

## **RECENT DEVELOPMENTS IN ARBITRATION LAW IN THE MIDDLE EAST\***

### ***INTRODUCTION***

Historically, dispute resolution in the Middle East region has been problematic. Enforcement of legal rights was unpredictable, and there was a lack of uniformity. Dispute resolution procedures were generally not in line with international standards and best practices. The need for improvement and change has been recognized for many years. That change is now starting to come about, and it is primarily due to the influx of large and sophisticated Western construction and engineering firms, all of whom have come into the region with well-developed notions and expectations about basic fairness and transparency in the resolution of construction disputes.

The international perception of arbitration as a viable means of dispute resolution in the Middle East has been bolstered by the establishment of regional arbitration institutions, including the Cairo Regional Centre for International Commercial Arbitration (“CRCICA”), the Abu Dhabi Commercial Conciliation and Arbitration Centre, the Bahrain Arbitration Centre and the Dubai International Arbitration Centre (“DIAC”). The accession of several Middle Eastern states to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) also demonstrates a shift in the region’s arbitration culture. Most important, however, are the attempts by some Middle Eastern countries to enact new arbitration provisions that are more progressive, accessible, transparent and familiar to foreign entities doing business in the area.

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\* George Anthony (“Tony”) Smith and Matthew A. Marrone can be reached through the Atlanta office of Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC ([www.wwhgd.com](http://www.wwhgd.com)). Tony, a partner with the firm, specializes in legal issues related to the construction industry, and Matt is an associate in the firm’s Construction Litigation practice area.

It is well known that the UAE, and Dubai in particular, is committed to becoming a significant force in the international economy. Toward that end, in 2006, the UAE became the 138<sup>th</sup> state to adopt the New York Convention. In 2008, three additional significant developments occurred: (1) The UAE federal government drafted a new arbitration law, which has been published for comment; (2) the Dubai International Financial Centre enacted a comprehensive and jurisdictionally inclusive new arbitration law; and (3) The Dubai International Financial Centre and the London Court of International Arbitration partnered to create the DIFC – LCIA Arbitration Centre. These three events have significantly strengthened Dubai’s position in its bid to become an international center for arbitration. This paper will focus on the current, dynamic state of arbitration law in the UAE and Dubai, after a brief overview of arbitration in the Middle East region and how it is shaped by Islamic law.

## ***ARBITRATION IN THE MIDDLE EAST – AN OVERVIEW***

In order for a foreigner to begin to understand the arbitration systems in place in the Middle East, he or she must first recognize the important role that religion plays in Middle Eastern law and society. As explained by one scholar, “Islamic law pervades the commercial world, as well as a Muslim’s way of life. Islam is a complete way of life: a religion, an ethic and a legal system all in one.”<sup>1</sup> Islamic law is known as the Shariah and is the basis for the laws of several Middle Eastern countries, including Syria, Egypt, Kuwait, Yemen, Bahrain, Qatar, and the UAE.<sup>2</sup> The importance of the Shariah to Middle Eastern law is illustrated by the fact that the Shariah was enacted as Saudi Arabia’s constitution.<sup>3</sup> Similarly, the Omani Basic Law proclaims: “the religion of the State of Islam and the Islamic Shariah is the basis of legislation.”<sup>4</sup> Since the Shariah constitutes the very foundation of Islamic Middle Eastern law and culture, it is not surprising that the Shariah plays a significant role in the region’s arbitration processes.

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<sup>1</sup> Arthur J. Gemmell, *Commercial Arbitration in the Islamic Middle East*, 5 Santa Clara J. Int’l L. 169, 170 (2006) (quotation and citation omitted).

<sup>2</sup> *Id.* at 171.

<sup>3</sup> *Id.* at 172.

<sup>4</sup> *Id.*

## THE INFLUENCE OF LOCAL LAW

Arbitration has been practiced in the Middle East since the early days of Islam.<sup>5</sup> Both the Koran and the Sunna of the Prophet (two of the main sources of the Shariah), make reference to arbitration.<sup>6</sup> Bahrain's former minister of justice and Islamic affairs, his Excellency Shaikh Abdullah Bin Khalid Al Khalifa, reflected on the applicability of arbitration to the Middle Eastern mentality:

The Arab is conscious of the fact that a case in a court is actually a dispute between two adversaries whereas in the case of arbitration it is a dispute between brothers. This clear distinction makes arbitration harmonize with an Arab's psychological make-up which is imbued with sentimentalism and which is more at home with a spirit of peace, good will and conciliatory brotherhood. This makes arbitration as a method of settling disputes more effective on Arab soil which provides an appropriate environ for the acceptance, strengthening and popularizing of this mode and infusing a spirit of respect for it.<sup>7</sup>

Despite the attitude embodied in Shaikh Abdullah Bin Khalid Al Khalifa's remarks, the Middle East has struggled to harmonize the ancient tenets of the Shariah with the modern expectations of the region's growing number of foreign investors. The attempt to adhere to Islamic Law, while responding to the needs of an ever-shrinking commercial world is demonstrated by some countries' bifurcation of their religious and civil codes. For example, Yemen, Jordan and Kuwait have attempted to modernize their arbitration rules by requiring arbitrators to apply the law chosen by the parties, even if it is non-Shariah law.<sup>8</sup> Such bifurcation allows the parties to control the impact of the Shariah in their choice of law. Those Middle Eastern states that have not bifurcated religion from their rules of arbitration will administer arbitrations in strict

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<sup>5</sup> Lovells, *Client Note: Project Dispute Resolution in the Middle East: arbitration and enforcement*, at p. 1 (Lovells 2006).

<sup>6</sup> Stephen Jagusch & James Kwan, *Middle East Overview*, The European & Middle Eastern Arbitration Review 2008 (Global Arbitration Review, 2008), available at <http://www.globalarbitrationreview.com/reviews/3/sections/6/chapters/63/middle-east-overview/>.

<sup>7</sup> *Id.* quoting *ICC Congress Series No. 6 International Arbitration in a Changing World*, General Editor: Albert Jan van den Berg, at p. 2 (1994, Kluwer Law).

<sup>8</sup> Gemmell, *supra* note 1, at 182-183.

adherence with Shariah principles. Such states may prohibit, for example, speculative contracts or contractual provisions calling for the award of interest.<sup>9</sup>

The Shariah may also dictate whether an arbitration award is binding on the parties. In those countries where arbitration is based primarily on the Shariah, arbitration awards must contain four distinct parts: “A description of the dispute; the findings of facts under Shariah rules of evidence; the reasoning of the award with reference to the Shariah source; and the decision itself.”<sup>10</sup> Further, regardless of what law or procedures the parties have chosen, Middle Eastern countries consistently mandate that for an arbitration award to have *res judicata* effect, it must be approved by a court.<sup>11</sup> This system of court review means that the rendering of an arbitration award does not “necessarily bring finality to a dispute between the parties. Sufficient room is left, procedurally, for either expeditious judicial management or judicial meddling, procrastination, and delay.”<sup>12</sup>

## **ENFORCEMENT OF FOREIGN AWARDS**

Ostensibly, the adoption of the New York Convention by 16 Middle Eastern countries (including Bahrain, Oman, Saudi Arabia, Jordan, Kuwait, Qatar and the UAE) should provide for more straightforward enforcement of foreign arbitral awards in those states.<sup>13</sup> The New York Convention severely restricts the grounds on which a country’s courts can refuse to enforce foreign arbitration awards.<sup>14</sup> However, the New York Convention also contains an exception allowing courts to repudiate foreign awards that are “contrary to the public policy of that country.”<sup>15</sup> Many Middle Eastern countries rely

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<sup>9</sup> Mark Wakim, *Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East*, 21 N.Y. Int’l L. Rev. 1, 41 (2008).

<sup>10</sup> Gemmell, *supra* note 1, at p. 184.

<sup>11</sup> *Id.* at 185.

<sup>12</sup> Abdullay Kh. Al-Ayoub, *International Commercial Arbitration in the Middle East*, American Bar Association Section on International Law, at p. 6 (Spring Meeting, 2006), available at <http://www.abanet.org/intlaw/calendar/spring2006materials.html>.

<sup>13</sup> A full list of the signatories to the New York Convention is available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html).

<sup>14</sup> See Convention on the Recognition and enforcement of Foreign Arbitral Awards, Art. V, June 10, 1958, 21 U.S.T. 2517, I.I.A.S. No. 6997, 330 U.N.T.S. 38, available at [http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII\\_1\\_e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf).

<sup>15</sup> *Id.* at Art. V, ¶2(b).

on this exception to deny enforcement of foreign arbitration awards that do not comply with the Shariah.<sup>16</sup> Saudi Arabia is even more apt to refuse recognition of foreign arbitration awards due to the fact that the Saudi law and policy is “diametrically opposed to the rules and laws of many [New York Convention] member nations.” Thus, “[i]n essence, Saudi Arabia may not be required to enforce any more non-domestic arbitral awards that it did prior to its 1994 accession to the New York Convention”<sup>17</sup>

## **CHANGING PERCEPTIONS?**

Due in large part to the influence of Shariah-based local laws and complicated enforcement schemes, many foreign investors have been reluctant to seat their arbitrations in the Middle East. Reinforcing this apprehension is the perception that, as a general rule, the practice of international commercial arbitration in the Middle East is still in its infancy and that the arbitration experience and training of most lawyers and judges in the region lags far behind the rest of the commercial world.<sup>18</sup> To attempt to dispel these notions, many Middle Eastern countries have begun to reform and modernize their arbitration laws and practice. These initiatives have ranged from the adoption of the familiar United Nations Commission on International Trade Law (“UNCITRAL”) Model Law on International Commercial Arbitration in the countries of Bahrain, Iran, Jordan, Oman, Egypt and Tunisia to the adoption of Western arbitration models in Qatar and Lebanon.

In addition, the number of arbitral institutions in the region is growing, allowing for the more effective administration of local arbitrations by experienced personnel backed by recognized rules and modern resources.<sup>19</sup> Well-established organizations such as CIRCICA and DIAC have been supplemented with the recent openings of the International Arbitration and Conciliation Centre in Qatar and the DIFC-LCIA Arbitration Centre in Dubai, which is discussed in further detail below. Increased interest in the arbitration conferences and training programs held by these organizations demonstrates

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<sup>16</sup> Gemmell, *supra* note 1, at p. 188-89.

<sup>17</sup> *Id.* at 189 quoting Kristen Roy, *The New York Convention and Saudi Arabia: Can a Country Use the Public Policy to Refuse Enforcement of Non-Domestic Arbitration Awards*, 18 Fordham Int’l L.J. 920, 936 at 954 (1995).

<sup>18</sup> Abdullay Kh. Al-Ayoub, *supra* note 12, at p. 14.

<sup>19</sup> See Jagusch & Kwan, *supra* note 6.

the region's efforts to meet the needs of foreign investors and to conform to the norms of the international arbitration community.<sup>20</sup>

Most recently, in January 2010, Bahrain partnered with the American Arbitration Association to launch the Bahrain Chamber of Dispute Resolution ("BCDR-AAA").<sup>21</sup> Established through legislation that also establishes an arbitration "free zone," disputes heard at the BCDR-AAA will be guaranteed and not subject to challenge in Bahrain – provided that the parties agree to be bound by the outcome.<sup>22</sup> This one-of-a-kind legislation also introduces mandatory arbitration at the BCDR-AAA for commercial and financial disputes involving an international party or a party licensed by the Central Bank of Bahrain where the claim is over 500,00 BHD (1.3M USD).<sup>23</sup> In commenting on the BCDR-AAA, Bahrain's Minister of Justice, Sheikh Khaled bin Ali Al Khalifa, explained both Bahrain's intent to establish itself on the cutting edge of international dispute resolution as well as the purpose of the BCDR-AAA:

The BCDR-AAA will provide [its users], including Bahrain's legal community, international legal firms, multi-nationals and governments contracting in the Gulf and beyond, with a purpose-built solution for the rapid, effective and certain resolution of commercial disputes. And, by introducing unique elements including an arbitration free zone and statutory arbitration, we are seeking to set the pace of ADR in modern day commerce. We firmly believe the Chamber has all the necessary elements to become a leader in its field and provide Bahrain with another compelling draw for the international business community.<sup>24</sup>

With the foregoing overview of the issues at the forefront of arbitration law in the Middle East as background, the recent attempts by the UAE and the Dubai International Financial Center to legislate change to their arbitration laws can be more meaningfully examined. Like Bahrain's recent legislation, these new measures represent a

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<sup>20</sup> *Id.*

<sup>21</sup> Unattributed, *Bahrain Launches Alternative Dispute Resolution Chamber Worlds First Arbitration Free Zone*, Eye of Dubai, January 12, 2010, available at <http://www.eyeofdubai.com/v1/news/newsdetail-38258.htm>

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

recognition of, and an attempt to remedy, the issues and inconsistencies associated with arbitration within the Middle East region. In addition, they embody a commitment to establish Dubai as a serious center for the resolution of international commercial disputes.

## **UAE – CURRENT RULES GOVERNING ARBITRATION**

Despite its reputation and posturing as an global commercial center, at present, the UAE<sup>25</sup> does not have a common arbitration law. Instead, arbitration in the UAE is governed primarily by a handful of provisions in the UAE's Civil Procedure Code, ("UAE Code").<sup>26</sup> To be deemed valid under the UAE Code, arbitration agreements must be evidenced in writing, and the subject matter of the dispute must be clearly defined.<sup>27</sup> The UAE will not uphold the validity of an arbitration clause contained in the general conditions of an insurance policy, or on the back of an invoice. The UAE Code provides that arbitration is permissible only between parties who are legally entitled to dispose of the disputed right.<sup>28</sup>

Under the UAE Code, the number of arbitrators must be odd and they can be appointed in one of three ways: (1) Nomination by the parties in accordance with the terms of the arbitration agreement; (2) nomination by an arbitral institution, provided that the parties have submitted their dispute to the rules of an arbitration institution that provide for the institution to appoint an arbitrator in the absence of an agreement between the parties; and (3) nomination by the competent court at the seat of the arbitration, at the request of any party.<sup>29</sup> Arbitrators are authorized to act only if they are specifically named and empowered to act in the arbitration agreement or in a

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<sup>25</sup> The UAE is comprised of seven states, or emirates: Abu Dhabi, Dubai, Shajah, Ajman, Unna-Quwain, Ras al-Khaimah and Fujairah.

<sup>26</sup> See The UAE Civil Procedure Code, Federal Law No. (11) of 1992, Chapter III, available at <http://www.diac.ae/ideas/rules/uae/chapter3/>. It is important to note that disputes arising out of commercial contracts to which the Dubai Government or any of its subsidiary departments are a party are not governed by the UAE Code. Such disputes, if submitted to arbitration, fall under other specific laws.

<sup>27</sup> *Id.* at Articles 203, 206.

<sup>28</sup> *Id.* at Article 203.

<sup>29</sup> *Id.* at Article 204; Charbel Fadel & Nada Sader, *Arbitration in the United Arab Emirates*, The CMS Guide to Arbitration (3<sup>rd</sup> ed.), available at [http://cmsarbitration.com/wiki/index.php?title=United\\_Arab\\_Emirates#ARBITRATION\\_IN\\_THE\\_UNITED\\_ARAB\\_EMIRATES](http://cmsarbitration.com/wiki/index.php?title=United_Arab_Emirates#ARBITRATION_IN_THE_UNITED_ARAB_EMIRATES).

subsequent agreement.<sup>30</sup> Minors, bankrupts and those who lack legal capacity or have been deprived of their civil rights due to the commission of a criminal offense may not serve as arbitrators.<sup>31</sup>

## A PROBLEMATIC REGIME

The limited number of provisions pertinent to arbitration under the UAE Code and the lack of certainty as to how those provisions will be applied has led to unanimous agreement that the UAE Code does not provide an adequate framework for arbitration.<sup>32</sup> In particular, under the UAE Code, arbitration proceedings are subject to the intervention and supervision of the courts in many situations, which undermines the authority of the arbitrators. For instance, courts have the power to dismiss an arbitrator, hear preliminary issues, grant interim measures, make evidentiary decisions on commission, extend the time for the arbitration and to approve, correct, enforce or even nullify awards.<sup>33</sup> Under the UAE Code, arbitrators have no powers to impose fines, to compel any party to act or to require the production of documents and other information necessary for the arbitration award. Instead, enforcement requires that the arbitrators suspend the proceedings and make an application to a competent court.<sup>34</sup>

Further, the UAE Code does not sufficiently restrict parties from challenging arbitration awards. Any party may, while the award is being reviewed by the court, request the nullification of, or otherwise contest the award on any number of grounds set forth in the UAE Code.<sup>35</sup> The enumerated grounds for nullification cannot be waived by the parties to the arbitration under any circumstances.<sup>36</sup> Historically, the UAE courts have refused to recognize and enforce arbitration awards with only minor defects in the

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<sup>30</sup> *Id.* at Article 205.

<sup>31</sup> *Id.* at Article 206.

<sup>32</sup> Raid Abu-Manneh, *Dubai: A Regional Arbitration Centre?*, Mayer Brown International, LLP, August 10, 2009, available at [http://www.martindale.com/international-law/article\\_Mayer-Brown-International-LLP\\_783158.htm](http://www.martindale.com/international-law/article_Mayer-Brown-International-LLP_783158.htm).

<sup>33</sup> See UAE Code, *supra* note 22, at Articles 207, 208, 209, 214, 215, 216, 217.

<sup>34</sup> See *id.* at Article 209.

<sup>35</sup> *Id.* at Article 216.

<sup>36</sup> *Id.*

proceedings, form or content of the award.<sup>37</sup> The 2004 case of *International Bechtel Co. Ltd. v. Department of Civil Aviation of the Government of Dubai* serves as a prime example. In *Bechtel*, an arbitration award rendered in favor of the claimant in Dubai was set aside by the Dubai Court of Cession, on the ground that the arbitrator had failed to swear witnesses in the manner prescribed by UAE law for court hearings.<sup>38</sup> In the wake of decisions like *Bechtel*, one UAE practitioner explains, “[t]he fear is that when an arbitration award is issued, it will be struck down by the courts – for one reason or the other.”<sup>39</sup>

Enforcement of foreign awards within the UAE is also problematic, even after the UAE’s accession to the New York Convention. The UAE Code stipulates that an award rendered in a foreign country may be enforced in the UAE under the same conditions applicable under the laws of the foreign country.<sup>40</sup> However, the UAE Code, like the New York Convention, also contains a provision allowing courts to refuse to execute a foreign judgment if it violates “moral code or public order”.<sup>41</sup> Thus, the UAE courts sometimes also require that the foreign award satisfy the rules and procedures of the UAE and may strike down an award if there is a violation of local laws.<sup>42</sup>

Whether a party has obtained an arbitration award in a foreign or domestic arbitration award, in practice, the enforcement procedures under the UAE Code are often unpredictable and time-consuming.<sup>43</sup> These complications defeat the very purpose of arbitration – a swift and efficient dispute resolution process.

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<sup>37</sup> Patrick Bourke & Dominic Hennessy, *Brighter times – developments in arbitration in the United Arab Emirates*, IBA Legal Practice Div. Arbitration Committee Newsletter, September 2008, at p. 42 (Int’l Bar Assoc. 2008).

<sup>38</sup> Jagusch & Kwan, *supra* note 6.

<sup>39</sup> Sona Nambiar, *Common law needed as UAE sees spurt in arbitration*, Emirates Business 24/7, September 9, 2009, available at <http://www.zawya.com/story.cfm/sidZAWYA20090909041615/Rise%20In%20Arbitration>.

<sup>40</sup> The UAE Civil Procedure Code, Federal Law No. (11) of 1992, Chapter IV, Article 235, available at <http://www.diac.ae/idias/rules/uae/chapter4/>.

<sup>41</sup> *Id.*

<sup>42</sup> See Fadel & Sader, *supra* note 25.

<sup>43</sup> Antonios Dimitracopoulos, *Arbitration; Light at the end of the tunnel*, Construction Week Online, May 3, 2008, available at, [http://www.constructionweekonline.com/article-2862-arbitration\\_light\\_at\\_the\\_end\\_of\\_the\\_tunnel/1](http://www.constructionweekonline.com/article-2862-arbitration_light_at_the_end_of_the_tunnel/1).

## **UAE – PROPOSED FEDERAL ARBITRATION LAW**

On February 2, 2008 the UAE's Ministry of Economy released a Draft Federal Law on Arbitration and the Enforcement of Arbitral Awards ("Proposed Law").<sup>44</sup> The Proposed Law would institute a comprehensive system for regulating arbitrations based in the UAE. By providing for enforcement of foreign awards in accordance with the New York Convention, the Proposed Law is intended to change the general perception that the UAE is an unreliable arbitration forum, particularly with regard to the enforcement of arbitration awards.<sup>45</sup> Indeed, the stated objectives of the Proposed Law are to "provide for domestic and international arbitration within the State and for the efficient enforcement of arbitration awards within its territory."<sup>46</sup> A brief examination of the Proposed Law provides insight into the issues at the forefront of dispute resolution in the UAE and the Middle East.

### **SCOPE AND ADMINISTRATION**

The Proposed Law is intended to be user-friendly for parties, legal practitioners, arbitrators and judges alike. Published in both Arabic and English, the Proposed Law is closely based on the familiar UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), and incorporates the Model Law as Annex No. 1 to the Proposed Law.<sup>47</sup> The Ministry of Economy and the Ministry of Justice are tasked with supervising the Proposed Law's implementation.<sup>48</sup> To ensure that the Proposed Law's interpretation will remain abreast of the current state of international arbitral best practice, it contains the following provisions:

For the purpose of interpreting any Part or Annex of this Law, any arbitral tribunal, court or other authority of, or within, the State, may refer to, and take guidance from, the documents and publications of the [UNCITRAL] relating to the Model Law,

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<sup>44</sup> Medilyn Manibo, *UAE Ministry of Economy completes draft federal law on arbitration*, AME Info, February 2, 2008, available at <http://www.ameinfo.com/145430.html>.

<sup>45</sup> Reza Mohtashami, *Recent Arbitration Developments in the UAE*, Journal of International Arbitration, at p. 632 (Kluwer Law International, 2008).

<sup>46</sup> Proposed Law, Article 2.

<sup>47</sup> *Id.* at Article 3.

<sup>48</sup> *Id.* at Article 4.

including those of the Working Groups involved in its preparation.<sup>49</sup>

An Arbitration Office shall be established in the Ministry of Economy to monitor international developments in arbitration and, in particular, the Model Law and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Arbitration Office shall submit recommendations for the improvement of this Law to the Minister.

The Minister may request the assistance of experts in domestic and international arbitration from government bodies or private sectors within, or outside the State, including any arbitral institutions or centers.<sup>50</sup>

In tune with the goal of establishing a comprehensive and modern arbitration law in the UAE, the Proposed Law contains amendments, supplements and additions to the Model Law, carefully delineated in Annex No. 2.<sup>51</sup> The provisions of Annex No. 2 provide for a wider scope of application than the Model Law and attempt to clarify perceived ambiguities in the Model Law. The enlarged scope of the Proposed Law is illustrated by its amendment of the Model Law so as to encompass both domestic and international arbitrations, regardless of whether they are of a commercial nature or not.<sup>52</sup>

## **ROLE OF THE COURTS**

In sharp contrast with prior and current practice, the Proposed Law seeks to curtail both the local courts' ability and propensity to get involved in ongoing arbitration proceedings. Under the Proposed Law, the Court of Appeal of the Emirate has exclusive jurisdiction to hear requests for interim measures and may consider such requests only if there is no other institution that has the power to act in the required manner.<sup>53</sup> Even in the event that the Court grants a request for interim measures, the Court's order "shall cease to have effect in whole or in part on the order of the arbitral

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<sup>49</sup> *Id.* at Article 3.

<sup>50</sup> *Id.* at Article 4.

<sup>51</sup> *Id.* at Article 3.

<sup>52</sup> *Id.* at Annex 2, Article 1.

<sup>53</sup> *Id.* at Annex 2, Article 9.

tribunal.”<sup>54</sup> The autonomy of the arbitration tribunal and the role of the courts is clear under the Proposed Law: “[The courts] shall at all times strive to uphold the parties’ agreement to arbitrate and support the arbitral tribunal’s performance of its duties.”<sup>55</sup>

## PROCEDURE

Through its modifications to the Model Law, the Proposed Law also attempts to modernize and clarify arbitration procedure. For example, the Proposed Law contains new provisions, not found in the Model Law, that give parties considerable leeway in their selection of counsel and arbitrators. Under the Proposed Law, any legally competent adult may act as an arbitrator.<sup>56</sup> Parties can be represented by any person of their choice, irrespective of their nationality or qualification.<sup>57</sup> Likely equally important and appealing to parties is the Proposed Law’s added requirement that that arbitration proceedings will remain confidential, unless the parties agree otherwise.<sup>58</sup>

The Proposed Law also supplements the Model Law’s provisions regarding the number and selection of arbitrators. Where there is more than one arbitrator their number must be odd. Where there is an even number of arbitrators, an additional arbitrator will be appointed to act as chairman. Where no agreement exists between the parties specifying the number of arbitrators, the default rule is that there will be a sole arbitrator.<sup>59</sup> Arbitrators may be challenged and removed when “justifiable doubt” exists as to their impartiality or independence, as defined by the General Standards Regarding Impartiality, Independence and Disclosure adopted by the International Bar Association in its Guidelines on Conflicts of Interest in International Arbitration.<sup>60</sup> Disclosures made by an arbitrator regarding impartiality should be made in writing to all parties and an

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at Annex 2, Article 5.

<sup>56</sup> *Id.* at Annex 2, Article 11.

<sup>57</sup> *Id.* at Annex 2, Article 38.

<sup>58</sup> *Id.* at Annex 2, Article 39.

<sup>59</sup> *Id.* at Annex 2, Article 10.

<sup>60</sup> *Id.* at Annex 2, Article 12.

arbitrator must decline the appointment should there be any doubt in regard to impartiality or independence.<sup>61</sup>

It is also interesting to note that the Proposed Law would supplement the Model Law to provide additional procedures related to discovery and evidence. The Proposed Law provides that the arbitrators have the discretion to direct any party to produce documents to the tribunal or to another party.<sup>62</sup> Experts may be appointed to report to the arbitrators regarding specific issues and the costs of such experts will be borne by the parties in accordance with the direction of the arbitrators.<sup>63</sup> Any person or translator who falsely testifies before the arbitration tribunal shall be guilty of perjury.<sup>64</sup>

## **AWARDS AND ENFORCEMENT**

The Proposed Law defines the types of awards that an arbitration tribunal can make and what an award can include. Arbitrators can grant preliminary, interim, interlocutory, partial or final awards.<sup>65</sup> Arbitrators are directed to provide for the costs of arbitration in the award. Costs may include arbitrators fees and expenses, costs of expert advice, costs related to the arbitration proceedings (including room hire, interpreters, and transcription services), fees and expenses of any arbitral institution and any other legal fees, charges, costs and expenses reasonably incurred by a party throughout the proceedings. The arbitrators may withhold any award until the tribunal's fees and expenses are paid in full.<sup>66</sup>

The Proposed Law also includes several amendments to the Model Law designed to simplify and expedite the procedure for enforcement of arbitration awards. Notably, original, signed authentic awards or certified copies of same are enforceable. An award is deemed authentic if signed by the majority of the arbitrators, so long as reasons are given for the omitted signature. Certified copies must be authenticated

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at Annex 2, Article 19.

<sup>63</sup> *Id.* at Annex 2, Article 26.

<sup>64</sup> *Id.* at Annex 2, Article 19.

<sup>65</sup> *Id.* at Annex 2, Article 31.

<sup>66</sup> *Id.*

either by a public notary, consular authority or judicial officer.<sup>67</sup> In addition, the Proposed Law seeks to give effect to the UAE's obligations under the New York Convention and only limited grounds are provided for refusal to enforce a foreign judgment.<sup>68</sup>

## **CURRENT STATE OF THE PROPOSED LAW**

Whether the Proposed Law marks a significant change in the arbitration culture of the UAE will be known only after it is implemented and cases begin testing the new measures. However, it is certain that with construction and other commercial arbitration on the rise in the UAE, a common arbitration law is needed now more than ever. Unfortunately, as of September 2010, the Proposed Law remains a work in progress, its final form the subject of ongoing dialog and debate. In fact, the UAE seems to have adopted a communal approach to finalizing the Proposed Law. For instance, on May 24, 2010, Sultan Bin Saeed Mansouri, the UAE's Minister of Economy, presided over the Draft Federal Arbitration Law Conference held in Abu Dhabi.<sup>69</sup> Similar round table meetings regarding the Proposed Law and potential changes and improvements to the Proposed Law have been held by the UAE's International Chamber of Commerce.<sup>70</sup> While this ongoing discourse highlights the UAE's eagerness to produce one of the leading arbitration laws in the region, it is unknown when the discussions will stop and steps toward enactment will begin. However, Sultan Bin Saeed Al Mansouri recently reaffirmed the UAE's commitment to have the Proposed Law passed as soon possible, perhaps by the end of 2010.<sup>71</sup> As of the date of the submission of this paper, the Proposed Law was not available on the UAE Ministry of Economy website.

## **DUBAI INTERNATIONAL FINANCIAL CENTRE**

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<sup>67</sup> *Id.* at Annex 2, Article 35.

<sup>68</sup> See *id.* at Article 4, Annex 2, Articles 35, 36.

<sup>69</sup> Christina Tsogas, *United Arab Emirates: All About Arbitration- The Draft Federal Arbitration Law*, mondaq.com, available at <http://www.mondaq.com/article.asp?articleid=107228>.

<sup>70</sup> Unattributed, *ICC UAE Commission on Arbitration discussed key Issues and proposed changes to the draft UAE Arbitration Law*, ICC UAE Web Site, at Home Page, available at <http://www.iccuae.com>.

<sup>71</sup> Himendra Mohan Kumar, *Arbitration law in UAE set for year-end*, gulfnews.com, May 25, 2010, available at <http://gulfnews.com/business/economy/arbitration-law-in-uae-set-for-year-end-1.631770>.

In 2004, an amendment was made to the UAE Constitution, providing the basis for the establishment of financial free zones throughout the UAE. One such free zone was established in Dubai – the Dubai International Financial Centre (“DIFC”). Through various initiatives, DIFC is at the forefront of efforts to create an environment of progress and economic development in the UAE. Registrants at the DIFC work in a range of business areas such as banking, capital markets, accounting, wealth management and Islamic Finance. It is now ranked as the world’s fastest growing international financial center.<sup>72</sup>

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<sup>72</sup> DIFC – LCIA Arbitration Centre Web Site, at Home Page, available at <http://www.difcarbitration.com/>.

## SEPARATE LAWS

By government decree, DIFC is exempt from UAE civil and commercial laws and regulations.<sup>73</sup> This exemption has allowed the DIFC to establish laws to attract and cultivate foreign investment. For example, the DIFC does not tax profit or income and allows 100 percent foreign ownership.<sup>74</sup> The DIFC has established its own legal and regulatory framework for civil and commercial matters, which is modeled on English common law rather than the civil code applicable in the rest of Dubai.<sup>75</sup> The DIFC courts have exclusive jurisdiction over civil and commercial disputes arising out of or related to contracts executed or concluded within the DIFC and disputes related to incidents that occurred within the DIFC.<sup>76</sup> DIFC judges are both commercial law and arbitration savvy, and include Chief Justice Anthony Evans, a former Commercial Court and Court of Appeals judge in England and other experienced judges and arbitrators.<sup>77</sup> The result is “a business-friendly environment that is regulated by a legal system which is both accessible and familiar to common-law lawyers.”<sup>78</sup>

## DIFC ARBITRATION LAW

While DIFC has long provided arbitration services as an option for dispute resolution, a new DIFC Arbitration Law was enacted in September 2008 (“2008 Law”).<sup>79</sup> The 2008 Law provides a legislative platform for comprehensive dispute resolution and has much in common with the Proposed Law. Like the Proposed Law, the 2008 Law is based on the Model Law.<sup>80</sup> In addition, the 2008 Law adopts many of the supplementary and additional provisions of the Proposed Law. By way of illustration, the

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<sup>73</sup> See Law No. (9) of 2004 in respect of the Dubai International Financial Centre, available at [http://difc.complinet.com/en/display/display\\_viewall.html?rbid=2618&element\\_id=9414](http://difc.complinet.com/en/display/display_viewall.html?rbid=2618&element_id=9414).

<sup>74</sup> Claudia T. Salomon & James P. Duffy, *The New Dubai International Arbitration Law*, New York L.J., Nov. 26, 2008, available at <http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202426297155>.

<sup>75</sup> *Id.*

<sup>76</sup> See Law No. (12) of 2004 in respect of the Judicial Authority at Dubai International Financial Centre, available at [http://difc.complinet.com/en/display/display\\_main.html?rbid=2618&element\\_id=3561](http://difc.complinet.com/en/display/display_main.html?rbid=2618&element_id=3561).

<sup>77</sup> Ty D. Laurie & Daniel J. Brenner, *Dubai: Changing the Face of Arbitration in the Middle East?*, JAMS Global Construction Solutions, Volume 2, No. 2, Summer 2009, at p. 6 (JAMS 2009).

<sup>78</sup> *Id.*

<sup>79</sup> DIFC Law No. (1) of 2008, available at [http://difc.complinet.com/en/display/display\\_viewall.html?rbid=2618&element\\_id=8998](http://difc.complinet.com/en/display/display_viewall.html?rbid=2618&element_id=8998).

<sup>80</sup> Laurie and Brenner, *supra* note 71, at p. 6.

2008 Law applies to civil and commercial arbitrations, whether international or domestic, and includes provisions regarding: disclosures by arbitrators; conflicts of interest; court enforcement of tribunal orders; the powers of the arbitrators to deliver preliminary, interim, interlocutory, partial and final awards; grounds for refusing recognition or enforcement; and confidentiality.<sup>81</sup> Nonetheless, despite its similarities with the Proposed Law, there are several distinctions in the 2008 Law that are worthy of review.

The DIFC's previous arbitration law, enacted in 2004, applied only to disputes and transactions having some connection with the DIFC.<sup>82</sup> This jurisdictional limitation came with a complex set of definitions that made it somewhat confusing to try to determine whether the arbitration law applied to a particular class of persons or a specific dispute.<sup>83</sup> In regard to the 2008 Law, the DIFC's original intent was to amend and clarify these provisions, but instead it eliminated the jurisdictional limitations all together. The 2008 Law allows parties to seat their arbitration in the DIFC regardless of whether they have any connection with the DIFC.<sup>84</sup> The removal of jurisdictional restrictions coupled with the 2008 Law's basis in an internationally-recognized model is appealing to both foreign and Middle Eastern businesses alike. Foreign businesses can have the benefit of using familiar arbitration procedures backed by an experienced judiciary and Middle Eastern businesses can have their disputes resolved close to home.<sup>85</sup>

Parties should be aware that if they choose a location other than the DIFC as the seat of the arbitration, they may not be able to take full advantage of the 2008 Law. Only specific provisions of the 2008 Law apply to arbitrations seated outside the DIFC: Article 14 – Confidentiality; Article 15 – Arbitration Agreement and interim measures by Court; Part 4 (Articles 42 – 44) The Recognition and Enforcement of Awards; and Schedule Interpretation which includes sections on rules of interpretation, calculation of

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<sup>81</sup> See 2008 Law, *supra* note 73 (various provisions).

<sup>82</sup> Laurie and Brenner, *supra* note 71, at p. 6.

<sup>83</sup> Philip Punwar, *DIFC Arbitration Law 2008 Enters into Force and Replaces DIFC Arbitration Law 2004*, Modern Arbitration, September 2008, available at [http://www.tamimi.com/files/articles/Dispute%20Resolution/Modern\\_Arbitration\\_Sept08.pdf](http://www.tamimi.com/files/articles/Dispute%20Resolution/Modern_Arbitration_Sept08.pdf).

<sup>84</sup> *Id.*

<sup>85</sup> Laurie and Brenner, *supra* note 71, at p. 6.

periods of time and defined terms.<sup>86</sup> These restrictions should be relatively easy to circumvent. Under the 2008 Law, parties that choose the DIFC as their seat of arbitration do not have to physically conduct the arbitration hearings in the DIFC and may arbitrate under the rules of any arbitration institution that will administer arbitrations held outside of its immediate locale.<sup>87</sup>

Like the Proposed Law, the 2008 Law has also simplified the recognition of arbitration awards. Under the 2008 Law, the award must first be certified by the DIFC Court. Once it is so certified, it is enforceable within the DIFC.<sup>88</sup> A party wishing to enforce the award outside the DIFC must take additional steps. A Dubai court must conduct a cursory review of the award to confirm that it is appropriate for enforceability and has been translated into Arabic.<sup>89</sup> The reviewing Dubai court has no authority to review the merits of a DIFC award.<sup>90</sup> Once an execution order is obtained from the Dubai court, DIFC awards are then enforceable throughout the UAE as well as the 144 states that have adopted the New York Convention.<sup>91</sup>

As comprehensive and progressive as it is, the 2008 Law omits some of the more innovative aspects of the Proposed Law. For example, there is no express power under the 2008 Law for the DIFC Court to refer to publications or documents of UNCITRAL in its application of the 2008 Law. Also absent is the Proposed Law's supplementation of the Model law that mandates that the courts "shall at all times strive to uphold the parties' agreement to arbitrate and support the arbitral tribunal's performance of its duties." The Proposed Law's provision regarding the arbitrator's power to discontinue interim measures granted by the court is missing from the 2008 Law as well.<sup>92</sup>

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<sup>86</sup> 2008 Law, *supra* note 73, at Article 7.

<sup>87</sup> *Id.* at Article 27.

<sup>88</sup> *Id.* at Articles 42, 43.

<sup>89</sup> *Id.*; Law No. (12) of 2004, *supra* note 70, at Article 7.

<sup>90</sup> Law No. (12) of 2004, *supra* note 70, at Article 7.

<sup>91</sup> *Id.*; 2008 Law, *supra* note 73, at Article 42.

<sup>92</sup> Mohtashami, *supra* note 41, at p. 637.

## **THE DIFC-LCIA ARBITRATION CENTRE**

In furtherance of its effort to become a lead forum for arbitration, the DIFC has recently partnered with the London Court of International Arbitration (“LCIA”) to create the DIFC-LCIA Arbitration Centre (“Centre”). Located within the DIFC, the Centre touts that it will “promote and administer the effective resolution of international business disputes through arbitration and mediation.”<sup>93</sup> The Centre will look to draw on the DIFC’s business-friendly regime as well as the LCIA’s international reputation, established practices and knowledge base.

The Centre will supervise arbitrations in accordance with a modified version of the LCIA rules and procedure.<sup>94</sup> The DIFC-LCIA rules are said to be “universally applicable and compatible with both civil and common law systems, offering the international community, international lawyers and arbitrators a comprehensive and modern set of rules and procedures.”<sup>95</sup> Also attractive, especially to parties with large claims, the LCIA charges administrative and arbitrators’ fees on a time-basis instead of a percentage of the value of a claim.<sup>96</sup>

Even with such strong selling points, the Centre faces stiff competition. Many foreign parties will continue to prefer the lead arbitration forums located in New York, London and Paris.<sup>97</sup> In addition, established regional institutions such as the CRCICA and the Abu Dhabi Commercial Conciliation and Arbitration Centre will also be vying for the same business as the Centre.<sup>98</sup> Most intriguing is that the Centre will have competition within Dubai itself – the DIAC. In anticipation of the opening of the Centre, the DIAC also released new arbitration rules “that appear to incorporate some of the best provisions of [the UNCITRAL, International Chamber of Commerce and American Arbitration Association] rules in an attempt to provide a straightforward yet

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<sup>93</sup> DIFC – LCIA Arbitration Centre Web Site, *supra* note 66, at Home Page.

<sup>94</sup> *Id.* at FAQs. The DIFC – LCIA Arbitration Rules are available at [http://www.difcarbitration.com/arbitration/rules\\_clauses/](http://www.difcarbitration.com/arbitration/rules_clauses/).

<sup>95</sup> *Id.* at Home Page.

<sup>96</sup> Laurie and Brenner, *supra* note 71, at p. 7. The DIFC – LCIA Arbitration Costs are available at [http://www.difcarbitration.com/arbitration/arbitration\\_costs/](http://www.difcarbitration.com/arbitration/arbitration_costs/).

<sup>97</sup> *Id.*

<sup>98</sup> *See id.*

comprehensive arbitral framework.”<sup>99</sup> However, because it is located outside the DIFC, it is unlikely that the DIAC can provide an environment that is as business friendly and pro-arbitration as the Centre, and the uncertain status of the Proposed Law is problematic as well.<sup>100</sup>

## **CHALLENGES AHEAD**

Geographically, Dubai makes sense as a seat for arbitrations involving companies based in Eastern Europe, Africa and Asia. The creation of the DIFC, the 2008 Law and the establishment of the Centre should mean that parties from those geographic areas will have access to comparably high quality arbitration resources – such as those found in Europe or the U.S. – but with less hassle, travel, cost and inconvenience. These new developments have generated high hopes for greater transparency, fairness and consistency in arbitration proceedings in the region.

However, the vast majority of UAE – based contracts entered into outside the DIFC and prior to September 2008 are still subject to the comparatively archaic and unpredictable UAE Code, due to the fact that parties at that time could not select the DIFC as an arbitration seat. Still, the worldwide economic downturn and the resultant stifling of development has led to a substantial rise in arbitration filings in the UAE since January 2009.<sup>101</sup> Insofar as the DIFC is concerned, undoubtedly some of these fresh disputes will test both how the 2008 Law will be applied and the capacity of the Centre to administer them.

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<sup>99</sup> *Id.* at 8.

<sup>100</sup> *Id.*

<sup>101</sup> Nambiar, *supra* note 35.