

UNITED ARAB EMIRATES

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UNITED ARAB EMIRATES

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I. INTRODUCTION: ARBITRATION IN THE UNITED ARAB EMIRATES—HISTORY AND INFRASTRUCTURE

A. *History and Current Legislation on Arbitration*

1. Brief historical evolution of law relating to arbitration.

The United Arab Emirates (the “UAE”) is a federation of seven Islamic Emirates, which was established in 1971. All of the Emirates, with the exception of Dubai and Ras al Khaimah that have retained their own courts, form part of the federal judicial system. The UAE operates under a civil law system. The civil court system in the UAE consists of three tiers:¹

- (a) Court of First Instance;
- (b) Court of Appeal; and
- (c) Court of Cassation.

The Court of Cassation is the highest court of appeal, where five judges sit in final determination, and its decisions are final in all matters of litigation.

The legal system in the UAE is founded in its Constitution. The Constitution provides, in Article 6 that the “Shari’a is the main source of legislation.” The Sharia is derived from two main sources, that is, the Quran and the Sunnah.

The Islamic faith plays a central role in all aspects of life in the Middle East including its legal system. It was on this basis, that Sharia law was given a constitutional imperative and a central place in the UAE’s legal system.

Arbitration is not regarded as inconsistent with Sharia Law and it appears that arbitration in some form or another was used to resolve disputes in the early days of the Middle East. The Quran makes reference to arbitration at verse 4.35 where it states:

If you fear a breach between them (a man and his wife),

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¹ Ras Al Khaimah is an exception with only a Court of First Instance and a Court of Appeal.

Appoint (two) arbitrators, one from his family and the other from her family; if they both wish for peace, Allah will cause their reconciliation. Indeed Allah is ever all knower, well acquainted with all things.

Although explicitly endorsed by the Quran, the process of arbitration in early Islam would have more closely resembled the process of mediation or conciliation rather than the modern law of arbitration which we know today.

As Islamic jurisprudence developed over the centuries and evolved into a sophisticated body of law, Islamic scholars and jurists recognised the importance and necessity of arbitration as an alternative means of dispute resolution.

2. Current law

Despite the fact that historically the concept of arbitration was well recognised within Islamic jurisprudence, the UAE has been slow to introduce a common or federal legislative framework to support arbitration. Indeed, although the UAE has become a beacon for international investment and arbitration has emerged as a popular choice for dispute resolution in the region, the UAE has remained slow in responding to the need to introduce a coherent federal legislative framework for arbitration. Currently arbitration in the UAE is governed by a small number of provisions set out in UAE Civil Procedure Code, Federal Law No. (11) of 1992, (the “CPC”) which is discussed in more detail below.

It should be noted, however, that the Dubai International Financial Centre (the “DIFC”), which came into existence in 2004, has a jurisdiction of its own based on the common law system. The DIFC Courts place within the UAE’s civil law framework was aptly summarised by the DIFC Courts Chief Justice Michael Hwang, when he described the DIFC as a “*common law island in a civil law ocean*.”² The DIFC has its own courts and civil and commercial laws, as well as an arbitration law³ which is discussed further below under *DIFC Arbitration*. Accordingly, the provisions of the CPC relating to arbitration would not apply where the seat of arbitration is the DIFC.

² Address to Lawasia Conference, Kuala Lumpur 1 Nov 2011.

³ DIFC Arbitration Law (No. 1 of 2008).

3. Law reform projects

A draft federal law on arbitration has been circulated by the Ministry of the Economy but as yet has not been enacted. The most recent draft was released on 16 February 2012. The draft law on arbitration is intended to modernise the arbitration framework in the UAE and bring it in line with the international best practice. To this end, the draft is expected to repeal the sections of the CPC, which deal with arbitration and bring arbitration in the UAE in line with the UNCITRAL Model Law on International Commercial Arbitration. At present it remains unclear when this law will be enacted.

4. Confidentiality and publication of awards.

The CPC does not expressly address the issue of confidentiality of arbitration proceedings. It is left to the parties to agree whether matters will be confidential or not. However, in practice arbitration proceedings are usually confidential and it is normal for arbitration agreements to contain a confidentiality clause. Absent any such a clause, the parties may agree, and usually do agree, in the terms of reference that all matters between them will remain confidential.

Where the arbitration is conducted through an arbitration institution, such as the DIAC or DIFC-LCIA, their rules cater specifically for confidentiality. For instance Article 41 of the DIAC Rules provides:

Unless all parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards and orders in their arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain—save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority.

Where the DIFC is the seat of arbitration, Article 14 of the DIFC Arbitration Law (No. 1 of 2008) states that “unless otherwise agreed by the parties, all information relating to the arbitral proceedings shall be kept confidential, except where disclosure is required by an order of the DIFC Court”.

B. Arbitration Infrastructure in Practice

1. Major arbitration institutions

Over the last couple of decades the UAE has grown into global centre for international commerce.

The influx of international investment in the region has brought with it a need for dispute resolution machinery sophisticated enough to cater for complex commercial disputes and to provide confidence to international investors. International investors new to the region may have been somewhat reticent to refer complex commercial disputes to the UAE Courts given that proceedings in the UAE Courts are conducted in Arabic and there is no doctrine of binding precedent with the result that predicating the outcome of a dispute was fraught with uncertainty.

These factors led to a rapid growth in arbitration in the UAE and a consequently a growth in arbitration centres to such an extent that nearly every Emirate has its own arbitration institution. Most of the arbitration centres have rules and procedures which supplement the rules prescribed by the CPC.

The major arbitration institutions administering arbitrations in the UAE are:

i. The Dubai International Arbitration Centre (the "DIAC")

The DIAC is Dubai's leading arbitration institution. It began as an arbitration off-shoot of the Dubai Chamber of Commerce. It was established in 1994 as the "Centre for Commercial Conciliation and Arbitration." In 2007 DIAC produced its own set of rules (the DIAC Rules) which were drafted by its trustees, the majority of whom are eminent foreign international arbitrators.

The DIAC was established to cater for commercial arbitration, promote the settlement of disputes by arbitration and develop a pool of international arbitrators. The DIAC is a financially and administratively autonomous institution with an aim to provide an impartial administration of disputes.

In its short life it has blossomed into the region's busiest arbitration centre. For example, in 2007 the DIAC registered 77 new cases. Over the years it has seen a rapid increase in business with 100 new cases in 2008, 292 new cases in 2009, 422 in 2010 and 429 in 2011.

The DIAC Rules (as well as the rules of the other arbitral institutions discussed below) supplement the CPC provisions on arbitration and provide the arbitrator with additional powers not specifically mentioned in the CPC.

With respect to a tribunal's powers under the CPC, Article 209 of the CPC empowers a tribunal to suspend the proceedings, where during the course of the arbitration, a preliminary issue arises, (such as a challenge that a document is a counterfeit or a criminal act has been committed), which is outside the powers of the arbitrator. The tribunal may also suspend proceedings and refer certain issues to the President of the competent court such as (i) the failure of witnesses to appear before the tribunal or give a statement (ii) to order a party to submit any documents in its possession which are relevant to the proceedings and (iii) to decide on evidence by commission.

The DIAC Rules provide a tribunal with additional powers, such as the power to issue any provisional orders, or take other interim or conservatory measures it considers necessary, including injunctions and measures for the conservation of goods which form part of the subject matter of the dispute, such as an order for their deposit with a third party or an order for the sale of perishable goods.⁴

The DIAC only has jurisdiction to hear disputes where the parties have agreed in writing to submit the dispute in question to the DIAC. Under the DIAC Rules, the parties are free to choose the law applicable to the dispute. If they do not do this, the tribunal applies the law(s) it considers most appropriate.⁵

The DIAC Rules also provide for the timetabling of the proceedings and the exchange of pleadings. Pursuant to the DIAC Rules the final arbitral award must be rendered within six months of the tribunal's appointment.⁶ The arbitrator may extend this by an additional six months if necessary.⁷ The parties may refer the award back for review to the arbitrators in order to correct any clerical, typographical or computational errors in the award.⁸ Where the tribunal considers the request to be justified, it must make any correction within 30 days of receipt of the request.⁹ Where any such

⁴ Article 31 DIAC Rules 2007

⁵ Article 33 DIAC Rules 2007.

⁶ Article 36.2 DIAC Rules 2007.

⁷ Article 36.3 DIAC Rules 2007.

⁸ Article 38.2 DIAC Rules 2007.

⁹ Article 38.2 DIAC Rules 2007.

correction takes the form of a supplemental award, it must be signed by the tribunal and it is thereby regarded as forming part of the substantive award.¹⁰ Insofar as permitted by the law the parties waive all rights of appeal against awards rendered by the DIAC. In order for DIAC awards to be enforceable the award must be ratified by the Dubai Courts. The process of ratification is discussed in more detail under the sections dealing with enforcement below.

ii. DIFC-LCIA Arbitration Centre

The DIFC-LCIA Arbitration Centre was established in February 2008 and is based in the DIFC. The DIFC-LCIA is a partnership between the London Court of International Arbitration and the DIFC.

The DIFC-LCIA Arbitration Centre's arbitration rules are a close adaptation of the LCIA Rules, with minor changes to reflect the particular needs of the DIFC-LCIA Arbitration Centre. The rules are equally applicable and compatible with both civil and common law systems. The rules provide a modern and comprehensive framework, which allows the international business community, international lawyers and arbitrators to conduct arbitrations under the auspices of the DIFC-LCIA with confidence and efficiency. In this regard the DIFC-LCIA further serves to promote the UAE as an effective dispute resolution venue for international commercial disputes.

The centre has jurisdiction to hear disputes where the parties have agreed in writing that arbitration will be conducted under its rules. In line with the DIFC's arbitration legislation, the DIFC-LCIA Arbitration Centre offers dispute resolution services to parties internationally rather than solely within the DIFC.

With respect to the timetabling of proceedings, the parties are free to agree on the procedure to be followed by the tribunal. In the absence of formal direction, the arbitral tribunal has discretion to discharge its duties in order to conduct the arbitration in a fair, efficient, and expeditious manner. Awards under the DIFC-LCIA Arbitration Rules are final and binding, and the parties irrevocably waive any right to appeal. Requests for interpretation or the correction of errors of a typographical, computation, or clerical nature can be made to the DIFC-LCIA Registrar within a period of 30 days from receipt of the award.

¹⁰ Article 38.2 DIAC Rules 2007.

iii. The Abu Dhabi Commercial Conciliation and Arbitration Centre (the “ADCCAC”)

The ADCCAC is Abu Dhabi’s main arbitration institution. It was established in February 1993 by the Abu Dhabi Chamber of Commerce & Industry to provide a facility for resolving trade disputes through conciliation and arbitration. The ADCCAC Charter & Regulations contains the Procedural Regulations for Arbitration and Conciliation. The Rules provide that the parties to a contract may agree to have disputes settled by way of arbitration under the ADCCAC Rules or they may elect ADCCAC arbitration once a dispute has arisen. The proceedings are conducted in Arabic unless otherwise agreed by the parties. Arbitral awards must be in Arabic in addition to any other language adopted during the proceedings. The ADCCAC Rules do not provide any grounds for the appeal of an award.

iv. The International Islamic Centre for Reconciliation and Commercial Arbitration (the “IICRCA”)

The IICRCA is a dispute resolution forum for the Islamic finance industry, based in Dubai. The centre was established for the purpose of assisting in resolving financial and commercial disputes that may arise between financial or commercial institutions or between such institutions and their clients or third parties through reconciliation or arbitration in accordance with the principles and rules of the Islamic Sharia. The IICRCA handles commercial disputes in the Islamic finance industry from across the GCC as well as Malaysia. Again, the agreement of the parties is required for the IICRCA to have jurisdiction.

There are other regional arbitration centres, in Sharjah and Ras Al-Khaimah, such as the Sharjah International Commercial Arbitration Centre and the Ras Al-Khaimah Centre of Reconciliation and Commercial Arbitration. However, this chapter will focus on the Dubai based arbitration centres, such as DIAC and DIFC-LCIA, which are the most utilised institutions in the UAE.

2. Arbitration under DIFC Law

Another forum available for the settlement of disputes in the UAE is by way of an arbitration seat in the DIFC. In 2008 the DIFC enacted its arbitration law, DIFC Law No. 1 of 2008 (the “DIFC Arbitration Law”). The DIFC Arbitration Law is based on the

UNCITRAL Model Law and provides a legislative framework for enforcing arbitral awards made in the seat of the DIFC.

The parties to a DIFC Arbitration are free to determine the number of arbitrators, and, in the absence of such agreement, the default position is that there will be one arbitrator. If the parties are unable to agree on the identity of an arbitrator, the DIFC Courts will make the appointment within thirty days of a request by the parties and the appointment in such circumstances is final. The suitability of an arbitrator can only be challenged where there are questions concerning his or her impartiality or independence, or if he or she does not possess the qualifications agreed to by the parties.

The parties are free to determine the rules that will govern the arbitration and, if no agreement can be reached, the arbitral tribunal can determine the procedures to be applied. Similarly, the parties are free to agree the seat of the arbitration and if no agreement is reached, the default position will be that the seat of the arbitration will be the DIFC. According to Dubai Law No. (12) of 2004 (as amended)¹¹, arbitral awards rendered by an arbitral tribunal which is seated at the DIFC may be enforced outside of the DIFC and throughout the UAE provided that the award is recognised or ratified by the DIFC Courts and complies with the requirements set out in Article 7 of Law No. (16) of 2011. Article 7(2) of Law No. (16) provides that DIFC Court judgments, decisions or orders, including ratified arbitral awards (hereinafter collectively referred to as “*DIFC Awards*”) may be enforced through the Dubai Courts where three conditions are met, namely:

- a. They must be final and executory;
- b. They must be legally translated into Arabic;
- c. They must be certified by the DIFC courts for execution and have a formula of execution affixed by the Courts.¹²

The Dubai Courts have no authority to review the merits of DIFC Awards before their enforcement in Dubai¹³. DIFC Awards may be viewed as being converted into a judgment of the Dubai courts once

¹¹ Amended by Dubai law No. (16) of 2011.

¹² The formula of execution affixed by the Courts is in the following terms: “*Authorities must take the initiative to enforce this document and assist in implementing it even forcefully whenever requested to.*”

¹³ Article (7) (3) (c) of Law No.(16) of 2011.

the Dubai Courts issue an execution order.. Such an award may then be enforced in Dubai.

With respect to the enforcement of DIFC Awards in other emirates in the UAE, Article 7(2) of Law No. (16) of 2011 provides as follows:

Where the subject matter of execution is situated outside the DIFC, the judgments, decisions and orders rendered by the Courts and the Arbitral Awards ratified by the Courts shall be executed by the competent entity having jurisdiction outside the DIFC in accordance with the procedure and rules adopted by such entities in this regard....

According to Article 7(2), DIFC Awards may be sent direct to the “competent entity” in any emirate for execution. Although the term competent entity is not defined, it most likely refers to the competent execution judge of the particular emirate where execution is sought. Although, Article 7(2) appears to allow DIFC Courts to send DIFC Awards directly to the competent execution judge in the target emirate where enforcement is sought, there remains some doubt whether the DIFC Award should first be converted to a Dubai Court judgment and then sent to the target emirate where enforcement is required. The latter approach is still the preferred approach to ensure that a DIFC Award is enforced in emirates other than Dubai.

Article 221 of the CPC outlined the procedure for the enforcement of DIFC Awards, outside of Dubai, before Article 7(2) was enacted. The provisions of Article 221 are broadly similar to those in Article 7(2). Nonetheless, Article 221 represents an established procedure for enforcing DIFC Awards and therefore offers the best security in ensuring that DIFC Awards are executed in other emirates. DIFC Awards which have been ratified by the Dubai Courts can be enforced in the other Gulf Co-operation Council (GCC) states under the GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications. Furthermore, the DIFC is bound by the international conventions ratified by the UAE. Therefore, DIFC awards are also enforceable in all states which have adopted the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In January 2014, the DIFC Courts established the DIFC Courts Enforcement Department. The

aim of the Enforcement Department is to bolster the enforcement of DIFC Awards within the UAE and internationally. Michael Hwang, Chief Justice of the DIFC Courts summarised the Department's goals in the following terms:

The creation of this department sends a very clear signal that the DIFC Courts' judgments are enforceable internationally and that we will enforce the judgments of other leading jurisdictions. This will give additional certainty to international business while also contributing to a strong and effective justice system, which is a key goal of the UAE'S 2021 Vision.

On 15 December 2013, the DIFC Arbitration Law was amended by Law No.6 of 2013. The purpose of the amendment was to bring the DIFC Arbitration Law in line with Article 11(3) of the New York Convention. Article 11(3) provides that a court of a contracting state must, at the request of either party to a dispute, refer the dispute to arbitration if the parties have agreed that the dispute should be arbitrated.

In contrast, Article 13 (1) of the DIFC Arbitration Law, which deals with the recognition of arbitral agreements, provided in its original form, that the DIFC Court was only empowered to order a stay of proceedings and refer the parties to arbitration where the arbitration was seated in the DIFC.

The discrepancy between the New York Convention and the DIFC Arbitration Law with respect to the recognition of arbitral agreements was the cause of two conflicting judgments being handed down by the DIFC Court of First Instance. In *Injazat Capital Limited v Denton Wilde Sapte & Co*,¹⁴ Sir Justice David Steel found that the DIFC Arbitration Law was not in compliance with the New York Convention. In so holding, Justice Steel, in accordance with Article 13(1), refused to stay an action where the contract in question provided for the dispute to be referred to LCIA arbitration in London i.e. a seat outside the DIFC.

The decision in *Injazt*, however, was not followed in the subsequent decision of *International Electromechanical Services Co LLC v Al Fattan Engineering LLC*.¹⁵ Judge Williams QC reasoned that

¹⁴ CFI 019/2010,

¹⁵ CFI 004/2012.

notwithstanding Article 13 (1) of the DIFC Arbitration Law, the DIFC Court had an inherent discretion to order a stay of proceedings in favour of arbitration seated outside the DIFC.

The amendment to the DIFC Arbitration Law has now clarified matters and rendered as academic the contrasting decisions of the DIFC Court of First Instance.

It is now settled that Article 13 of the 2008 Law applies (1) where the seat of arbitration is the DIFC; (2) where the seat is other than the DIFC; and (3) where no seat is designated or determined.

II. CURRENT LAW AND PRACTICE

A. *Arbitration Agreement*

1. Types and validity of agreement

As already noted above, the UAE does not as of yet have a common or federal arbitration law. Instead arbitration in the UAE is primarily governed by a small number of provisions in the CPC. This is not an ideal situation given the recent increase in arbitrations in the UAE, and particularly given that fact that the main purpose of the CPC was to govern domestic legal proceedings in the UAE rather than arbitration proceedings. The specific sections of the CPC which deal with arbitrations are:

- Articles 203–218 which regulate the framework for arbitrations
- Articles 235–238 which regulate the execution of foreign judgments
- Articles 239–243 which regulate the execution procedures

The CPC provides mandatory provisions on the enforceability of arbitration agreements. In order for an arbitration agreement to be enforceable, the following requirements must be satisfied: (a) an arbitration agreement must be in writing;¹⁶ and (b) the subject matter of the dispute must be specified in the arbitration agreement.¹⁷ On the whole, agreements to arbitrate are construed narrowly in the UAE. It is important therefore that the wording of

¹⁶ Article 203(2), CPC.

¹⁷ Article 203(3), CPC.

the arbitration agreement is clear and unequivocal and reflects the fact that the parties understand and intend that any disputes which may arise should be referred to arbitration.

The parties to a contract can refer a dispute that may arise between them to arbitration either through a clause in the main contract, which provides for arbitration, or a separate arbitration agreement.¹⁸ The CPC does not prescribe any special wording for the content of the arbitration agreement. However, most arbitration centres provide model arbitration clauses, which contracting parties would be wise to adopt to ensure that any dispute is referred to their arbitral institution of choice. In order to be effective the arbitration agreement should be unequivocal to ensure that no potential problems arise concerning jurisdiction. The legal provisions in CPC relating to limitation periods are applicable to arbitrations. The general limitation period is 15 years. However, the limitation periods applicable to a certain dispute may depend on the subject matter involved.

Under the law most commercial and civil disputes may be submitted to arbitration, including banking/finance, real estate and construction, oil and gas, foreign direct investment, and international commercial transactions. Since 2008, many of the arbitrations in the region have related to the construction and real estate sector. However, recent trends have demonstrated a willingness of parties to submit not just specialist disputes to arbitration but a broader range of general commercial matters. Importantly, the UAE has also seen a number of cross-border disputes, especially in light of the international commercial attractiveness of some of the Emirates and their free zones.

2. Enforcing domestic arbitration awards

An arbitration award is final and binding and is not capable of being appealed under UAE law.¹⁹ However, for an award to be valid under the CPC, the final arbitral award must:²⁰

- be signed by the arbitrator, and where there is a panel the majority of members of the tribunal must sign the award;

¹⁸ Article 203(1) CPC.

¹⁹ Article 207 (1) CPC.

²⁰ Article 212 CPC.

- state the facts of the dispute, the legal reasons for the decision and the date on which it was reached; and
- be accompanied by the arbitration agreement.

The major arbitration institutions also stipulate consistent requirements in relation to the validity of the final award.

Generally arbitral awards rendered by a tribunal in the UAE are enforceable (subject to local laws) in jurisdictions that, like the UAE, are a party to the following international treaties:

- The New York Convention
- The Arab Convention on Judicial Cooperation (Riyadh Convention)
- Agreement of Execution of Judgments, Delegations and Judicial Summons in the Arab Gulf Cooperation Council countries (GCC Treaty)
- The Agreement on Judicial Cooperation, Execution of Judgments and Extradition of Criminals between the United Arab Emirates and the Tunisian Republic.
- The Convention on Judicial Assistance, Recognition and Enforcement of Judgments in Civil and Commercial matters signed between France and the UAE.
- The Agreement on Juridical Cooperation in Civil and Commercial Matters with India.
- The Convention on Judicial Assistance in Civil and Commercial matters between the UAE and the Republic of China.

Before a domestic arbitration award can be enforced in the UAE the award must be ratified by a UAE Court. However, according to Article 215 of the CPC, the ratification process of an arbitral award follows the same procedure as a party commencing an action in the Court of First Instance in the UAE Courts. The party seeking to have the arbitral award ratified must issue a claim form with supporting documents. Once the claim is filed, it is up to the Court to either ratify or annul the award. Once the award is ratified it becomes equivalent to a UAE court judgment and can be enforced throughout the UAE.

The ratification process adds another layer to arbitration proceedings in the UAE, significantly also in terms of the time and expense for the parties involved. Parties embarking on arbitration proceedings need to be cognizant of this at the outset. It is usual for

the unsuccessful party in the arbitral proceedings to resist the ratification application in the UAE Courts and seek to have the application annulled by submitting a defence to the action for ratification. The ratification procedure may take up to two years depending on the complexity of the issues involved and whether the unsuccessful party remains resolute and decides to exhaust all avenues of appeal. The arbitral award can only be enforced and executed when a final decision on the ratification of the arbitral award has been rendered by the Dubai courts and accepted by the parties to the dispute. .

In assessing whether to ratify an award the courts are precluded from reconsidering the merits of the arbitral tribunal's findings. Instead the courts can only consider the arbitral award on procedural grounds. In other words, the courts are not concerned with the Tribunal's decision but with how the decision was reached.

Historically, the UAE Courts had a reputation for not enforcing awards on the basis of minor technicalities. For instance in the 2004 case of *International Bechtel Co. Ltd. v. Department of Civil Aviation of the Government of Dubai*;²¹ the Dubai Court of Cassation ruled that a US\$ 25 million dollar arbitration award in favor of the claimant should be set aside on the grounds that the arbitrator had failed to swear in witnesses in the manner prescribed by UAE law for court hearings and in accordance with Article 41(2) of the CPC.

Notwithstanding judgments like *Bechtel*, it is fair to say that recent judgments on enforcement and ratification emanating from the courts indicate that on the whole the UAE Courts have embraced a more arbitration friendly attitude to ratification of arbitral awards. This recent trend must, however, be weighed against a recent decision of the Dubai Courts in relation to ratification of arbitral awards which was challenged on grounds of "public order".

In the recent decision the Court of Cassation²² overturned an arbitration award on the basis of public policy considerations as provided for in Article 3 Federal Law No. *5) of 1985 (the "UAE Civil Transactions Law"). Article 3 provides:

Public order shall be deemed to include matters relating to personal status such as marriage, inheritance, and lineage, and matters relating to systems of government, freedom of

²¹ Dubai Court of Cassation, Petition no 503/2003 (judgment dated 15 May 2005).

²² Case No.: 180/2011 date of judgment 12/02/2012.

trade, the circulation of wealth, rules of individual ownership and the other rules and foundations upon which society is based

In brief, the arbitration award declared the sale and purchase agreement for an off plan property purchase to be null and void on the basis that the agreement was in violation of Article 3 of Law No. (13) of 2008 Regulating the interim Real Estate Register in Dubai (Law No. (13) of 2008). Article 3 of Law No. 13 of 2008 provides for the mandatory registration of any sale and purchase of properties in Dubai in the Real Estate Register through the Dubai Lands Department. The sale and purchase agreement was not so registered. As a result the arbitrator found the sale and purchase to be null and void.

The Court of Cassation overturned the arbitration award on the basis that the arbitrator did not have the power to adjudicate on matters of “public policy” such as “matters related to the circulation of wealth, rules of individual ownership...”. Such matters which the Court determined included whether the sale and purchase agreement was registered with the interim Real Estate Register pursuant to Law No. (13).

Unfortunately, public policy in the UAE is defined very widely. It is conceivable that the UAE Courts may determine that a real estate contract, or in fact any “commercial” contract may be interpreted as falling within the “freedom of trade” or “circulation of wealth” categories and thus within the definition of matters, which are deemed to concern public order. In this event, the court may hold that the arbitration clause in the concerned contract is invalid and void.

The Court of Cassation judgment sounds a note of caution for parties seeking to have an arbitral award ratified and enforced. It appears that legal opinion is somewhat divided on the implications of this recent judgment. It is not clear whether the decision signals that this public policy exemption from arbitration will apply to all real estate cases or just to those cases involving technical issues such as the law requiring the registration of transactions with the land department. Some view the decision as confined to the particular set of facts that were present in that case.

The fact that there is no doctrine of binding precedent in the UAE also adds to the uncertainty surrounding this decision as it is not clear whether this decision will or will not be followed in future.

From a practical point of view the Court of Cassation decision makes it difficult to predict with any certainty the outcome in any

case concerning the ratification of an arbitral award, and accordingly, there can be uncertainty how a UAE Court may in future treat an application for enforcement of any arbitration award that is issued.

If the ratification of an award is refused, it is likely that the dispute will have to be re-argued before the UAE Courts, resulting in inherent delay and substantial additional expenditure that this will necessitate.

Given the far reaching implications of this decision, together with the uncertainty which it has caused, it would undoubtedly be an ideal time for the authorities to intervene to allay fears both domestically and internationally and introduce some much needed clarity on this issue.

3. Enforcement of foreign awards in the UAE

The UAE is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"). The UAE ratified the Convention on 13 June 2006 and it entered into force on 19 November 2006.²³ The Convention is a mechanism which allows a party to enforce an arbitration award made in one country in another country that is also a signatory to the Convention. Accordingly, pursuant to Article 5 of the Convention, the UAE Courts should enforce foreign arbitral awards unless the limited grounds to resist enforcement in the Convention have been proved by the party seeking to resist an enforcement application.

Where a party in the UAE seeks to have a foreign award enforced under the Convention, the party must furnish a duly authenticated original award or a duly certified copy thereof and the original arbitration agreement and/or a duly certified copy thereof.²⁴ Where the award and the arbitration agreement is in a foreign language the party seeking to have it recognised and enforced in the UAE must have it translated into Arabic.²⁵

The grounds for refusing recognition or enforcement are set forth in Article V (1) of the Convention. The party seeking to have an award refused must furnish proof that:

²³ Federal Decree No. 43 of 2006

²⁴ Article IV (1) of the New York Convention.

²⁵ Article IV (2) of the New York Convention.

- a. The parties to the agreement were under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the law of the country where the award was made; or
- b. The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
- c. The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or
- d. The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- e. The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Additionally, Article V (2) (b) of the Convention contains an exception to the enforcement of foreign arbitral awards. Article V (2) (b) provides that the recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: “The recognition or enforcement of the award would be contrary to the public policy of that country.”

Despite the UAE’s accession to the Convention, the UAE Courts in the past have remained somewhat reluctant to comply fully with their obligations under the Convention and recognise foreign arbitration awards. The reluctance of the UAE Courts to enforce foreign arbitration awards may in some way be explained by jingoistic desires not to surrender jurisdiction to foreign decision makers.

The UAE Courts have continued to place reliance on strict domestic provisions governing the enforcement of foreign arbitral

awards in the UAE as outlined in Article 235 of the CPC. While these provisions of the CPC have allowed for the enforcement of foreign arbitration awards, in practice having such an award successfully enforced in the UAE (absent any reciprocal treaty on enforcement) has been difficult. In order to have a foreign award enforced the conditions in Article 235 have to be satisfied. Article 235 provides that the UAE Courts will not ratify an award unless the following conditions are met:

- a. The state courts do not have jurisdiction over the dispute on which the judgment or the order was passed and the issuing foreign courts have such jurisdiction in accordance with the International Judicial Jurisdiction Rules decided in its applicable law.
- b. The judgment or order was passed by the competent court according to the law of the country in which it was passed.
- c. The parties were correctly summoned and duly represented.
- d. The judgment or order is final.
- e. The judgment is not contrary to UAE public policy or to a previous UAE Court judgment

Article 235 (e) in particular gives the UAE Courts a broad remit to refuse the enforcement of a foreign arbitration award, which remains applicable notwithstanding the UAE's accession to the Convention.

Further proof of the UAE's reluctance to comply with its enforcement obligations under the Convention can also be seen in the *Bechtel* case outlined above where the court refused enforcement of a foreign award on purely formal grounds outlined in the CPC.

However, any reluctance which the UAE Courts may have had towards its obligations under the Convention appear to have been tempered by recent decisions, which show a willingness of the UAE Courts to comply with the Convention.

The recent decision of the Dubai Court of Cassation in *Airmech Dubai LLC v Macsteel International LLC*²⁶ appears to demonstrate that the UAE Courts have adopted a more open attitude towards the recognition and enforcement of foreign arbitral awards under the Convention. *Airmech* was a Dubai based company which entered into a contract with *Macsteel* for the purchase of a certain quantity of

²⁶ Appeal for Cassation No. 132/2012.

steel. A dispute arose between the parties and the matter was referred to arbitration before the DIFC-LCIA with the seat specified as London in accordance with the arbitration agreement.

The arbitrator found in favour of *Macsteel* which subsequently sought to have the awards enforced in Dubai. *Airmech* sought to resist the enforcement action on *inter alia* the procedural grounds under which the UAE Courts may nullify domestic arbitral awards as set out in Article 216 of the CPC. Article 216 provides that the parties to a dispute may, at the time of consideration of the arbitration award, request the nullification of the award in the following circumstances:

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

Both the Court of First Instance and the Court of Appeal found in favour of *Macsteel*. The decision of the lower courts was also upheld by the Court of Cassation. The Court of Cassation found that the CPC should only apply to arbitral awards rendered in the UAE. In reaching its conclusion the Court cited *inter alia* Article 238 of the CPC, which provides that the rules that apply to the ratification and execution of foreign awards set out in Article 235 “do not prejudice rules and regulations provided for in conventions signed between the UAE and other countries in this respect.” Thus, the Court of Cassation reasoned that as the NYC had been adopted into UAE law, the UAE Courts were bound to apply its provisions with respect to the recognition of foreign arbitral awards.

Despite the Court of Cassation’s unequivocal endorsement of the UAE’s obligations under the Convention, a recent decision of the

Dubai Court of First Instance handed down on 18 December 2012,²⁷ seems to have cast doubt on whether the decision in *Airmech* represents a true departure from the Dubai Courts historical reluctance towards enforcing foreign arbitral awards. The Court of First Instance made a decision on the enforcement of three foreign awards on the basis of Article 235 of the CPC. The awards were rendered under the ICC rules in Paris. The arbitrator found in favour of a French company in respect of monies it was owed by the Sudan Government in relation to the construction of a Canal in South Sudan. In refusing to enforce the foreign awards, not only did the Court of First Instance appear to disregard the obligations under the Convention, it also seems to have ignored the bi-lateral enforcement treaty between the UAE and France.²⁸

Another recent case may be viewed as casting further doubt on the Dubai Courts acceptance of their obligations under the NYC. In the case of *Construction Company International (CCI) v Ministry of Irrigation of the Government of Sudan*²⁹ (MOI), the Dubai Court of Cassation refused to enforce a foreign arbitral award against the MOI. CCI was successful in ICC arbitration proceedings in Paris and sought to enforce its awards in Dubai. Neither party nor the contract in dispute had any connection to the UAE.

In refusing to enforce the foreign awards, the Court of Cassation relied on the provisions of the CPC, most notably Article 21, which provides that parties must be domiciled in the UAE and the subject matter of the contract must be performed in the UAE. The decision also appears to run counter to the decision in *Airmech*, where the Court of Cassation was unequivocal that the provisions of the CPC were inapplicable when the Dubai Courts were considering an application for the enforcement of a foreign award.

Any negative implications which may be thought to arise out of the decision in the CCI case may be tempered, when one considers the somewhat unique circumstances of the case. For example, the parties and the contract in dispute had no relationship whatsoever to the UAE. Additionally, the Court's reasoning appeared to be influenced by the fact that CCI had already made numerous failed

²⁷ Case no. 489/2012.

²⁸ The Convention on Judicial Cooperation and the Recognition and Enforcement of Judgments in Civil and Commercial matters between the UAE and the French Republic (Federal Decree No.31 of 1992).

²⁹ Dubai Court of Cassation Case No. 156/2013.

attempts to enforce the arbitral awards in several other jurisdiction, including France, the country where the awards were initially issued.

It is to be hoped that these two decisions are an aberration and do not signal a return to the UAE's historical reluctance with respect to the enforcement of foreign arbitral awards. Given the Court of Cassation's clear decision in *Airmech*, and the UAE's ambitions to continue to develop as an international centre for arbitration, it may be unlikely that these decisions will be followed in the future.

4. Effects on third parties.

Only parties to the arbitration agreement are bound by the agreement. There is therefore no provision in the CPC which empowers a tribunal to order either that (i) a third party be joined to the arbitration proceedings; or (ii) that a third party is bound by an arbitration award. That said, pursuant to Article 209(2) of the CPC an arbitrator may apply to the President of the Competent Court for an order requiring third parties to produce documents in their possession that are necessary to render the award. Such action will necessitate the suspension of the proceedings.

B. Doctrine of Separability

According to the doctrine of separability, an arbitration clause in a main contract constitutes a separate and independent agreement of the main contract. The CPC does not expressly provide for the doctrine of separability. However, this doctrine is recognised by the UAE Courts. The CPC does provide that contracting parties can refer a dispute that may arise between them to arbitration either through a clause in the main contract or by way of a separate arbitration agreement.³⁰

The DIAC also recognises the separability of arbitration agreements. Article 6.1 of the DIAC Rules provides that: "unless the parties agree otherwise, an arbitration agreement which forms, or was intended to form, part of another agreement must not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and the arbitration agreement must for that purpose be treated as a distinct agreement".

³⁰ Article 203.

C. Jurisdiction

The “*Kompetenz-Kompetenz*” principle is recognised in the UAE. The principle provides that an arbitral tribunal decides itself whether it has jurisdiction to decide a dispute brought before it. For instance, in proceedings before the DIAC if any party raises a plea relating to the existence, validity, scope or applicability of the arbitration agreement, the Executive Committee of the DIAC can decide, without prejudice to the admissibility or merits of the parties substantive pleadings, that the arbitration must continue if the Executive Committee is prima facie satisfied that an arbitration agreement exists. In these circumstances, the parties are not prevented from raising any such jurisdictional objection before the tribunal, and any decision as to the jurisdiction of the tribunal will be taken by the tribunal itself. If the Executive Committee is not so satisfied, the parties will be notified that the arbitration cannot proceed. Any party then retains the right to ask any competent court to determine whether or not there is a binding arbitration agreement.³¹

D. Arbitrability

Most disputes which arise between parties to a contract are capable of being dealt with by arbitration in the UAE. The only prohibition on arbitration in the CPC is contained in Article 203 (4) which provides that arbitration is not permissible in matters which are not capable of being reconciled. Accordingly, this provides a very broad threshold for matters which may be dealt with by arbitration. However, arbitrability must also now be considered in light the aforementioned judgment of the Dubai Courts which have held that matters concerning public order are not capable of resolution by arbitration. Criminal matters and matters of personal statute may also not be referred to arbitration. Furthermore, matters relating to commercial agency disputes³² and labour disputes³³ are not capable of being dealt with by arbitration. While the CPC recognises that parties to an arbitration may apply for interim measures such as attachment orders³⁴ against assets of the other party; where a

³¹ Article 6.2 DIAC Rules.

³² Article 6 of Federal law No. 18 of 1981, as amended (the Commercial Agency law).

³³ Federal law No. 8 of 1980 as amended (the Labour Law).

³⁴ Article 255 CPC.

dispute arises, however, in relation to any such order it may not be dealt with by arbitration unless the parties have agreed otherwise³⁵. Despite these limited exceptions, the majority of disputes which may arise will be amenable to arbitration.

E. Arbitral Tribunal

1. Appointment, status and qualifications

The arbitration provisions of the CPC provides compulsory provisions concerning the appointment of the arbitral Tribunal. The CPC does not prescribe a limit to the number of arbitrators although the number must be odd where there is more than one arbitrator.³⁶ The CPC restricts certain persons from acting as an arbitrator.³⁷ For instance, an arbitrator must not be a minor, have a criminal conviction, have been bankrupt, or be legally incapacitated. Where the parties to an arbitration agreement fail to agree on the number or identity of the arbitrators, the courts will intervene to make the appointment, which will be final and not appealable.³⁸

In relation to the procedural rules, the parties can, and usually do, determine the applicable procedural rules in the arbitration agreement. If the arbitration agreement is silent, the parties can decide on the applicable procedural rules in the terms of reference. In arbitration proceedings before institutions such as, for example, the DIAC, the DIAC Rules will apply. If the parties cannot agree on the procedural rules, the arbitrators must decide on the applicable rules, provided that the selected rules meet the requirements of the CPC.

2. Qualifications

There are no special educational requirements to act as an arbitrator in the UAE. Once a person does not come within the restrictions stated in the CPC, as outlined above, and is impartial and independent he may act as an arbitrator. Nonetheless, all arbitrators will usually be professionally qualified and have a wealth of experience in their respective professional fields. They will also

³⁵ Dubai Court of Cassation, Commercial Cassation, recourse No. 204/2005, Jul.2.2005

³⁶ Article 206 (2), CPC.

³⁷ Article 206 (1), CPC.

³⁸ Article 204, CPC.

likely be members of internationally accredited arbitration organisations, which provide training for arbitrators. Most arbitrators will also need to apply to the various arbitration institutions for permission to be placed on the relevant institution's panel of arbitrators in order to be eligible to be selected to adjudicate in its arbitrations.

3. Independence, impartiality and grounds for challenge

Most of the institutional arbitration rules have express provisions requiring arbitrators to be independent and impartial. When a person is approached in connection with his possible appointment as an arbitrator, he should disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, should disclose any such circumstances to the parties and any arbitral institution administering the arbitration, unless they have already been so informed.

Article 9 of the DIAC Rules provides that:

All arbitrators conducting an arbitration under these Rules shall be and remain impartial and independent of the parties; and shall not act as advocates for any party in the arbitration.

Generally arbitrators cannot be dismissed, save with the consent of all of the parties to the proceedings.³⁹ However, pursuant to the CPC an arbitrator may be removed where it is established that the arbitrator has (i) willfully neglected to act in accordance with the terms of reference, or on (ii) the same grounds on which a judge may be dismissed or deemed unfit to pass judgment. According to Article 114 of the CPC, a judge may be disqualified where:

- he is the spouse of any of the litigants
- if he is the litigant's relative or in-law to the fourth degree
- his wife has an existing dispute with any of the parties (or their wives)
- he is an agent, trustee or guardian of any of the parties in his private capacity
- he has given a legal opinion or has pleaded for any of the parties in the lawsuit, or any written statement during it

³⁹ Article 207(3) CPC.

An application to remove an arbitrator must be made to the original court having jurisdiction to hear the dispute within five days from either the arbitrator's appointment, or the date on which the cause of disqualification first became known.

Where the parties to a dispute agree to refer the dispute to arbitration, the courts will decline to hear the matter. That said, where one of the parties commences proceedings in the courts instead of proceedings by way of arbitration, and the other party fails to object to the commencement of the court proceedings at the first opportunity to do so, the courts will deem that the parties have waived their right to have the matter determined by way of arbitration and the arbitration provision shall be deemed cancelled.

4. Payment arrangements

The CPC does not fix the fees or the cost of the arbitration process. Most arbitration institutions set out rules for calculating the costs associated with each particular dispute before it.

According to the DIAC Rules the costs of the arbitration are calculated by reference to a table of fees and costs.⁴⁰ Under the DIAC Rules the costs of the arbitration include the centre's administrative fees for the claim and any counterclaim. The fees and expenses of the tribunal fixed by the centre in accordance with the table of fees and costs in force at the time of the commencement of the arbitration, and will include any expenses incurred by the tribunal, as well as the fees and expenses of any experts appointed by the tribunal.

The DIFC-LCIA's charges,⁴¹ and the fees of the tribunals it appoints, are not based on the sums in issue. The DIFC-LCIA is of the view that a very substantial monetary claim (and/or counterclaim) does not necessarily mean a technically or legally complex case and that arbitration costs should be based on time actually spent by administrator and arbitrators alike.

A non-refundable registration fee of AED 9,750 is payable on filing the Request for Arbitration. Thereafter, hourly rates are applied both by the DIFC-LCIA and by its arbitrators, with part of the DIFC-LCIA's charges calculated by reference to the tribunal's fees. The DIFC-LCIA sets a maximum hourly rate, at or below which the arbitrators it appoints must (other than in exceptional cases) set their fees. The maximum hourly rate of the arbitrators is AED 2,525

⁴⁰ Appendix – Cost of Arbitration DIAC Rules.

⁴¹ DIFC LCIA - Schedule of Costs.

per hour. The tribunal will agree in writing the fee rates conforming to the *Schedule of Arbitration Costs* prior to its appointment by the DIFC-LCIA. The rates will be advised by the DIFC-LCIA Registrar to the parties at the time of the appointment of the tribunal. Parties may call for financial summaries at any time to keep track of costs. Every payment on account of arbitrators' fees will be notified in advance and accounted for on disbursement.

5. Arbitrator liability and immunity

Article 40 of the DIAC Rules provides that: "No member of the Tribunal or of the Executive Committee, nor the Centre and its employees, nor any expert to the Tribunal shall be liable to any person for any act or omission in connection with the arbitration." The DIFC Arbitration Law contains a similar provision where the DIFC is the seat of arbitration.

Generally, where any of the parties suffer damage or loss caused by fraud or negligence of the arbitrators it may be open to them to seek redress for the damages caused. There are, however, no specific provisions in the CPC which entitle a party to seek redress in this regard. The arbitrator may, however, have to indemnify the parties where he withdraws from his appointment without a significant reason.⁴²

F. Conducting the Arbitration

The basic procedural principle to be applied by the arbitral tribunal is the respect of due process. All arbitrators conducting arbitrations whether *ad hoc* or under the auspices of an arbitration institution are required to remain impartial and independent of the parties and to give each party an equal and full opportunity to present their cases.

The CPC provides that within a maximum of thirty days from the acceptance of its appointment the arbitrator must notify the parties to the dispute of the date of the first hearing for consideration of the dispute. The arbitrator must also fix a date for the parties to submit their documents and pleadings. Where, however, the arbitration is conducted under the auspices of an arbitration institution, such as the DIAC, their institutional rules will prescribe a detailed time table for the exchange of pleadings by the parties. Usually the claimant is

⁴² Article 207 (2), CPC.

required to submit its statement of claimant within thirty days of the tribunal's appointment and the respondent has thirty days to submit its defence.

It is usual when the arbitrators have been appointed for them to request the parties to agree on terms of reference for the proceedings which will contain the time table for the proceedings.

The CPC itself does not empower the tribunal to issue any provisional or interim orders. Where the arbitration proceeds under the auspices of one of the arbitration institutions such as the DIAC, for instance, the tribunal can issue provisional orders, take any interim or conservatory measures it considers necessary, including injunctions and measures relating to the conservation of goods which form part of the subject matter of the dispute, such as an order for their deposit with a third party or an order for the sale of perishable goods.

1. Taking evidence

The tribunal has the power to decide on the rules of evidence to be applied including the admissibility, relevance or weight of any material tendered by a party on any matter of fact or expert opinion; and to determine the time, manner and form in which such material should be exchanged between the parties and presented to the tribunal.

All of the major arbitration centres in the UAE allow for witnesses of fact and expert witnesses to be called where necessary. The CPC requires that where witnesses of fact or expert witnesses are called to present their respective evidence they must do so under oath. As already outlined under the enforcement considerations above, failure to comply with this provision can have a detrimental effect on having the award ratified.

In terms of disclosure requirements, the UAE in general, is very limited in the scope of disclosure in both litigation and arbitration. A party is not obliged to disclose any document which is detrimental to its case, unless ordered by the court to do so. In addition, the parties will usually agree at the outset on the rules of disclosure in the terms of reference. Under the DIAC Rules, the tribunal has the power to decide on the rules of evidence to be applied during the proceedings.⁴³ In addition, the parties are not required to disclose

⁴³ Article 27.2, DIAC Rules.

any document they are not intending to rely on, unless ordered by the arbitrator to do so.

Increasingly, the IBA Rule on the Taking of Evidence in International Arbitration⁴⁴ is adopted within arbitration proceedings in the region.

2. Disposal of proceedings

The tribunal can dispose of the proceedings on the basis of the pleadings submitted by each party alone. Alternatively, the tribunal can, should it consider it necessary or where the parties' request, hold a hearing to ensure each party is provided an opportunity to present their respective cases. Each party shall have the burden of proving the facts relied upon to support its claim or defence. At the hearing each party may present evidence by witnesses, including expert witnesses.

The arbitral tribunal must issue a final award within six months from the date of the "*first arbitration session*".⁴⁵ The parties may, however, agree to have the time extended by a further six months in which the tribunal is to render its final award. The DIAC Rules also provide that the final award must be rendered within six months of the tribunal's appointment, with an option to extend the time by a further six months.⁴⁶ Interestingly, the DIFC Arbitration Law does not prescribe a time limit within which an award is to be rendered.

3. Judgment in default of appearance

Where a party fails to engage with the arbitral process, a tribunal will usually continue and exhaust the arbitral process rather than issue a preemptive final judgment against the party in default. This accords with the overall spirit of the arbitral process, in which parties have consented to the matter being disposed of by way of arbitration. This contrasts with proceedings before a court where the parties are usually summoned to appear before it. Notably, the DIFC Arbitration Law empowers the tribunal to terminate proceedings where the claimant fails to submit his statement of case in accordance with the applicable rules.

⁴⁴ May 29, 2010, IBA.

⁴⁵ Article 210, CPC.

⁴⁶ Article 36, DIAC Rules.

The major arbitration institutions impose rules addressing the situation where a party to the dispute is in default of the proceedings. According to Article 5.6 and Article 32 of the DIAC Rules, the Tribunal is empowered to proceed with the arbitration and make the final award in circumstances where the Respondent has: (1) failed to submit an Answer in accordance with Article 5.1 of the Rules; and (2) failed to submit a Statement of Defence in accordance with Article 24 of the Rules.

4. Court intervention

Where the seat of the arbitration is non-DIFC Dubai, the UAE courts will play a supervisory role in the arbitration proceedings on the basis of the CPC being the *lex arbitri* of the arbitral process. The areas where the UAE Courts may intervene is limited to the following matters set out in the CPC:

- a party may seek to challenge the jurisdiction of the tribunal and apply to the UAE Courts;
- a party may apply for interim relief;
- a party may apply to the court to challenge the appointment of an arbitrator.

Where the seat of arbitration is the DIFC, the DIFC Courts will play a supervisory role in the arbitration proceedings. The DIFC's scope for intervention is limited to the matters set out in Article 10 of the DIFC Arbitration Law. Article 10 provides: "In matters governed by this Law, no DIFC Court shall intervene except to the extent so provided in this Law."

The Law specifically authorises judicial intervention in relation to the following matters:

1. Article 13 - Where proceedings are before the DIFC Court in a matter which is the subject of an arbitration agreement.
2. Article 15 - Interim Measures
3. Article 17 - Appointment of Arbitrators
4. Article 19 - Challenge Procedure
5. Article 20 - Termination of Mandate of Arbitrator
6. Article 23 - Decision on Jurisdiction of Arbitral Tribunal
7. Article 34 - Court Assistance in Taking Evidence
8. Article 41 - Applications to Set Aside Award
9. Article 42–44 - Recognition and Enforcement of Awards

Generally, however, the DIFC Courts would only exercise its right to intervene in relation to the above areas where it is clear that the parties are at an impasse and that the success of the arbitral proceedings depends on its intervention.

5. Remedies

Under the CPC and the rules of the various arbitration institutions in the UAE, an arbitral tribunal is empowered to award:

- (a) Damages;
- (b) Injunctions;
- (c) Costs; and/or
- (d) Interest.

6. Interest

An arbitral tribunal is also empowered to make provisional and interim orders as already outlined above. In relation to damages it is usual for costs to follow the event, that is, the losing party will pay for the costs of the other party. However, a tribunal can apportion the costs between the parties where appropriate. All costs are subject to the schedule of costs set out by the relevant arbitration institution.

An arbitration tribunal can also award interest on the amount of the final award where appropriate. While the CPC reflects the Sharia Law position that interest cannot be awarded,⁴⁷ the Commercial Transactions Law, Federal Law No. (18) of 1993 (the "Commercial Code") confirms that interest may be awarded. Pursuant to Article 76 of the Commercial Code interest may be awarded on the amount of the final award where appropriate. Article 76 of the UAE Commercial Code is in the following terms:

A creditor is entitled to receive interest on a commercial loan as per the rate of interest stipulated in the contract. If such rate is not stated in the contract, it shall be calculated according to the rate of interest current in the market at the time of dealing, provided that it shall not exceed 12% until full settlement.

⁴⁷ Article 714 CPC.

It is usual for the tribunal to award interest from either: (i) the date the action was filed until final settlement of the amount awarded; or (ii) from the date on which the award becomes final until final settlement, provided the original claim did not specify the amount of the claim.

Although a tribunal may award a maximum rate of 12 % interest, it is not uncommon for interest to be awarded at a level closer to the prevailing EIBOR rate, which is predominantly a lot lower than 12%.

In recent years many arbitral disputes in Dubai have concerned sale and purchase agreements relating to real estate. A party to such a dispute usually requests a tribunal to award interest. In such circumstances it is normal for a party to claim that the contract in question constitutes a commercial contract and thus, in addition to other reliefs, claim interest according to the provisions of the UAE Commercial Code. However, a party seeking interest under the Commercial Code may also seek to rely on provisions of the UAE Civil Code to *inter alia* cancel or terminate the contract. In such circumstances, the question may arise whether the contract in dispute is properly regarded as a civil contract or commercial contract. This is an important consideration when one considers that the UAE Civil Code prohibits interest.

According to Article 10 of the UAE Commercial Code, “where a contract is commercial with regard to one party and civil to the other party, the provisions hereof shall apply to the obligations of both parties unless the law states otherwise or there is an agreement between the parties to the contrary”. Accordingly, an agreement for the sale and purchase of real estate can fall under the UAE Commercial Code and may be considered as a commercial contract.

Commercial contracts, however, are not governed exclusively by the provisions of the UAE Commercial Code. The provisions of the UAE Civil Code may be referred to and relied upon by the parties and a tribunal where there are no imperative provisions in the UAE Commercial Code or in customary commercial practices. UAE Civil Code provisions can also be applied to commercial contracts in case of absence of agreement between the parties, provision in the UAE Commercial Code and commercial custom.

In summary, interest may be awarded under the UAE Commercial Code where the contract in dispute is found to constitute a commercial contract. However, it appears that the application of UAE Civil Code provisions to commercial contracts is an accepted practice of the UAE courts and that while contracts may

be terminated pursuant to provisions of the UAE Civil Code, interest may be awarded under the UAE Commercial Code.

Article 88 of the Commercial Code also allows interest to be awarded as compensation for the delay in settling a debt. Article 88 provides:

If the subject of a commercial obligation is a sum of money in an amount known at the time the obligation arose, and the debtor delays in making settlement, he shall be bound to pay the creditor the interest specified in Articles 76 and 77 as compensation for the delay unless otherwise agreed.

In summary, notwithstanding the Sharia's prohibition on interest, generally, where a tribunal makes an award of interest it will not prevent the award as a whole from being ratified and enforced in the UAE.

II. APPENDICES AND RELEVANT INSTRUMENTS

A. Main Arbitration Institutions in the UAE:

Dubai International Arbitration Centre (DIAC)
c/o Dubai Chamber of Commerce and Industry (DCCI)
14th Floor, Baniyas Road
PO Box 1457
Deira
Dubai
United Arab Emirates
Tel: +971 4 2028 343
Fax: +971 4 2028 668
www.diac.ae/idias

Dubai International Financial Centre – London Court of
International Arbitration (DIFC-LCIA)
c/o Dubai International Financial Centre
The Gate Precinct
Building 4
PO Box 211724
Dubai
United Arab Emirates
Tel: +971 4 427 3333

Fax: +971 4 4273330
www.difc.ae

Abu Dhabi Commercial Conciliation and Arbitration Centre
(ADCCAC)
c/o Abu Dhabi Chamber of Commerce and Industry (ADCCI)
PO Box 662
Cornish Road
Abu Dhabi
United Arab Emirates
Tel: +971 2 317599
Fax: +971 2 2311410
www.abudhabichamber.ae

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Cassation No. 132/2012

Dubai Court of First Instance - Case no. 489/201218 - December
2012

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204/2005, Jul.2.2005

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DIFC Courts' Activities and Business Plan 2013-15, DIFC Courts website at <http://difccourts.complinet.com/en/display>.