

The Arbitration Law of the Dubai International Finance Centre

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Abstract. The latest and most ambitious Free Financial Zone in the United Emirates is the Dubai International Finance Centre (DIFC). The DIFC was set up in 2004. It has its own courts and judicial system. It also has its own arbitration law. The DIFC arbitration law is in a process of review. A Model Law instrument is expected late in 2008. It is intended to explain some of the provisions of the current DIFC arbitration law and to assist those using it.

Keywords: Law, Dubai, United Arab Emirates, International Commercial Arbitration.

Introduction

The Dubai International Finance Centre (DIFC) was established by Federal Law No.8 of 2004.¹ It is a free financial zone within Dubai city. Dubai is one of the seven Islamic principalities that make up the federation of the United Arab Emirates. At the federal level, measures have been taken to bring UAE arbitration law into line with the international norms. On 13 June 2006 the United Arab Emirates (UAE) ratified the *New York Convention on the Recognition and Enforcement of Arbitral Awards* 1958². Rumor has it that a UNCITRAL Model Law statute is being discussed. Although the UAE is yet to pass a federal arbitration statute the creation of Special Economic Zones³ like the DIFC has raised its status as a seat. This is because the DIFC is 'arbitration friendly' – it has a dedicated arbitration law⁴ and an independent legal system mandated to support arbitral proceedings.

Arbitration under DIFCAL

Articles 203 to 218 of the UAE Federal Code of Civil Procedure concern arbitration. In the absence of contrary election by the parties, the Federal Code of Civil Procedure stands as *lex arbitri* in the UAE (including Dubai). For reasons outside the scope of this paper, the Federal Code is not ideal. One way of disputing parties safely contracting out of it is to select DIFC law. The *lex arbitri* of the DIFC is Law No.8 of 2004 (Arbitration Law)⁵. DIFCAL governs the actual conduct of arbitral proceedings and the recognition and enforcement of foreign arbitral awards in the DIFC. Process before product, it is appropriate to review the procedural rules and requirements of DIFCAL before we consider its enforcement provisions. Under DIFCAL:

1. Arbitration agreements must be in writing (which includes exchanges of letters and data messages⁶) and may take the form of arbitration clauses concerning future disputes, or submissions in respect of existing disputes (Art 11(1)). Arbitration clauses may be incorporated by reference in a contract (Art 11(5)). It is notable that, in contrast to the approach taken by UAE courts⁷, the DIFCAL states expressly that arbitration clauses in standard form agreements will be considered binding arbitration agreements (Art 11(2)).
2. The parties are free to choose the number of arbitrators, but it must be an odd number (Art 13(1)). Failing specification in the arbitration agreement, the number of arbitrators will be three (Art 11(2)).

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¹ After a facilitating amendment to the UAE Constitution, the DIFC was established by Federal Law No.8 of 2004.

² Hereinafter referred to as the 'New York Convention' of the 'NYC'.

³ The other free trade zones in the UAE are the Ajman Free Zone, Dubai Airport Free Zone (DAFZA), Dubai Cars and Automobile Free Zone, Dubai Internet City, Dubai Media City, Dubai Knowledge Village, Fujairah Free Trade Zone, Dubai Gold and Diamond Park, Jebel Ali Free Zone (JAFZ), Sharjah Hamriya Free Zone, Sharjah Airport Free Zone, Ras al-Khaimah Free Zone, Um al-Quwain Free Zone.

⁴ DIFC Law No. 9 of 2004

⁵ Hereinafter referred to as 'DIFCAL'.

⁶ DIFCAL Article 11(7).

⁷ Al Tamimi, E, *Practical Guide to Litigation and Arbitration in the United Arab Emirates*, (Kluwer, 2003), p.83.

3. Article 14(2) confers general party autonomy over appointment procedure. Even where appointment procedures are tailored, the Court may still intervene by request of any party and appoint where the appointment procedure has not been carried out (Art 14(4)). Where the parties fail to agree as to the appointment of a sole arbitrator within 30 days of request, then the Court is empowered to make the appointment (Art 14(3) (b)). The same 30 day time limit is applicable where party appointed arbitrators fail to agree on a chairman (Art 14(3) (a)). All appointments by the Court are final and not subject to appeal (Art 14(5)).
4. There is no requirement that the arbitrator be a UAE national. Article 14(1) allows the parties to exclude persons of certain nationality from appointment. When the court is asked to or is required to appoint and arbitrator, Article 14(5) requires that the court shall have due regard to the nationality of the parties.
5. An arbitrator must be independent and impartial, meaning that he (or she ⁸) must not sit as arbitrator if there are circumstances which exist *'that give rise to justifiable doubts as to his impartiality or independence'*. This is the same as the standard for impartiality and independence for arbitrators set by Article 10(1) of the UNCITRAL Arbitration Rules. It is imposed 'indirectly' by way of the obligation of arbitrators to disclose conflicts of interest before accepting appointment (Art 15(1)). There is the right of the parties to challenge the arbitrator if they become aware of such circumstances (Art 15(2)).
6. Unless the parties agree otherwise⁹, challenges to arbitrators must be brought within 15 days of becoming aware of the Article 15 circumstances (Art 16(2)). After this time, if no challenge is made then the parties are deemed to waive their right to object. If an alternative challenge procedure is agreed, and a challenge is made unsuccessfully in accordance with the tailored procedure, then the aggrieved party may apply to the Court for determination of their challenge (Art 16(3)). Any such 'second run' must be made within 30 days of being advised of first failure, after such time waiver will apply.
7. There is no express right to counsel in the DIFCAL. It is submitted that the right to be represented by a lawyer is implied in the requirement that the parties be given a full opportunity to present their cases (Art 21).
8. There is no reference in the DIFCAL to the privacy or confidentiality of arbitral proceeding.
9. The parties are entitled to equal treatment and to obtain the equal benefit of the principles of procedural fairness (Art. 21). The use of the word 'shall' in this article requires that natural justice be observed and cannot be contracted out of. This limits party autonomy as the parties may not agree to 'rapid fire' arbitral procedures that cause them to be treated unequally. 'Baseball' or 'Last/Best Offer Arbitration' may not, for example, be possible under DIFC law.
10. The arbitrator may make preliminary and interim orders, including orders for collateral confiscation, attachment, bailment to third parties, and sale of perishable goods.
11. The positions of the parties must be stated in writing within a period of time agreed by the parties. Statements of claim and defence are mandatory under DIFCAL Article 26(1). It appears from Article 26(2) that unless the parties agree otherwise, amendments to pleadings may be made at any time unless they will cause undue delay. It is notable that sub-article (3) of Article 26 contains a number of blanks and is, to the writer, unintelligible. It is respectfully submitted that it needs to be removed or corrected.
12. There is no mandatory requirement for an oral hearing – unless the parties agree that an oral hearing is necessary. Ultimately it is for the tribunal to determine if oral hearings will take place (Art. 27). It follows that DIFCAL arbitrations can be entirely 'on the papers', and will be unless the parties agree (or the tribunal forms the view) that oral hearings will take place.
13. Default judgment may be ordered by the tribunal if a party fails to appear at the hearing (Art 28(c)), fails to file a statement of claim (Art 28(a)) or fails to file a defence (Art 28(b)). When proceedings are

⁸ The act uses the masculine gender, but the interpretation section of the schedule expressly states at 1(d) that a 'reference to the masculine gender includes the feminine'.

⁹ DIFCAL Article 16(1) confers party autonomy in challenge procedure.

conducted in the absence of the respondent, it appears that default judgment may be ordered even where the claimant has no case.

14. The tribunal may appoint expert witnesses to report on specific issues (Art 29(1) (a)).
15. The tribunal does not have the power to subpoena witnesses, but may request the DIFC Courts to assist in taking evidence (Art 30). It can be assumed from the express reference to the competence and rules of the court in Article 30 that the tribunal has the power to request subpoenas to attend (*ad testificandum*) and produce documents or things (*duces tecum*).
16. The DIFC Court must stay court proceedings where there is a valid arbitration agreement, so long as a request for stay has been made by one party concurrent with or before the filing of their statement of claim/defence in the Court (Art 12(1)). The DIFC Court of First Instance has jurisdiction over default appointment, challenges to arbitrators and requests to enforce preliminary, interim and conservatory measures ordered by arbitral panels.
17. The Doctrine of *Kompetenz-Kompetenz* is recognised at DIFC law. The tribunal may rule on objections to its own jurisdiction (Art 19(1)). Positive findings of jurisdiction may be appealed to the DIFC Court while the hearings on the merits are under way (Art 19(3)). A thirty day time limit (from the date of the positive finding) applies to such appeals.
18. The Doctrine of Separability is recognised at DIFC law. Article 19(1) provides that an arbitration clause shall be treated as a contract separate from that in which it is embedded.
19. The tribunal has wide powers to order interim measures of protection that it deems necessary for the proper conduct of the arbitration. These measures include prohibitive and mandatory injunctions (Articles 20(4)(a) and (c)). The tribunal also appears to have the power to make *Mareva* orders¹⁰ – Article 20(4) empowers the tribunal to grant an interim measure ‘*providing a preliminary means of securing or facilitating the enforcement of an award*’. Whether this is only a power to order security is unclear. A *Mareva* injunction is not an order for security, but it may be within the tribunal’s power to order security due to the drafting of this sub-article of the DIFCAL. When interim measures are ordered, the tribunal has the power to require the applicant to provide appropriate security for such measures (Art 20(4)). Presumably this means payments into escrow and undertakings to pay damages.
20. The parties are free to choose any substantive law they wish. Failing designation of substantive law in contract, the tribunal is to determine the applicable substantive law by application of the conflict of laws rules it ‘considers appropriate’ (Art 31(3)). Naturally, what conflicts rules are appropriate would depend upon the nationality of the parties. Given the common law outline of DIFC law, it is submitted that English conflict of laws rules would be the most probably default rules where nationality was not determinative.
21. Whilst the parties are free under Article 31(3) to empower the tribunal to decide according to equity and good conscience (*ex aequo et bono*). It seems that, even where such an election is properly made, the tribunal may not disregard the terms of the contract and the trade usages relevant to the dispute. This limitation on amiable composition comes from the inter-operation of sub-articles (3) and (4) of DIFCAL Article 31. Sub-Article (4) uses the words ‘In all cases’, as such shows the clear intention of the drafters that contract and custom be mandatory considerations even where the tribunal is empowered to decide ‘according to equity and good conscience’.
22. Unless the parties agree otherwise, decisions on the merits may be reached by majority of the members of the panel (Art 32).
23. Decisions of matters of procedure are decided unanimously unless the parties agree otherwise (Art 32).
24. In terms of form, under DIFCAL Article 34 Awards must:
 - be in writing (Art 34(1)),
 - bear the signature of at least the majority of members of the tribunal (Art 34(2)),

¹⁰ *Mareva Compania Naviera SA of Panama v International Bulk Carriers SA* [1980] 1 All ER 213, [1975] 2 Lloyd’s Rep 509

- identify the seat of the arbitration (Art 34(3)), and
 - be copied to the parties (Art 34(4)).
25. Reasons are to be given unless the parties have agreed otherwise, or the award is by consent. Article 33 authorises the tribunal to make consent awards ('awards on agreed terms'), and requires that consent awards be made in the same form as awards on the merits under Article 34. There is a 'slip rule' under Article 36(1) that allows the parties to request the tribunal to correct typographical and clerical errors in the award. The time limit for such request is 30 days from the date of that party's receipt of the award (Art 36(1)). The tribunal may correct on its own initiative, the same time frame applies (Art 36(2)).
26. It is not clear whether the DIFCAL grants the tribunal the power to order costs against a losing party, or apportion them on the basis of heads-of-claim made out (or any other basis).
27. Under Article 35 the tribunal is *functus officio* on and from the date the award is handed down. This rule is expressed in Article 35(3) as being subject to corrections under Article 36 and 33(4). Article 36 is the 'slip rule' noted above. Article 33(4) does not exist. Presumably, the drafters of the DIFCAL meant Article 36(4), which empowers the tribunal to extend the time for the correction of typographical and clerical errors. It is submitted that this sub-article needs to be corrected.

DIFC Courts and the Enforcement of Arbitral Awards

In order to understand DIFCAL, it is important to understand the relationship between the judicial organs of the DIFC and those of the wider UAE. To that end we must consider the 'portability' of DIFC court orders and judgments. Article 42(2) of Law 10 of 2004 (The DIFC Courts Law) states that judgments and awards handed down by DIFC courts are enforceable in accordance with the Judicial Authority Law of Dubai. Article 7(2) of the Judicial Authority Law states that DIFC judgments are enforceable in Dubai courts provided they are *'final and appropriate for enforcement'*¹¹. This drafting is somewhat vague because, whilst it seems to import public policy considerations, it does not use the expression 'public policy' (let alone a narrower phrase like 'Dubai public policy'). This creates adjudicatory uncertainty and, it follows, country risk. The 'appropriateness' of a DIFC judgment for enforcement in wider Dubai could, for example, be determined by reference to the tenets of public order and policy of the Emirate of Dubai, the UAE, the GCC or the wider international community.

To consider the reverse scenario, Article 7(4) of the Judicial Authority Law provides that judgments of the courts of wider Dubai (and the UAE generally) are enforceable in the DIFC. Article 24 of the DIFC Court Law states that the Court of First Instance has jurisdiction to ratify 'judgments, orders and awards that emanate from Dubai and UAE courts, and *'Foreign courts'*¹². Despite the word 'Foreign' being capitalized, it is not defined in the DIFC Court law. Article 24(2) requires that the DIFC Court of First Instance comply with the terms of any mutual recognition of judgments agreements entered into by the UAE. This specific reference to reciprocity, placed as it is after a general reference to 'Foreign courts' (at sub-article (1) (a)), coupled with the failure to define the expression 'Foreign court' by reference to any reciprocal enforcement agreement or convention, suggests that the intention of the drafters of the DIFC Courts Law was not to limit the enforceability of foreign judgments on the basis of reciprocity. Indeed, the use of the word 'recognised' to preface the specifications of Article 24 may have the effect of making any judgment handed down by a court of a state diplomatically recognised by the UAE enforceable in the DIFC Court of First Instance. If so, the DIFC Courts law represents a dramatic and liberal departure from the firmly reciprocal civil judgments enforcement model created by the UAE Federal Code of Civil Procedure.

Applications for ratification and enforcement of arbitral awards go to the DIFC Court of First Instance. It is notable that the expression 'Arbitral Award' is defined in the schedule to the DIFC Courts Law to mean:

'an award made in Arbitration proceedings under the Arbitration Law No.8 of 2004, DIFC Dispute Resolution Scheme, foreign awards, or any awards recognised by this Law'.

Although sub-article (d) of Article 24 refers to 'Foreign Arbitral Awards' specifically, the all inclusive definition of 'Arbitral Award' in the DIFC Courts Law suggests that this express reference is superfluous. The free standing use of the words 'Foreign Arbitral Awards' does, however, raise an interesting question of legislative classification – is the DIFC Arbitration Law monist or dualist?

¹¹ Article 42(2) refers to the DIFC Judicial Authority Law (Law No.12 of 2004), Article 7(2) of which governs the enforcement of DIFC judgments in greater Dubai.

¹² Law No.10 of 2004, Article 24(1) (a).

By way of preface on this point, a monist *lex arbitri* exists wherever the laws of a state do not differentiate between domestic and international arbitrations, and create a 'unified regulatory model' for arbitration¹³. A dualist system, on the other hand, does so differentiate. Australia is an example of a nation with a dualist model, having a federal law for international commercial arbitration (the International Arbitration Act 1974 (Cth)) and a separate package of state laws for domestic commercial arbitration (the 'uniform' Commercial Arbitration Acts of 1985-6). The United States is also dualist¹⁴. Whilst commentators are divided on the virtues of legislative monism¹⁵, the modern trend in lawmaking appears to be slightly in its favour. The widely celebrated English Arbitration Act 1996 (UK) is monist¹⁶, as are the arbitration laws of The Netherlands¹⁷, Sweden and Germany.

The inclusive definition of 'Arbitral Award', and the resulting lack of distinction between foreign and domestic arbitral awards in the DIFC Courts Law, suggests that the Arbitration law of the DIFC is monist. The appearance of monism is supported by the fact that only Part 5 (The Recognition and Ratification of Foreign Awards) of the DIFC Arbitration Law uses the expression 'Foreign Award'. The special treatment of foreign awards in enforcement proceedings is not, it is submitted, enough to constitute a dualist *lex arbitri*. It is submitted that in order to be truly dualist a law must create (or permit) different procedures for domestic and international arbitrations - mere discrimination between foreign and domestic (or DIFC) rendered awards does not necessarily connote the existence of a dualist procedural law. Part 4 of the DIFC Arbitration Law (which is the 'true *lex arbitri*' of the DIFC) does not create a separate statutory model for international arbitration. It only attaches the word 'Foreign' to the word 'Award' in Part 5, defining 'Foreign Awards' as 'awards made in a seat other than that of the DIFC'¹⁸. The DIFCAL should, therefore, be read as monist.

Outside Part 5, the DIFCAL uses the simpler expression 'arbitral award', which is defined somewhat awkwardly as:

'an arbitration award made under the Seat of the DIFC either within or outside the jurisdiction of the DIFC'.

The words '*Seat of the DIFC*' are crucial, and expose the true modernity of the DIFCAL. 'Seat' is defined in the schedule to the DIFCAL to mean:

'the juridical seat which indicates the procedural law chosen by the parties to govern their arbitration awards as designated in Article 25'¹⁹.

This definition of 'Seat' is highly progressive because it is 'de-localised'. The *Delocalisation Theory* holds that, instead of a dual system of control (i.e. first by the courts of the state of the *lex arbitri* and second by the laws of the state where enforcement is sought), there should only be one point at which national control is asserted over the arbitral process. According to the *Delocalisation Theory*, that single point of procedural control should be the state in which enforcement is sought. Proponents of this theory assert that using a single point of control will result in the 'trans-nationalisation' of international commercial arbitration. The delocalized nature of the DIFCAL is apparent in the drafting of the definition of 'Seat' in the DIFCAL – the words 'govern their arbitration awards' have the effect that if the parties identify DIFC law as the law for recognition and enforcement of their award, then their award will be an 'Arbitral Award'. This is the case regardless of the fact that the arbitration is not physically conducted inside the DIFC. If the arbitration agreement specifies DIFC law as governing law for enforcement, the

¹³ Lew J D M, Mistelis, L A, Kroll S M, *Comparative International Commercial Arbitration* (Kluwer 2003), p 63.

¹⁴ Other dualist states include France, Italy and Switzerland.

¹⁵ A competing view is that which asserts that the harmonization of national laws concerning international arbitration is best achieved through the dualist legislative model. This is because dualist law allows the state to retain all of its exclusive regulatory power over domestic arbitration and only 'give up ground' in the importation of foreign legal norms for international arbitration. See for example Petsche, Markus A, *The Growing Autonomy of International Commercial Arbitration*, (Sellier 2005), p. 137, where the learned author expresses that view that dualistic lawmaking plays a 'pivotal role' in the unification of national laws on international commercial arbitration.

¹⁶ Although the 1996 UK Act contemplates different systems for international and domestic arbitration, the domestic rules were never put into effect. The UK law is, therefore, monist in so far as it is silent on separate substantive law for domestic arbitration. Indeed, the English Court of Appeal in *Philip Alexander Securities and Futures v Werner Bamberger and Ors* (1996) XXII YBCA 872 (1997) held that distinguishing between international and domestic arbitrations is discriminatory under EC law.

¹⁷ See for example the *Dutch Arbitration Act* of 1986.

¹⁸ See the definition of 'Foreign Award' in the Schedule to the DIFC Arbitration Law.

¹⁹ The reference to 'Article 25' is a typographical error – Article 25 (Language) is concerned with the language of the arbitral proceedings (and the freedom of the parties to choose the same). Certainly it was not the intention of the drafters that the language used in the proceedings be determinative of the seat. We can only assume that the drafters of the DIFCAL intended to refer to Article 23 (Seat of Arbitration) when they defined 'Seat'. This error needs to be corrected.

award will be ‘made under the Seat of the DIFC’. For example, an arbitration held in wider Dubai, under Dubai law, would produce a ‘Foreign Award’. This is because the award was not ‘made under the Seat of the DIFC’. However, if the arbitration agreement provided for arbitration in Dubai under the UNCITRAL Arbitration Rules but selected DIFC law as the law for the determination of the validity of the award, then any award produced in it would be an ‘Arbitral Award’ (i.e. a DIFC award) for the purposes of the DIFCAL.

The significance of the monism of the DIFCAL lies in the different approaches taken to the ratification and enforcement of foreign and DIFC rendered awards. Chapter 7 of Part 4 regulates the setting aside of Arbitral Awards. Part 5 covers the recognition and enforcement of Foreign Awards. For the most part, the provisions of Chapter 7 and Part 5 are comparable to one another, and to the terms of Article 216 of the Federal Code of Civil Procedure. To deal with the common ground first, Article 37 (2) (a) of Chapter 7 allows the setting aside of (domestic/DIFC rendered) Arbitral Awards only if:

- (i) The arbitration agreement was not valid under the *lex arbitri* (whether that is DIFC law or other law). This ground of annulment is common to Foreign Awards under Article 39(1) (a) (i) of the DIFCAL, and is also a feature of the UAE Federal Code (see Article 216(a) (1) (ii)).
- (ii) There has been a denial of natural justice/procedural fairness. This is also a basis for refusal to enforce a Foreign Award (see DIFCAL Art. 39(1) (a) (ii)). Outside the DIFC, breaches of procedural fairness are captured by the words ‘something invalid in the ruling or in the procedures affecting the ruling’ at Article 216(c) of the UAE Federal Code.
- (iii) The award is *ultra petita* (repeated at DIFCAL Article 39(1) (a) (iii), comparable to Article 216(1) (a) (iv) of the Federal Code).
- (iv) The composition of the tribunal was not in accordance with the agreement of the parties (or the mandatory provisions of the *lex arbitri*). The same proviso is applicable to Foreign Awards at Article 39(1) (a) (iv), the only difference being that the breached agreement of the parties as to composition need not comply with the mandatory provisions of the DIFCAL when the award is foreign. Again, the same ground of resistance is available under Article 216(c) of the UAE Federal Code of Civil Procedure.

The terms of DIFCAL Article 37(2) (b) are effectively the same as those of DIFCAL Article 39(1) (b). DIFC rendered awards may, like Foreign Awards, be set aside where:

- (i) The subject matter of the dispute was not arbitrable under DIFC law. Article 39(1) (b) (i) allows DIFC courts to refuse to ratify or enforce Foreign Awards on the grounds of non-arbitrability under DIFC law. The UAE Federal Code of Civil Procedure is silent on what subject matter is and is not capable of settlement by arbitration²⁰. The DIFCAL deals with arbitrability in its definition of ‘Arbitration Agreement’ at Article 11(1):

‘An “Arbitration Agreement” is an agreement by the parties to submit to Arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not...’

This drafting seems to leave open the possibility that non-contractual matters, such as intellectual property rights and anti-trust, are capable of settlement by arbitration in the DIFC (and that foreign awards in these areas may be enforceable in the DIFC). Such a liberal Mitsubishi-type approach to arbitrability is consistent with the progressive tone of the DIFCAL. It would make invoking the ‘non-arbitrability’ exception to enforcement more difficult in the DIFC than elsewhere in the UAE, where the Doctrine of Non-Arbitrability is not settled.

- (ii) the dispute is *sub judice* in another DIFC body or tribunal²¹. An example is a breach of DIFC Collective Investment Law²². This would be dealt with by the Dubai Financial Services Authority (DFSA)²³. The DFSA would commence proceedings against the offending entity in the Financial

²⁰ Supra note 7 at 156.

²¹ The Foreign Award equivalent is at DIFCAL Article 39(1)(b)(ii)

²² DIFC Law No.1 of 2006.

²³ The DFSA is responsible for the laws and regulations relating to the all financial and ancillary services within the DIFC, and the enforcement of the same.

Markets Tribunal (FMT). An arbitral award made in relation to such a matter would be able to be set aside under Article 37(2) (b) (ii) on the grounds that it is before the FMT.

- (iii) The award is in conflict with the public policy of the DIFC (Art 37(1) (b) (iii))²⁴. The public policy of the DIFC is difficult to define. The DIFC is a politically, legally and commercially complex seat. As has been noted above in respect of the Ryadh Convention, UAE courts tend to interpret the expression 'public policy' on a domestic, regional (i.e. GCC) or Islamic basis. This domestic or localized interpretation will, it has been submitted, probably influence UAE courts in their reading of the same expression in Article V (2) (b) of the New York Convention. It is, however, too early to tell. But the same should not be assumed of DIFC Courts, even though the words '*of the DIFC*' follow the expression 'public policy'. The DIFC is proudly 'internationalist' – the delocalized definition of 'Seat' in the DIFCAL is proof of this. In light of this deliberate internationality, there is a good chance that the words '*public policy of the DIFC*' would be read as meaning 'transnational public policy' (to read them any other way would defeat the purpose for which the DIFC was established). This means that when one party has not been given proper notice of a hearing²⁵ or the appointment of an arbitrator, or has otherwise not been able to present its case, any award against them will be unenforceable. Awards made in circumstances of bias will also not be enforceable in the DIFC²⁶. Corruption (or 'procured bias') and fraud - recurring themes in discussions of transnational public policy - will also render awards unenforceable in the DIFC.

There is a three month limitation period on proceedings for the setting aside of DIFC rendered awards²⁷. This limitation period is not applicable to Foreign Awards²⁸. There is also a significant difference in the jurisdiction to ratify and enforce. DIFC courts will refuse to ratify Foreign Awards when 'the award has no connection with anyone appearing to the court to be within the jurisdiction of the DIFC'²⁹. Naturally, assets and funds located within the DIFC will satisfy this requirement. But, the question is whether mere choice of DIFC law (procedural or substantive) would be enough to connect the dispute to the DIFC. The DIFC courts have the appearance of permanent courts of arbitration. Under the Judicial Authority Law and DIFC Courts Law they have jurisdiction to hear '*civil or commercial cases and disputes involving the [Dubai International Finance] Centre*'³⁰. The writer has argued above that the contractual selection of DIFC law would be enough to '*involve the Centre*' for the purposes of this jurisdictional Article of the DIFC Courts Law. The same submission is made in respect of the DIFCAL. It is unlikely that a DIFC Court, faced with an application to enforce a Foreign Award against a party to arbitral proceeding where DIFC law was used (procedurally or substantively) would decline to ratify or recognize the award for want of jurisdiction.

Recommendations on DIFCAL

The writer's conclusions on the DIFC Arbitration law are, therefore, mixed. On the one hand, it is impressive for the high degree of party autonomy it grants its users. It has comparatively few mandatory provisions. It also grants arbitrators substantial power to order interim measures such as prohibitive injunctions and security for costs which, in turn, protect the integrity of the arbitral process. The reliance on delocalization theory in its definition of the seat is jurisprudentially progressive and politically consistent with the economic objectives of the DIFC. On the other hand, it is strangely deficient in other areas.

The law contains several typographical errors in its internal referencing that, if tested in DIFC courts, could have serious implications for disputants. The most serious of these is probably in the definition of 'Seat' in the schedule (which erroneously references the language of the proceedings as indicating the designation of law). There is also no mention of the privacy/confidentiality of arbitral proceedings, and no express power to order or apportion costs. Most importantly, the law does not deal satisfactorily with the status of DIFC rendered arbitral awards in the wider UAE. It appears from the definition of 'Foreign Award' in the DIFCAL that DIFC law intended them to be 'Foreign' in the courts of wider Dubai (and the UAE). If this is so, then much of the benefit of

²⁴ The Foreign Award equivalent is at DIFCAL Article 39(1)(b)(iii)

²⁵ It is clear from the express references to procedural fairness in Article 37(2)(a) that the observation of natural justice is part of the public policy of the DIFC. See also DIFCAL Article 27(2) which requires sufficient advance notice be given to each party of hearing dates and meetings.

²⁶ See also DIFCAL Article 15(2) which provides that an arbitrator may be challenged '*if circumstances exist which rise to justifiable doubts as to his impartiality or independence*'.

²⁷ DIFCAL Article 37(3).

²⁸ There is no Article 37(3) equivalent in DIFCAL Article 39.

²⁹ DIFCAL Article 39(1)(b)(iii)

³⁰ See Article 5A(1)(a) of the Judicial Authority Law, and Article 19(1)(a) of the DIFC Courts Law.

using the DIFC as a seat is foregone (because users end up with a foreign award in a Dubai court anyway). Dubai law suggests otherwise: Article 7(2) of the Dubai Judicial Authority Law states that DIFC judgments are enforceable in Dubai courts provided they are '*final and appropriate for enforcement*'. This, it has been submitted, is a reference to public policy. The question then becomes whether the public policy referred to here is that of the emirate of Dubai (truly domestic), the UAE (national/federal), the GCC (regional/Islamic) or the world (transnational)? Whilst the latter would be ideal, and would be in keeping with the economic objectives of the emirate of Dubai in creating the DIFC special zone, experience suggests that domestic (or at best regional) interpretations may prevail in Dubai courts. However, given that a domestic (or regional) interpretation of public policy is virtually guaranteed where truly foreign awards are brought to UAE courts, and considering the clearly transnational commercial objectives of the Ruler of Dubai in establishing the DIFC, there is a reasonable prospect of the transnational/international standard being applied to a DIFC rendered arbitral award. This moderate chance is a lot better than nothing.

So despite the weaknesses in the DIFC Arbitration Law, it does represent an advance of the interests of the international commercial community in Dubai. Foreign businesses and investors transacting with UAE entities are advised to make the most of the delocalised autonomy afforded to them under the DIFCAL and negotiate for it in their dispute resolution clauses. If DIFC arbitration can be agreed, it is recommended that users 'split' their arbitration clauses in the following terms:

Arbitration

- *Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force, which rules shall, subject to item 4 below, constitute the procedural law of the arbitration.*
- *The appointing authority shall be the Dubai Chamber of Commerce and Industry (DCCI).*
- *The number of arbitrators shall be three (3).*
- *The place of arbitration shall be the Dubai International Finance Centre (DIFC) and the ratification, recognition and validity of any award made shall be governed by the DIFC Arbitration Law as at present in force.*
- *The language to be used in the arbitral proceedings shall be English.*

Splitting the *lex arbitri* in this way allows parties to maximize the benefits of the DIFCAL but minimize its risks – item 4 of the above model clause gives the award DIFC 'nationality' but limits the application of the DIFCAL to the actual dispute resolution process (to which the UNCITRAL rules apply). When the time comes to enforce, an award bred from such a clause would be a 'DIFC rendered award', and *not* a Foreign Award. Giving the award DIFC 'nationality' is the only way of maximizing the prospect of transnational/international public policy standards being applied to it by UAE courts. This gives the award optimal enforceability which should, in turn, reduce the adjudicatory (and then country) risk for the relevant foreign investors. DIFC 'nationality' will also work in favour of the parties if, due to target asset distribution, they need to enforce the award in other jurisdictions. This is because, even though many national courts will accept limited delocalization (i.e. the application of transnational rules like UNCITRAL to the actual arbitral proceedings), they will often still require that the award have a nationality. It is submitted that, until such time as modern *sui generis* arbitration law is adopted by the UAE, DIFC nationality is better than Dubai.