

# Insight: Arbitration

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## DIFC Courts open consultation regarding amendments to the Rules of the DIFC Courts

The Dubai International Financial Centre (DIFC) Courts have opened up a month-long consultation regarding proposed amendments to the Rules of the DIFC Courts (the "RDC"). A proposed amendment of particular interest relates to the rules of service in proceedings concerning arbitration (including enforcement and recognition proceedings regarding arbitral awards).

The proposed amendment will, if adopted, allow a party to serve such proceedings only on the party against which it intends to enforce an arbitral award. This is in contrast to the current position where *all* parties to the arbitration need to be served. This proposed amendment may therefore help mitigate against one of the principal logistical hurdles for parties seeking to enforce arbitral awards against counterparties in the region.

### Enforcement Issues in the Middle East

Enforcement, enforcement, enforcement: one of the key considerations for businesses contracting in foreign jurisdictions is whether, in the event of a dispute, they can successfully enforce any judgments/arbitral awards they obtain. This is a particular concern where judgments/arbitral awards are required to be recognised in the Middle East.

Currently, the majority of western parties operating in the region opt to refer disputes to arbitration. The perceived advantage of this is that they can enforce arbitration awards under the New York Convention. Whilst true in theory, enforcement of arbitral awards in the region in practice is not always a given norm.

Recent practice suggests that Middle Eastern courts are starting both to accept parties' choice to refer disputes to arbitration and to recognise the validity of such arbitral awards. For example, the UAE Courts have enforced several international arbitration awards since 2010.



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However, isolated instances still emerge of Middle Eastern courts quashing awards on purported grounds of public policy which are unfamiliar to western parties.<sup>1</sup> One example is a recent Qatar Court of Cassation decision to set aside an arbitral award on the grounds that the award was not issued in the name of the Emir.<sup>2</sup> Another is the recent Dubai Court of Cassation decision to quash an arbitral award concerning a property dispute on the grounds that the sole arbitrator did not have the power to adjudicate on matters concerning property, as “private ownership and the circulation of wealth” were matters of public policy under the UAE Civil Procedure Code.<sup>3</sup>

Such instances contribute to the apprehension felt by many foreign parties as to the prospects of successfully enforcing arbitral awards in the region.

### The DIFC Courts: The User-Friendly Court

Given these fears, businesses are increasingly turning to the DIFC Courts. The DIFC is a financial free zone located near Dubai Central Business District.

The DIFC Courts were established under a Decree from the Ruler of Dubai. They are separate from the local onshore Dubai Courts which operate under local UAE/ Dubai law with proceedings conducted in Arabic.<sup>4</sup>

By contrast, the DIFC Courts offer the advantage of familiarity for many foreign users. Proceedings are conducted in English and the DIFC has developed its own laws based on English common law. Where DIFC law is silent, DIFC law provides that English law should fill the gap.<sup>5</sup> Further, the DIFC Courts have adopted court rules based on the English Civil Procedure Rules. Indeed, many legal practitioners refer to the DIFC as a “common law island floating in a civil law sea”.

### Proposed Amendments to the RDC to Assist with Enforcing Arbitration Awards

Since their inception, the DIFC Courts have aimed to be a user-friendly option. The DIFC Courts’ Registrar, Mark Beer (previously Legal Counsel for South Asia, Middle East & Africa at MasterCard), has encouraged users to raise ideas to improve the Courts. As an example of this, the DIFC Courts regularly open consultations with Court users before adopting proposed amendments to the RDC.

In the current consultation period, which is open until 26 October 2013, among other things, the DIFC Courts propose to amend certain provisions relating to proceedings concerning arbitration.

Currently, RDC 43.17 requires that all parties to the arbitration must be joined in any proceedings commenced in the DIFC Courts in relation to an arbitration. This includes proceedings seeking

recognition or enforcement of an arbitral award. However, the DIFC proposes to amend this to allow applicants to choose which specific parties to the arbitration they intend to join in such recognition or enforcement proceedings (i.e. so that only parties against which enforcement of the award is sought are required to be joined to the proceedings).

This proposed amendment should serve to mitigate against difficulties that can often arise in respect of service of recognition or enforcement proceedings on parties based outside of the UAE, which can typically involve serving through diplomatic channels, a slow and often unwieldy mechanism. By allowing service to be made only against the parties against which the applicant intends to enforce an award, this should, in theory, facilitate the speed at which a party can enforce and reduce the time and cost burden upon the enforcing party.

In addition, a further proposed amendment to RDC 43.17 seeks to clarify the existing position that recognition and enforcement proceedings can be made on an ex parte basis. Again, given the current issues relating to service out of the jurisdiction, this proposed change offers further encouragement to parties seeking enforcement.

Whilst enforcement of arbitral awards in the region can still be uncertain territory, the willingness of the DIFC Courts to engage with users in order potentially to provide for a more streamlined process for parties seeking enforcement is a positive step in the right direction.

1 Art. V(2)(b) of The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides signatory states the right to refuse recognition or enforcement of an arbitral award if it is contrary to the public policy of that country.

2 Qatar Petition No 64/2012.

3 Dubai Appeal No 14/2012, Real Estate Cassation.

4 Although the DIFC Courts are separate from the Dubai Courts, the DIFC Courts enjoy the benefits of an “enforcement protocol” with the Dubai Courts (Dubai Law No 12 of 2004 as amended by Dubai Law No 16 of 2011). This protocol ensures that the Dubai Courts shall ratify and execute DIFC Court judgments without “reconsider[ing] the merits” (Art. 7(3)(c) Dubai Law No 12 of 2004 as amended). Further, because DIFC Court judgments are recognised by the Dubai Courts, parties can, in principle, enforce DIFC Court judgments across the Middle East under the GCC and Riyadh Conventions. One such example has already arisen where a DIFC Court order was recognised in Kuwait (*Global Strategies Group (Middle East) FZE v Aqeeq Aviation Holding Company LLC* (DIFC Arbitration 002/2010)).

5 Art. 8(2)(e) DIFC Law No.3 of 2004