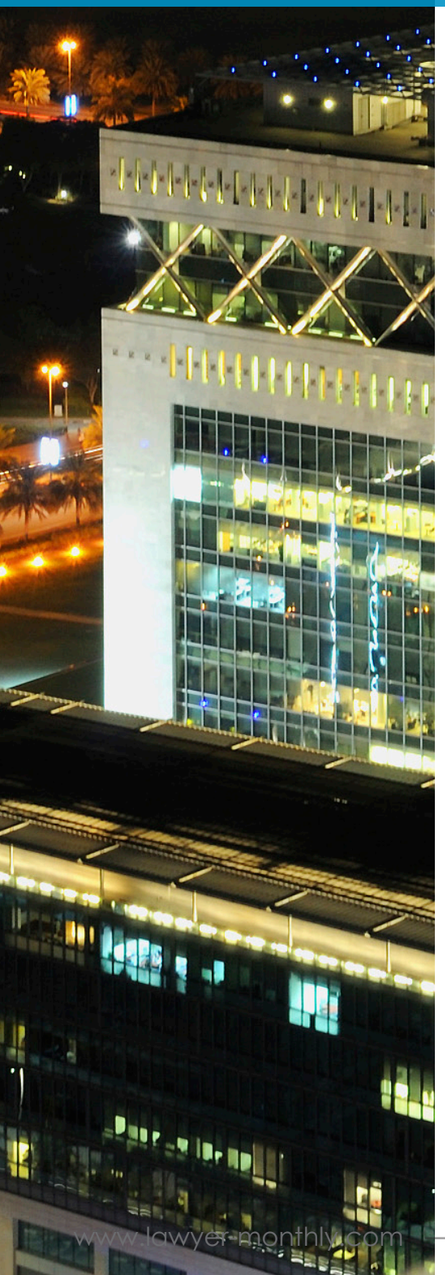
The Dubai International Finance Centre Arbitration Law



The DIFC, Dubai's, Common Law jurisdiction has recently amended its arbitration law in order to expand the jurisdiction of its Courts with regard to staying proceedings in favour of arbitration. Antonios Dimitracopoulos, Partner and Head of Arbitration at Bin Shabib &Associates LLP, DIFC, looks at the long term repercussions of this recent development, on the basis of his firm's involvement in one of the matters that signalled the need for legislative change.

Does the DIFC have its own arbitration law?

Yes. The DIFC legislature promulgated the Arbitration Law (DIFC Law No. 1 of 2008) ("the Arbitration Law"), which codified the arbitration process from the form of agreement to the enforcement of awards. The Arbitration Law is based upon the UNCITRAL Model Law on International Commercial Arbitration 1985 ("the Model Law"), with the provisions thereof being largely adopted to reflect the intentions of the DIFC legislature. This Arbitration Law has now been amended by virtue of DIFC Law No. 1 of 2013.

Under what circumstances could the DIFC Courts stay an action under the Arbitration Law where an arbitration agreement is shown to exist?

The Arbitration Law has always permitted the DIFC Courts to stay proceedings where an arbitration agreement existed in respect of DIFC seated arbitration agreements. However, the Arbitration Law in its original form did not provide for the DIFC Courts to stay proceedings where the seat of the arbitration in question was not within the confines of the DIFC. In this regard the Arbitration law did not conform to the provisions of the Model Law.

How did the original Arbitration Law depart from the Model law in relation to non-DIFC seated arbitrations?

The original version of the Arbitration Law stated at Article 7(2), which provisions of the Arbitration Law would be applicable to non DIFC seated arbitrations. Notably, there was no reference to Article 13 of the Arbitration Law in respect of non-DIFC arbitration agreements. Article 13 contained the obligation upon the DIFC Courts, where an action is brought in relation to which there exists an arbitration agreement, to refer the parties to arbitration. However this was applicable only to DIFC seated arbitrations under the Arbitration Law.

The Model Law also contained reference to such circumstances, stating that its provisions were applicable to arbitrations where the seat of arbitration is within the territory of the state. However, the Model Law contained exceptions which would be applicable even if the seat of the arbitration was not within the territory of the State – with one such exception being that the Court must also stay proceedings even where the arbitration seat was outside of the state's territory.

Hence, the Model Law and the Arbitration Law differed directly on this point. Indeed, the draftsmen responsible for the Arbitration Law had specifically not incorporated this principle into the Arbitration Law.

How was this issue assessed by the DIFC Courts?

This issue was considered in detail in two cases, which were heard before the DIFC Courts.

(1) Injazat Capital Limited and (2) Injazat Technology Fund BSC v Denton Wilde Sapte and Co (CFI 019/2010) (the "Injazat Case")

The contract relevant to this case, contained a provision that the Defendant could refer disputes to arbitration in London under the auspices of the LCIA. It therefore had to be considered whether the DIFC Courts could stay the proceedings in favour of the non-DIFC seated arbitration.

The judgment issued in this case referred to the fact that it was common ground that any reliance upon Article 13 of the Arbitration Law was misconceived, since by virtue of Article 7 it could not apply where the seat of the arbitration fell outside of the DIFC.

When considering whether the Court had an inherent jurisdiction to stay the proceedings, the judgment stated that as the Arbitration Law was detailed and precise with regard to the powers of the Court in relation to non-DIFC arbitration agreements – the inherent jurisdiction option was not available. As such the Court refused the application that the proceedings be stayed.

(2) International Electromechanical Services Co LLC v (1) Al Fattan Engineering LLC and (2) Al Fattan Properties LLC (CFI 004/2012) (the "IEMS case")

In this case, where Bin Shabib & Associates represented one of the parties, the relevant contract was between the Claimant and the First Defendant and incorporated an arbitration agreement, specifying a seat in on-shore Dubai. With regard to the jurisdiction to grant a stay, the Court considered that the usual procedure for challenging its prima facie jurisdiction over a dispute because of an arbitration agreement, is to apply for a stay under Article 13(1) of the Arbitration Law. However, as a result of the provisions of Article 7, Article 13 could not be applied as the seat of arbitration fell outside of the DIFC. In this regard the Court agreed with the judgment in the Injazat Case.

However, the Court elected not to retain jurisdiction in this case, this time upholding that it did in fact have an inherent jurisdiction to grant a stay and declined to follow the ruling to the contrary in the Injazat Case. This resulted in two judgments from the same court, pertaining essentially to the same issue, with diametrically opposite results.

How could a claimant know which way the DIFC Courts would decide this issue in future cases?

It would be extremely difficult for any claimant to make even an educated guess as to this issue. The consensus of the legal community regarding the Injazat judgment, was that it was flawless in its reasoning, although the conclusion was arbitration-unfriendly. As such, it would have been expected that the IEMS judgment would have followed suit.

Ultimately, the issue was clarified on a statutory basis when the DIFC legislature amended the Arbitration Law, by virtue of DIFC Law No. 1 of 2013 - "the Amended Arbitration Law". The main point of the amendment is that Article 7(2) has been updated so as to include the application of Article 13 where the seat of the arbitration is outside of the DIFC. Moreover, Article 7(3) has been inserted to the effect that Article 13 will be applicable even where no seat has been designated in the arbitration agreement.

Does the amended law remove the uncertainty?

Yes, at least with regard to the obligation upon the DIFC Courts to stay proceedings where an arbitration agreement exists. There is now an express statutory obligation upon the DIFC Courts to stay proceedings in the face of an arbitration agreement between the parties, regardless of whether the seat of such arbitration is located within or outside of the geographical boundaries of the DIFC, or where there is no agreed designation.

It is clear that the Amended Arbitration Law has been designed to remove the confusion which was generated by the judgment issued in the IEMS Case and remedy the application of the Arbitration Law with regard to its apparent incompatibility with the New York Convention.

Do problems still exist?

Despite the Amended Arbitration Law, potential problems may still arise. The DIFC Court – with regard to an arbitration agreement with a seat in onshore Dubai – will consider the existence and validity of such agreement and, under the Amended Arbitration Law, will in all probability stay proceedings.

As such, the parties will then be required to refer to arbitration, following which the award will need to be ratified by the Dubai Courts. However, the Dubai Courts could potentially assess the validity of arbitration agreements upon different bases and standards to those which would be considered by the DIFC Courts.

As such there is prospective danger, that the DIFC Court may stay proceedings, the arbitration is conducted and then the Dubai Courts refuse to ratify the award on the basis of their perception as to the validity of the arbitration agreement itself. This results in a continuing uncertainty in the processes between the two jurisdictions.

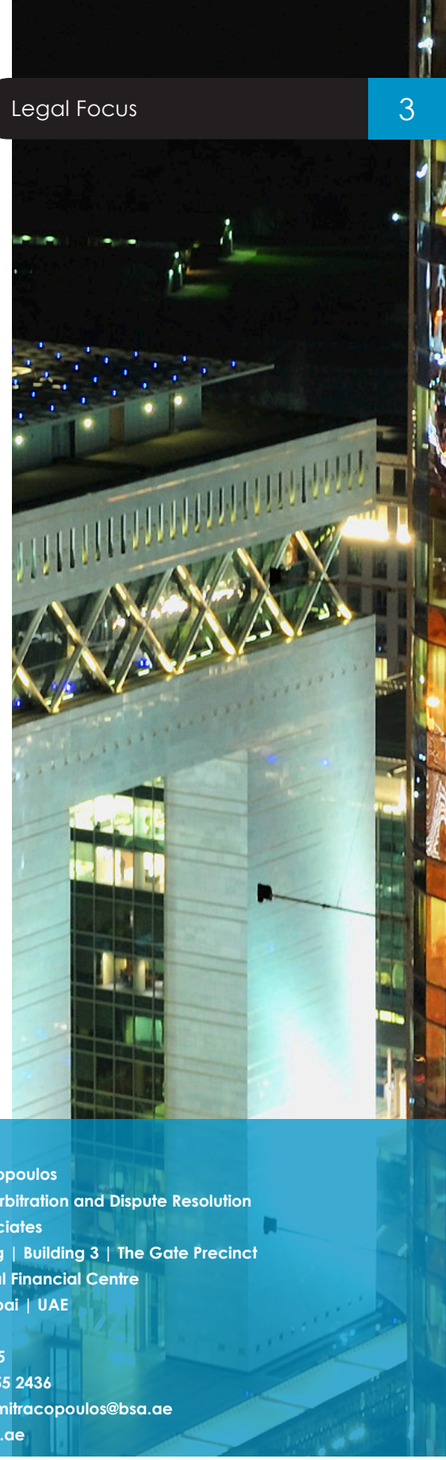
It should also be noted that the amended Arbitration Law is not actually reflective of a change: it was the original Arbitration Law that in fact effected a change from the standard principles of the Model Law. The amendments are simply reverting to the original wording of the Model Law, despite the fact that the legislature previously elected not to adhere to this .

What should be considered to redress the potential problems?

Changes in the law should aim to assist the parties in arbitration, not to compound confusion which already exists. The amendments to the Arbitration Law have the potential to exacerbate problems.

One must question what (if any) underlying processes have been considered to minimise the risks referred to above. In order to fully redress the dangers that face claimants in relation to potentially invalid arbitration agreements, the DIFC Courts and the Dubai Courts must reach a consensus to co-create a standard for the assessment of an arbitration agreement's validity.

Until such a consensus is confirmed, there can be no certainty that the two court systems are aligned so as to ensure a synchronicity of approaches – and as such uncertainty will continue to prevail. **LM**



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