

FREE ZONE ARBITRATION: THE MECHANICS

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Abstract

This article examines the operation of free zone arbitration in the United Arab Emirates (UAE), with a focus on the arbitration capabilities offered through the Dubai International Arbitration Centre (DIFC) and the Abu Dhabi Global Market (ADGM). The UAE leads the way in free zone arbitration as a novel form of arbitration. In an attempt to highlight the unique characteristics of free zone arbitration, this article will look at the legislative, institutional and judicial mechanics of free zone arbitration. In doing so, it will, in particular, introduce the reader to free zone arbitration as a desirable new product offering on the arbitration landscape in the Middle East and more specifically, the UAE. It is seen that free zone arbitration facilitates the choice of common law style arbitration within a civil law environment, and encourages the interplay between, and the mutual integration of the civil and common law worlds to enable the unobstructed enforcement of free zone arbitration awards onshore.

I. Introduction

Free zone arbitration is a novel concept that has emerged in developing arbitration jurisdictions, particularly in the Middle East. Examples of it can be found in the Gulf countries, with the United Arab Emirates [“UAE”] leading the way. Other jurisdictions that are currently experimenting with the concept include Qatar and Bahrain. The UAE, however, is arguably the most advanced in having implemented free zone arbitration with the resolve to embed it in the existing civil law environment of the wider UAE and make it work as an additional product offering between the civil and common law worlds. In addition, the UAE has given rise to the concept of free zone arbitration in two separate Emirates- Dubai and Abu Dhabi. These are likely to enter into direct competition with each other in an attempt to attract a greater pool of users, thus providing further impetus to the development of free zone arbitration as a viable alternative to onshore arbitration, i.e. arbitration in mainland Dubai or mainland Abu Dhabi (or indeed elsewhere in the UAE).

The Dubai-based free zone, the Dubai International Financial Centre [“DIFC”], was founded in 2004,¹ and has since developed - to great international acclaim - into a mature common law jurisdiction. The Abu Dhabi-based free zone, the Abu Dhabi Global Market [“ADGM”], is a more recent creation² and is modelled on the design and experience of the DIFC. Both the DIFC and the ADGM are legal transplants of the English common law system into the UAE’s

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¹ The DIFC free zone was established by Dubai Law No. (3) of 2002 together with Federal Decree No. (35) of 2004, followed by Dubai Law No. (9) of 2004.

² See Abu Dhabi Law No. (4) of 2013 Concerning Abu Dhabi Global Market.

civil law environment. For this reason, the older DIFC has earned the sobriquet of ‘*a common law island in a civil law ocean*’.³

Given the nascent success of free zone arbitration in the UAE and its deep integration into the surrounding civil law environment, UAE free zone arbitration in particular lends itself as an object of study to examine the mechanics of free zone arbitration as a novel concept of arbitration. This also stands confirmed by the fact that the DIFC presently serves as a model for the establishment of a similar free zone in Kazakhstan, and that the DIFC Dispute Resolution Authority in particular has been asked to advise on the creation of this free zone jurisdiction referring to the design and experience of the DIFC.⁴

This article will take a closer look at the operation of the free zone jurisdictions in the UAE, with particular attention to the manner in which they have succeeded in adding to the existing arbitration landscape a new product offering in the shape of free zone arbitration. The article will examine, in some detail, the concept of free zone arbitration, the way it works and is meant to work in theory and practice. A better understanding of the (intended) mechanics of free zone arbitration will undoubtedly assist in distinguishing it from existing forms of arbitration and promote the role of free zone arbitration in the interplay between common and civil law.

II. Legislative Mechanics

Both the DIFC and the ADGM constitute autonomous judicial systems based on the common law. Each has its own courts as well as its own body of procedural and substantive laws.⁵ Whereas the DIFC has adopted its own laws based on an English common law blueprint, the ADGM has opted for the wholesale incorporation of the English statute and common law by reference.

A. The DIFC

Arbitration in the DIFC is governed by the DIFC Arbitration Law.⁶ The choice of the DIFC as the seat of arbitration⁷ will prompt the application of the DIFC Arbitration Law as the

³ A phrase coined by the present Chief Justice of the DIFC Courts, Michael Hwang SC. See Michael Hwang, Address at the Lawasia Conference, *The Courts of the Dubai International Finance Centre: A Common Law Island in a Civil Law Ocean* (Nov. 1, 2008).

⁴ See Philip Kim, *The Astana International Financial Centre: AIFC Court and International Arbitration Centre Legal Systems to be based on English Common Law*, KLUWER ARB. BLOG (Aug. 6, 2017), available at <http://arbitrationblog.kluwerarbitration.com/2017/08/06/astana-international-financial-centre-aifc-court-international-arbitration-centre-legal-systems-based-english-common-law/>.

⁵ See e.g., the DIFC Law of Contract and the DIFC Law of Obligations.

⁶ DIFC Law No. 1 of 2008 [*hereinafter* “DIFC Arbitration Law”]. For a commentary on the DIFC Arbitration Law, see Claudine Helou, *The New Arbitration Law of the “Dubai International Financial Centre”*, 1 J. ARAB ARB. 133 (2009).

⁷ Reference to ‘Dubai’ as the seat of arbitration in combination with the DIFC-LCIA Rules has been interpreted as meaning mainland or onshore Dubai (and not the DIFC), hence importing the application of the UAE Arbitration Chapter (i.e. the arbitration-relevant provisions of the UAE Civil Procedures Code) as the procedural law of the arbitration. See Claim no. CFI 011/2009 – Amarjeet Singh Dhir v. Waterfront Property Investment Limited and Linarus FZE (Grounds of Decision of the DIFC Court of First Instance, July 8, 2009). For a detailed article-by-article commentary on the UAE Arbitration Chapter, see GORDON BLANKE, ANNOTATED GUIDE TO ARBITRATION IN THE UAE – VOLUME I: THE UAE ARBITRATION CHAPTER (2014), electronically accessible on Westlaw Gulf; and more recently GORDON BLANKE, COMMENTARY ON THE UAE ARBITRATION CHAPTER (2017). More recent case law developments appear to intimate, however, that this distinction may after all not be as clear-cut: See CFI 020/2016 – Brookfield Multiplex Constructions LLC v. (1) DIFC Investments LLC (2) Dubai International Financial Centre Authority (Ruling of the DIFC Court of First Instance, July 28, 2016). For commentary, see

procedural law of the arbitration. The DIFC Arbitration Law makes detailed provision for the conduct of arbitration proceedings in the DIFC, from the constitution of the arbitral tribunal to the recognition and enforcement as well as the annulment of awards. It is largely modelled on the UNCITRAL Model Law⁸ and makes provision for the discrete procedural intervention of the DIFC Courts in their supervisory and supportive capacity in aid of DIFC-seated arbitrations. For the avoidance of doubt, under the DIFC Arbitration Law, arbitration clauses in consumer and employment contracts are only enforceable in exceptional circumstances, for instance, where there is *ex post facto* written consent or a DIFC Court order to that effect.⁹ Importantly in this context, the proper scope of arbitration within the DIFC was controversial for some time with some arguing for,¹⁰ and others against the possibility of resolving by arbitration in the DIFC, disputes that have no link with and are hence unrelated to the DIFC.¹¹ That said, it is generally understood that this controversy has now been settled in favour of the DIFC arbitration through the widening of the scope of application of the DIFC Arbitration Law in its revised version of 2008, read with the expansion of the jurisdiction of the DIFC Courts beyond the strict confines of the DIFC by virtue of Article 5(A)(2) of the amended Judicial Authority Law.¹²

Apart from the DIFC Arbitration Law, it bears mentioning that following an initiative of the Chief Justice of the DIFC Courts, Michael Hwang SC, the DIFC Courts have issued Practice Direction No. 2/2015¹³ [**“PD 2/2015”**], which allows parties to convert a DIFC Court money judgment into an arbitral award¹⁴ in order to enable enforcement under the New York

Gordon Blanke, *Dubai Courts v. DIFC Courts: interim measures and anti-suits*, KLUWER ARB. BLOG (Oct. 7, 2016), available at <http://kluwerarbitrationblog.com/2016/10/07/difc-courts-v-dubai-courts-arbitration-interim-measures-anti-suits/>; and Interview by R. Matthews with Gordon Blanke, *Considering the powers of the DIFC court*, LEXISNEXIS PSL (Aug. 12, 2016). Note also the confusion caused by CFI 017/2015 – Emirates NBD Bank PJSC v. Infospan Gulf Inc. (Ruling of the DIFC Court of First Instance, Apr. 3, 2016), with commentary by Gordon Blanke, *The scope of the DIFC Courts’ curial jurisdiction in support of arbitration: A step too far?*, KLUWER ARB. BLOG (Apr. 24, 2016), available at <http://kluwerarbitrationblog.com/2016/04/24/the-scope-of-the-difc-courts-curial-jurisdiction-in-support-of-arbitration-a-step-too-far/>.

⁸ U.N. Comm. on Int’l. Trade Law, UNCITRAL Model Law on International Commercial Arbitration, U.N.G.A. Res 40/72 (Dec. 11, 1985), as amended by U.N.G.A. Res 61/33 (Dec. 18, 2006) UN Doc A/RES/61/33.

⁹ DIFC Arbitration Law, art. 12(2). See also CFI 012/2014 – Pierre-Eric Daniel Bernard Lys v. Elseco Limited (Ruling of the DIFC Court of First Instance, Dec. 11, 2014), in which the Court refused to grant leave for an application for an order to disapply Article 12(2) in relation to an employment contract given the late stage in the proceedings at which the application was made.

¹⁰ See, e.g., Sir Anthony Evans, former Chief Justice, Address to the IBA Mediation Committee, Dubai, *Dispute Resolution in the DIFC* (Feb. 16, 2009), at 15 *et seq.*

¹¹ See Habib Al Mulla, *The DIFC arbitration: Awards facing challenges*, GULF NEWS (Nov. 20, 2008), basing his argument on the constitutional limits of the jurisdiction granted to the DIFC as a free zone by the Ruler of Dubai. According to Al Mulla, awards rendered in the DIFC (including DIFC-LCIA awards) in violation of these constitutional limits are likely to remain unenforceable outside the DIFC before the onshore Dubai or UAE Courts.

¹² See, e.g., Jitheesh Thilak, *Extension of Jurisdiction of DIFC Courts and its Impact on Arbitration in the Middle East*, 8(2) ASIAN INT’L ARB. J. 161 (2012).

¹³ DIFC Court Practice Direction No. 2/2015 on the Referral of Judgment Payment Disputes to Arbitration [*hereinafter* “PD 2/2015”]. For further detail, see Gordon Blanke, *DIFC Courts Practice Direction No. 2 of 2015: Adopted at Last!*, KLUWER ARB. BLOG (Mar. 31, 2015), available at <http://kluwerarbitrationblog.com/blog/2015/03/31/difc-courts-practice-direction-no-2-of-2015-adopted-at-last/>.

¹⁴ For further detail, see Gordon Blanke, *DIFC Court Practice Direction on the conversion of DIFC Court judgments into DIFC-LCIA awards goes full steam ahead!*, KLUWER ARB. BLOG (Nov. 23, 2014), available at <http://kluwerarbitrationblog.com/blog/2014/11/23/difc-court-practice-direction-on-the-conversion-of-difc-court-judgments-into-difc-lcia-awards-goes-full-steam-ahead/>; Gordon Blanke, *The DIFC and arbitration: Raising the stakes?*, KLUWER ARB. BLOG (July 20, 2014), available at <http://kluwerarbitrationblog.com/blog/2014/07/20/the-difc-and->

Convention.¹⁵ PD 2/2015 is “*the first of its kind globally*”¹⁶ and “*an experiment without parallel in arbitration history*”.¹⁷ The workability of the mechanism envisaged by PD 2/2015 in practice will ultimately depend on its proper implementation by arbitral tribunals and the receptiveness of international courts that are seized of the recognition and enforcement of DIFC judgment-converted-awards.¹⁸ To date, PD 2/2015 has remained untested. That said, PD 2/2015 (as amended) contains some commentary on how the Direction is intended to operate, which sets out how enforcement of a DIFC payment judgment before the competent courts and in arbitration may complement each other. In the terms of PD 2/2015 (as amended):¹⁹

- A. The judgment creditor has the option either to litigate or to arbitrate (as long as the arbitration has not commenced).
- B. The judgment creditor would opt to litigate before arbitration if the judgment debtor has assets in Dubai, a common law country, a Gulf Cooperation Council [“GCC”] country and/or another country with which the UAE has a treaty providing for mutual recognition and enforcement of judgments.
- C. If the judgment debtor does not have assets in Dubai, a common law country, a GCC country and/or a country with which the UAE has a bilateral or multilateral treaty on recognition and enforcement of judgments (or if the above step proved to be unsuccessful), the judgment creditor would commence arbitration.

In the last scenario, it is likely that the vast majority of signatory countries to the New York Convention will uphold this arbitration clause, and the arbitration award could then be enforced in almost all of the 157 countries that have acceded to the New York Convention.

For the avoidance of doubt, only practice will ultimately tell whether the intended objective of PD 2/2015 will be achieved over time.

B. The ADGM²⁰

The ADGM has adopted a stand-alone arbitration law called the 2015 ADGM Arbitration Regulations which is based on the UNCITRAL Model Law. These regulations apply as curial law

arbitration-raising-the-stakes-2/; See also Interview by N. Laver with Gordon Blanke, *Enforcing DIFC court payment judgments*, LEXISNEXIS PSL (Apr. 30, 2015).

¹⁵ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, of 1958 (June 10, 1958), 330 U.N.T.S. 38.

¹⁶ See Press Release, DIFC, Another Innovative World First for DIFC Courts (Feb. 25, 2015), available at <http://difccourts.ae/another-innovative-world-first-difc-courts/>.

¹⁷ As per Chief Justice Michael Hwang, DIFC Court Lecture, *The DIFC Courts Judgment-Arbitration Protocol – Referral of Judgment Payment Disputes to Arbitration* (Nov. 19, 2014).

¹⁸ Also referred to as a ‘judgmaward’, borrowing the terminology of Jeremy Winter from personal discussions with the author.

¹⁹ Amended DIFC Courts Practice Direction No. 2 of 2015 – Referral of Judgment Payment Disputes to Arbitration DIFC COURTS, available at <https://www.difccourts.ae/2015/05/27/amended-difc-courts-practice-direction-no-2-of-2015-referral-of-judgment-payment-disputes-to-arbitration/>.

²⁰ For initial insights, see Gordon Blanke, *Arbitration in the Abu Dhabi Global Market: Ready, Steady, Go ...!*, KLUWER ARB. BLOG (Feb. 7, 2016), available at <http://kluwerarbitrationblog.com/2016/02/07/arbitration-in-the-abu-dhabi-global-market-ready-steady-go/>; Gordon Blanke, *Arbitrating in the ADGM: Some further thoughts and considerations*, KLUWER ARB. BLOG (Mar. 10, 2016), available at <http://kluwerarbitrationblog.com/2016/03/10/arbitrating-in-the-adgm-some-further-thoughts-and-considerations/>.

to arbitration seated in the ADGM. The 2015 ADGM Arbitration Regulations, on their own, contain sufficient procedural detail to avoid major difficulties in commencing the arbitration process and irretrievable breakdown once the process is afoot, governing such matters as the constitution of the tribunal, the challenge of arbitrators, the procedural formalities of an ordinary arbitration process, the privacy and confidentiality of the arbitration, and the nullification and enforcement of awards.

More importantly, the scope of arbitration in the ADGM is more limited when compared to arbitration in the DIFC. Unlike in the DIFC, future arbitrating parties cannot contract to resolve *any* disputes by arbitration in the ADGM: arbitrating in the ADGM instead requires a subject-matter nexus to it. This essentially means that arbitration in the ADGM is limited to (i) the resolution of civil or commercial disputes involving the ADGM or its stakeholders (i.e. ADGM authorities or establishments) or to (ii) the resolution of disputes arising out of a contract or a transaction conducted in whole or in part in the ADGM or out of an incident that occurred in the ADGM.²¹

DIFC arbitration therefore remains an attractive option for parties that wish to arbitrate in a common law environment in the Middle East. However, the scope of arbitration in the ADGM is likely to expand as the ADGM is settling in and establishing itself as a new free zone jurisdiction within the UAE.

III. Institutional Mechanics

A number of arbitration centres have settled in the free zones, and they offer their services for the institutional administration of free zone arbitration. Both the DIFC and the ADGM host arbitration centres that provide a credible and tested framework for institutional arbitrations seated there. For the avoidance of doubt, DIFC- and ADGM-seated arbitration centres are also available for administering arbitrations seated outside the free zones subject to party agreement. That said, the focus here is on the use of the institutional frameworks of the DIFC or ADGM in free zone arbitration in particular.

Before looking at the working of individual free zone arbitration centres in further detail, an introduction of the Arbitration Institute seems relevant.²² By way of background, an amendment to Dubai Law No. (9) of 2004, concerning the Dubai International Financial Centre²³, was issued by the Ruler of Dubai on May 21, 2014,²⁴ establishing the so-called ‘Dispute Resolution Authority [“**DRA**”], which is headed by Chief Justice Michael Hwang SC, the current President of the DIFC Courts. The DRA operates in the DIFC and is essentially comprised of the DIFC Courts and the Arbitration Institute.²⁵ The Arbitration Institute is vested with separate legal personality and may sue and be sued in this capacity.²⁶ It operates on an independent budget and

²¹ See Law No. (4) of 2013 Concerning Abu Dhabi Global Market, arts. 6-7.

²² For contemporaneous commentary, see Gordon Blanke, *DIFC introduces Arbitration Institute*, KLUWER ARB. BLOG (June 4, 2014), available at <http://kluwerarbitrationblog.com/blog/2014/06/04/difc-introduces-arbitration-institute/>.

²³ As previously amended by Dubai Law No. 14 of 2011.

²⁴ Referred to as Dubai Law No. (7) of 2014 (Amending the Law of the Dubai International Financial Centre No. (9) of 2004).

²⁵ Dubai Law No. (7) of 2014, art. 3.

²⁶ *Id.* art. 8(1).

exercises its functions independently from the DIFC Courts and other DIFC bodies.²⁷ The main duties of the Arbitration Institute include (i) 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 mechanisms [“**ADR**”]; (ii) the preparation and issuance of rules and procedures required for regulating the administration of arbitration, mediation, and other forms of ADR; and (iii) entering into co-operation and joint venture agreements with any local, regional, or international centre specialized in arbitration and ADR.²⁸ The DRA Academy of Law, which forms part of the DRA²⁹, also dispenses training courses and conferences to promote arbitration practice in the DIFC. In particular, the DRA Academy of Law has created a so-called bridge series, which is composed of a number of lectures on the various legislative sources of the DIFC/Dubai legal system and seeks to bridge the gap between practice in the common and civil law worlds, i.e. onshore Dubai and the offshore DIFC.³⁰

A. The DIFC-LCIA

The DIFC is home to the DIFC-London Court of International Arbitration [“**DIFC-LCIA**”]. The DIFC-LCIA, founded in 2008,³¹ administers arbitrations under the DIFC-LCIA International Rules of Arbitration³² (which are modelled on the Rules of Arbitration of the LCIA) in association with the London-based LCIA, or alternatively serves as an appointing or challenging authority in *ad hoc* arbitral proceedings.³³ In order to stay ahead of the competition, the DIFC-LCIA has recently re-launched³⁴ and published a revised set of Rules to keep up with the 2014 amendments to the LCIA Rules.³⁵

The DIFC-LCIA primarily draws upon the list of arbitrators of the LCIA. In addition to the registration fees,³⁶ the DIFC-LCIA charges for its administrative services on an hourly basis.³⁷ Arbitrators’ fees are also computed on an hourly-rate basis.³⁸ The parties are free to opt for a

²⁷ *Id.* art. 8(2).

²⁸ *Id.* art. 8(5).

²⁹ For further detail, see DRA Academy of Law, available at <http://www.draacademy.ae>.

³⁰ For further detail, see *id.*

³¹ By virtue of DIFC Arbitration Law No. 1 of 2008.

³² The Rules are electronically available on the official website of the DIFC-LCIA at http://www.difcarbitration.com/arbitration/rules_clauses/.

³³ DIFC-LCIA Rules, art. 23.

³⁴ See Gordon Blanke, *The DIFC-LCIA Arbitration Centre re-launches in new location: Bound for a brighter future?*, KLUWER ARB. BLOG (Nov. 20, 2015), available at <http://kluwerarbitrationblog.com/2015/11/20/the-difc-lcia-arbitration-centre-re-launches-in-new-location-bound-for-a-brighter-future/>; Mohamed El Ghatit, *DIFC-LCIA: The Relaunch*, in 83(1) ARBITRATION, SPECIAL FOCUS ON MIDDLE EASTERN AND NORTH AFRICAN ARBITRATION, 29-34 (Gordon Blanke ed., 2017).

³⁵ See Gordon Blanke, *DIFC-LCIA revised rules: one year on*, PRACTICAL LAW (Oct 24, 2017). For an initial discussion, see Gordon Blanke, *Arbitration in the UAE: End of Year Round-up – From the Penal Sanctioning of Arbitrators to the 2016 DIFC-LCIA Rules of Arbitration (Part 1)*, KLUWER ARB. BLOG (Jan. 17, 2017), available at <http://kluwerarbitrationblog.com/2017/01/17/arbitration-in-the-uae-end-of-year-round-up-from-the-penal-sanctioning-of-arbitrators-to-the-2016-difc-lcia-rules-of-arbitration-part-1/>.

³⁶ AED 10,000, non-refundable and to be paid separately for claims and counterclaims. See DIFC-LCIA Rules, Schedule of Arbitration Costs, cl. 1(i).

³⁷ This is set at AED 1,500 for Registrar/Deputy and Registrar/Counsel and AED 1,000 for other DIFC-LCIA Secretariat personnel.

³⁸ See DIFC-LCIA Rules, Schedule of Arbitration Costs. The fees depend on the charge-out rate of the individual arbitrator, subject to a cap of AED 2,250.

sole arbitrator or a three-member tribunal of their choice,³⁹ provided the nominated individuals are independent and impartial.⁴⁰ The default place of arbitration is the DIFC.⁴¹ The language of arbitration will be English subject to the parties' agreement otherwise.⁴² Importantly, the revised set of Rules in 2016 also makes provision for the appointment of an emergency arbitrator,⁴³ consolidation⁴⁴ and the appointment and conduct of legal representatives⁴⁵.

It may be clarified here that the choice of the DIFC-LCIA Rules as the governing institutional rules of an arbitration does not require the arbitration to be seated in the DIFC. Parties may contract into the application of the DIFC-LCIA Rules irrespective of the location of the seat of the arbitration, whether within the DIFC or within the UAE (but outside the DIFC) or indeed outside the UAE. This also means that parties may choose to submit an arbitration seated in mainland, i.e. onshore Dubai (or outside the UAE) to the application of the DIFC-LCIA Rules.

B. The DIFC-DIAC

The Dubai International Arbitration Centre [**"DIAC"**], the onshore arbitration institution of the Emirate of Dubai, has recently opened a branch in the DIFC.⁴⁶ This is believed to assist the DIAC in offering its users a credible common law alternative to arbitrating in onshore Dubai. With this objective in mind and in order to stay abreast of the competition, including in particular the DIFC-LCIA, the 2007 DIAC Rules are presently undergoing a revision and will most likely be amended to include a DIFC-specific model clause, which will allow DIAC users to contract into arbitrations seated in the DIFC and governed by the DIFC Arbitration Law with the DIFC Courts as the curial courts.⁴⁷

In support of its move offshore, the DIAC has also signed a Memorandum of Understanding with the DRA (which comprises both the DIFC Academy of Law and the DIFC Courts) [**"DIAC-DRA MoU"**].⁴⁸ The DIAC-DRA MoU envisages co-operation between the DIAC and the DRA on different levels, including the development and dispensation of joint training programs to the legal profession in the Middle East, joint marketing of services, organisation of joint conferences and seminars, and joint research and academic writing.⁴⁹ Most importantly, the

³⁹ DIFC-LCIA Rules, art. 5(8).

⁴⁰ *Id.* art. 5(3).

⁴¹ *Id.* art. 16(2).

⁴² *Id.* art. 17.

⁴³ *Id.* arts. 9B *et seq.*

⁴⁴ *Id.* art. 22.

⁴⁵ *Id.* art. 18.

⁴⁶ See Gordon Blanke, *The DIAC goes offshore: Strategic move or promotional ploy?*, KLUWER ARB. BLOG (June 6, 2016), available at <http://kluwerarbitrationblog.com/2016/06/06/the-diac-goes-offshore-and-the-proverbial-proof-of-the-pudding/>.

⁴⁷ In the alternative, DIAC arbitrations may be default-seated in the DIFC.

⁴⁸ Memorandum of Understanding Between Dubai International Arbitration Centre and DIFC Dispute Resolution Authority For Mutual Cooperation Including Enhancing the Recognition and Enforcement of DIAC Arbitration Awards by the DIFC Courts and regarding Training, Research and Developments of Programmes, For the benefit of the Legal Community in the Middle East, (Sept. 20, 2016), available at <https://www.difccourts.ae/2016/09/25/memorandum-understanding-diac-dra/>. For commentary, see Gordon Blanke, *DIAC and DRA sign MoU to promote enforcement of DIAC awards by the DIFC Courts: A second look*, KLUWER ARB. BLOG (Nov. 12, 2016), available at <http://kluwerarbitrationblog.com/2016/11/12/diac-and-dra-sign-mou-to-promote-enforcement-of-diac-awards-by-the-difc-courts-a-second-look/>.

⁴⁹ See DIAC-DRA MoU, in particular, ¶ II.A.b.

DIAC and the DRA are to focus their co-operation on the enhancement of the enforcement of DIAC awards within the DIFC (and possibly through the DIFC Courts in their capacity as conduit courts – subject, of course, to the limitations of the DIFC Courts’ conduit jurisdiction status as discussed in section IV. C. iii below).⁵⁰ It is presently unknown what form such an enhancement is intended to take and to what extent the present proven status of the DIFC Courts, as a conduit jurisdiction for the ratification and enforcement of DIAC awards, is capable of improvement in the light of the envisaged strands of co-operation with the DIFC-based DIAC. Taken in the round, the DIAC-DRA MoU is anticipated to have positive effects on the relations between onshore and offshore Dubai in matters of arbitration. It is hoped that the various forms of co-operation between the DIAC and the DRA will promote the complementarity of civil and common law in an arbitration offered in the UAE, hence further enhancing the choice for arbitration available to contracting parties.

C. The EMAC

The Emirates Maritime Arbitration Centre [**“EMAC”**] is a specialised maritime arbitration centre established in April 2016⁵¹ that seeks to establish Dubai as a maritime dispute resolution hub in the Middle East. The EMAC aims to “*enhance maritime arbitration procedures to be more impartial and just*” and to “*disseminate the culture of maritime arbitration locally, regionally and internationally*”.⁵² The EMAC administers disputes both under the EMAC Arbitration Rules or any other rules elected by the parties, seeks co-operation with other regional and/or international arbitration centres and has established a roster of maritime arbitrators for appointment in EMAC arbitration.⁵³

The EMAC Arbitration Rules⁵⁴ came into effect on June 23, 2016.⁵⁵ These constitute a modern set of arbitration rules that combine the best of other leading international arbitration rules, and

⁵⁰ See *id.* in particular, ¶ II.A.a: “*The Parties have agreed to enter into this MOU in order to execute, consult, cooperate and exchange information with each other in areas of mutual interest that will further enhance their respective strategic interests and objectives, specifically: 1. the expedited recognition, ratification and/or enforcement of DIAC arbitration awards by the DIFC Courts. For this purpose, the Parties will exchange information regarding the applicable procedures, rules, regulations and laws (including the DIFC Courts’ Rules Part 45) relevant to the recognition, ratification and/or enforcement of a DIAC award by the DIFC Courts. The [P]arties will work together to identify ways to ensure parties electing to arbitrate under the DIAC rules/deciding to include the model clause in a contract, are aware of the options available to them in Dubai when determining the seat of arbitration. In addition, the Parties will discuss with each other the possibility of amending the current DIAC rules for consideration by the Board of Trustees of DIAC to include provisions for the expedited recognition, ratification and enforcement of DIAC arbitral awards by the DIFC Courts. [...]*”.

⁵¹ Decree No. (14) of 2016 establishing the Emirates Centre for Maritime Arbitration, including *inter alia* the Statute of the EMAC; For some history on the establishment of EMAC, see Gordon Blanke, *Dubai announces plans to establish Emirates Maritime Arbitration Centre: Do they hold water?*, KLUWER ARB. BLOG (Oct. 2, 2014), available at <http://kluwerarbitrationblog.com/blog/2014/10/02/dubai-announces-plans-to-establish-emirates-maritime-arbitration-centre-do-they-hold-water/>; Gordon Blanke, *The EMAC finally established: Welcome on board!*, KLUWER ARB. BLOG (June 4, 2016), available at <http://kluwerarbitrationblog.com/2016/06/04/the-emac-finally-established-welcome-on-board/>.

⁵² Statute of Emirates Maritime Arbitration Centre, art. 2.

⁵³ *Id.* art. 3.

⁵⁴ The Rules are electronically accessible on the official website of EMAC at <http://www.emac.org.ac/en/EMACRules/ArbitrationRules>.

⁵⁵ For initial commentary, see Gordon Blanke, *Arbitration in the UAE: End of Year Round-up – From Apparent Authority and shipping arbitration under the EMAC Rules to Kompetenz-Kompetenz under the DIFC Arbitration Law (Part 2)*, KLUWER ARB. BLOG (Jan. 18, 2017), available at <http://kluwerarbitrationblog.com/2017/01/18/arbitration-in-the-uae-end-of-year-round-up-from-apparent-authority-and-shipping-arbitration-under-the-emac-rules-to-kompetenz-kompetenz-under-the-difc-arbitration-law-part-2/>.

contain provisions such as the appointment of an emergency arbitrator,⁵⁶ an extensive arsenal of interim measures⁵⁷ and a fast-track procedure⁵⁸ that may be of particular assistance in the resolution of maritime disputes. Most importantly for present purposes, arbitrations under the EMAC Rules are, by default, seated in the DIFC.⁵⁹ This will import the efficiencies of the DIFC Courts in their role as curial courts into EMAC arbitrations.

D. The ADGM-ICC⁶⁰

According to a recent press release,⁶¹ with effect from January 1, 2018, the International Chamber of Commerce [“ICC”] International Court of Arbitration is set to open a representative office in the ADGM. The establishment of the ICC in the ADGM will add to arbitrations in the ADGM an institutional dimension that will facilitate the administration of ADGM-seated arbitrations under the ICC Rules of Arbitration. For the avoidance of doubt, the ADGM-ICC will be the first and only arbitration institution with a presence in the ADGM.

The new ADGM-ICC will only operate as a representative office and will not be a full-service outfit of the size found at the ICC headquarters in Paris. That said, the ADGM-ICC will be able to process requests of arbitration with the assistance of the existing MENA case management teams of the ICC in Paris, which will remain in charge of the full administration of an individual reference. Importantly, the office will have state-of-the-art hearing facilities, which will offer a neutral ground for holding hearings under the ICC Rules in ADGM-seated arbitrations.

IV. Judicial Mechanics

In free zone arbitration – like in any other type of arbitration, judicial support is usually required to aid the smooth conduct and development of the arbitration process and/or to ensure the enforcement of a resultant arbitral award. For the avoidance of doubt, the on- and offshore courts enjoy a special relationship in that, constitutionally speaking, they form part of the same family of courts. In other words, there is no hierarchy between the mainland and free zone courts. From a constitutional perspective, the Dubai/Abu Dhabi and DIFC/ADGM Courts – even though representing different legal traditions form an integral part of the UAE legal system and hence qualify as UAE Courts. Both the DIFC and the ADGM Courts are English-speaking and staffed by arbitration-experienced common-law judges with long-standing judicial experience in their respective home jurisdictions. Further, the DIFC Courts have two resident local judges with the ability to provide a civil law perspective to the exercise of curial functions performed by the DIFC Courts in order to facilitate the proper integration of the DIFC Courts into the wider civil law environment. This, no doubt, provides comfort to foreign users of

⁵⁶ EMAC Arbitration Rules, art. 12.

⁵⁷ *Id.* arts. 28-29.

⁵⁸ *Id.* art. 50.

⁵⁹ *Id.* art. 20(1).

⁶⁰ For initial commentary, see Gordon Blanke, *ICC Moves Offshore: Clash of the Titans?*, KLUWER ARB. BLOG (Aug. 11, 2017), available at <http://kluwerarbitrationblog.com/2017/08/11/scheduled-icc-adgm-arbitration-gordon-blanke/>. For the avoidance of doubt, the ADGM-ICC is housed at the ADGM Arbitration Centre. The state-of-the-art hearing facilities may be used for any arbitration, whether or not seated in the ADGM or whether or not administered by the ICC.

⁶¹ See *ICC Court to establish MENA office in UAE*, NEWS, ICC INTERNATIONAL CHAMBER OF COMMERCE (June 26, 2017), available at <https://iccwbo.org/media-wall/news-speeches/icc-court-establish-mena-representative-office-uae/>.

arbitration who are not familiar with the onshore UAE court system and Arabic, which is the official language in UAE Courts.

A. DIFC Court Support⁶²

Choice of the DIFC as the seat of arbitration will prompt the role of the DIFC Courts as the curial courts of the arbitration.⁶³ In their capacity as curial courts, the DIFC Courts are accorded the usual supportive functions in relation to the course of the arbitration proceedings and have the jurisdiction to hear actions for the setting aside of DIFC awards and the enforcement of international and DIFC awards in the DIFC.⁶⁴

The DIFC Courts' powers to assist with interim relief in their capacity as curial courts only apply to arbitrations seated in the DIFC or arbitrations that are, more generally, subject to the DIFC Arbitration Law. Under the DIFC Arbitration Law, the DIFC Courts are expressly empowered to default-appoint arbitrators,⁶⁵ determine challenges of arbitrators,⁶⁶ and take evidentiary measures in support of the arbitration.⁶⁷ Other than that, the DIFC Courts have, in principle, wide powers to award interim relief in support of ongoing arbitration proceedings,⁶⁸ which mirror their powers within the context of litigious proceedings.⁶⁹ These include anti-suit injunctions,⁷⁰ freezing orders,⁷¹ orders for assistance in taking evidence,⁷² search orders,⁷³ orders for interim payment⁷⁴ and orders for security for costs.⁷⁵ In a couple of instances to date, the DIFC Court was asked to exercise its powers in an application for a freezing injunction within the framework of DIFC-LCIA arbitration proceedings,⁷⁶ as well as in relation to the

⁶² For a detailed analysis, see Gordon Blanke, *Court-Ordered Interim Relief in the United Arab Emirates*, in INTERIM AND EMERGENCY RELIEF IN INTERNATIONAL ARBITRATION 811 *et seq.* (Diora Ziyaeva et al eds., 2015); Gordon Blanke & Khalil Mechantaf, *United Arab Emirates*, in INTERIM MEASURES IN INTERNATIONAL ARBITRATION 795, 837 *et seq.* (Lawrence W. Newman & Colin Ong eds., 2014).

⁶³ However, recent case law precedent suggests that the curial competence of the DIFC Courts may be determined by reference to the proper subject-matter competence of the DIFC Courts: See CFI 017/2015 – Emirates NBD Bank PJSC v. Infospan Gulf Inc. (Ruling of the DIFC Court of First Instance, Apr. 3, 2016).

⁶⁴ DIFC Arbitration Law, arts. 41-44.

⁶⁵ *Id.* art. 17.

⁶⁶ *Id.* art. 19.

⁶⁷ *Id.* art. 34.

⁶⁸ See, e.g., CFI 036/2014 – Vannin Capital PCC PLC v. (1) Al Khorafi and Others (Ruling of the DIFC Court of First Instance, Feb. 18, 2015); Amended Order of the DIFC Court of First Instance of April 18, 2016.

⁶⁹ See DIFC Arbitration Law, art. 24(3), pursuant to which the DIFC Court have “*the same power of issuing an interim measure in relation to arbitration proceedings [...] as [they have] in relation to proceedings in court.*” For the full range of interim measures that are available in DIFC Court proceedings, see Rules of the DIFC Courts, pt. 25, 25.1. [*hereinafter* “RDC”].

⁷⁰ For confirmation, see, in particular, Justice David Williams, *The Supervisory Role of the DIFC Courts in Arbitration Matters Including the Recognition and Enforcement of Awards*, DIFC LECTURE SERIES 2010 ¶¶ 1.16 *et seq.* (Nov 1, 2016).

⁷¹ RDC, pt. 25, 25.33-25.36.

⁷² DIFC Arbitration Law, art. 34.

⁷³ RDC, pt. 25, 25.37 *et seq.*

⁷⁴ *Id.* pt. 25, 25.73 *et seq.*

⁷⁵ *Id.* pt. 25, 25.97 *et seq.* read together with DIFC Court Law No.10 of 2004, art. 46(1) [*hereinafter* “DIFC Court Law”].

⁷⁶ See Claim no. CFI 011/2009 – Amarjeet Singh Dhir v. Waterfront Property Investment Limited and Linarus FZE, (Grounds of Decision of the DIFC Court of First Instance, July 8, 2009) and Claim no. CFI 012/2009 – Five River Properties LLC and Renaissance Holdings and Developers FZE v. Waterfront Property Investment Limited and Linarus FZE (Grounds of Decision of the DIFC Court of First Instance, July 8, 2009), even though both applications were unsuccessful on the ground that the DIFC Court found that it did not have jurisdiction as the seat of the arbitration was (onshore) Dubai, and not the (offshore) DIFC.

appointment of a sole arbitrator in a DIFC-LCIA arbitration.⁷⁷ Recent case law⁷⁸ also confirms that DIFC Courts have the power to grant an anti-suit injunction, i.e. an injunction to protect a party's negative right not to be sued in a court in violation of an agreement to arbitrate, even where the arbitration is not seated in the DIFC. Equally, the DIFC Courts have confirmed that the appointment of an expert pursuant to Article 68 of the UAE Law of Evidence is compatible with an arbitration procedure seated in the DIFC.⁷⁹ It may be clarified that interim measures adopted by the Dubai/DIFC Courts benefit from the regime of mutual recognition and enforcement in force between the Dubai and DIFC Courts and are hence enforceable before the DIFC/Dubai Courts respectively.⁸⁰

In addition, the DIFC Courts have more recently confirmed their competence to entertain actions for recognition and enforcement of Dubai International Arbitration Centre (DIAC) awards issued in mainland Dubai, i.e. outside the DIFC, and of foreign arbitral awards, e.g. under the New York Convention. Further, Article 13 of DIFC Arbitration Law has recently been amended to bring it in line with the requirements of the New York Convention.⁸¹ Of late, the DIFC Courts' status as a conduit jurisdiction has also been extended to the recognition and enforcement of foreign judgments.⁸² That said, these more recent developments have now come under the scrutiny of the Dubai-DIFC Joint Judicial Committee.⁸³

⁷⁷ See Case no. CFI 004/2010 – Injazat Capital Limited v. Optimiza Solutions (Al Faris National Company for Investment & Export), (DIFC Court of First Instance, Order of 22/03/2010).

⁷⁸ CFI 020/2016 – Brookfield Multiplex Constructions LLC v. (1) DIFC Investments LLC (2) Dubai International Financial Centre Authority (Ruling of the DIFC Court of First Instance, July 28, 2016). For commentary, see Gordon Blanke, *Dubai Courts v. DIFC Courts: interim measures and anti-suits*, KLUWER ARB. BLOG (Oct. 7, 2016), available at <http://kluwerarbitrationblog.com/2016/10/07/difc-courts-v-dubai-courts-arbitration-interim-measures-anti-suits/>.

⁷⁹ *Id.*

⁸⁰ See Dubai DIFC Prot No. 999 of 2009 and Law No. (12) of 2004 in respect of the Judicial Authority at Dubai International Financial Centre as amended, art. 7 [*hereinafter* "Judicial Authority Law as amended"].

⁸¹ For contemporaneous commentary, see Gordon Blanke, *Amendment to DIFC Arbitration Law brings DIFC into line with the New York Convention*, KLUWER ARB. BLOG (Jan. 12, 2014), available at <http://kluwerarbitrationblog.com/blog/2014/01/12/amendment-to-difc-arbitration-law-brings-difc-into-line-with-the-new-york-convention/>; Gordon Blanke, *Dubai Court confirms jurisdiction to stay proceedings in favour of foreign arbitrations: Nothing more to fear ... and further lessons to be learnt*, KLUWER ARB. BLOG (Jan. 30, 2013), available at <http://kluwerarbitrationblog.com/blog/2013/01/30/dubai-court-confirms-jurisdiction-to-stay-proceedings-in-favour-of-foreign-arbitrations-nothing-more-to-fear-and-further-lessons-to-be-learnt/>. For relevant background case law, see Claim No. CFI 019/2010 - Injazat Capital Limited and Injazat Technology Fund B.S.C. v. Denton Wilde Sapte & Co (Ruling of DIFC Court of First Instance, Mar. 6, 2012); and Claim No. CFI 004/2012 - International Electromechanical Services Co. LLC v. (1) Al Fattan Engineering LLC and (2) Al Fattan Properties LLC, (Ruling of DIFC Court of First Instance, Oct. 14, 2012).

⁸² See CA 007/2015 – DNB Bank ASA v. (1) Gulf Eyadah Corporation (2) Gulf Navigation Holdings PJSC, (Ruling of the DIFC Court of Appeal, Feb. 25, 2016), reversing the previous ruling of the DIFC Court of First Instance in CFI 043/2014 – DNB Bank ASA v. (1) Gulf Eyadah Corporation (2) Gulf Navigation Holding PJSC (Ruling of the DIFC Court of First Instance, July 2, 2015). For contemporaneous commentary, see Gordon Blanke, *Enforcement of foreign judgments v. enforcement of foreign awards: The limits of the DIFC Courts' role as host jurisdiction revisited*, KLUWER ARB. BLOG (Mar. 7, 2016), available at <http://kluwerarbitrationblog.com/2016/03/07/enforcement-of-foreign-judgments-v-enforcement-of-foreign-awards-the-limits-of-the-difc-courts-role-as-a-host-jurisdiction-revisited/>; Gordon Blanke, *Enforcement of foreign judgments v. enforcement of foreign awards: The limits of the DIFC Courts' role as a host jurisdiction*, KLUWER ARB. BLOG (Aug. 10, 2015), available at <http://kluwerarbitrationblog.com/blog/2015/08/10/enforcement-of-foreign-judgments-v-enforcement-of-foreign-awards-the-limits-of-the-difc-courts-role-as-a-host-jurisdiction/>. See also Mischa Balen, *Using the DIFC's Off-Shore Jurisdiction to Enforce Arbitration Awards in On-Shore Dubai*, 82(3) ARBITRATION 233 (2016).

⁸³ For further discussion, see section IV. C. iv *infra*.

B. ADGM Court Support

ADGM Court support in arbitration is mirrored on the support offered by the DIFC Courts in aid of arbitration. It deserves emphasis that curial intervention by ADGM Courts is kept to a minimum, supporting the unobstructed course of the arbitral process and facilitating the enforcement of a resultant award,⁸⁴ its functions including in particular (i) the default-appointment of the tribunal and/or a substitute arbitrator;⁸⁵ (ii) the determination of a preliminary point of jurisdiction;⁸⁶ (iii) the power to order interim measures in support of the arbitration;⁸⁷ and (iv) assistance in taking evidence.⁸⁸ Given the pro-arbitration origin of the ADGM judiciary, it can be expected that the ADGM Courts' supportive and supervisory powers will be exercised *in favorem arbitrandi*.

C. Recognition and Enforcement

Recognition and enforcement of domestic and foreign arbitral awards play an important role in free zone arbitration before both the DIFC and ADGM Courts. Apart from the mechanics of enforcement, there is a question as to the mutual recognition of the respective judicial instruments of the onshore UAE and offshore free zone courts, which is required to allow these to move freely between onshore and offshore courts.

i. Domestic Awards

In their capacity as supervisory courts, the DIFC Courts will not undertake a review on the merits. The legal basis for recognition and enforcement of domestic awards before the DIFC Courts is Article 42 of the DIFC Arbitration Law, pursuant to which "... awards [ratified] by the DIFC Court may be enforced within the DIFC in this Law and in the manner prescribed [in the Rules of Court] [i.e. the RDC]".⁸⁹ Article 42(1) of the DIFC Arbitration Law confirms the DIFC Courts' obligation to "recognise ... as binding within the DIFC ... an arbitral award" whether international or domestic⁹⁰ and to "enforce [it] upon application in writing ...". The RDC, in essence, requires an award creditor to file an application for recognition and enforcement before the DIFC Courts (including an *ex parte* application). The award debtor, in turn, will be entitled to appeal against any order for recognition and enforcement issued by the DIFC Courts with the DIFC Court of Appeal having the final word on whether or not an order for recognition and enforcement stands confirmed or is ultimately set aside. Grounds for refusing recognition and enforcement of an arbitral award by the DIFC Courts are confined to those set out in Article 44 of the DIFC Arbitration Law and as such are restrictive, echoing the grounds for refusal in the New York Convention and supporting the general arbitration-friendliness of the DIFC Courts. In a recent case, the DIFC Courts refused to set aside a DIFC-LCIA award and, relying instead on the

⁸⁴ ADGM Arbitration Regulations, 2015, arts. 11-12.

⁸⁵ *Id.* arts. 18 *et seq.*

⁸⁶ *Id.* art. 26.

⁸⁷ *Id.* art. 29.

⁸⁸ *Id.* art. 43.

⁸⁹ DIFC Arbitration Law, art. 42(4).

⁹⁰ That is "irrespective of the State of jurisdiction in which it was made", i.e. inside/outside the DIFC or abroad.

doctrine of apparent authority, held that the underlying arbitration agreement was validly executed (whether under DIFC or UAE law).⁹¹

Given the procedural uncertainties prevalent in the ratification process under Article 215 of the UAE Arbitration Chapter and the seemingly formalistic approach the UAE Courts have taken in the interpretation of Article 216 of the UAE Arbitration Chapter,⁹² a recent ruling of the DIFC Court of Appeal⁹³ has, in principle,⁹⁴ confirmed the DIFC Courts' role as a host jurisdiction for the recognition of domestic awards for onward execution in onshore Dubai by virtue of the wide scope of Article 42(1) of the DIFC Arbitration Law, even in the absence of a geographic nexus with the DIFC (for instance, even without the presence of assets of the award debtor in the DIFC).⁹⁵ The DIFC Courts have also confirmed their view that their role as a conduit jurisdiction does not create any constitutional conflict⁹⁶ or raise concerns of public policy⁹⁷.

The ADGM Courts deal similarly with the question of recognition and enforcement of arbitral awards, both domestic and foreign.⁹⁸ The grounds for refusal of enforcement of an award under the 2015 Arbitration Regulations are identical to those under the DIFC Arbitration Law.

⁹¹ See Claim No. XXXX – GINETTE PJS v. (1) GEARY MIDDLE EAST FZE (2) GEARY LIMITED (Order of the DIFC Court of First Instance, Apr. 7, 2016).

⁹² On the difficulties of domestic ratification and enforcement under the UAE Arbitration Chapter, see GORDON BLANKE, COMMENTARY ON THE UAE ARBITRATION CHAPTER 156-170 (2017).

⁹³ See Case CA-005-2014 (Ruling of the DIFC Court of Appeal, Nov. 3, 2014), affirming the ruling of the DIFC Court of First Instance in Case No. ARB 003/2013 - BANYAN TREE CORPORATE PTE LTD v. MEYDAN GROUP LLC (Ruling of the DIFC Court of First Instance, May 27, 2014). For contemporaneous commentary, see Gordon Blanke, *DIFC Court of Appeal confirms the DIFC's status as host jurisdiction for recognition of domestic awards*, KLUWER ARB. BLOG (Nov. 11, 2014), available at <http://kluwerarbitrationblog.com/blog/2014/11/11/difc-court-of-appeal-confirms-the-difcs-status-as-host-jurisdiction-for-recognition-of-domestic-awards/>; Kartikey Mahajan & Kanishka Singh, *DIFC as host jurisdiction of domestic awards outside the DIFC*, 17(4) INT'L ARB. L. REV. N20-N22 (2014); Gordon Blanke, *DIFC Court of First Instance confirms its status as host jurisdiction for recognition of both domestic and foreign awards*, KLUWER ARB. BLOG (June 7, 2014), available at <http://kluwerarbitrationblog.com/blog/2014/06/07/difc-court-of-first-instance-confirms-its-status-as-host-jurisdiction-for-recognition-of-both-domestic-and-foreign-awards/>; For earlier considerations, see also Gordon Blanke, *Enforcement of New York Convention Awards in the UAE (Part II): The DIFC as "host" jurisdiction?*, KLUWER ARB. BLOG (Sept. 2, 2012), available at <http://arbitrationblog.kluwerarbitration.com/2012/09/04/enforcement-of-new-york-convention-awards-in-the-uae-part-ii-the-difc-as-host-jurisdiction/>. For the sequel in *Banyan Tree*, see Gordon Blanke, *ARB 003/2013: The DIFC Court of First Instance's Sequel in Banyan v. Meydan*, KLUWER ARB. BLOG (July 19, 2015), available at <http://kluwerarbitrationblog.com/blog/2015/07/19/arb-0032013-the-difc-court-of-first-instances-sequel-in-banyan-v-meydan/>.

⁹⁴ Note that the proceedings in relation to the onward enforcement of the DIFC Court order ratifying the DIAC award are currently pending before the Dubai Courts.

⁹⁵ In light of the analogical ruling of Sir John Chadwick in Case No. ARB 002/2013 - (1) X1, (2) X2 v. (1) Y1, (2) Y2 (DIFC Court of First Instance), this wide interpretation of Article 42(1) of DIFC Arbitration Law will possibly also apply to the enforcement of domestic arbitration awards without any geographic connection to the DIFC.

⁹⁶ See Case ARB 001/2014 – (1) X1 (2) X2 v. (1) Y, (Order of the Dubai Court of First Instance, Jan. 5, 2014). For commentary, see Gordon Blanke, *DIFC Court of First Instance dismisses application for referral to USC of purported constitutional conflict between UAE Civil Procedures Code and Dubai Judicial Authority Law and DIFC Arbitration Law*, KLUWER ARB. BLOG (July 22, 2015), available at <http://kluwerarbitrationblog.com/blog/2015/07/22/difc-court-of-first-instance-dismisses-application-for-referral-to-usc-of-purported-constitutional-conflict-between-uae-civil-procedures-code-and-dubai-judicial-authority-law-and-difc-arbitration-law/>.

⁹⁷ See Case No. XX – (1) X1 (2) X2 v. (1) Y1 (2) Y2 (Ruling of the DIFC Court of First Instance, July 29, 2015), with comments by Gordon Blanke, *Host jurisdiction status of DIFC Courts not contrary to UAE public policy*, KLUWER ARB. BLOG (Sept. 5, 2015), available at <http://arbitrationblog.kluwerarbitration.com/2015/09/05/host-jurisdiction-status-of-difc-courts-not-contrary-to-uae-public-policy/>.

⁹⁸ ADGM Arbitration Regulations, 2015, arts. 55-57.

ii. *Foreign Awards*

Albeit largely untested, enforcement of foreign awards before the DIFC Courts is anticipated to be a matter of formality in the terms of the New York Convention.⁹⁹ This is in particular so given the DIFC Courts' wide enforcement obligations under Article 42(1) of the DIFC Arbitration Law. Due to the anticipated ease with which enforcement of foreign awards is expected to operate in the DIFC, recourse to the DIFC Courts as an intermediate or host jurisdiction may arguably be a reliable way to circumvent the residual risk of the UAE judiciary's reliance on the by now obsolete Article 235 of the UAE Civil Procedures Code¹⁰⁰ in the enforcement of foreign awards in the UAE.¹⁰¹ This also stands confirmed by the ruling of the DIFC Court of First Instance in Case No. ARB 002/2013 – (1) X1, (2) X2 v. (1) Y1, (2) Y2,¹⁰² confirming its competence to hear applications for the recognition of foreign arbitration awards within the DIFC without the need for a (geographic) connection to the DIFC¹⁰³ (although the DIFC's role as a conduit has anew come under scrutiny more recently)¹⁰⁴.

The 2015 ADGM Arbitration Regulations contain detailed provisions on recourse against, and the recognition and enforcement of a resultant award.¹⁰⁵ The grounds for nullification and refusal to enforce, essentially echo those of the New York Convention, and are thus restrictive in content and scope. Importantly, public policy as a ground for nullification or refusal of enforcement is to be understood in line with the terms prevailing in the UAE.¹⁰⁶ Further, under the Regulations, the parties may waive their right to bring a nullification action.¹⁰⁷

By virtue of Article 42(1) of the DIFC Arbitration Law and Article 55(2) of the 2015 ADGM Arbitration Regulations,¹⁰⁸ the courts in the free zones are bound by a number of international conventions that put in place a regime of reciprocity for the recognition and enforcement of arbitration agreements and arbitral awards between the UAE and the other convention countries. These include in particular the New York Convention,¹⁰⁹ the GCC Convention,¹¹⁰ and

⁹⁹ See, e.g., Case No. ARB 005/2014 – A v. B, (Order of Justice Sir David Steel of the DIFC Court of First Instance, May 11, 2015) (unpublished), with comments by Gordon Blanke, *DIFC Court of First Instance supports enforcement of foreign ICC award against a non-DIFC award debtor*, KLUWER ARB. BLOG (Aug. 31, 2015), available at <http://kluwarbitrationblog.com/blog/2015/08/31/difc-court-of-first-instance-supports-enforcement-of-foreign-icc-award-against-a-non-difc-award-debtor/>. In this case, the DIFC Court of First Instance ordered immediate enforcement of an ICC award rendered in Paris (despite pending challenge proceedings in France) given that there was not a sufficient chance of success of the pending appeal proceedings.

¹⁰⁰ On which, see in further detail, BLANKE (2017), *supra* note 7.

¹⁰¹ See Blanke (Sept. 2012), *supra* note 93.

¹⁰² Case No. ARB 002/2013 – (1) X1, (2) X2 v. (1) Y1, (2) Y2 (Ruling of the DIFC Court of First Instance). For the avoidance of doubt, the DIFC Court of First Instance's ruling has remained unchallenged and is therefore final. The issue of DIFC enforcement in the given context therefore remains untested before the DIFC Court of Appeal. That said, analogical developments in relation to the recognition of domestic (non-DIFC) awards have been confirmed by the DIFC Court of Appeal in Case CA-005-2-14 (Ruling of the DIFC Court of Appeal, Nov. 3, 2014), affirming the ruling of the DIFC Court of First Instance in Case No. ARB 003/2013 - Banyan Tree Corporate PTE Ltd v. Meydan Group LLC (Ruling of the DIFC Court of First Instance, May 27, 2014).

¹⁰³ See Case No. ARB 002/2013 - (1) X1, (2) X2 v. (1) Y1, (2) Y2 (Ruling of the DIFC Court of First Instance), ¶¶ 5 & 41.

¹⁰⁴ For further detail on this, see section IV. C. iv. below.

¹⁰⁵ ADGM Arbitration Regulations, 2015, arts. 53 *et seq.*

¹⁰⁶ *Id.* arts. 53(2)(b)(ii) & 57(1)(b)(ii).

¹⁰⁷ *Id.* art. 54.

¹⁰⁸ To the same effect, see ADGM Courts Regulations, art. 170.

¹⁰⁹ The UAE acceded to the New York Convention in 2006.

the Riyadh Convention.¹¹¹ Bilateral conventions of importance include those concluded with Egypt,¹¹² France,¹¹³ India,¹¹⁴ Jordan,¹¹⁵ Morocco,¹¹⁶ Somalia,¹¹⁷ Sudan,¹¹⁸ Syria,¹¹⁹ and Tunisia.¹²⁰ In addition, there are a number of bilateral investment treaties (BITs)¹²¹ and regional investment agreements¹²² that may benefit the DIFC- or ADGM-incorporated or -resident investors in actions for compensation for frustrated investments in qualifying host States.¹²³

iii. Free Onshore/Offshore Movement of Awards

For free zone arbitration to function properly, it requires a strong link to the surrounding civil law environment, in particular when it comes to the execution of arbitration awards against assets of award debtors onshore.

a. Dubai-DIFC

¹¹⁰ Entered into force in 1996.

¹¹¹ Entered into force in 1999.

¹¹² Legal and Judicial Cooperation Agreement Between the Governments of United Arab Emirates and Arab Republic of Egypt, Egypt-UAE (2000), ratified domestically by UAE Federal Decree No. (83) of 2000.

¹¹³ Convention on Judicial Cooperation and the Recognition and Enforcement of Judgments in Civil and Commercial Matters Between United Arab Emirates and France, Fr.-UAE (1992), ratified domestically by UAE Federal Decree No. (31) of 1992.

¹¹⁴ Agreement of the Legal and Judicial Cooperation in Civil & Commercial Matters and Mutual Legal Assistance in Criminal Matters and the Extradition of Criminals Agreement between the Government of the United Arab Emirates and the Government of the Republic of India, India-UAE (2000), ratified domestically by UAE Federal Decree No. (33) of 2000.

¹¹⁵ Legal and Judicial Cooperation Agreement Between Hashemite Kingdom of Jordan and United Arab Emirates, Jordan-UAE (1999), ratified domestically by UAE Federal Decree No. (106) of 1999.

¹¹⁶ Agreement on Judicial Cooperation in Criminal Matters, Extradition of Offenders, Cooperation in Civil, Commercial and Personal Status (Family) Matters Between the Government of the United Arab Emirates and the Kingdom of Morocco, Morocco-UAE (2006), ratified domestically by UAE Federal Decree No. (57) of 2006.

¹¹⁷ Legal and Judicial Cooperation Agreement on the civil and commercial articles, articles of personal status and penal articles between the United Arab Emirates and the Somali Democratic Republic, Som.-UAE (1982), ratified domestically by UAE Federal Decree No. (95) of 1982.

¹¹⁸ Treaty on Mutual Legal Assistance in Criminal Matters, Extradition of Offenders, Cooperation in Civil, Commercial and Personal Status Matters, Service of Judicial and Extrajudicial Documents, Obtaining Evidence, Commissions and the Recognition and Enforcement of Foreign Judgments and Arbitral Awards Between the Government of United Arab Emirates and the Government of the Republic of Sudan, Sudan-UAE (2005), ratified domestically by UAE Federal Decree No. (8) of 2005.

¹¹⁹ Convention of Juridical and Judicial Cooperation between the Government of the United Arab Emirates and the Government of the Syrian Arab Republic, Syria-UAE (2002), ratified domestically by UAE Federal Decree No. (60) of 2002.

¹²⁰ Agreement of the Judicial Cooperation, Execution of Judgments and Extradition of Criminals Agreement between the UAE and the Tunisian Republic, Tunis.-UAE (1975), ratified domestically by UAE Federal Decree No. (32) of 1975.

¹²¹ For a full list, see Gordon Blanke & Khalil Mechantaf, *United Arab Emirates*, GAR INV. ARB. KNOW-HOW, available at https://globalarbitrationreview.com/digital_assets/03091ec7-a6d5-48f2-895d-ae22d4df7edd/ita2016-uae.pdf.

¹²² Including in particular, the Unified Agreement for the Investment of Arab Capital in the Arab States (1980); the Washington Convention on the Settlement of the Investment Disputes between States and Nationals of Other States (1965); and the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of Islamic Cooperation (1986).

¹²³ For further detail on the recognition and enforcement of investment arbitration awards in the UAE, including more specifically the DIFC, see Gordon Blanke & Soraya Corm-Bakhos, *The Enforcement of International Commercial and Investment Arbitration Awards in the MENA Region*, in 83(1) ARBITRATION, SPECIAL FOCUS ON MIDDLE EASTERN AND NORTH AFRICAN ARBITRATION 71, 79-80 (Gordon Blanke ed., 2017); and Gordon Blanke, *Recognition and enforcement of domestic and foreign arbitral awards in the Middle East*, in TRANSNATIONAL CONSTRUCTION ARBITRATION: KEY THEMES IN THE RESOLUTION OF CONSTRUCTION DISPUTES 139, 11.71 *et seq.* (Renato Nazzini ed., 2017).

In order to facilitate the free movement of judicial instruments, including arbitral awards, between the onshore Dubai Courts and the offshore DIFC Courts, the Ruler of Dubai has established a regime of mutual recognition between the two. The proper functioning of this regime presupposes a measure of trust between the Dubai and DIFC Courts, whereby both refrain from examining the merits of a court order issued by the respective other ratifying an arbitral award and declaring it fit for execution. That said, there has been little practice in the co-operation in recognition and enforcement of ratified awards between the Dubai and DIFC Courts. However, professionals involved at first hand, such as Mark Beer OBE, the Head Registrar of the DIFC Courts, are reported to have confirmed that there are no concerns with the mutual recognition of awards between the Dubai and the DIFC Courts¹²⁴ and that DIFC ratified awards are readily enforceable and have, in fact, been readily enforced by the Dubai Courts. To the best of this author's knowledge, there has to date been only one officially reported precedent demonstrating the Dubai Courts' ready disposition to enforce an award ratified by the DIFC Courts,¹²⁵ in addition to the various decisions of the Dubai-DIFC Joint Judicial Tribunal discussed in section IV. C. iv below.

The legal basis for this co-operation in the recognition and enforcement of domestic awards is Article 7 of the Judicial Authority Law as amended. Article 24(1) of the DIFC Court Law authorises the DIFC Court of First Instance to “ratify ... any ... award of any recognised ... Courts of Dubai and United Arab Emirates ...”¹²⁶ and make “orders for the purposes of any subsequent application for enforcement in the courts of Dubai”.¹²⁷ Article 42(2) of the DIFC Court Law, in turn, confirms in this context that “awards ... ratified by the DIFC Court may be enforced outside the DIFC in accordance with the Judicial Authority Law”. Articles 7(2) to 7(5) of the Judicial Authority Law as amended more specifically set out the various conditions that must be fulfilled for an award ratified by the DIFC Courts to be enforced before the Dubai Courts and *vice versa*. These are: (i) the award must be final and executory;¹²⁸ (ii) it must be legally translated into Arabic (Arabic being the official working language of the Dubai Courts);¹²⁹ and (iii) it must bear the executory formula¹³⁰ of the DIFC Courts¹³¹. Article 7(3) of the Judicial Authority Law as amended lays down the

¹²⁴ See Jayanth K. Krishnan & Priya Purohit, *A Common Law Court in an Uncommon Environment: The DIFC Judiciary and Global Commercial Dispute Resolution*, 25(3-4) AM. REV. OF INT'L ARB. (2014), various footnoted comments by Mark Beer. More skeptical, however, are international practitioners more generally, *id.* at 9-11.

¹²⁵ See Property Concepts FZE v. Lootah Network Real Estate & Commercial Brokerage, D-L9008, ARB 001/2010, *in DIFC Courts and Dubai Courts achieve new arbitration enforcement landmark*, DIFC COURTS (Mar. 29, 2011), available at <http://difccourts.ae/29-march-2011-difc-courts-and-dubai-courts-achieve-new-arbitration-enforcement-landmark/>; To the same effect, see also Ghada Qaisi Audi, *Dubai Courts approve execution of DIFC Courts-ratified award*, 6(2) GLOBAL ARB. REV. (April 2011).

¹²⁶ DIFC Court Law, art. 24(1)(b).

¹²⁷ *Id.* art. 24(1)(1)(e).

¹²⁸ Judicial Authority Law as amended, art. 7(2)(a).

¹²⁹ *Id.* art. 7(2)(b).

¹³⁰ The executory formula reads as follows: “Authorities must take the initiative to enforce this document and assist in implementing it even forcefully whenever requested to.”, See Shamlan Al Sawalehi & Natasha Bakirci, *Enforcement Guidelines: Enforcing DIFC Court Judgments and Orders outside the DIFC* (1st ed. 2012, now in their 4th edition) available at <http://difccourts.ae/enforcing-difc-court-judgments-and-orders-outside-the-difc1/> [hereinafter “Enforcement Guidelines”], at n. 8 (and at n. 7 in the 4th edition). For the avoidance of doubt, the Enforcement Guidelines are not legally binding and intend to provide guidance only: *Id.* ¶ 1. In addition, even though the Enforcement Guidelines do not make specific reference to the enforcement of arbitration awards, arbitration awards ratified by DIFC Courts take the form of DIFC Court orders.

¹³¹ Judicial Authority Law as amended, art. 7(2)(c).

procedure for enforcement:¹³³ (i) the enforcing party requires an execution letter from the DIFC Courts to the Chief Justice of the Dubai Courts setting out the procedure required for enforcement;¹³⁴ (ii) the enforcing party is required to submit to the execution judge of the Dubai Courts an application together with the execution letter and a legal translation (into Arabic) of the ratification order of the underlying award;¹³⁵ and (iii) on receipt of the application, the DIFC order for ratification is enforced by the execution judge of the Dubai Court in accordance with the prevailing provisions of the UAE Civil Procedures Code, without it being submitted to a review on the merits^{136, 137}. The same procedure applies *mutatis mutandis* in the event of enforcing a Dubai ratified award in the DIFC.¹³⁸

Essentially, Article 7 of the Judicial Authority Law as amended establishes a regime of mutual recognition between the onshore Dubai and the offshore DIFC Courts, which promotes the free movement of judgments, orders and ratified awards between the two courts.¹³⁹ In this sense, Article 7 has laid the foundations for an onshore-offshore zone of free movement of judicial instruments.

Despite the direct method of enforcement provided by Article 7(2) of the Judicial Authority Law as amended,¹⁴⁰ it has been suggested that in light of the continuing uncertainty as to whether this method works in practice (and in particular as to whether other Emirati Courts would respect a DIFC ratified award without revisiting the merits), it may be advisable to rely on the ‘deputisation’ or ‘referral’ procedure prescribed by Article 221 of the UAE Civil Procedures Code instead.¹⁴¹ According to this procedure, the competent execution judge for a DIFC ratified award will remain the execution judge of the Dubai Courts. The Dubai Court enforcement order, rather than a DIFC ratified award, will subsequently be subject to enforcement in other Emirates in accordance with Article 11¹⁴² of UAE Federal Law No. (11) of 1973.¹⁴³ That said, following the letter of the law, a DIFC ratified award should be directly enforceable before the courts of any other Emirate in accordance with Article 13 of UAE Federal Law No. (11) of 1973, without even a review of the merits of the underlying arbitral award,¹⁴⁴ this is in particular

¹³² Enforcement Guidelines, ¶ 7.

¹³³ *Id.* ¶ 8.

¹³⁴ Judicial Authority Law as amended, art. 7(3)(a), read with Enforcement Guidelines, ¶ 9.

¹³⁵ Judicial Authority Law as amended, art. 7(3)(b), read with Enforcement Guidelines, ¶ 10.

¹³⁶ Judicial Authority Law as amended, art. 7(3)(c), read with Enforcement Guidelines, ¶ 11.

¹³⁷ Enforcement Guidelines, ¶¶ 9-13.

¹³⁸ Judicial Authority Law as amended, arts. 7(4) & 7(5).

¹³⁹ See the words of Dr. Habib Al Mulla serving as expert in Claim No. XX - (1) Egan (2) Eggert v. (1) Eava (2) Efa, (Judgment of the DIFC Court of First Instance, July 29, 2015).

¹⁴⁰ Article 7(2) of the Judicial Authority Law provides in pertinent part: “Where the subject matter of execution is situated outside the DIFC, [...] the Arbitral Awards ratified by the [DIFC] Courts shall be executed by the competent entity having jurisdiction outside DIFC in accordance with the procedure and rules adopted by such entities in this regard [...]”.

¹⁴¹ Enforcement Guidelines, ¶¶ 17-20.

¹⁴² Article 11 of UAE Federal Law 11 of 1973 provides in pertinent part that “[a]ny order deciding civil or commercial rights or damages ... issued by a juridical body in one of the emirates member of the federation, shall, according to the rules of this law be executable to carry out the execution [...]”.

¹⁴³ UAE Federal Law No. 11 of 1973 Concerning the Regulation of Judicial Relations Between the Emirates Members of the Federation, issued July 25, 1973.

¹⁴⁴ Article 13 provides in pertinent part as follows: “The decisions of the arbitrators issued in one of the emirates shall be executable in any other emirate member of the federation. The juridical body being demanded to carry out the execution cannot reinvestigate the same incident concerning which the decision of the arbitrators was issued.”.

so given that from a constitutional point of view, the DIFC Courts are to be considered as an integral part of the Dubai judicial system and hence qualify as Emirati Courts for the purposes of mutual recognition and enforcement within the meaning of UAE Federal Law No. (11) of 1973. Enforcement through deputisation may gain new significance in light of recent case law precedent of onshore Dubai courts and the Dubai-DIFC Joint Judicial Tribunal discussed in further detail in section IV. C. iv. below.

b. Abu Dhabi - ADGM¹⁴⁵

Unlike between the mainland Dubai and DIFC Courts,¹⁴⁶ there is at present no mechanism of mutual recognition in place between the Abu Dhabi onshore and the ADGM offshore courts. This is so even though Article 11 of Law No. (3) of 2013 lays the foundations for the adoption of memoranda and agreements between the relevant stakeholders to facilitate the required forms of (judicial) co-operation.¹⁴⁷ With regard to the enforcement of both domestic and foreign arbitral awards, it would appear that if there is an ADGM nexus, the ADGM Courts are competent to serve as a ‘host’ or ‘conduit’ jurisdiction in a way similar to the DIFC Courts.¹⁴⁸

That said, since the adoption of Law No. (3) of 2013, two memoranda of understanding have been concluded between the ADGM Courts and the Federal Ministry of Justice and the Abu Dhabi Judicial Department respectively. Both of these seek, *inter alia*, forms of co-operation to promote the mutual recognition and enforcement of awards between onshore UAE and/or Abu Dhabi more specifically and the offshore ADGM. The first one, the Memorandum of Understanding between Ministry of Justice and Abu Dhabi Global Market Courts concerning cooperation in legal and judicial matters of May 15, 2016 [the “**MoJ-ADGM MoU**”],¹⁴⁹ promotes the direct enforceability of ADGM Court judicial instruments, including arbitral awards, before any other Emirati Courts and *vice versa*. Once fully implemented, this system would dispense with the need to rely upon Law No. (11) of 1973 and render any ADGM Court or other Emirati Courts’ judgments, orders and awards directly enforceable in other Emirates or the ADGM respectively.¹⁵⁰ The second memorandum, the Memorandum of Understanding concerning cooperation in legal and judicial matters on April 19, 2016¹⁵¹ [the “**AD-ADGM**”

¹⁴⁵ This section is based on Gordon Blanke, *MoU on Judicial Co-operation Adopted Between Abu Dhabi Judicial Department and the ADGM Courts*, KLUWER ARB. BLOG, (July 15, 2016), available at <http://kluwerarbitrationblog.com/2016/07/15/mou-on-judicial-co-operation-adopted-between-abu-dhabi-judicial-department-and-the-adgm-courts/>; Gordon Blanke, *UAE MoJ and ADGM Courts set for pan-UAE regime of mutual recognition and enforcement of arbitral awards*, MENA WEEK IN REVIEW, LEGAL NEWSLETTER, THOMSON REUTERS (June 16, 2016); Gordon Blanke, *The UAE MoJ and the ADGM Courts adopt a MoU on judicial co-operation: A world first?*, KLUWER ARB. BLOG, (June 8, 2016), available at <http://kluwerarbitrationblog.com/2016/06/08/uae-moj-and-adgm-courts-adopt-mou-on-judicial-co-operation-a-world-first/>.

¹⁴⁶ See Judicial Authority Law as amended, art. 7.

¹⁴⁷ See also ADGM Courts Regulations, arts. 168(2) & 169, read together with art. 180.

¹⁴⁸ See section IV. C. i - ii above.

¹⁴⁹ A full copy of the MoU is available online on the official website of the ADGM at <http://www.adgm.com/media/71361/final-executed-mou-between-moj-and-adgm-courts.pdf>.

¹⁵⁰ For confirmation of the more ambitious scope of the MoJ-ADGM MoU, see in particular Clause 2(5) (objective to “to take all necessary measures that will ensure that enforcement of the ADGM Courts’ judgments and arbitration awards issued in ADGM may be sought before the federal courts in the UAE and implementing Articles 219 – 234 of Federal Law No. (11) of 1992 Concerning Civil Procedure to the enforcement of such judgments and arbitration awards without examining the substance of the dispute.”).

¹⁵¹ A copy of the MoU is available online on the official website of the ADGM at http://www.adgm.com/media/75985/mou-adjd-and-adgm_english.pdf.

MoU”], calls into question the true geographic scope of the MoJ-ADGM MoU: Arguably, the Courts of Dubai, Ras Al Khaimah, and Abu Dhabi do not come within the purview of the MoJ-ADGM MoU given that those courts are not part of the UAE federal court system. Hence, these Courts will have to create their own regime of judicial co-operation with the ADGM Courts.

That said, the MoJ-ADGM MoU seeks, first and foremost, the “[f]acilitation of the judicial cooperation procedures of recognition and reciprocal enforcement of certified judgments, decisions, orders and arbitration awards in a manner that does not contradict the laws regulating the same.”¹⁵² This, no doubt, will encourage the Abu Dhabi and ADGM Courts to set up a regime of mutual recognition similar to the present regime between the Dubai and DIFC Courts,¹⁵³ thus facilitating the free movement of ratified arbitral awards between the offshore ADGM and onshore Abu Dhabi and *vice versa*, and the operation of the ADGM Courts as a conduit. Given the present experience of the DIFC as a conduit jurisdiction, the ADGM is likely to lobby for the adoption of legislation in the terms suggested below, i.e. laying down a first-seized rule together with a 30-day moratorium for a challenge of a resultant award before the onshore courts.

*iv. The Dubai-DIFC Joint Judicial Tribunal*¹⁵⁴

The DIFC’s expansion of its own jurisdiction to include the hearing of actions for recognition and enforcement of domestic arbitral awards absent any connection with the DIFC (also referred to as the DIFC’s status as a host or conduit jurisdiction) has naturally given rise to conflicts of jurisdiction between the Dubai and DIFC Courts. This is typically the case where an award debtor challenges a domestic non-DIFC award before the onshore Dubai Courts pending an enforcement action commenced by the award creditor before the DIFC Courts in their capacity as a conduit court. In order to resolve any such conflicts through a formal judicial channel, by adoption of a decree of June 2016¹⁵⁵, which entered into immediate effect,¹⁵⁶ the Ruler of Dubai established a so-called Joint Judicial Tribunal (or Committee) of the Dubai Courts and the DIFC Courts [the “**Dubai-DIFC Joint Judicial Tribunal**” or simply the “**JT**”].

The JT is chaired by the President of the Dubai Court of Cassation and otherwise comprises (i) the President of the DIFC Courts, (ii) the Presidents of the Dubai and the DIFC Courts of Appeal, (iii) the President of the Dubai Court of First Instance, (iv) a Judge of the DIFC Court of First Instance and (v) the Secretary-General of the Dubai Judicial Council.¹⁵⁷

Pursuant to Article 2 of Decree No. (19) of 2016, the JT is responsible for the determination of jurisdictional disputes in relation to (i) conflicts of jurisdiction between the Dubai and the DIFC

¹⁵² AD-ADGM MoU, cl. 4(4).

¹⁵³ See section IV. C. iii. a above.

¹⁵⁴ This section is based on Gordon Blanke, *Ruler of Dubai establishes new Judicial Committee to resolve conflicts of jurisdiction between the on- and offshore Dubai Courts: Will it undermine the DIFC Court’s acquired status as a conduit jurisdiction for the enforcement of arbitral awards?*, KLUWER ARB. BLOG (Nov. 29, 2016), available at <http://arbitrationblog.kluwerarbitration.com/2016/11/29/ruler-of-dubai-establishes-new-judicial-committee-to-resolve-conflicts-of-jurisdiction-between-the-on-and-offshore-dubai-courts-will-it-undermine-the-difc-courts-acquired-status-as-a-conduit/>.

¹⁵⁵ Decree No. (19) of 2016 forming the Judicial Committee of the Dubai Court and the DIFC Courts (June 9, 2016).

¹⁵⁶ *Id.* art. 8.

¹⁵⁷ *Id.* art. 1. The DIFC Court members are nominated by the President of the DIFC Courts.

Courts¹⁵⁸, including the DIFC Courts' role as a conduit jurisdiction, and (ii) conflicting judgments of the Dubai and DIFC Courts dealing with the same parties and the same subject-matter¹⁵⁹, including conflicting orders of enforcement by the Dubai and DIFC Courts in relation to the same arbitral award. The JT is also entrusted with (iii) suggesting rules for the prevention of conflicts of jurisdiction between the Dubai and DIFC Courts and their respective Execution Departments¹⁶⁰ and (iv) advising on the potential co-ordination and co-operation between the Dubai and DIFC Courts,¹⁶¹ which will assist the mutual integration of the two Courts over time. The JT will only decide upon conflicts of jurisdiction upon petition from a litigating party or the Public Prosecutor¹⁶² and provided that a jurisdictional conflict has materialised (which will not be the case where the onshore Dubai or offshore DIFC Courts decline jurisdiction¹⁶³). The JT's deliberations are confidential.¹⁶⁴ The JT issues a non-appealable (i.e. final and binding) decision¹⁶⁵ within thirty days from the date of the petition.¹⁶⁶ Whilst a decision of the JT is pending, the proceedings before the Dubai or DIFC Courts are stayed (except for a court's power to "*discharge subsidiary orders so designed that, upon the ultimate enforcement of a final judgment, justice will be done*").¹⁶⁷

Little detail is presently available on the precise course of the proceedings before the JT, but it is expected that more detailed procedural directions will soon be issued to provide further guidance. That said, the JT's decision-making practice to date has been a source of much disappointment. In a number of recent decisions that are of relevance to arbitration and that more specifically bear on the conduit jurisdiction status of the DIFC Courts in relation to the offshore recognition and enforcement of both domestic (non-DIFC) and foreign arbitral awards for onward execution against an award debtor's assets onshore, the JT has found against the proper competence of the DIFC Courts in favour of onshore jurisdiction.¹⁶⁸ This approach, based on the purported general jurisdiction of the Dubai Courts, is fundamentally flawed: In the

¹⁵⁸ *Id.* art. 2(1).

¹⁵⁹ *Id.* art. 2(2).

¹⁶⁰ *Id.* art. 2(3).

¹⁶¹ *Id.* art. 2(4).

¹⁶² *Id.* art. 4(1).

¹⁶³ CFI 026/2014 – Standard Chartered Bank v. Investment Group Private Limited (Ruling of the DIFC Court of First Instance, Aug. 1, 2016), as per Deputy Chief Justice Sir David Steel.

¹⁶⁴ Decree No. (19) of 2016, art. 3(d).

¹⁶⁵ *Id.* art. 7.

¹⁶⁶ *Id.* art. 3(b).

¹⁶⁷ CFI 013/2016 – Oger Dubai LLC v. Daman Real Estate Capital Partners Limited (Ruling of the DIFC Court of First Instance, July 28, 2016), as per Justice Sir Richard Field, ¶ 7.

¹⁶⁸ See Cassation No. 1/2016 (JT) – Daman Real Capital Partners Company LLC v. Oger Dubai LLC (Hearing of Dec. 19, 2016), with comments by Gordon Blanke, *Daman v. Oger: The First Decision of the Dubai-DIFC Judicial Committee (Part 1)*, KLUWER ARB. BLOG (Feb. 24, 2017), available at <http://kluwerarbitrationblog.com/2017/02/24/daman-v-oger-the-first-decision-of-the-dubai-difc-judicial-committee-part-1/>; Cassation No. 2/2016 (JT) – Dubai Water Front LLC v. Chenshan Liu (Hearing of Dec. 19, 2016), with comments by Gordon Blanke, *The Dubai-DIFC Judicial Committee and DIFC Conduit Jurisdiction: A Sequel in Four Parts – The DIFC Courts under Siege (Part 2)*, KLUWER ARB. BLOG (May 27, 2017), available at <http://kluwerarbitrationblog.com/2017/05/27/dubai-difc-judicial-committee-difc-conduit-jurisdiction-sequel-four-parts-difc-courts-under-siege-part-2/>; Cassation No. 1/2017 – Gulf Navigation Holding PJSC v. Jinhai Heavy Industry Co Ltd (JT) (Hearing of May 22, 2017); and Cassation No. 3/2017 – Ramadan Mousa Mishmish v. Sweet Homes Real Estate (JT) (Hearing of May 22, 2017), with comments by Gordon Blanke, *The Dubai-DIFC Judicial Committee and DIFC Conduit Jurisdiction: A Sequel in Four Parts – Game over? (Part 4)*, KLUWER ARB. BLOG (Oct. 16, 2017), available at <http://arbitrationblog.kluwerarbitration.com/2017/10/16/dubai-difc-judicial-committee-difc-conduit-jurisdiction-sequel-four-parts-game-part-4/>.

view of a dissenting minority,¹⁶⁹ led by Michael Hwang SC, the Chief Justice of the DIFC Courts, there is no principle of general jurisdiction in favour of the onshore Dubai Courts; on the contrary, it is the DIFC Courts that enjoy exclusive jurisdiction over applications for recognition and enforcement of both domestic and foreign arbitral awards on the basis of a combined reading of Articles 5(A)(1) and 5(A)(1)(e) of the Judicial Authority Law as amended, which defines areas of exclusive jurisdiction of the DIFC Courts, including in particular, the recognition and enforcement of arbitral awards in terms of Article 42(1) of the DIFC Arbitration Law. With respect to foreign awards more specifically, the JT's disregard of the inherent relevance of the New York Convention, in fact, places the UAE Courts in violation of their enforcement obligations under the Convention. There is hope that future JTs will decide differently, taking account of the UAE's international enforcement obligations, the competence of the DIFC Courts to determine their own jurisdiction and the regime of mutual recognition in place between the onshore Dubai and the offshore DIFC Courts under Article 7 of the Judicial Authority Law as amended. It has been suggested that a first-seized rule¹⁷⁰ combined (at least in the event of a domestic, non-DIFC award) with a thirty-day moratorium within which to bring an action for nullification of a domestic award before the Dubai Courts in their capacity as curial courts could adequately address the present shortcomings.¹⁷¹ That said, as matters presently stand, the Dubai Court of First Instance has been equally critical of the status of the DIFC as a conduit, setting aside the DIFC Courts' findings in the *Banyan Tree* line of cases, which are regarded as the cradle of DIFC Courts' conduit jurisdiction status.¹⁷² Only time will tell whether or not these more recent developments stand a chance of extinguishing the role of the DIFC Courts as a conduit and mark an adverse turn in the developing relationship between onshore Dubai and offshore DIFC Courts.

v. Public Policy Considerations

By virtue of Article 44(1)(b)(vii) of the DIFC Arbitration Law and Article 57(1)(b)(ii) of the 2015 ADGM Arbitration Regulations, the UAE free zone courts are bound by the definition of public policy as it prevails in mainland UAE. That said, it is well established that the UAE qualifies as a secular arbitration jurisdiction, with the Islamic Shari'a playing a distinctly subordinate role in everyday arbitration practice.

In relation to the DIFC more specifically, case law precedent of the DIFC Courts provides some initial insight into what qualifies and what does not qualify as public policy from the perspective

¹⁶⁹ See Cassation No. 1/2017 (JT) – Gulf Navigation Holding PJSC v. Jinhai Heavy Industry Co Ltd (Dissenting Opinion of June 4, 2017); and Cassation 3/2017 (JT) - Ramadan Mousa Mishmish v. Sweet Homes Real Estate (Dissenting Opinion of June 5, 2017).

¹⁷⁰ According to which the court first seized will properly have jurisdiction.

¹⁷¹ See Gordon Blanke, *The DIFC Courts' Conduit Jurisdiction: Time for a Post Mortem?*, PRACTICAL L. ARB. BLOG (Oct. 26, 2017); Gordon Blanke, *The DIFC's conduit jurisdiction – not dead yet*, GLOBAL ARB. REV. (Nov. 15, 2017).

¹⁷² See Commercial Case No. 1619/2016 (Ruling of the Dubai Court of First Instance, Feb. 15, 2017), with comments by Gordon Blanke, *The Dubai-DIFC Judicial Committee and DIFC Conduit Jurisdiction: A Sequel in Four Parts - The Dubai Court of First Instance on the Attack (Part 3)*, KLUWER ARB. BLOG (June 11, 2017), available at <http://klowerarbitrationblog.com/2017/06/11/dubai-difc-judicial-committee-difc-conduit-jurisdiction-sequel-four-parts-dubai-court-first-instance-attack-part-3/>; Gordon Blanke *Dubai Courts v. DIFC Courts: Just a jurisdictional stand-off or an outright declaration of war?*, PRACTICAL L. ARB. BLOG (June 12, 2017), available at <http://arbitrationblog.practicallaw.com/dubai-courts-v-difc-courts-just-a-jurisdictional-stand-off-or-an-outright-declaration-of-war/>.

of the DIFC Courts. In response to a public policy defence raised by an onshore award debtor in response to an application for recognition and enforcement of a New York Convention award in the DIFC for onward execution in onshore Dubai, the DIFC Courts found that the award debtor's allegation to the effect that the DIFC Courts' conduit procedure was impermissible in light of the existing procedure of enforcement before the onshore Dubai Courts was:

*“not a public policy complaint within Article V2(b) of the Convention but rather an objection to the deployment of the procedural mechanism of enforcement in the country of domicile of the arbitration debtor, namely the UAE. It is therefore an objection which falls outside the scope of challenges permissible upon applications for recognition or enforcement under Article 44(1) of the DIFC Arbitration Law.”*¹⁷³

More generally, the DIFC Courts found that it was *“public policy in the whole of the UAE not to apply the CPC [i.e. the UAE Civil Procedures Code] in the DIFC.”*¹⁷⁴ On another occasion, the DIFC Courts confirmed that the DIFC Courts' role as a conduit did not raise any public policy issues and in doing so, stated its understanding of the concept of public policy relying on the 2012 Digest of Case Law on the UNCITRAL Model Law in the following terms:

*“The public policy defence should be applied only if the arbitral award fundamentally offended the most basic and explicit principles of justice and fairness in the enforcement State, or evidences intolerable ignorance or corruption on part of the arbitral tribunal. Courts have also stated that to refuse to enforce an award on the ground that it violates public policy, the award must either be contrary to the essential morality of the State in question, or disclose errors that affect the basic principles of public and economic life. Not every infringement of mandatory law amounts to a violation of public policy. Occasionally it was also required that the violation of public policy must be obvious.”*¹⁷⁵

This would intimate that the DIFC Courts are more likely than not to take a minimalist approach to public policy, finding violations only in the most severe circumstances. Finally, it is interesting to note that on one occasion (within the context of a challenge of the DIFC Courts' service as a conduit), the DIFC Court rejected an application for admission of expert evidence on the meaning of UAE public policy, including in particular the question as to whether enforcement of a foreign award through the DIFC Courts' conduit was in violation of UAE public policy.¹⁷⁶ Clearly, the DIFC Courts are protective of their own jurisdiction and keen to limit the reach of the notion of UAE public policy into the DIFC (in particular to avoid any interference with what the DIFC Courts consider the proper limits of their own jurisdiction).

There is at present no particular experience and/or case law precedent on how the ADGM Courts approach the concept of public policy in an arbitration context or otherwise.

V. Conclusion

¹⁷³ As per Colman J., Case No. XX – (1) X1 (2) X2 v. (1) Y1 (2) Y2 (Ruling of the DIFC Court of First Instance, July 29, 2015), ¶ 62.

¹⁷⁴ *Id.* ¶ 53.

¹⁷⁵ As per Al Muhairi J., ARB 003/2013 – Banyan Tree Corporate Pte Ltd v. Meydan Group LLC (Ruling of the DIFC Court of First Instance, Apr. 2, 2015), ¶ 31.

¹⁷⁶ CA 002/2015 – Fidel v. (1) Felicia (2) Faraz (Ruling of the DIFC Court of Appeal, Nov. 22, 2015).

Free zone arbitration has developed into a credible alternative to arbitration onshore. It allows parties of international origin to arbitrate their disputes with locals or other international stakeholders in a forum that is familiar to home. Admittedly, the free zones that presently exist all espouse the common law tradition, but promote the highest arbitration standards on the basis of procedural laws that are firmly based on the UNCITRAL Model Law. No procedural surprises await arbitrating parties within a free zone arbitration framework.

DIFC arbitration more specifically offers an exciting alternative to arbitration in mainland Dubai or elsewhere in the UAE and beyond. Given its UNCITRAL Model Law pedigree, the DIFC Arbitration Law provides an internationally-recognised framework for the conduct of arbitrations in the DIFC. In addition, the DIFC-LCIA and its set of arbitration rules provide a world-class institutional framework for the administration of arbitrations seated in the DIFC. With this in mind, there is no reason to hesitate in the choice of a DIFC-seated arbitration under the DIFC-LCIA Arbitration Rules or an alternative *à la carte* combination of a DIFC seat with another leading set of institutional rules. Further, it is encouraging to see that the ICC has now lent its support to the creation of a new free zone arbitration centre in the form of the ADGM-ICC, which will offer an interesting alternative to the DIFC-LCIA for the administration of arbitration proceedings in the UAE.

The ADGM is still only a nascent arbitration free zone and follows, for all intents and purposes, in the footsteps of the DIFC. It has also adopted an UNCITRAL Model Law-based arbitration law and is endeavouring to build on the DIFC Courts' experience as a conduit jurisdiction. That said, in light of the more recent case law precedent of the Dubai-DIFC Joint Judicial Tribunal, it remains to be seen whether the concept and practice of a conduit between a free zone and the mainland are capable of survival going forward. In order to provide reassurance to international investors, the conduit jurisdiction status of the free zone courts no doubt deserves to be confirmed.

Irrespective of the foregoing, free zone arbitration adds an attractive alternative to the overall choice of dispute resolution in the Middle East. Its uniqueness also places the UAE on the map of comparative laws, an unrivaled laboratory to test the functionality of common law legal transplants. It will be fascinating to watch the continuous enhancement of co-operation between the onshore civil law jurisdiction and its offshore common law counterpart in years to come and see whether, at some point in the future, the on and offshore legal systems will develop into a fully integrated whole.