



ARBITRATION IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE: A PROMISING LAW, BUT WILL IT TRAVEL WELL?

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The greatest advantage of international arbitration in the context of international contracts is undoubtedly its cross-border enforceability. As a consequence of its almost unique position as one of the few “cross-road” seats, being both a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Arab Convention on Judicial Co-operation (the Riyadh Convention), Dubai (as part of the United Arab Emirates) has always held a high appeal as an arbitral seat for those parties looking to enforce an arbitration award both in the Middle East and outside that region. However, an older arbitration law,¹ and a certain reticence in subjecting any award to the review of the (for many) unfamiliar UAE courts has put off many parties from making that selection. The recent establishment of the Dubai International Financial Centre (DIFC) arbitration law may serve to remove these concerns. But before everybody jumps on this new bandwagon, the question should be asked—is a DIFC award as extra-territorially enforceable as an award rendered in Dubai?

One of the greatest advantages of international arbitration is its cross-border enforceability—in other words, an award rendered in one country can be taken, with relative ease, to another country and enforced against the assets of a judgment creditor there. This is simply not true of almost all court judgments.² The principal source of this ease of enforcement is the 1958 New York Convention on the Recognition and Enforcement of

Foreign Arbitral Awards, which as at the date of writing now has 143 signatory states, following the accession of Rwanda to the treaty. The New York Convention provides for the recognition of all foreign arbitral awards provided they meet certain basic minimum standards (such as the award being in writing, and not contrary to public policy).

While awards rendered in Dubai would, in the normal course, fulfil these standards, western parties have generally felt a certain level of reluctance to seat their arbitrations there. The reasons for this are complex, but can be summarised thus: (i) a general fear of the unknown, particularly where the unknown for US or English parties also means exposure to the courts of a civil law jurisdiction; (ii) a lack of detailed precedent as to how the UAE courts determine challenges to arbitral awards, or as to its approach to questions of supporting or interfering with ongoing arbitrations; and (iii) a general reluctance of many corporate draftsmen to allow detailed (i.e. longer) arbitration clauses which are required to properly take advantage of the various options allowed under the UAE Civil Procedure Code sections dealing with arbitration.

However, matters have now changed. Under the powers granted by way of Federal Law 8 of 2004 concerning financial free zones, the Dubai International Financial Centre was created. The DIFC, as it is widely known, serves as a virtual jurisdiction for those wishing to conduct commerce within the UAE, subject not to the general UAE law but to a suite of laws based very heavily on that of England and Wales. In essence, the DIFC is a legal jurisdiction untied from geographical boundaries. The DIFC comes with its own court system (staffed by renowned common law judges) and has its own arbitration act.³ This arbitration law is based heavily on the UNCITRAL Model Law, and provides a modern, sophisticated and familiar framework for the conduct of international arbitrations. Accordingly, any concerns about arbitrating in Dubai can seemingly be resolved by selecting the DIFC as the seat of any arbitration⁴; or can they?

There is, of course, a catch, or at least a potential one (or perhaps two). The first relates to the question of cross-border enforcement under the New York Convention.

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1. There are currently proposals for a new federal arbitration law which will, once past, and if it retains its current proposed form represent a significant modernization of the UAEs' current regime and stand as one of the world's more sophisticated laws. For more details see: http://www.velaw.com/uploadedFiles/VEsite/Resources/White%20Paper%20-%20Analysis%20of%20the%20Draft%20UAE%20Arbitration%20Law-Loftis-2008_02_06.pdf [Accessed January 15, 2009].

2. The best step in this direction, the 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters has failed to win anything approaching wide support. As of November 14, 2008, the only signatories remain Cyprus, the Netherlands, Portugal and Kuwait.

3. DIFC Law 1 of 2008 (Arbitration Law).

4. As allowed under art.27 of the Arbitration Law.

While there are 143 signatory parties, 69 of these only joined the Convention on the reservation being made that they would only recognise foreign arbitral awards rendered in fellow signatory states. While the UAE acceded to the Convention in 2006 and accordingly awards rendered in, for example, Dubai would normally meet this reciprocity requirement, there is an open question as to whether a DIFC award, by itself, satisfies this requirement.

The other question, of a very similar nature, is whether such an award qualifies as an award made in the jurisdiction of a signatory party for the purposes of the Riyadh Convention. Given that many of the Arab League states are not parties to the New York Convention, the Riyadh Convention may well represent a foreign party's only avenue of enforcement, and accordingly certainty on this point is important.

Although some commentators and interested parties are very bullish as to the answers to these questions (see, for example, the FAQ's posted on the website of the DIFC-LCIA Arbitration Centre), the answer is seemingly not entirely clear. This is highly regrettable—there are few questions more important to potential claimants than, “just how enforceable is my award going to be?”.

A useful starting place is the question of whether a DIFC arbitration award is enforceable on its own terms in the UAE (this must be a likely clue to the broader question of whether it would be enforceable as an award rendered in the UAE abroad). The answer is no. Under the terms of Law 12 of 2004 in respect of the Judicial Authority at Dubai International Finance Centre, a DIFC arbitral award is not directly enforceable in the emirate courts. It must first be ratified by the DIFC courts, although thereafter the emirate courts have no jurisdiction to review the merits of the award.⁵ This is an important clue—if the award is not enforceable as an award in the UAE without confirmation of the DIFC Court, it would seem unlikely to be considered an award of the UAE for the purposes of the New York Convention/Riyadh Convention without such ratification either.

Article 44 of the Arbitration Law provides the grounds which a party seeking to block such a confirmation may rely on. This mostly mirrors the grounds set out in art.V of the New York Convention (e.g. incapacity, invalid agreement to arbitrate, excess of jurisdiction, improper constitution, absence of finality, subject matter not capable of settlement by arbitration, or the award being contrary to public policy). At best this sets up a two stage confirmation process. While normally a party seeking to enforce an award extra-territorially will only have to satisfy the New York Convention tests once (in the country they are seeking to enforce the award), they will now have to do it twice (once at the DIFC, and once in the country where they are seeking to enforce). Not only does this increase costs, but it will slow the enforcement process down, and will also give reluctant defendants a second bite at the cherry in terms of avoiding enforcement.

This is of course the best case (and in the author's, and clearly the DIFC-LCIA Arbitration Centre's, view the most likely case). However, even then it remains not absolutely clear that for the purposes of those signatories who have made a reciprocity reservation to their entry into the New York Convention that even a DIFC court confirmed award is sufficient. To assist in providing the necessary certainty on this point, it is suggested that the UAE should take the step of issuing a declaration under art.X of the New York Convention, specifically extending the ambit of the treaty to the DIFC. Such a move would aid certainty and would be entirely inline with the treatment the People's Republic of China has afforded to its own “special administrative regions” in the case of both Hong Kong and Macau. Equally, steps should also be taken to clarify the position under the Riyadh Convention.

In short the DIFC Arbitration Law represents a significant step forward in increasing Western investors' confidence and familiarity with arbitration in Dubai, but more could be done now in an attempt to avoid any enforcement fights down the road, the danger of which could depress enthusiasm for this new seat option.

5. Law 12 of 2004 art.7.