The International Arbitration Review

Seventh Edition

Editor
James H Carter

Law Business Research

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EDITOR'S PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another. The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more hours of reading from lawyers than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. However, there is a niche to be filled by an analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world is consumed with debate over whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

James H Carter
Wilmer Cutler Pickering Hale and Dorr LLP
New York
June 2016

Chapter 45

UNITED ARAB EMIRATES

DK Singh[1]

I INTRODUCTION

The United Arab Emirates (UAE) is a federation of seven emirates formed in accordance with the UAE Constitution in 1971. At the time the federation was established, each of the seven emirates had their respective laws in force. These laws remain effective unless they are superseded by any federal law, are in conflict with federal laws or are otherwise repealed. In accordance with the Constitution, individual emirates are free to promulgate legislation in relation to matters that are not exclusively reserved for federal powers. In addition to this duality, there are also carve-outs for free zones within the seven emirates wherein the emirate concerned has the freedom to pass laws specific to a particular free zone. In this regard, the Dubai International Financial Centre (DIFC) is the most advanced and internationally reputed free zone within the UAE.

The UAE has a civil law system whereby its laws are codified in statute and there is no formal system of precedent. Arabic is the official language of the UAE, and all court proceedings in the UAE (other than in the DIFC courts and the Dubai World Tribunal) are conducted in Arabic. Arbitrations, on the other hand, are commonly conducted in English. This is because they are a contractual agreement, and parties frequently opt to conduct the proceedings in English, being the most commonly used language for business.

There is, as yet, no federal arbitration law promulgated in the UAE.

Currently, all arbitration proceedings seated within the UAE, save for those seated in the DIFC, are governed by Part 3 of Book II of Federal Law No. 11 of 1992 (as amended by Law No. 30 of 2005), which is the Civil Procedure Code (Code). Arbitrations seated in the DIFC are governed by the DIFC Arbitration Law (No. 1 of 2008) (DIFC Law). The arbitration provisions in the Code are not based on United Nations Commission on International Trade Law (UNCITRAL Model Law), but the provisions in the DIFC Law are.

1 DK Singh is a partner at KBH Kaanuun. DK Singh was assisted in the preparation of this chapter by Karen Kilgallen.

The Code is aimed principally at domestic rather than international arbitration, and places significant limitations on arbitration proceedings. For example, arbitrations may be subject to the intervention and supervision of the courts. This can be seen to potentially undermine the authority of arbitrators. For example, pursuant to the Code the courts have the power to dismiss an arbitrator, hear preliminary issues, grant interim measures, and correct, enforce or even nullify an award.[2] This has caused concern among the international arbitration fraternity, and has created a fragile ratification and enforcement process. It is mainly because of this that, historically, foreign investors have been reluctant to seat their arbitration proceedings in the UAE.

Despite the historical reluctance by foreign investors and business to arbitrate in the UAE, the UAE, and Dubai in particular, is demonstrating to the international community that it is serious about putting in place the necessary infrastructure and laws to successfully count itself as one of the key arbitration players alongside London, Paris and Hong Kong. This desire to be a hub of commerce has been underscored by a number of events, including the UAE's successful bid to host Expo 2020 in Dubai, and the establishment of key regional arbitration centres over the past few years such as the Dubai International Arbitration Centre (DIAC) and the DIFC–LCIA Arbitration Centre (DIFC–LCIA) in February 2009, which is a joint venture between the DIFC[3] and the London Court of International Arbitration (LCIA). Both these institutions operate alongside the Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC).

The UAE joined the New York Convention[4] in 2006 through Federal Decree No. 43 of 2006, along with 16 other Middle Eastern countries. The UAE's accession to the New York Convention represented a significant step in demonstrating the UAE's commitment to foreign investors and the international community. In accordance with the New York Convention, arbitral awards issued in the UAE now enjoy automatic recognition in the other 152 Member States and can be enforced outside the UAE on a reciprocal basis.

The UAE Ministry of Economic Affairs also released a draft Federal Law on Arbitration and Enforcement of Arbitral Awards in February 2008 (Draft Federal Arbitration Law), and published further revised drafts of it in 2010 and February 2012. While at the time of writing the Draft Federal Arbitration Law is still not finalised or promulgated, it is anticipated that the promulgation of this law will provide a uniform basis and legislative support for the various arbitral institutions that currently operate in the UAE.

In terms of further efforts to advance the UAE's appeal as a seat for arbitration, the DIFC has amended one if its existing practice directions (No. 2 of 2012) to provide parties who have elected to submit to the jurisdiction of the DIFC courts the option to refer any dispute relating to the enforcement of a decision of the DIFC courts to DIFC-LCIA arbitration. This unique and unprecedented move aims to facilitate the enforcement of DIFC judgments by 'converting' them into arbitral awards, which can in turn be enforced through a well-established and highly efficient enforcement regime. The arbitral award will be capable of enforcement in 152 states worldwide under the New York Convention. This

2 UAE Civil Procedure Code, Federal Law No. (11) of 1992, Chapter 111, Articles 207, 208, 209, 214, 215, 216 and 217.

3 The DIFC is an 'offshore' jurisdiction within the Emirate of Dubai, and operates on a common law jurisdiction basis drawing on the laws of England and Wales.

4 Convention On The Recognition And Enforcement Of Foreign Arbitral Awards 1958.

amendment demonstrates the DIFC's forward-thinking nature, its willingness to address difficulties or apprehensions in respect of arbitrating in the UAE, and its serious commitment to establishing itself as a major arbitration-friendly environment.

In addition to the above, the DIFC has established a Dispute Resolution Authority (DRA). The Dispute Resolution Law came into force on 21 May 2014 and amends certain provisions of the DIFC's founding law. The DRA was launched in May 2016, and is the third body of the DIFC along with the DIFC Authority and the Dubai Financial Services Authority. The DRA is headed by Chief Justice Michael Hwang of the DIFC courts. The objective of the DRA is to provide comprehensive dispute resolution services and mechanisms that are on par with international standards. The DRA will include an Arbitration Institute, along with the DIFC courts to supervise and administer DIFC–LCIA arbitrations. While the functions of the Arbitration Institute are yet to be codified and incorporated in its constitution, the aim is that they will include the promotion of the Arbitration Institute as 'a hub for the settlement of domestic and international disputes, and of disputes arising out of treaties, by arbitration, mediation and other forms of alternative dispute resolution'. The Arbitration Institute will exercise its functions and powers independently from the DIFC courts and will operate on an independent budget.

The DIFC–LCIA, DIAC and ADCCAC all offer their own procedural rules and regulations for the amicable settlement of disputes through arbitration. There are other regional arbitration centres in the UAE that provide for the settlement of disputes by way of arbitration, such as those in Sharjah and Ras Al Khaimah. However, for the purposes of this chapter, the focus will be on DIAC, the DIFC–LCIA and the Abu Dhabi Global Market (ADGM).

II THE YEAR IN REVIEW

i Creation of a Abu Dhabi-based, UNCITRAL-based arbitration seat

The Abu Dhabi Global Market is a financial free zone in the UAE for local, regional and international institutions. The ADGM operates under its own self-contained common law legal system, and therefore comparisons with the DIFC can be drawn. The ADGM officially opened in October 2015, as did the ADGM courts. The ADGM Arbitration Regulations (Regulations) were enacted by the ADGM on 17 December 2015, and allow parties to select the ADGM as their seat of arbitration even where there is no specific link to the ADGM.

The Regulations are modelled on the UNCITRAL Model Law on International Commercial Arbitration, and as such seek to implement best international arbitration practice and procedure. This facility for offshore arbitration provides competition for the DIFC, which has been offering such facilities since 2008. Unlike the DIFC, the ADGM does not have its own arbitration institution; however, the Regulations contain sufficient procedural detail for the arbitration process.

Significant features to note within the Regulations include the following:

a detailed procedural rules that will ensure the timely constitution of an arbitration tribunal in the event that the parties fail to agree upon a matter (Article 17);

b an option for parties to dispense entirely with the right to bring an action to set aside an arbitral award in the ADGM courts, which has the effect of making an award completely final with no process of appeal possible. This eliminates uncertainties with respect to potential local court interference;

c the Regulations confer the power upon the tribunal to award interim measures (Article 27);

d the Regulations provide for enhanced confidentiality and privacy, given the nature of the business that will be conducted in the ADGM and the prevailing culture of discretion in the region, which prohibit disclosure of not only the existence of the arbitration and the resultant arbitral award, but also any related court proceedings (Articles 30 and 40); and

e the Regulations empower the tribunal to determine the substantive law applicable to the dispute where the parties do not agree and to award any remedies available under the governing law on the merits (Articles 44 and 46).

The creation of this ADGM arbitration seat is a welcome development in the UAE, and the ADGM has the potential to become a popular choice for arbitration in the UAE. It will be interesting to see how it will compete against the DIFC, given that the DIFC already has a strong system in place that has the benefit of mutual cooperation with the Dubai courts to facilitate the enforcement of awards.

ii DIFC conversion of money judgments to arbitral awards

The DIFC courts have introduced, by way of a practice direction,[5] a new method by which parties can agree, subject to certain conditions, to have a DIFC court judgment converted into an arbitral award. This will result in the arbitral award being capable of enforcement in 152 states worldwide under the New York Convention.

The location of the judgment debtor's assets will, of course, affect such course of action. For example, if the debtor has assets in Dubai, the creditor will likely turn to the Dubai courts for enforcement. If there are no suitable enforcement remedies available, the debtor can turn to enforcement through arbitration.

If the judgment debtor has assets in another Gulf Cooperation Council (GCC) country, then the judgment creditor may wish to sue the DIFC court's judgment arising out of the arbitration award in the relevant GCC country in reliance on the mutual enforceability of court judgments in the GCC region under the GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications. The same considerations would apply if the judgment debtor has assets in a country with which the UAE has a treaty providing for the mutual recognition and enforcement of judgments.

The practice direction contains strict criteria that allow the parties to convert to litigation as follows:

a the judgment has taken effect in accordance with Part 36.30 of the Rules of the DIFC Courts 2016;

b the judgment is not in respect of any employment contract or consumer contract that is subject to Article 12 (2) of the Arbitration Law 2008, precluding arbitration of such contracts;

c the judgment is not subject to any appeal; and

d there is a dispute regarding a payment judgment.

5 Amended Practice Direction No. 2 of 2015 DIFC Courts.

The DIFC courts recommend using an arbitration clause to avail of this facility. This development is, of course, subject to its implementation by the arbitral tribunals and the cooperation of the relevant courts that are instructed in the enforcement of converted awards.

iii The new UAE Commercial Companies Law and arbitration

The new UAE Commercial Companies Law[6] came into force on 1 July 2015 and replaced the 1984 Law. Article 154 stipulates specific requirements in relation to the capacity of directors to bind a company to arbitration. Article 154 states:

> *The Board of Directors shall have all the powers specified in the Articles of Association of the company, other than as reserved by this Law or the Articles of Association of the company to the General Assembly. However, the Board of Directors may not enter into loans for a period in excess of three years, sell the property of the company or the store, or mortgage movable and immovable property of this company, discharge the debtors of the company from their obligations, make compromise or agree on arbitration, unless such acts are authorized under the Articles of Association of the company or are within the object of the company by nature. In cases other than these two ones, such acts require to issue a special resolution by the General Assembly.*

Consequently, a separate shareholders' resolution will be required if such express powers are not already provided in, for instance, the company's constitutional documents. The only difference between Article 154 and the corresponding Article 103 of the old Commercial Companies Law is that Article 154 requires 'a special resolution' whereas Article 103 required 'an approval from the General Assembly'. The new Law therefore maintains its restrictive approach in respect of companies' agreement to arbitration. Therefore, specific reference to the power to agree to arbitration is required in a company's articles of association. Alternatively, a special resolution will be required.

iv Developments affecting international arbitration

Issues surrounding the enforcement of foreign awards within the UAE still exist, even after the UAE's accession to the New York Convention, albeit to an ever-lessening degree. The difficulty is that the Code contains a provision allowing the UAE courts the right to refuse to execute a foreign judgment if it violates 'moral code or public order'.[7]

Dubai's desire to be regarded as a commercial hub and attractive to foreign nationals for the settlement of disputes through arbitration is demonstrated in the recent Dubai Court of Cassation decision of *Al Reyami Group LLC v. BTI Befestigungstechnik GmbH & Co KG*.[8] The Court upheld the enforcement of a foreign arbitral award on the basis of the New York Convention. The case is a promising sign that the Dubai courts are fully appreciating their role in the process of creating an environment that is attractive in terms of the recognition and enforcement of arbitral awards.

Some further measure of comfort can be taken from other Dubai court cases. For example, an application before the Dubai courts for the ratification of two related foreign

6 Federal Law No. 2 of 2015 replacing Federal Law No. 8 of 1984.

7 The UAE Civil Procedure Code, Federal Law No. 11 of 1992, Chapter IV, Article 235.

8 *Al Reyami Group LLC v. BTI Befestigungstechnik GmbH & Co KG* (Dubai Court of Cassation, 23 November 2014, Case No. 434/2014).

arbitral awards was allowed before a court of first instance in January 2011, and the awards were subsequently upheld by the Court of Appeal on 22 February 2012.[9] In particular, the Court of Appeal confirmed that, pursuant to the Federal Decree concerning accession to the New York Convention,[10] the courts may not reject the approval and execution of a foreign arbitral award unless a party can adduce proof to establish one of the grounds set out in Article V of the New York Convention for refusal of recognition of an award. In this particular case, the relevant ground relied upon by the party challenging ratification was the capacity of the signatory to the arbitration agreement to execute the agreement on behalf of the entity.

The positive trend continued in the *Airmec* case,[11] where the Dubai Court of Cassation categorically ruled on 18 September 2012 that foreign awards were only subject to its jurisdiction to the extent that they were in compliance with Federal Decree No. 43 of 2006.

While the overall trend has been positive, a recent Dubai Court of Appeal judgment, which came out in March 2016, has cast doubt on whether this progress is consistent. The decision demonstrates that in the absence of a system of binding precedents or a codified law of arbitration, the Dubai couts can arrive at conflicting decisions. In this case, between Fluor Transworld Services, a US-based company, and Petrixo Oil & Gas, a UAE company, the Dubai Court of Appeal refused to allow the enforcement of a New York Convention arbitration award on the basis that it was not satisfied that there was sufficient evidence that the UK was in fact a signatory to the New York Convention.

It should be noted that the UAE adopts a civil legal system; therefore, decisions of higher courts are of persuasive value only. Accordingly, the uncertainty of the ratification and enforcement process under UAE law (as opposed to DIFC law) will remain unless and until a complete and independent arbitration law comes into effect that properly addresses the current shortcomings. A draft Federal Law on Arbitration and Enforcement of Arbitral Awards (Draft Federal Arbitration Law) was released by the UAE Ministry of Economic Affairs, but has remained in 'draft' form for a number of years. Whether this new Federal Law, once finalised, rectifies the difficulties surrounding the ratification and enforcement of both domestic and foreign awards will depend on the terminology of the final version, and will only become apparent after it is implemented and the Law is put to the test.

v Arbitration developments in the local courts

There remains a great deal of uncertainty under the Code over the recognition and enforcement of arbitration awards in the local courts. The fear is that such awards will be refused on trivial and unpredictable grounds. A particular low point for arbitration in Dubai was the Court of Cassation's decision in the 2004 *International Bechtel Co* case.[12] The Court of Cassation, the UAE's highest civil court, annulled an arbitral award made two years earlier in Dubai in favour of the claimant on the grounds that the arbitrator had failed to swear witnesses in the manner prescribed by UAE law for court hearings.

9 Dubai Court of Appeal judgment (Case No. 126/2011), dated 22 February 2012.

10 Federal Decree No. 43 of 2006.

11 *Airmec v. Maxtel* (Cassation No 132/2012).

12 *International Bechtel Co. Ltd v. Department of Civil Aviation of the Government of Dubai*, 300 F Supp 2d 112[1] (DDC 2004).

In a 2012 case,[13] a DIAC arbitral award was nullified (and the validity of many other DIAC awards called into question) when the Dubai Court of Cassation held that Article 2 of Law No. 13 of 2008 Regulating the Interim Real Estate Register in the Emirate of Dubai is a matter of public policy, and as such, disputes in relation to Article 2 are under the exclusive jurisdiction of the Dubai courts, and are therefore not open to arbitration.[14]

The above examples highlight the importance for legal practitioners to consider, at the time of advising on or drafting an arbitration clause for a contract, whether a different forum (such as the DIFC-LCIA) may be a more attractive forum for their client. Similarly, once arbitration has already taken place, whether the enforcement and ratification of the arbitral award can be done through the DIFC to avoid the pitfalls of having the award recognised through the Dubai courts. DIAC revised and adapted its rules to meet international standards and best practice. The new rules were issued by Decree No. (11) of 2007 and are generally regarded as progressive. However, the DIAC rules in their current form do not appear to provide for the award of legal fees. The issue was raised in the Dubai Court of Cassation Case No. 282/2012, where the Court found that legal fees could only be awarded if the applicable procedural law allowed for the recovery of legal fees; the rules agreed to by the parties allowed for an award of costs of legal fees; or the power to award legal fees was contained in the arbitral agreement. The Court further held that neither the Code nor the DIAC rules confer the power to award legal fees on the arbitral tribunal. On the basis of that judgment, therefore, a successful party in DIAC arbitration proceedings may only be entitled to recover legal fees where such power is granted by the arbitration agreement or, possibly, if such power is contained in the terms of reference. Of course, it remains to be seen whether the Dubai courts will adopt this approach to interpreting the DIAC rules across the board.[15] The *Banyan Tree Corporate Pte Ltd v. Meydan Group LLC* case[16] established that an award issued by DIAC can be recognised as binding within the DIFC. The DIFC claim was brought by Banyan, a company incorporated in Singapore, which was seeking to have a DIAC arbitration award recognised as binding on the parties. The arbitration was in respect of the termination of a hotel services agreement between Banyan and Meydan Group LLC, a UAE-incorporated company. The DIFC court agreed with Banyan's submissions that none of the grounds warranting refusal to recognise or enforce the award had been made out, and ordered the defendant to pay the claimant's costs of issuing proceedings. The case is significant because it confirms that any arbitral award can be declared valid and enforced in the DIFC without the need to go to the Dubai court first. This bypasses the issues with the enforceability of the award traditionally encountered at Dubai court level where, pursuant to Part 3 of Book II of Federal Law No. 11 of 1992, judges have extensive powers to 'undo' the arbitral award. This is because unlike the Dubai courts, the DIFC court only considers whether the award is valid and enforceable. Pursuant to the memorandum of understanding

13 *Baiti Real Estate Development v. Dynasty Zarooni* (Appeal No. 14/2012, Real Estate Cassation).

14 Nassif BouMalhab and Susie Abdel-Nabi of Clyde & Co.

15 Karrar-Lewsley, Robert, Al Tamimi & Company: Recovering Legal Costs in DIAC Arbitrations, 2013.

16 *Banyan Tree Corporate Pte Ltd v. Meydan Group LLC* (ARB 003/2013).

(MOU) between the DIFC and Dubai courts,[17] any DIFC court judgment is enforceable in the Dubai court. Dubai Law No. 16 of 2011[18] sets out the procedure to be followed for an application for enforcement of a DIFC court order in the Dubai courts.

The 2014 judgment in the *X1 & X2 v. Y1 & Y2* case[19] further confirmed this. In this case, the claimants sought an order recognising and granting leave to enforce a foreign arbitral award obtained in their favour in arbitration with the defendants. The defendants issued an application that the arbitration award be set aside because the DIFC court had no jurisdiction to entertain the enforcement of the arbitration award, and sought costs. The claimants were companies incorporated outside the Emirate of Dubai, and the defendants were entities incorporated within the Emirate of Dubai but outside the DIFC. The court determined that, despite there being no 'obvious' connection to the DIFC, the DIFC had jurisdiction to make an order for the recognition of the arbitral award and enforce the award within the DIFC.

The *Banyan Tree Corporate Pte Ltd v. Meydan Group LLC* and *X1 & X2 v. Y1 & Y2* decisions make it clear that the DIFC court has the power and the jurisdiction to enforce arbitral awards in the DIFC irrespective of the nationality of the award, and that it is not necessary to first seek ratification of the award in the Dubai courts in order to enforce any arbitral award in the DIFC. Pursuant to the MOU between the DIFC and Dubai courts, that DIFC judgment is then enforceable in the Dubai court, meaning that parties can now efficiently and effectively circumvent the difficulties traditionally experienced in the recognition and enforcement of arbitral awards in the Dubai courts but still enforce the award in the Emirate of Dubai.

However, practitioners should be aware that the MOU between the DIFC and the Dubai courts does not necessarily mean that the enforcement of DIFC-LCIA arbitral awards in the Dubai courts is straightforward and quick. Under the current procedure, a new Dubai court application is required, and all available details of the assets against which enforcement is sought should be provided. The application must be signed before the Chief Justice of the Dubai Commercial Court. The documents must then be taken to the execution judge; however, at this stage the court will only accept the signature of a legal representative with rights of audience before the Dubai courts (or the individual or authorised signatory in person). The UAE has demonstrated efforts to encourage the settlement of disputes through methods of alternative dispute resolution by Law No. 19 of 2009 (ADR Law) establishing the Centre for Amicable Settlements of Disputes on 15 September 2009. An incentive to settle is provided to participants in the form of a refund of half of the upfront fees payable for registration of a dispute with the Centre upon the parties reaching settlement. If a settlement is reached, all parties must sign the settlement agreement. Article 12 of the ADR Law provides that a settlement agreement signed under the auspices of the Centre will be directly enforceable in the Dubai courts as a writ of execution.

17 Memorandum of Understanding between Dubai Judicial Institute and DIFC Authority entered into on 26 August 2010, available at difccourts.ae/memorandum-understanding-dubai-judicial-institute-difc-judicial-authority.

18 Dubai Law No. 16 of 2011 amends Dubai Law No. 12 of 2004.

19 *X1 & X2 v. Y1 & Y2* (ARB 002/2013).

As the UAE's approach to international and domestic arbitration under the UAE Code continues to evolve, many commercial contracts continue to be drafted subject to the arbitration rules of DIAC, the DIFC–LCIA and International Chamber of Commerce.

The DIFC enacted a DIFC Arbitration Law in 2008, being DIFC Law No. 1 of 2008 (2008 Law).[20] The 2008 Law provides a legislative platform for comprehensive dispute resolution and is based on the UNCITRAL Model Law. Other similarities include the application of the 2008 Law to both civil and commercial arbitrations (whether international or domestic), and the inclusion of provisions regarding enforcement and grounds for refusal to recognise or enforce an award. A major change to the 2008 Law is the elimination of jurisdiction limitations: parties are now allowed to seat their arbitration in the DIFC regardless of whether they have any connection with the DIFC.

The 2008 Law was also intended to simplify the process for recognition of an award by the DIFC courts and in turn enforcing an award inside or outside of the DIFC. Pursuant to Article 42(1) of the DIFC Court Law, an award once ratified by the DIFC court is enforceable within the DIFC. Following ratification by the DIFC court, a party may apply to have the ratification order converted to a Dubai court order, which will then be enforceable. These steps have been set out in the 2009 MOU between the Dubai courts and the DIFC courts and the related protocol of enforcement, the intention being to ultimately simplify the process of enforcement of DIFC awards in the Dubai courts.

The relatively recent DIFC court decision in *Injazat Capital Limited & 1 Or v. Denton Wilde Sapte & Co* (a firm),[21] however, caused some consternation within the legal community as to whether the 2008 Law failed to fully implement the terms of the New York Convention. In this case, the DIFC court held that Article 13 of the 2008 Law, which provides for a mandatory stay of court proceedings where there is a valid arbitration agreement, is only applicable to arbitration clauses where the seat of arbitration is the DIFC. Moreover, having considered the terms of Article 10 of the 2008 Law[22] and the 'detailed and precise' nature of the 2008 Law, His Honour Justice Sir David Steel went on to conclude, although reluctantly, that the court also had no discretion to order a stay of court proceedings where the seat of an arbitration agreement was not in the DIFC.

The issue arose again soon afterwards in the *International Electromechanical Services v. Al Fattan* case. However, in this instance, although the court also found no legislative basis for granting a stay in relation to foreign-seated arbitrations, it went on to find that the court had an inherent jurisdiction to stay proceedings in those circumstances.

These issues led to an amendment to the DIFC Arbitration Law in December 2013 to bring the Arbitration Law in line with the UAE's obligations under the New York Convention and which addressed the possibility for different treatment in determining a stay application for DIFC-seated and non-DIFC-seated arbitrations.

There has also been a recent judicial consideration of the time frame in which an award must be rendered by tribunals. In the 2013 *Middle East Foundations LLC v. Meydan*

20 The 2008 Law repealed Arbitration Law No. 8 of 2004.

21 *Injazat Capital Limited and Injazat Technology Fund BSC v. Denton Wilde Sapte & Co* (CFI 019/2010).

22 Article 10 of the 2008 Law: 'In matters governed by this Law, no DIFC Court shall intervene except to the extent so provided in this Law'.

Group LLC case,[23] the defendant sought to argue that an arbitral award should not be ratified because there had been multiple extensions of time for the issuing of the award granted by the DIAC's executive committee. The defendant accepted that the DIAC rules permit the executive committee to extend the deadline, but argued that this power was limited to one extension. The court of first instance agreed with the defendant and held that the award was invalid. The Court of Appeal determined that the executive committee's power to grant an extension of time for the arbitral tribunal to render its award could be exercised multiple times, provided that there are justifiable reasons for the extensions.

Finally, there is a peculiar requirement for practitioners to be aware of when dealing with federal government departments. Any federal government department that enters into an arbitration agreement must first obtain the approval of the Council of Ministers and the Ministry of Justice.[24] This does not necessarily extend to commercial entities that are partly government-owned or in which the government has invested, as demonstrated by the *Middle East Foundations LLC v. Meydan Group LLC c*ase, in which the Dubai Court of Appeal held that Meydan qualified as a private company despite being partly government-owned. The additional requirements were therefore not applicable.

A 2015 DIFC Court of Appeal case, *DNB Bank ASA v. Gulf Eyadah*,[25] significantly held that parties with or without assets in the DIFC can enforce a foreign judgment in the DIFC courts and take the resulting DIFC court judgment to the Dubai courts for execution. This decision results in a more efficient route for the execution of foreign judgments and arbitral awards in onshore Dubai.

At first instance, the judge found an abuse of process whereby a recognised foreign judgment could not be covered by Article 7(2) of the Judicial Authority Law.

However, on appeal it was found that the judgment sought to be enforced, and now recognised by the DIFC courts, had become an independent domestic judgment of the DIFC courts. Such judgment therefore came within the remit of Article 7(2), and could therefore be taken to the Dubai courts for execution.

This decision compliments the decision taken in *X1 & X2 v. Y1 & Y2* regarding ratified foreign arbitration awards that also allowed the DIFC courts to be utilised as a conduit jurisdiction. Although these decisions provide confirmation that this facility is available, it remains to be seen how the reality of enforcement plays out in the Dubai courts.

vi Investor–state disputes

Investor–state disputes were the focus of much attention in the post-crisis years. In November 2009 Dubai World, the Dubai state trading entity and holding company for property giant Nakheel, announced that it was unable to meet the repayment of its estimated US$60 billion debt.[26] In response to the Dubai World financial crisis, a special tribunal was set up in December 2009 by Decree No. 57 of 2009 (as amended by Decree No. 11 of 2010) to handle debt claims arising out of the reorganisation and restructuring of Dubai World

23 *Middle East Foundations LLC v. Meydan Group LLC* (Case No. 249 of 2013, Dubai Court of Appeal).

24 Council of Ministers Decision No. 406/2 of 2003.

25 *DNB Bank ASA v. Gulf Eyadah* (Case No. 007 of 2015 Dubai Court of Appeal).

26 Stephen McCormish and Dr Sam Luttrell, Enforcement of Contractual Rights in Dubai, p. 1 (2 December 2009), available at www.allens.com.au/pubs/arb/cuarb2dec09.htm.

and any of its subsidiaries (Tribunal). The Tribunal members currently comprise three senior international judges from the DIFC courts, Sir Anthony Evans (a former High Court judge of England and Wales and former Chief Justice of the DIFC courts), Michael Hwang (Chief Justice of the DIFC courts and a former judicial commissioner of the Supreme Court of Singapore) and Justice Sir John Chadwick (judge of the DIFC courts and a former judge of the Court of Appeal of England and Wales), who is a world-renowned bankruptcy and insolvency specialist.[27]

On 23 August 2011, by way of decree, Nakheel PJSC and all of its subsidiaries ceased to be subsidiaries of Dubai World. To allay the subsequent confusion as to the legal status of claims brought in the Tribunal, the Tribunal issued Practice Direction 3 of 2011, which, until further ruling, will govern any claims against Nakheel and its subsidiaries in the Tribunal. Matters already before the Tribunal as at 23 August 2011 will continue within the jurisdiction of the Tribunal. In the event of new claims, the Tribunal may require the would-be claimant to make an application to the Tribunal for the purpose of establishing whether jurisdiction exists. The jurisdictional question of the Tribunal is of great significance for investors in Nakheel and its subsidiaries, as most of those contractual disputes are subject to arbitration agreements, and it is widely accepted that the Tribunal has consistently offered a straightforward, efficient and predictable means of ratifying arbitral awards. Since its inception, a total of 92 cases with a total value of US$3.1 billion have been filed with the Tribunal, with four of these coming in 2014.[28] The vast majority of cases have now been resolved, which will be viewed positively by investors internationally.

Foreign investors may seek to commence investor–state arbitration under one of the UAE's 11 bilateral investment treaties (BITs). The vast number of BITs in force worldwide and their subsequent interlocking nature have made investor–state arbitration possible. By signing a BIT, the foreign investing party is afforded substantial protection for its investment under international law. Thus, depending on the terms of the BIT, an investor may have the option of enforcing an arbitral award in Dubai and against Dubai-owned assets elsewhere under the New York Convention or Washington Convention.[29]

The UAE is a signatory to the Washington Convention 1965, which established the International Centre for Settlement of Investment Disputes (ICSID). The ICSID Convention provides a comprehensive set of rules for the settlement of investment disputes, including several provisions that are clearly favourable to foreign investors. There is now greater awareness on the part of both foreign investors and governments about the investor–state dispute resolution process.

There have been a number of reported cases bought before ICSID arbitral tribunals against Arab states. Specifically in relation to the UAE, one of the most widely reported is the

27 Special Tribunal set up for Dubai World Disputes (14 December 2009): www.clydeco.com/insight/updates/view/special-tribunal-established-for-dubai-world-disputes.

28 Fifth Annual Report for the Special Tribunal to Decide the Disputes Related to the Settlement of the Financial Position of Dubai World and its subsidiaries (2014).

29 IIA Monitor No. 1 (2008): International investment agreements, available at www.unctad.org/en/docs/iteiia20083_en.pdf.

Soufraki case,[30] where a claim was bought against the UAE under the Italy–UAE BIT. The claimant's rights under the BIT and its right to submit a claim to ICSID were raised by the defence, but the claim was eventually rejected by ICSID in its entirety for lack of jurisdiction.

Cases such as *Soufraki* have contributed greatly to the development of case law on the determination of complex issues such as nationality under international law. In the *Soufraki* case, it was decided that the claimant had not proven that he held the Italian nationality necessary to claim under one of Italy's investment treaties.[31] Pursuant to figures published in 2008 by the United Nations Conference of Trade and Development relating to the latest developments in investor–state dispute settlements, there were two known investment treaty claims filed with ICSID by defendants against the UAE as of December 2007; these figures remain unchanged to date.[32]

Another notable developing trend is that for the first time in known investment treaty case history, an Arab company has initiated arbitration against another Arab state. The case, *Desert Line Projects LLC v. Republic of Yemen*,[33] involved an Omani company, Desert Line, which relied on the BIT between Oman and Yemen. Since the *Desert Line* case, a case involving an investor from the UAE against another Arab state was recently registered by ICSID in the matter of *MTN (Dubai) Limited and MTN Yemen for Mobile Telephones v. Republic of Yemen*.[34] The significance of such Arab-versus-Arab investment disputes demonstrates that actions pursuant to BITs are no longer dominated by investors from Western states. It shows that Arab investors have realised that they too can take advantage of these treaties to protect their investments abroad. It is also for these reasons that a greater understanding in the UAE is required by those wishing to rely on BITs in order that parties are fully aware of their responsibilities and liabilities under a BIT.

Alternatively, investors may bring litigation proceedings in Dubai and UAE federal courts, and consider enforcing judgments in Dubai and against Dubai-owned assets in other Gulf states under the Riyadh Convention on Judicial Cooperation 1983.

III OUTLOOK AND CONCLUSIONS

There has been much international focus on the UAE in recent times. The way in which the Dubai World Tribunal has dealt with investor disputes should instil some confidence in international and local investors that the systems that are in place can deal with potential claims efficiently and fairly. It is encouraging that the Dubai Court of Cassation is willing

30 *Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/07.

31 Anthony C Sinclair, associate, international arbitration group, Allen & Overy, Nationality Requirements for Investors in ICSID Arbitration The Award in '*Soufraki v. The United Arab Emirates*' (2004), available at www.italaw.com/documents/CommentonSoufraki.pdf.

32 IIA Monitor No. 1 (2008): International investment agreements, available at www.unctad.org/en/docs/iteiia20083_en.pdf; investmentpolicyhub.unctad.org/ISDS/CountryCases/220?partyRole=2.

33 ICSID Case No. ARB/05/17.

34 ICSID Case No. ARB/09/7; Dany Khayat, 'Investor–state disputes on the rise in the Arab world', p. 39, *Arbitration Newsletter* (March 2010).

to uphold a foreign arbitral award.[35] In addition, the key DIFC decisions of *Meydan* and *X1 & X2 v. Y1 & Y2* have established an easier way to enforce arbitral awards in the emirates, because ratification of DIAC awards can now take place through the DIFC courts. In addition, the recent DIFC Court of Appeal decision in *DNB Bank*, which should also extend to foreign arbitral awards, is welcome. However, it should be noted that certain obstacles to enforcement remain in relation to the Dubai courts' approach. The result is that we are likely to see an increased level of arbitrations in the UAE. The UAE is on the verge of being recognised as an international arbitration hub; however, challenges remain, and much will depend on the pending Draft Federal Arbitration Law, along with the success of arbitration centres such as DIAC, the DIFC–LCIA and the new arbitration seat in ADGM. For the newer arbitration centres, as well as for the government and legislative ministries, it will be a testing time of transition. The current developments have created high hopes for the future, with greater transparency, fairness and consistency in arbitration proceedings in the region. Only time will tell whether expectations are met.

The UAE is committed to arbitration, and has adopted a progressive approach to reforming and developing its practices and laws to successfully deal with international and domestic arbitration. The realisation that arbitration is both an effective and cost-saving dispute resolution alternative is evident from the recent revision of the DIAC rules, the joint venture between the DIFC and the LCIA, and the Draft Federal Arbitration Law.

The long-term goals of the UAE are for its continued economic growth and social development, and a legal system that can competently deal with both international and domestic arbitration cases, which will ultimately appeal to foreign and local investors. Recent decisions of the Dubai courts suggest that there is an appetite to bring arbitration practice in the UAE more directly in line with international best practice.

However, with the rise in the number of arbitration cases being heard in the UAE, a comprehensive arbitration law, which has been outstanding for a number of years, is needed now more than ever.

35 *Al Reyami Group LLC v. BTI Befestigungstechnik GmbH & Co KG* (Dubai Court of Cassation, 23 November 2014 Case No. 434/2014).

Appendix 1

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