷⁶ Emmerson and Hutchison, *supra* note 15.

¹⁷⁷ Kantaria, *supra* note 143, p. 63; Karim Nassif, Gordon Blanke and Soraya Crom-Bakhos, ‘Arbitration under UAE Law: Towards a Modern Legal Framework?’ *The In-House Lawyer*, 9 September 2010 <www.inhouselawyer.co.uk/index.php/united-arab-emirates/8140-arbitration-under-uae-law-towards-a-modern-legal-framework> (16 October 2012).

¹⁷⁸ Smith and Ibrahim, *supra* note 36.

which allows annulment of the award based on “a nullity in the award...or in the procedures” and would thus give the court authority to review the merits.¹⁷⁹ According to Beswetherick and Hutchison, it is common practice for losing parties, “once served with notice of ratification proceedings, to make a counter application for the annulment of the award.”¹⁸⁰ Additionally, the court can return the award back to the arbitrator for clarification, which according to Kantaria, would be time consuming and would in essence allow the court to examine the merits of the award.¹⁸¹ There is also an automatic right to appeal to the Court of Appeal and a final right of appeal to the Court of Cassation.¹⁸² A re-examination of the merits of the award frustrates the very purpose of parties choosing arbitration which should be expeditious and informal.

As to the grounds for challenging the enforcement of an award under the UAE Code, Shome states, “it has generally been easier to challenge an arbitral award in UAE courts than in other New York Conventions signatory countries.”¹⁸³ Article 216 of the UAE Civil Procedure Code sets out the grounds upon which an arbitral award may be set aside: (1) lack of or an invalid arbitration agreement, (2) incapacity of a party to the agreement, (3) improper appointment of the arbitrator, (4) the arbitrator’s ruling lacked authority or exceeded the terms of reference, (5) the award was made outside the time limits, and (6) violation of due process or procedures. It should be noted that public policy or public order is not one of the grounds listed under Article 216. However, the courts have stated that public order should be taken into account at the enforcement stage even if not a ground for setting aside.¹⁸⁴ According to Smith and Ibrahim, the UAE Code fails to sufficiently restrict parties from challenging arbitral awards.¹⁸⁵ Additionally, the vagueness of Article 216(c), which allows nullification of an award “if there is something invalid in the ruling or in the procedures affecting the ruling,” only encourages challenges to the enforcement of an award.¹⁸⁶

Beswetherick and Hutchison put it best when they explain the current situation as follows: “While the courts are not permitted to re-examine the merits of the underlying dispute,

¹⁷⁹ Kantaria, *supra* note 143, p. 63.

¹⁸⁰ Beswetherick and Hutchison, *supra* note 4; Luttrell, *supra* note 6, p. 272.

¹⁸¹ Kantaria, *supra* note 143, p. 63.

¹⁸² Beswetherick and Hutchison, *supra* note 4.

¹⁸³ Shome, *supra* note 127, p. 56.

¹⁸⁴ Union Supreme Court, Petition No. 2009, Judicial Year 15, 22 January 1995; Dubai Court of Cassation, Petition No. 146/2008, Judgment, 9 November 2008; Nassif, Blanke and Crom-Bakhos, *supra* note 177; Kantaria, *supra* note 143, p. 62.

¹⁸⁵ Smith and Ibrahim, *supra* note 36.

¹⁸⁶ Beswetherick and Hutchison, *supra* note 4.

in practice defendants take the opportunity presented by ratification proceedings to raise the same arguments before the courts that were previously made during the arbitration, and to challenge the validity of the award on sometimes spurious procedural grounds.”¹⁸⁷

B. The Enforcement of Foreign Awards

Even after the UAE accession¹⁸⁸ to the New York Convention in 2006 following other GCC states, enforcement of foreign arbitral awards remained problematic since, according to Blanke, UAE courts were reluctant to apply the Convention¹⁸⁹ despite its implementation by the UAE.¹⁹⁰ The reluctance may perhaps stem from numerous reasons including judges not being familiar with the New York Convention and continuing to apply the UAE Civil Procedure Code even when it contradicts the New York Convention.¹⁹¹

The 2004 case of *International Bechtel Co. Ltd. v. Department of Civil Aviation of the Government of Dubai* is often cited as a prime example of Dubai Courts setting aside a foreign arbitral award on formalistic grounds.¹⁹² In *Bechtel*, the Dubai Court of Cassation set aside an arbitration award rendered in favour of the claimant in Dubai because “the arbitrator had failed to swear witnesses in the manner prescribed by UAE law for court hearings.”¹⁹³ In addition to the *Bechtel* case, “the Dubai Court of First Instance refused to enforce a Stockholm Chamber of Commerce award with no reasons,” but the decision is currently being appealed.¹⁹⁴

Unfortunately, the cumbersome requirements of ratification and the numerous opportunities for setting aside an award applicable to domestic arbitral awards under the UAE

¹⁸⁷ *Ibid.*

¹⁸⁸ The UAE ratified the New York Convention without any reservation.

¹⁸⁹ Gordon Blanke, ‘Enforcement of New York Convention Awards in the UAE’, 26 July 2012 <kluwerarbitrationblog.com/blog/2012/07/26/enforcement-of-new-york-convention-awards-in-the-uae-part-i-quo-vadis/> (16 October 2012), citing Dubai Court of Cassation, Case No. 258/1999, Judgment, 10 February 1999; Dubai Court of Cassation, Case No. 267/1999, Judgment, 27 November 1999; Dubai Court of Cassation, Case No. 17/2001, Judgment, 10 March 2001.

¹⁹⁰ UAE Federal Decree No. 43; Dubai International Arbitration Centre, ‘13th June 2006 - UAE’s membership of the New York Convention’ <www.diac.ae/idias/aboutus/news> (21 November 2012) (stating that UAE adopted and implemented the New York Convention); Yaman Al Hawamdeh, ‘International Arbitration Bulletin May 2011 – Enforceability of foreign arbitral awards – UAE’ <www.hfw.com/publications/bulletins/international-arbitration-may-2011/international-arbitration-bulletin-may-2011-enforceability-of-foreign-arbitral-awards-uae> (21 November 2012); *Airmec Dubai, LLC v. Maxtel International, LLC*, Appeal for Cassation No. 132/2012 Commercial.

¹⁹¹ Smith and Ibrahim, *supra* note 36.

¹⁹² Blanke, *supra* note 189; Smith and Marronel, *supra* note 19.

¹⁹³ Smith and Marrone, *supra* note 19; Blanke, *supra* note 189.

¹⁹⁴ Lawry-White, *supra* note 58.

Civil Procedure Code have been continuously applied in practice by UAE courts to the challenge of foreign arbitral awards despite the UAE's accession to the New York Convention.¹⁹⁵ Having said this, Dubai's highest court, the Court of Cassation, has recently made clear that foreign arbitral awards would be enforced in Dubai in accordance with its New York Convention obligations and without resort to the UAE Code of Civil Procedure.¹⁹⁶ Dubai, however, is another matter; and other UAE courts have continued to rely on the UAE Civil Procedure Code to determine enforcement when it is no longer needed under the New York Convention. As Blanke puts it:

To the contrary, they persevered in the obsolete application of the requirements set out in Article 235 of the UAE Civil Procedure Code and used these as a pretext for a *quasi* review on the merits of foreign awards in order to refuse their enforcement. On repeated occasions, the UAE Courts even proved susceptible to formalistic procedural grounds, which are commonly invoked in the ratification process of domestic awards under the applicable provisions of the UAE Civil Procedure Code, for setting aside foreign awards.¹⁹⁷

Despite the UAE Civil Procedure Code's ratification requirement expressly excluding foreign awards,¹⁹⁸ UAE courts continue to require ratification.¹⁹⁹ A foreign arbitral award must still be filed with and approved by a local court, which, in turn, has been willing to revisit the merits of

¹⁹⁵ Emmerson and Hutchison, *supra* note 15; Paula Hodges, Charles Kaplan and Peter Godwin, 'Enforcement of foreign arbitral awards in Dubai', 8 January 2012 <www.lexology.com/library/detail.aspx?g=4bf350ff-b1aa-4859-be5b-79d960734679> (10 December 2013); Essam Al-Tamimi, 'The Status of Arbitration in the UAE' (March 2004) 1 *DIAC Journal* 1, 46 (observing that UAE judges tend to ensure that an arbitral award, even a foreign one, satisfies the UAE Code of Civil Procedure, making it difficult to enforce a foreign award in the UAE).

¹⁹⁶ Emmerson and Hutchison, *supra* note 15, citing Appeal for Cassation No. 132/2012 Commercial – *Airmec Dubai, LLC v. Maxtel International, LLC*; Hodges, Kaplan and Godwin, *supra* note 195; Gordon Blanke, 'Dubai Court of Cassation Confirms Enforcement of Foreign Awards under New York Convention: The End of a Beginning – Inshallah!', 21 November 2012 <kluwarbitrationblog.com/blog/2012/11/21/dubai-court-of-ca...ArbitrationBlogFull+%28Kluwer+Arbitration+Blog+-+Latest+Entries%29> (24 December 2012).

¹⁹⁷ Blanke, *supra* note 189.

¹⁹⁸ According to Blanke, the ratification process provided for under the UAE Civil Procedure Code applied only to UAE domestic – with the exclusion of foreign – awards. Blanke, *supra* note 189.

¹⁹⁹ "The UAE is a double *exequatur* jurisdiction." Moens and Jones, *supra* note 173, p. 156. The Chilean Supreme Court has also required proof of the finality of an award. Corte Suprema, RoI 6600-2005 (Supreme Court, Chile); Corte Suprema, RoI 2097-1997 (Supreme Court, Chile); *See also* Herbert Kronke, Patricia Nacimiento, Dirk Otto and Nicola Port (eds.), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer 2010) 189 (stating that the New UAE Draft Arbitration Law would remove this "double *exequatur*" obstacle in place with the UAE Civil Procedure Code); Patrick Bourke and Dominic Hennessy, 'Brighter times – Developments in Arbitration in the United Arab Emirates' (2008)13 *IBA Arbitration Committee Newsletter* 2, 42.

an arbitral award and “adjudicate on the disputes afresh.”²⁰⁰

The UAE requires that the foreign award must have been granted leave to enforce at the seat of arbitration, a much stricter requirement²⁰¹ than the “binding” requirement in Oman and Qatar, and a double *exequatur*²⁰² that the New York Convention meant to eliminate. Under Article 235(2)(d) of the UAE Civil Procedure Code, a foreign award must be final under the law of the country of origin to be enforceable.²⁰³ As in Oman and Bahrain, this rule is stricter than the New York Convention, which only requires a binding award.

Under the UAE Civil Procedure Code,²⁰⁴ a foreign judgment, and therefore a foreign award, may be ratified, if UAE courts did not have jurisdiction over the subject-matter of the dispute, and the foreign court had jurisdiction, according to the rules of international legal jurisdiction in the country where the judgment is made.²⁰⁵ The Dubai Court of Cassation had refused to uphold a foreign judgment,²⁰⁶ and in a case before the UAE’s accession to the New York Convention, refused to uphold a foreign arbitral award, because the case involved a UAE national for which the court viewed would have given it jurisdiction over the matter.²⁰⁷ A foreign award must not conflict with a domestic court’s judgment previously made in the UAE.²⁰⁸ As in Oman, Qatar, and Bahrain, this rule follows the Egyptian rule, and therefore gives priority to prior domestic court judgments over foreign arbitral awards.

Furthermore, the UAE has required that the UAE rules of procedure must be followed when enforcing a foreign award, which means that the UAE requires that due process must have been followed for an award to be enforceable. The UAE in this regard, according to Al-Siyabi, is comparable to Oman and other GCC states.²⁰⁹ Article 235(2)(c) of the UAE Civil Procedure

²⁰⁰ Shome, *supra* note 127, p. 57.

²⁰¹ Mohamed K. Al-Siyabi, ‘A Legal Analysis of the Development of Arbitration in Oman with Special Reference to the Enforcement of International Arbitral Awards,’ (July 2008) Doctoral Thesis, University of Hull 255.

²⁰² See Luttrell, *supra* note 6, p. 272 (stating that the UAE remains a double *exequatur* jurisdiction).

²⁰³ Dubai Court of Cassation Judgment 267/99, November 1999; Dubai Court of Cassation Judgment 17/2001, 10 March 2001.

²⁰⁴ Federal Law No. 11 of 1992.

²⁰⁵ Al-Siyabi, *supra* note 201, p. 257.

²⁰⁶ Alan Bainbridge and Helen Perrin, ‘Six Key Legal Points when Investing and Contracting in the UAE’, January 2012 <www.nortonrose.com/knowledge/publications/54329/six-key-legal-points-when-investing-and-contracting-in-the-uae> (12 October 2012) (stating that it is generally agreed that foreign arbitral awards are generally easier to enforce than foreign court judgments).

²⁰⁷ Bainbridge and Perrin, *supra* note 206 (also stating that UAE law may allow UAE courts to rehear the substance of a case which is the subject of a foreign judgment or award for that matter if one of the parties has a domicile or place of residence in the UAE).

²⁰⁸ Al-Siyabi, *supra* note 201, p. 257.

²⁰⁹ *Ibid.*, p. 260.

Code uses the same wording as the Omani law requiring due process for enforcement of a foreign award. However, the UAE Supreme Court of Cassation upheld a ruling by the Sharjah Court of Appeal that upheld a decision by the Sharjah Court of First Instance to enforce a judgment made in France. The Court of Cassation ruled that the procedural law of the country where a case is heard must govern the court proceedings, unless such a law is contrary to public policy in the enforcing state.²¹⁰ It has been said, nevertheless, that on occasions the UAE courts went beyond this, and required that the UAE law of procedure must also be complied with in making an award that is going to be enforced in the UAE.²¹¹

According to Shome, another obstacle to the enforcement of a foreign arbitral award is the UAE Code's requirement that a foreign judgment or award can only be enforced if rendered in a country with a reciprocal arrangement with the UAE to recognize judgments or awards.²¹² Such a requirement, if relied upon to challenge the enforcement of an award, is rarely satisfied according to Shome, because the number of countries meeting the requirement is limited to neighboring Arab states, India, and France.²¹³

The UAE Draft Arbitration Law²¹⁴ is a positive step toward making enforcement of arbitral awards in the UAE much easier and in line with international standards.²¹⁵ Since the release of the Draft Law on 16 February 2012, however, Kantaria commented that "further amendments will need to be made to bring the proposed law in line with international best practice in terms of the recognition and enforcement of both domestic and foreign arbitral award."²¹⁶ One positive step taken by the Draft Law is Article 57, which provides that a suit to annul an award shall not suspend the enforcement of the award except when the party can show "serious reasons" for suspension, and even with such a suspension the court is required to resolve the annulment suit within three months.²¹⁷ Articles 235 and 236 of the UAE Draft Law simplify

²¹⁰ Abu Dhabi Court of Cassation, 'Enforcement of Foreign Judgments' (March/April 2000) 14 *GCC Commercial Arbitration Centre Bulletin* 7.

²¹¹ Essam Al-Tamimi, *Practitioner's Guide to Arbitration in the Middle East and North Africa* (JurisNet 2009) 46.

²¹² Shome, *supra* note 127, p. 57.

²¹³ *Ibid.*

²¹⁴ The latest draft was released on 16 February 2012.

²¹⁵ El-Ahdab, *supra* note 165, pp. 818-819; Patrick Bourke and Adam Vause, 'Latest Draft of UAE Federal Arbitration Law Released' <www.martindale.com/alternative-dispute-resolution-law/article_Norton-Rose-Canada-LLP_1472118.htm> (14 March 2012).

²¹⁶ Kantaria, *supra* note 143, p. 63.

²¹⁷ Bourke and Vause, *supra* note 215.

the conditions and grounds for setting aside an award,²¹⁸ which have been based on the UNCITRAL Model Law.²¹⁹ These conditions include procedural issues such as the proper notification and representation of the parties before the arbitral tribunal that issues the decision in the foreign country. Also, the UAE courts may refuse the enforcement of a foreign arbitral award if it contradicts a previous judgment already issued by a UAE court or if it violates UAE public policy.²²⁰ Allowing the refusal to enforce based on a conflicting judgment by a UAE court, if interpreted broadly, could hamper the enforcement of awards.²²¹ It remains to be seen whether the final version of the UAE Draft Law, if ever it becomes law,²²² will be in line with the New York Convention.

C. The Public Policy Exception

Most importantly, an arbitral award will not be enforced in the UAE if it includes elements that “contradict public policy or morals.” According to El-Ahdab, “the courts of the Emirates are not bound to accept the decision of a foreign court if it is contrary to the public order of the Emirates.”²²³ The UAE follows the same rule as its fellow GCC states, for example Saudi Arabia,²²⁴ when it comes to the public policy exception. This pattern seems predictable within the context of Islamic law, as interconnected as its commercial and other laws are to morality and public order.

Article 3 of the UAE Civil Transactions Law²²⁵ defines public policy as follows:

Are considered of Public Policy, rules relating to personal status such as marriage, inheritance, descent, and rules concerning governance, freedom of commerce, trading in wealth, rules of personal property and provisions and foundations on which the society is based in a way that do not violate final decisions and major principles of Islamic Shari’a.²²⁶

According to Mechantaf, “this definition is wide enough to encompass almost anything that goes into ‘trading in wealth’ and ‘foundations on which the society is based,’ depending on the total

²¹⁸ El-Ahdab, *supra* note 165, pp. 818-819.

²¹⁹ Kantaria, *supra* note 143, p. 63.

²²⁰ El-Ahdab, *supra* note 165, pp. 818-819; Al-Tamimi, *supra* note 173, p. 154; Bourke and Vause, *supra* note 215.

²²¹ Bourke and Vause, *supra* note 215.

²²² According to Bourke and Vause, it remains unclear when the Draft Law will be passed. *Ibid.*

²²³ Ariel M. Ezrahi, ‘Arbitration in the Arab Middle East, a Snapshot’ (2005) 20:11 *Measley’s Int’l Arb. Rep.* 17; El-Ahdab, *supra* note 165, pp. 818-819.

²²⁴ Roy, *supra* note 175, pp. 923-924.

²²⁵ Article 3 of the UAE Transactions Law [Federal Law No. 5 of 1985].

²²⁶ *Ibid.*

discretion of UAE Courts.”²²⁷ Further, despite the existence of this definition, there is yet to be a coherent judicial definition or practice of defining the scope of public policy under this definition,²²⁸ owing largely to the fact that there is no official and systematic practice of precedent and publication of decisions.²²⁹

What is important, therefore, is how courts in Dubai and the rest of the Emirates will define and limit the scope of public policy in the UAE. A recent criticism by Blanke regarding the Dubai Court of Appeals’ overly broad interpretation of public policy sheds light on this issue.²³⁰ Blanke explains that in a recent ruling by *Baiti Real Estate Development v. Dynasty Zarooni Inc.*,²³¹ the Dubai Court of Cassation set aside an order to enforce a DIAC rendered domestic arbitral award made by the Dubai Court of First Instance and the Dubai Court of Appeals because the court misconstrued the limited scope of public policy under Article 3 of the UAE Civil Transactions Law.

The *Baiti* court, according to Blanke, failed to take into account that the definition of public policy under Article 3 of the UAE Civil Transactions Law is limited “in such a manner as not to conflict with the definitive provisions and fundamental principles of the Islamic Shari’a.”²³² In so doing, the *Baiti* court, according to Blanke, set a dangerous precedent for both domestic and foreign arbitral awards to be refused or set aside based on an overly broad standard of public policy that allows for application whenever the rules relate to the circulation of wealth or private ownership.²³³ Other commentators seem to oppose Blanke’s standpoint considering

²²⁷ Khalil Mechantaf, ‘Public Policy in the UAE as a Ground for Refusing Recognition and Enforcement of Awards’, 6 July 2012 <kluwarbitrationblog.com/blog/2012/07/06/public-policy-in-the-uae-as-a-ground-for-refusing-recognition-and-enforcement-of-awards/> (15 October 2012).

²²⁸ Mechantaf, *supra* note 227.

²²⁹ *Ibid.* (stating that “decisions rendered by national Courts refusing recognition on such ground limit to a mere reference to public policy without detailing the method of the Court’s reasoning, which would have helped the promotion of a coherent practice and the development of a consensus on principles and rules which may belong to public policy in the UAE”).

²³⁰ Gordon Blanke, ‘Public Policy in the UAE: Has the Unruly Horse Turned into a Camel?’, 14 October 2012 <kluwarbitrationblog.com/blog/2012/10/14/public-policy-in-the-uae-has-the-unruly-horse-turned-into-a-camel/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+KluwerArbitrationBlogFull+%28Kluwer+Arbitration+Blog+-+Latest+Entries%29> (15 October 2012).

²³¹ *Baiti Real Estate Development v. Dynasty Zarooni Inc.*, Dubai Court of Cassation, Appeal No. 14/2012, Real Estate Cassation, 16 September 2012; Carnell, *supra* note 129.

²³² Blanke, *supra* note 230.

²³³ *Ibid.*

instead the decision to be limited in its scope and application, and in their view it should not affect the enforcement in the UAE of foreign arbitral awards.²³⁴

The Dubai Court of Cassation had also decided a similar case in Case No. 180/2011 on 12 February 2012.²³⁵ In that case, the Court held as follows:

The selling of units without compliance with the registration requirement as provided for in article 3 of Law No. (13) 2008 may not be the subject matter of arbitration simply because this sale without registration contravenes public policy. Therefore, where a dispute subject to article 3 of Law No. (13) of 2008 is brought before an arbitral tribunal, and that tribunal rendered an award settling that dispute, such award is null as only the Court shall decide on the same dispute, at its own discretion, as it is a matter which relates to public policy.²³⁶

The award in the said case was a DIAC award, affirmed by the Dubai Court of First Instance and Dubai Court of Appeals, which had rendered a sale agreement between the parties to be null and void in light of article 3 of Law No. 1) of 2008 Regulating the Interim Real Estate Register in the Emirate of Dubai.²³⁷ What makes this case notable, according to Mechantaf, is that the Court of Cassation had set aside a DIAC arbitrator's ruling that nullified a sale agreement for not meeting the requirements of article 3 of Law No. (13) of 2008, a ruling which in effect does not violate any public policy since it only applies Dubai law.²³⁸

In regard to public policy, therefore, the Dubai Court of Cassation has recently favoured a broad interpretation. On the other hand, recent trends in cases in Dubai and Fujairah show courts favouring enforcement and disregarding technical requirements of the UAE Civil Procedure Code. Additionally, as mentioned earlier, Luttrell proposed that when a foreign investor takes advantage of the DIFC, one could split the *lex arbitri* by choosing the DIFC as the seat, while at the same time applying transnational procedures like the UNCITRAL Arbitration Rules, a choice that could theoretically maximise the prospect that an enforcing court would apply an international or transnational standard of public policy and minimise the likelihood that UAE

²³⁴ See Emmerson and Hutchison, *supra* note 15; Nassif BouMalhab and Susie Abdel-Nabi, 'Nullification of Another DIAC Arbitration Award – Have the Floodgates Opened? No, Says Clyde & Co.' <www.clydeco.com/insight/updates/nullification-of-another-diac-arbitration-award-is-it-time-to-panic-no-says> (12 January 2012) (stating that "the court is not opening the floodgates to review arbitral awards every time that a provision of public policy is interpreted").

²³⁵ Mechantaf, *supra* note 227.

²³⁶ Dubai Court of Cassation, Case No. 180/2011, 12 February 2012.

²³⁷ Mechantaf, *supra* note 227.

²³⁸ *Ibid.*

courts will refuse to ratify an award based on the riskier domestic or Islamic public policy.²³⁹

D. The Recent Trends in the Judiciary Towards Enforcement²⁴⁰

To be fair, Dubai courts have at times favoured enforcement despite a violation of the Shari'a,²⁴¹ perhaps because of Dubai's desire of being an international hub of arbitration. In one case, implying the UAE's less stringent adherence to the prohibition of the 'riba' (interest), the Dubai Court of First Instance, though ultimately refusing enforcement on evidentiary grounds because the claimant failed to prove the finality of the award, dismissed the argument relating to the unlawfulness of an award that ordered a UAE entity to pay the amount owed plus 7.75% interest.²⁴²

Recent cases have shown that, at least in Dubai, courts are more reluctant of late to interfere with the merits of awards.²⁴³ In a judgment of the Dubai Court of Cassation of 4 February 2007, the Court stated: "when the court ratifies an arbitration award, it may not deal with it from the point of view of the merits or the extent to which it complies with the law."²⁴⁴ The Union Supreme Court echoed similar language in 2008 when it stated: "when the trial court is hearing an application for ratification of an arbitration award, it may not look at it from the point of view of the merits to the extent to which it coincides with the law."²⁴⁵

Very recent cases in Fujairah and Dubai have shown a trend towards enforcing the New York Convention awards without the re-examination of their merits.²⁴⁶ In April 2010, the Fujairah Court of First Instance²⁴⁷ ratified two arbitral awards made by a sole arbitrator in London in relation to a dispute under the Rules of the London Maritime Arbitrators

²³⁹ Luttrell, *supra* note 6, p. 256.

²⁴⁰ Beswetherick and Hutchison, *supra* note 4 (stating that "there is a general trend in the UAE away from cases in which arbitration awards are overturned by the UAE courts on such pure technicalities," therefore heralding "a more arbitration-friendly landscape" in the UAE).

²⁴¹ The UAE, and specifically Dubai and Ras-al Khaima, can be placed in the middle of the spectrum of Shari'a application, a moderate placement. The primacy of the Shari'a in the other five Emirates, however, is beyond doubt. *See* Luttrell, *supra* note 6, p. 261.

²⁴² Dubai Court of First Instance, Judgment No. 190/98, 10 November 1998.

²⁴³ Kantaria, *supra* note 143, p. 63.

²⁴⁴ Dubai Court of Cassation, Case No. 273/2006, Judgment, 4 February 2007; Kantaria, *supra* note 143, p. 63.

²⁴⁵ Union Supreme Court, 486/Judicial Year 2 (30 October 2008). *See also* Union Supreme Court, 438/Judicial Year 23, 12 July 2004, para. 3; Kantaria, *supra* note 143, p. 63.

²⁴⁶ Martin and Cheney, *supra* note 96.

²⁴⁷ Commercial Case 35/2010, Fujairah Court of First Instance, April 2010; Kantaria, *supra* note 143, p. 64.

Association.²⁴⁸ The Fujairah Court decision of 2010 is commonly believed to be the first time a foreign arbitral award was ratified in the UAE in accordance with the New York Convention.²⁴⁹ The Fujairah Court followed two prior decisions by the UAE Court of Cassation. In the UAE Court of Cassation Case No. 556 of 19 April 2005, the Court held that the enforcing court is precluded from examining the merits of the award.²⁵⁰ In the second case, the UAE Court of Cassation in Case No. 774 of 7 April 2005 held that conventions made between the UAE and other countries regarding the enforcement and execution of arbitral awards are to be considered domestic legislation.²⁵¹ Based on the holdings of these UAE Court of Cassation cases, the Fujairah Court ratified both awards with interests, costs, and attorney fees.²⁵²

While the enforcement of foreign arbitral awards by courts in the UAE are few due to the lack of a formal system of precedent, the lack of formal publication of court decisions,²⁵³ and the lengthy process of enforcement due to multiple challenges created at the setting aside stage, some recent cases in Dubai show some ray of hope.²⁵⁴

The Dubai Court of Appeals in *Maxtel International FZE v. Airmec Dubai LLM*²⁵⁵ rejected an appeal against a decision of a Dubai Court of First Instance to issue an execution order to enforce two LCIA arbitration awards with an English Seat.²⁵⁶ The *Maxtel* appellant sought to set aside the award based on procedural grounds like lack of capacity of the signatory, invalid formation and composition of the tribunal, lack of terms of reference to arbitration in violation of the provisions of Article 216(a) of the UAE Civil Procedure Code and Article V(c) of the New York Convention, failure to apply the mandatory provisions of UAE law on oath-taking for witnesses, and failure to render the awards within the prescribed time-limit of 6

²⁴⁸ Ashraf, Brown and Lysenko, *supra* note 76; Audi and Tricoli, *supra* note 36.

²⁴⁹ *Ibid.*; Martin and Cheney, *supra* note 96.

²⁵⁰ United Arab Emirates Court of Cassation, Case No. 556, 19 April 2005; Audi and Tricoli, *supra* note 36.

²⁵¹ United Arab Emirates Court of Cassation, Case No. 774, 7 April 2005; Audi and Tricoli, *supra* note 36.

²⁵² Audi and Tricoli, *supra* note 36.

²⁵³ Lawry-White, *supra* note 58 (stating that “decisions of the Dubai Courts are not systematically reported”).

²⁵⁴ Shome, *supra* note 127, p. 56; Audi and Tricoli, *supra* note 36; Emmerson and Hutchison, *supra* note 15 (stating that “courts are enhancing confidence in Dubai as a centre for international arbitration”); Hodges, Kaplan and Godwin, *supra* note 195 (stating that there is a “trend towards a more developed pro-arbitration culture”).

²⁵⁵ In *Maxtel International*, the subsidiary of Maxtel was incorporated in the Jebel Ali Free Zone and was a Dubai-incorporated company. *Maxtel International FZE v. Airmec Dubai LLC*, Court of First Instance Commercial Action No. 268, 12 January 2011; Lawry-White, *supra* note 58; Kantaria, *supra* note 143, 63.

²⁵⁶ It was seated in London. *Maxtel International FZE v. Airmec Dubai LLC*, Court of First Instance Commercial Action No. 268, 12 January 2011; Association of Corp. Counsel, *supra* note 116; Kantaria, *supra* note 143, p. 64; Martin and Cheney, *supra* note 96; Lawry-White, *supra* note 58.

months under the UAE Civil Procedure Code.²⁵⁷ The Dubai Court of Appeals emphasized that under the New York Convention, the Court may not reject approval and execution of awards unless it is proven that (1) the parties to the agreement were under some incapacity, or (2) the agreement is invalid under the governing law chosen by the parties.²⁵⁸ Though no arguments were made under the public policy exception,²⁵⁹ the Dubai Court of Appeals decision is a promising sign for the enforcement of arbitral awards in the UAE. It is especially promising that the Dubai Court of First Instance discarded the application of Article 235 and 236 of the UAE Civil Procedure Code to enforce a foreign arbitral award and resorted directly to the New York Convention.²⁶⁰

By October 2012, Dubai's highest court, the Dubai Court of Cassation upheld the enforcement by the Dubai Court of Appeals of the above mentioned foreign awards in *Airmec Dubai LLM v. Maxtel International FZE*.²⁶¹ The Court of Cassation made clear that the New York Convention is the relevant law governing the enforcement of foreign arbitral awards and not the UAE Civil Procedure Code, which applies to domestic arbitral awards.²⁶² Practitioners like Emmerson and Hutchison have applauded the ruling, calling it the long awaited pro-enforcement decision for Dubai.²⁶³ While the Court of Cassation ruling is only of persuasive value in a civil law system, the case is important in showing Dubai's commitment towards becoming a business hub with a pro-enforcement attitude under its New York Convention obligation.²⁶⁴

In a recent case, the Dubai Court of Appeal in Case No. 1/2013 on 9 July 2013 recognized an arbitral award rendered in Stuttgart, Germany. The case is significant because the Dubai Court of Appeals rejected any pro forma challenges, including those based on public policy, stating that as long as a foreign arbitral award meets the requirements of Federal Decree

²⁵⁷ Blanke, 'Enforcement', *supra* note 189.

²⁵⁸ *Maxtel International FZE v. Airmec Dubai LLC*, Court of First Instance Commercial Action No. 268, 12 January 2011.

²⁵⁹ *Ibid.*

²⁶⁰ Blanke, *supra* note 189.

²⁶¹ Emmerson and Hutchison, *supra* note 15.

²⁶² *Ibid.*

²⁶³ *Ibid.*; Hodges, Kaplan and Godwin, *supra* note 195 (stating that the case is "particularly noteworthy given the number of potential arguments to enforcement that were raised and the strength with which they were dismissed by the Court of Cassation").

²⁶⁴ Hodges, Kaplan and Godwin, *supra* note 195.

No. 43 of 2006 concerning the UAE's accession to the New York Convention, it will be enforced pursuant to the New York Convention.

Additionally, according to Audi and Tricoli, the Dubai Court of Appeals in Civil Case No. 531/2011 on 6 October 2011 and in Civil Case No. 126/2011 on 22 February 2012 refused nullification of an arbitral award based on technical grounds, a sign that there may be a changing attitude among the Emirate judiciary in favour of a more rapid enforcement procedure.²⁶⁵ If so, these decisions may show a trend among some Emirate judges to abandon the approach taken by the Dubai Court of Cassation in *International Bechtel Co Ltd v. Department of Civil Aviation of Government of Dubai*.²⁶⁶ In the *International Bechtel* case, the Dubai Court of Cassation set aside an arbitral award rendered in Dubai for what commentators view as technical and formalistic grounds:²⁶⁷ the oath used to swear in witnesses during the arbitration did not strictly follow the formula prescribed for UAE court hearings.²⁶⁸ The trend, however, cannot be celebrated too quickly, according to Blanke,²⁶⁹ as exceptions remain.²⁷⁰

The Dubai Court of First Instance,²⁷¹ for example, refused to enforce an award rendered by the Singapore International Arbitration Centre because, according to the Court of First Instance's erroneous application of the UAE Civil Code, the award was not ratified in the country of origin and could therefore not be executed under Articles 235 and 236 of the UAE Civil Procedure Code.²⁷² The ratification process under the UAE Civil Procedure Code, however, is only required for domestic awards; and should not be required under the New York Convention.²⁷³ In another example, according to Beswetherick and Hutchison, the Court of Appeal, later upheld by the Dubai Court of Cassation in September 2012,²⁷⁴ "declined to ratify

²⁶⁵ Audi and Tricoli, *supra* note 36.

²⁶⁶ *International Bechtel Co Ltd v. Department of Civil Aviation of Government of Dubai*, Dubai Court of Cassation, Petition No. 503/2003, Judgment, 15 May 2005. Most practitioners caution, however, that while these cases are positive examples, there is no system in the UAE of binding precedent and the Fujairah and Dubai Courts of First Instance have no persuasive force. See Martin and Cheney, *supra* note 96; Audi and Tricoli, *supra* note 36; Beswetherick and Hutchison, *supra* note 4.

²⁶⁷ *Supra* note 266; see Beswetherick and Hutchison, *supra* note 4 (giving other examples of technicalities peculiar to UAE law, such as an award must be physically signed in the UAE and witnesses should not be present in the evidentiary hearing except when they are giving evidence).

²⁶⁸ Beswetherick and Hutchison, *supra* note 4.

²⁶⁹ Blanke, *supra* note 189.

²⁷⁰ Beswetherick and Hutchison, *supra* note 4.

²⁷¹ Dubai Court of First Instance, Case No. 531/2011, Judgment, 18 May 2011.

²⁷² Blanke, *supra* note 189.

²⁷³ *Ibid.*; Emmerson and Hutchison, *supra* note 15 (stating that ratification is required for domestic award but has no place in foreign award enforcement unless required by the seat of arbitration).

²⁷⁴ Emmerson and Hutchison, *supra* note 15.

an arbitration award because a dissenting opinion, although attached to the majority opinion, was not referred to” in the majority opinion.²⁷⁵ Further, Emmerson and Hutchison point to a case by the Dubai Court of First Instance where the Court “rejected an application made under the NYC (in the correct terms) for ‘recognition and enforcement’ of a London award on grounds that the Court could not ‘ratify’ a foreign award.”²⁷⁶

In another case, the Dubai Court of First Instance in Case No. 489/2012 on 18 December 2012 refused enforcement of three ICC awards rendered in France, reasoning that it lacked jurisdiction because the debtor was a foreigner and the agreement had been concluded and performed in Sudan outside of the UAE. The Dubai Court of Appeals in Case No. 40/2013, on 31 March 2013, affirmed the Dubai Court of First Instance. Thereafter, on 18 August 2013, the Dubai Court of Cassation in Case No. 156/2013 affirmed the Dubai Court of First Instance and the Dubai Court of Appeal.²⁷⁷

According to Smith and Marrone, the long awaited New Draft UAE Federal Arbitration Law is supposed to give effect to the UAE’s obligations under the New York Convention and is supposed to limit grounds for which to refuse recognition and enforcement of a foreign arbitral award.²⁷⁸ The New Draft UAE Federal Arbitration Law could be the missing link for Dubai and the UAE. Meanwhile, the backdoor mechanism for the enforcement of a foreign arbitral award through the sets of rules created by the DIFC may be used by those wanting to secure the enforcement of foreign awards in Dubai in a New York Convention friendly and pro-enforcement manner.²⁷⁹ As may be recalled, one could have the DIFC Courts recognize and thus ratify a foreign award, which can then be enforced and executed by Dubai Courts under Article 7(2) of the Judicial Authority Law.²⁸⁰

²⁷⁵ Beswetherick and Hutchison, *supra* note 4; Emmerson and Hutchison, *supra* note 15 (the award was also not signed by the dissenting arbitrator, a requirement under the UAE Civil Procedure Code, although the dissenting arbitration did sign the attached dissenting opinion).

²⁷⁶ Emmerson and Hutchison, *supra* note 15. The case is currently under appeal and the court’s decision, according to Emmerson and Hutchison, may stem from the court being confused as to the legal device for enforcement under the New York Convention.

²⁷⁷ Gordon Blanke, ‘Recent Ruling of Dubai Court of Cassation on Enforcement of Foreign Arbitral Awards: Back to Square One it is ...’, 21 October 2013 <kluerarbitrationblog.com/blog/2013/10/21/recent-ruling-of-dubai-court-of-cassation-on-enforcement-of-foreign-arbitral-awards-back-to-square-one-it-is/> (29 October 2013).

²⁷⁸ Smith and Marrone, *supra* note 19.

²⁷⁹ Blanke, *supra* note 189 (stating that “in the meantime, however, the DIFC may well serve as a viable – yet presently still untested – “host” or “intermediate” jurisdiction for enforcement of New York Convention awards in the UAE”); Emmerson and Hutchison, *supra* note 15.

²⁸⁰ See *supra* notes 121-126 and accompanying text.

E. The Setting Aside of an Arbitral Award in the UAE

The grounds for setting aside an arbitral award under the UAE Civil Procedure Code follow the grounds set forth in the UNCITRAL Model Law, which in turn mirrors the grounds for challenging the enforcement of an award under the New York Convention. Thus, by adopting the New York Convention to govern the enforcement challenge and the UNCITRAL Model Law to govern the setting aside challenge, the UAE has largely followed international standards. The setting aside procedure set out under the UAE Civil Procedure Code is only applicable to awards rendered in the UAE, and the DIFC has its own setting aside procedure for DIFC rendered awards. This section will only discuss the setting aside of awards rendered in the UAE, but not under the DIFC.

It has been observed that “[a]ny party may, while the award is being reviewed by the court, request the nullification of, or otherwise contest the award on any number of grounds set forth in the UAE Civil Procedure Code.”²⁸¹ Additionally, parties to the arbitration cannot waive the grounds for nullification under any circumstances.

The grounds for setting aside an arbitral award in the UAE are restrictive and limited²⁸² to the grounds set forth in Article 216(1) of the UAE of Civil Procedure Code,²⁸³ and those relating to public order.²⁸⁴ The same is true for the New Draft Law under Articles 53 and 54, which follows the approach of the Egyptian Arbitration Act in Articles 52-54. Setting aside is the only means of recourse against the arbitral award, and an award may only be set aside during the ratification process²⁸⁵ in “very determined cases where the defects in the award are so serious.”²⁸⁶

1. The Grounds for Setting Aside an Award in the UAE

Article 216(1) of the UAE Civil Procedure Code provides the grounds for setting aside an arbitral award as follows:

²⁸¹ Smith and Marrone, *supra* note 19.

²⁸² See also Al Mulla and Blanke, *supra* note 100.

²⁸³ Article 216 (1) of the UAE Civil Procedure Code, Federal Law No. (11) of 1992, Chapter Three.

²⁸⁴ Al Mulla and Blanke, *supra* note 100.

²⁸⁵ *Ibid.*; Gordon Blanke and Karim Nassif, ‘Arbitration in the UAE 2011’

<www.habibalmulla.com/Mediaresource/bdad3ca9-e25b-42f7-a6cd-bec9b24d6ab7.pdf> (25 September 2012).

²⁸⁶ El-Ahdab, *supra* note 165, p. 822.

The parties to a dispute may, at the time of consideration of the arbitrator's award, request the nullification of the same in the following events:

- a. If the award was issued without, or was based on invalid terms of reference or an agreement which has expired by time prescription, or if the arbitrator has exceeded his limits under the terms of reference.
- b. If the award was issued by arbitrators who were not appointed in accordance with the law, or by only a number of the arbitrators who were not authorized to issue the award in the absence of the others, or if it was based on terms of reference in which the dispute was not specified, or if it was issued by a person who is not competent to act as an arbitrator or by an arbitrator who does not satisfy the legal requirements.
- c. If the award of the arbitrators or the arbitration proceedings become void and such voidness affected the award.²⁸⁷

This provision has been interpreted to allow the setting aside of an arbitral award in six different, though sometimes interrelated, categories:²⁸⁸ (1) that the award was made without a valid arbitration agreement (including the situation where either party had no capacity to enter into the arbitration agreement) or with a void, voidable, expired arbitration agreement;²⁸⁹ (2) failure to observe due process including lack of notice, the right to be heard, and the right to present a case or defence;²⁹⁰ (3) the constitution of the tribunal or the appointment of arbitrators violated UAE law or the parties' agreement;²⁹¹ (4) the award dealt with matters beyond the scope of the arbitration agreement or the arbitrator or tribunal exceeded its mandate;²⁹² (5) the award or proceedings were affected by other "procedural irregularities"²⁹³ or violated a UAE law,²⁹⁴ including the Civil Procedure Code; and (6) the award contravenes UAE public policy or the subject of the award is non-arbitrable.²⁹⁵

Though Article 216(1) of the Civil Procedure Code does not seem to address all of these six categories, the language of Article 216(1)(c) allows for a broader interpretation of potential

²⁸⁷ Article 216 (1) of the UAE Civil Procedure Code, Federal Law No. (11) of 1992, Chapter Three.

²⁸⁸ Blanke and Nassif, *supra* note 285.

²⁸⁹ *Ibid.*; El-Ahdab, *supra* note 165, p. 822.

²⁹⁰ Blanke and Nassif, *supra* note 285; El-Ahdab, *supra* note 165, pp. 822-823.

²⁹¹ El-Ahdab, *supra* note 165, p. 823; Blanke and Nassif, *supra* note 285.

²⁹² El-Ahdab, *supra* note 165, p. 824; Blanke and Nassif, *supra* note 285.

²⁹³ Blanke and Nassif, *supra* note 285. Examples of procedural irregularities include failure by the arbitrators to sign both the reasoning and the dispositive of the award. Dubai Court of Cassation, Petition No. 233/2007, Judgment, 13 January 2008; *see also* El-Ahdab, *supra* note 165, p. 822.

²⁹⁴ El-Ahdab, *supra* note 165, p. 824.

²⁹⁵ *Ibid.*, p. 824-825.

grounds for setting aside an award. The Dubai Court of Cassation in two cases²⁹⁶ actually regrouped²⁹⁷ the above listed grounds into two general categories as follows:

1. Grounds linked to the arbitration agreement, namely: the non-existence or invalidity of the arbitration agreement; the expiration of the arbitration agreement; an arbitrator's excess of authority in addressing matters outside the scope of the arbitrator's mandate (listed in article 216, CPC); or the infringement of a public order rule (not listed in article 216, CPC).
2. Grounds linked to the arbitral proceedings per se, namely: the irregular composition of the arbitral tribunal; the issuance of the award by a truncated tribunal with no authorisation to do so; failure to define the dispute in the arbitration agreement; lack of capacity to enter into the arbitration agreement (listed in article 216, CPC); or due process violations, such as a denial of opportunity to present one's case and equal treatment of the parties (provided for under article 212, CPC); or if the award of the arbitrators or the arbitration proceedings become void and such voidness impacted the award (listed in article 216, CPC).²⁹⁸

The Dubai Court of Cassation's categorisation adds two additional categories: the issuance of the award by a truncated tribunal with no authorisation to do so²⁹⁹ and failure to define the dispute in the arbitration agreement.

a. Void, Voidable, or Expired Arbitration Agreement

An arbitration agreement is void if it is not in writing, a basic requirement of the Shari'a and a generally accepted requirement for an arbitration agreement.³⁰⁰ An agreement would also be void if it deals with a subject matter that is not arbitrable. It should be noted that arbitrability is closely tied to the issue of public policy, and as such UAE law would determine arbitrability.

²⁹⁶ Dubai Court of Cassation, Petition No. 270/2008, Judgment, 24 March 2009; Dubai Court of Cassation, Petition No. 32/2009, Judgment, 29 March 2009.

²⁹⁷ *Ibid.*

²⁹⁸ Al Mulla and Blanke, *supra* note 100.

²⁹⁹ See A.F. M. Maniruzzaman, 'The Authority of a Truncated Arbitral Tribunal – Straight Path or Puzzle?' (Summer 2012) 90 *Amicus Curiae* 22 (on file with author), also at Kluwer Arbitration Blog, 15 July 2012 <kluwerarbitrationblog.com/blog/2012/07/15/the-authority-of-a-truncated-arbitral-tribunal---straight-path-or-puzzle/> (10 December 2013).

³⁰⁰ *But see* the New French Arbitration Act (2011), which still maintains for domestic arbitration the writing requirement of an arbitration clause or submission to arbitration under new Articles 1442 and 1443, while abolishing mandatory formal requirements for international arbitration under new Article 1507 to accommodate investment arbitrations that often do not put consent to arbitrate in writing. Jean-Pierre Harb and Christophe Lobier, 'France: New Arbitration Law In France: The Decree Of January 13, 2011' (March 2011) 26:3 *Mealey's Int'l Arb. Rep. 1* <www.mondaq.com/x/135218/Arbitration+Dispute+Resolution/New+Arbitration+Law+In+France+The+Decree+Of+January+13+2011> (8 December 2012).

Additionally, an agreement is void if, according to El-Ahdab, “it contains one of the causes of absolute nullity in compliance with the general rules or if it is contrary to a mandatory provision of the law such as the agreement on an even number of arbitrators,” which of course is prohibited since the UAE makes it mandatory for there to be an odd number of arbitrators. Finally, an agreement is invalid or void if either of the parties was under full or partial incapacity at the time of entering into the agreement.³⁰¹ Though this ground is often listed separately, its effect is certainly to invalidate the arbitration agreement.

b. Due Process

An award may be set aside for violation of due process if there is lack of notice to either party of the appointment of arbitrator(s) and of the arbitration proceedings.³⁰² Due process may also be violated if, beyond the party’s control, there is a violation of a party’s right to be heard and the right to present a case and submit a defence. Additionally, the parties must be treated equally, and bias by the court in favour of one party against the other would be grounds for setting aside an award.³⁰³ It is worth noting that these are the same grounds set forth under the Shari’a. Other grounds on which an award may be set aside include not allowing the defendant to speak last or to comment on the claimant’s argument, a right similar to the right to cross examination; and not allowing the applicant to present a lay or expert witness or examine and comment on an expert’s report.³⁰⁴ Tricoli, however, pointed out that the Fujairah Court seemed to have loosened this requirement when it enforced an award despite that it was obtained in absentia without the representation of the Defendant, a fact that a court in the UAE would readily consider as depriving the party of his right to defend the claim.³⁰⁵

c. Constitution of Tribunal or Appointment of Arbitrators

According to El-Ahdab, “it is an essential rule of law” that an arbitral tribunal is composed of independent and impartial arbitrators, who accomplish their mission according to the

³⁰¹ El-Ahdab, *supra* note 165, p. 822.

³⁰² *Ibid.*

³⁰³ *Ibid.*, p. 823.

³⁰⁴ *Ibid.*, pp. 822-823.

³⁰⁵ Alessandro Tricoli, ‘How Fruitful Can a Foreign Award Be in the UAE?’, 10 January 2011 <www.fichtelegal.com/en/news_article.php?news_id=86> (12 October 2012).

requirements of the law.³⁰⁶ Therefore, once a party becomes aware of an arbitrator's conflict of interest or any conduct or position that would shed doubt on the tribunal's independence or impartiality, then the party could ask the court to set aside the arbitral award. An award may also be challenged, whether under this ground, or on the basis of a void arbitration agreement, if such agreement so indicates, if there is an even number of arbitrators because UAE law, like all GCC states, requires that there must be an odd number of arbitrators.³⁰⁷

d. Beyond the Scope of the Agreement

This ground, according to El-Ahdab, is the most common basis for setting aside an award in practice.³⁰⁸ Under this ground, an arbitral award that deals with matters that exceed the mandate of the arbitration agreement can be set aside. It is possible that only those portions that exceed the mandate may be partially set aside.

e. Procedural Irregularities or Violation of Law

An award may be set aside on this ground only if a procedural irregularity has a substantial effect on the arbitral award. The types of irregularities could include those which are conditions to the enforcement of an award.³⁰⁹ According to Blanke and Nassif, procedural irregularities may also include failure to administer oaths before hearing oral evidence,³¹⁰ and failure by the arbitrators to sign both the reasoning and the disposition of the award, as indicated by the Dubai Court of Cassation, in a judgment of 13 January 2008.³¹¹

2. Public Policy as a Separate Ground for Setting Aside an Award

Further, an award can be set aside for violating public policy "as understood in the UAE."³¹² As already discussed earlier,³¹³ a recent example is the Dubai Court of Cassation's judgment of 12 February 2012,³¹⁴ which set aside an award that nullified a sale and purchase agreement in the

³⁰⁶ El-Ahdab, *supra* note 165, p. 823.

³⁰⁷ *Ibid.*, pp. 822-823.

³⁰⁸ *Ibid.*, p. 823.

³⁰⁹ See also Beswetherick and Hutchison, *supra* note 4.

³¹⁰ Blanke and Nassif, *supra* note 285.

³¹¹ *Ibid.*, citing Dubai Court of Cassation, Petition No. 233/2007, Judgment, 13 January 2008.

³¹² Al Mulla and Blanke, *supra* note 100.

³¹³ See *supra* notes 238-240 and accompanying text.

³¹⁴ Dubai Court of Cassation, Case No. 180/2011, judgment 12 February 2012.

off-plan real estate sector on the basis that the underlying property had not been properly registered in accordance with Article 3 of Law No. 13 of 2008, Regulating the Interim Real Estate Register in the Emirate of Dubai. This decision means that Article 3 of Law No. 13 of 2008 falls within the meaning of public policy in the UAE.³¹⁵

In the UAE, according to El-Ahdab, “the courts of the Emirates are not bound to accept the decision of a foreign court if it is contrary to the public order of the Emirates.”³¹⁶ However, as mentioned earlier, in an exceptional case the Dubai Court of First Instance took a flexible approach to the Islamic orthodox prohibition of ‘riba’ (interest) as a matter of public policy.³¹⁷ To some, this case proves to be an indicator that a UAE court may not necessarily apply a narrow definition of public policy with regard to the Shari’a. Nevertheless, it seems that the UAE does not follow an international or transnational definition of public policy.³¹⁸

3. The Effect of Setting Aside an Award Within or Outside the UAE

As noted by some writers, “the effect of a successful challenge is that the underlying dispute cannot be remitted to the same arbitration tribunal, unless the parties have agreed otherwise.”³¹⁹ An alternative option is to refer the dispute to the courts by filing a separate action.³²⁰ Another issue is the status of an award that has been set aside at the seat of arbitration. UAE law remains silent on whether this type of award can be enforced in the UAE. There are no court precedents to provide guidance.³²¹ There has, however, been a controversial case regarding the enforceability of an arbitral award that has been set aside in the UAE. In *International Bechtel Co Ltd v. Department of Civil Aviation of Government of Dubai*, the Dubai Court of Cassation set aside an arbitral award rendered in Dubai for what commentators view as technical and formalistic grounds.³²² The party seeking enforcement, however, proceeded to have the award recognized and enforced in France, where the Paris Court of Appeals recognized the award

³¹⁵ Al Mulla and Blanke, *supra* note 100.

³¹⁶ Ezrahi, *supra* note 223, p. 18; El-Ahdab, *supra* note 165, p. 823.

³¹⁷ Dubai Court of First Instance, Judgment No. 190/98, 10 November 1998.

³¹⁸ See Dirk Otto and Omania Elwan, ‘Article V(2)’ in Kronke et al. (eds.), *supra* note 199, p. 365.

³¹⁹ Al Mulla and Blanke, *supra* note 100.

³²⁰ Dubai Court of Cassation, Petition No. 263/2007, Judgment, 3 February 2008; Dubai Court of Cassation, Petition No. 192/2007, Judgment, 27 November 2007; Blanke and Nassif, *supra* note 285.

³²¹ Al Mulla and Blanke, *supra* note 100.

³²² See *supra* note 266.

regardless of the previous annulment in the UAE.³²³ This has been done on some previous occasions, such as in the *Hilmarton* case (1997), where the French courts twice recognised an award made in Switzerland, which had been set aside or annulled by the Swiss courts.³²⁴

VI. Conclusion

The UAE has made great strides towards its goal of becoming the centre of dispute resolution in the Middle East. In doing so, it has also attracted more investors and has made Dubai a Middle East business hub. The UAE's pilgrimage towards international arbitration stardom came with needed innovative ideas like the creation of the DIFC common law jurisdiction within Dubai that, in turn, has posed numerous difficult questions about the relationship between the UAE courts and the DIFC courts, and the enforceability of offshore and onshore awards. For now, Dubai seems to have created a way forward. Still, questions remain as to the enforceability of foreign arbitral awards in the UAE, and whether UAE courts will continue its recent trend favouring enforcement. The way forward for the UAE is to create a culture among its judges favouring enforcement of foreign arbitral awards and to not lean towards setting aside an arbitral award for technical reasons. If the UAE can bridge the gap between policy and practice, then perhaps, the UAE will finally reach its goal of becoming the undisputed centre for international arbitration in the Middle East with Dubai leading the way. One of the first significant steps forward for the UAE is to finally enact the new UAE Federal Arbitration Law, the passage of which would put to rest many of the apprehensions about the future of international commercial arbitration in the UAE.

³²³ Paris Court of Appeals, 26 November 2006, *Revue de l'arbitrage* 2006, No 3, 694, reported in (2006) XXXI *Ybk. Comm. Arb.* 629-634.

³²⁴ See also the *Chromalloy* case where the French Cour d'Appel recognised an award, made and then set aside in Egypt. For a brief discussion on the matter and the issues concerned in different jurisdictions see Gary Born, *International Arbitration: Law and Practice* (Kluwer 2012) 338-341.