

**A COMPARATIVE ANALYSIS OF DISPUTE RESOLUTION MECHANISMS AT DIFC
AND AIFC: LESSONS FOR KAZAKHSTAN**

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Abstract

The Astana International Finance Centre is a special financial zone within the capital of Kazakhstan Astana established in order to attract investments and develop financial market in the Eurasia. The key characteristic of this Centre is its own jurisdiction based on the principles of English Common law and independent courts system with foreign judges. This model has been taken as an example from the Dubai International Financial Center in the United Arab Emirates. It has been functioning for 13 years and apparently proved to be effective. In the Dubai Center, along with courts, there is arbitration institution designed for alternative dispute resolution. Compared to other dispute resolution mechanisms, arbitration is considered to be more efficient since it can provide high quality, fast and flexible solution. In the UAE, due to unique interaction of two legal systems within one geographic area, arbitration functions under specific conditions which in fact creates some problems. Legal analysis of these problems is required for the Center in Astana to consider lessons in arbitration from Dubai experience. The Centre is planned to operate from 2018 but establishment of legal basis is still under way. This novelty and uniqueness of the project draws particular attention since no analysis as to Astana Center has been made so far. Hence this thesis is aimed at making analysis of arbitration as a dispute resolution mechanism at the Dubai International Finance Center so as to make contribution to successful establishment of arbitration and its further development at the Astana International Financial Center.

Table of contents

Abstract.....	1
Table of contents	2
Introduction.....	4
CHAPTER I: DIFC AND ARBITRATION AS A DISPUTE RESOLUTION MECHANISM	
.....	8
1.1. The DIFC: history, development of arbitration.....	8
1.2. Recognition and enforcement of arbitral awards in the UAE and the DIFC	14
1.2.1. <i>Mechanism for recognition and enforcement of arbitral awards in the UAE.</i>	15
1.2.2. <i>Mechanism for recognition and enforcement of arbitral awards at the DIFC</i>	18
1.2.3. <i>Mechanism for enforcement of the DIFC arbitral awards in Dubai</i>	19
1.3. Public policy in recognition and enforcement of arbitral awards at the DIFC	21
CHAPTER II: UNDERLYING LEGAL ISSUES IN ARBITRATION AT THE DIFC.....	28
2.1. Issue of seat of arbitration at the DIFC	28
2.2. Issue in reciprocal mechanism between Dubai and the DIFC in recognition and enforcement of awards	36
2.3. Issue of public policy as ground for annulment of awards at DIFC	45
CHAPTER III: OVERVIEW OF THE AIFC AND PERSPECTIVES IN ARBITRATION .	49
3.1. The AIFC: general information, reasons, objectives, incentives for investors.	49

3.2. Arbitration at the AIFC and in Kazakhstan.....	52
3.3. Issues that might arise in AIFC arbitration and lessons for Kazakhstan.....	56
Conclusion	64
Bibliography	67

Introduction

Heavily dependent on the export of minerals, mainly oil and gas, the drastic fall in resources prices as well as recession in the economies of the main trading partners such as Russia and China, has exposed Kazakhstan's economy to a significant decline and subsequent crisis. In this situation, the Government of Kazakhstan has sought for effective measures to attract further investments and develop financial market in Kazakhstan and Eurasia in order to diversify its economy. Among these measures was the idea to establish the Astana International Financial Centre (hereinafter referred as "the AIFC") within the national program "100 concrete steps to implement 5 institutional reforms" which is planned to function from January 1, 2018.

Pursuing these objectives, the Parliament of the Republic of Kazakhstan passed the Constitutional Law №438-V dated December 7, 2015 "On the Astana International Financial Centre" (hereinafter referred as "Law on the AIFC"), which provided for the legal basis for functioning of the AIFC, its permanent bodies, jurisdiction, tax regime, employment organization and official language. In accordance with the Law on the AIFC, the AIFC is defined as a "territory within the city of Astana with clearly defined borders, defined by the President of the Republic of Kazakhstan, within the framework of which there is a special legal regime".¹

The AIFC set ambitious objectives to be among the 20 leading financial centers in the world.² Kazakh officials and experts were carefully examining successful experiences of world's leading

¹ "Astana haliqaraliq qarji ortaligi turali" Qazaqstan Respublikasinin 2015 jigi 7 jeltoqsandagi № 438-V Konstituciyaliq Zani [Constitutional Law of the Republic of Kazakhstan №438-V dated December 7, 2015 "On the Astana International Financial Centre"] Art.1. (Hereinafter, the Law on the AIFC).

² Ult zhospary – bes institucionaldyq reformany zhuzege asyru zhonendegi 100 naqty qadam ["National Plan '100 Precise Steps' - Kazakhstan Institute for Strategic Studies under the President of the Republic of Kazakhstan"] dated May 20, 2015 (Hereinafter referred as "National Plan") available online at <http://kisi.kz/en/pages/national-plan-100-precise-steps> s 3 para 70

financial centers to refer to. Subsequently, the Kazakh authorities have decided to borrow successful model of the Dubai International Financial Centre (hereinafter referred as “the DIFC”). Kairat Kelimbetov appointed by the President of Kazakhstan as a Governor of the Astana International Financial Centre mentioned that the UAE had shown to the world how to successfully diversify the economy and Dubai was a great example to follow moving ahead with efforts to usher in changes.³ This decision was not made accidentally since Dubai has been successfully using the model of “entity within the entity” for more than 10 years.

In September 2004, Federal legislation of the United Arab Emirates (UAE) authorized the seven Emirates to create the legal structures necessary for international financial centers and Dubai was ready with a carefully drafted scheme.⁴ The DIFC was established in 2004 by Federal Law 35/2004 and Dubai Law 9/2004 (hereinafter referred as “the Law of the DIFC”) “to provide a stable and secure platform for businesses and financial institutions to tap into the emerging markets of the Middle East, Africa and South Asia”.⁵

During almost 13 years it has already achieved impressive results. As of March 2017, it has been ranked among top 30 of global financial centers.⁶ The major attractions of the DIFC are that entities registered within the 110-acres DIFC are not subject to UAE civil and commercial, tax and

³ John Isaac, “Dubai 'a Great Example' to Follow: AIFC Governor - Khaleej Times” (Khaleej Times - Dubai News February 19, 2016) <http://www.khaleejtimes.com/business/local/dubai-a-great-example-to-follow-aifc-governor> accessed December 9, 2016

⁴ Hwang M, “The Courts of the Dubai International Finance Centre - A Common Law Island in a Civil Law Ocean - DIFC Courts” (DIFC Courts November 1, 2008) <<http://difccourts.ae/the-courts-of-the-dubai-international-finance-centre-a-common-law-island-in-a-civil-law-ocean>> accessed November 22, 2016

⁵ 'Home | Dubai International Financial Centre (DIFC)' (Difc.ae, 2016) <https://www.difc.ae/> accessed October 28, 2016

⁶ Mark Yeandle, *The Global Financial Centres Index 21* (Global Financial Centres Index (GFCI 21, 21th Edition) March 2017) http://www.longfinance.net/images/gfci/gfci_21.pdf accessed April 3, 2017

other laws.⁷ The Center enacts its own laws for contract, company, partnership, financial markets, data protection, insolvency, banking, arbitration and courts.⁸

It should be emphasized that the process of the AIFC foundation has been still under way. At the present time only the Law on the AIFC has been adopted as a formal and legal framework for functioning of the AIFC similar to the Law of the DIFC in Dubai. The common objectives of both centers in Dubai and Astana, their ambitions, similar instruments to achieve these objectives justify the selection of the DIFC as a model to analyze the existing practice of dispute resolution mechanisms. At the same time the novelty of the AIFC project as well as the absence of any legal research into the area of the AIFC arbitration emphasizes the significance of the problem.

Throughout the thesis the main focus will be on arbitration due to its popularity as well as apparent advantages in freedom, flexibility, confidentiality etc. in comparison to other alternative dispute resolution mechanisms.⁹ The main purpose of the thesis is to analyze the current practice of arbitration at the DIFC so as to conclude what lessons can be learnt by Kazakh and Astana authorities from the DIFC's experience.

For the purposes of this thesis, the author will analyze how arbitration process is organized and conducted at the DIFC discussing and focusing on particular aspects and issues such as seat of arbitration, mechanism for recognition and enforcement of awards, certain considerations of public policy under the UAE, the Emirate of Dubai and the Centre's own legislation.

⁷ S R Lutrell, *Choosing Dubai: A Comparative Study of Arbitration under the UAE Federal Code of Civil Procedure and the Arbitration Law of the DIFC* (Business Law International 9.3, 2008) p 276

⁸ Ibid

⁹ Gary B Born, *International Arbitration: Law and Practice* (Second Edition), 2nd edition (Kluwer Law International; Kluwer Law International 2015) p 26

The author will employ comparative legal research method analyzing the present legislative acts and cases as well as scholar's opinions on the discussing issues. In this thesis, academic books, publications, journals, articles and other materials in the area of international arbitration available at different databases and websites were used.

The thesis consists of introduction, three chapters and conclusion. Chapter I will provide with an overview of the DIFC, history, development of arbitration and will explain how mechanism of enforcement of awards is implemented in the UAE, at the DIFC and in the Emirate of Dubai and give information about public policy in recognition and enforcement of arbitral awards at the DIFC. Chapter II will discuss issues that arose in the process of arbitration at the DIFC, namely, issues pertaining to the seat of arbitration, reciprocal mechanism of enforcement of awards as well as problem of public policy. Chapter III will be devoted to the overview of the AIFC, its reasons, objectives and features, will discuss problems pertaining to uncertainty in the Law on the AIFC concerning arbitration, and will finally analyze the issues that might arise in the AIFC arbitration in the future based on lessons from the DIFC's experience.

CHAPTER I: DIFC AND ARBITRATION AS A DISPUTE RESOLUTION MECHANISM

1.1. The DIFC: history, development of arbitration

In September 2004, Federal legislation of the United Arab Emirates (UAE) authorized the seven Emirates to create the legal structures necessary for international financial centers to be established and Dubai was ready with a carefully drafted scheme.¹⁰ The DIFC was established in 2004 by Federal Law 35/2004 and Dubai Law 9/2004 “to provide a stable and secure platform for businesses and financial institutions to tap into the emerging markets of the Middle East, Africa and South Asia”.¹¹

In accordance with the grounding Law of the DIFC as amended by Dubai Law 7/2014, the DIFC has three permanent bodies: Dubai international Financial Centre Authority, Dubai financial Services Authorities and Dispute Resolution Authority. Each of these bodies has their own powers and functions provided by law. The DIFC is a common law and English language jurisdiction within Dubai whose courts system is largely modeled on the English Commercial Court.¹² Direct or indirect application of principles of English common law along with English as an official language in most leading financial institutions all over the world including the DIFC is not a surprising trend. It should be noted that credibility of English common law in international financial transactions is justified by certain characteristics. Among them are well-established system and also rich experience in international commercial dealings, rich

¹⁰ Hwang M, “The Courts of the Dubai International Finance Centre - A Common Law Island in a Civil Law Ocean - DIFC Courts” (DIFC Courts November 1, 2008) <<http://difccourts.ae/the-courts-of-the-dubai-international-finance-centre-a-common-law-island-in-a-civil-law-ocean/>> accessed November 22, 2016

¹¹ 'Home | Dubai International Financial Centre (DIFC)' (Difc.ae, 2016) <<https://www.difc.ae/>> accessed 28 October 2016

¹² Hwang M, “The Courts of the Dubai International Finance Centre - A Common Law Island in a Civil Law Ocean - DIFC Courts” (DIFC Courts November 1, 2008) <<http://difccourts.ae/the-courts-of-the-dubai-international-finance-centre-a-common-law-island-in-a-civil-law-ocean/>> accessed November 25, 2016

experience in arbitration and judicial practice, predictability and accessibility of judicial decisions etc.

The function of dispute resolution at the DIFC is conferred upon a separate legal entity called Dispute Resolution Authority. It was established in February, 2014 by the amendment to the Law of the DIFC which replaced DIFC Judicial Authority consisting of only DIFC Courts at that time. It now comprises the Centre's Courts, the Arbitration Institute and any other tribunals or ancillary bodies established in accordance with Article 8(5)(b) of the Law of the DIFC. The DIFC's courts consist of two-tier system which are the Court of First Instance and the Court of Appeal that have the jurisdiction over the certain kinds of disputes. Pursuant to the Dubai Law 12/2004 Concerning Dubai International Financial Centre Courts, the following disputes are heard and determined by the Courts:

Civil or commercial claims and actions to which the DIFC or any DIFC Body, DIFC Establishment or Licensed DIFC Establishment is a party; civil or commercial claims and actions arising out of or relating to a contract or promised contract, whether partly or wholly concluded, finalized or performed within DIFC or will be performed or is supposed to be performed within DIFC pursuant to express or implied terms stipulated in the contract; civil or commercial claims and actions arising out of or relating to any incident or transaction which has been wholly or partly performed within DIFC and is related to DIFC activities; appeals against decisions or procedures made by the DIFC Bodies where DIFC Laws and DIFC Regulations permit such appeals; any claim or action over which the Courts have jurisdiction in accordance with DIFC Laws and DIFC Regulations; request of interpretation by the Chief Justice of the Courts of any article of the DIFC Laws and DIFC Regulations upon an application submitted to him from any DIFC Body, DIFC Establishment or Licensed DIFC Establishment; such interpretation shall have the same authority as the interpreted legislation.¹³

Another institution within the Dispute Resolution Authority responsible for dispute resolution at DIFC is Arbitration Institute. It was founded in addition to the DIFC Courts to provide

¹³ Dubai Law No.12 of 2004 in respect of The Judicial Authority at Dubai International Financial Centre as amended, Article 5(hereinafter referred as "JAL")

alternative dispute resolution mechanisms apart from litigation. In November 2015 Arbitration Institute entered into agreements with The London Court of International Arbitration (LCIA) for the management and administration of arbitrations in which the parties had selected DIFC-LCIA Rules.¹⁴ Since then it substituted its name for DIFC-LCIA Arbitration Centre. Its main objective is “to promote and administer effective, efficient and flexible arbitration and mediation services for businesses across various sectors including construction, media, real estate, international trade, finance, banking, maritime, leisure and telecommunications in numerous languages and applying different governing laws between local, regional and international

The DIFC provides for arbitration as one of the means of dispute resolution mechanisms. Initially, pursuant to the Law of the DIFC as of 2004, there used to be only one dispute resolution body called Judicial Authority comprising only DIFC Courts. Nonetheless, the President of the DIFC retained power to establish judicial committees and arbitration panels if it was necessary. As a package of statutes, the DIFC passed its first arbitration law¹⁵ in 2004 that was based on the UNCITRAL Model Law on International Commercial Arbitration.

On the whole, it provided for a legal framework for arbitration conducted at the Centre and also proposed some solutions to a number of issues existing at that time in the UAE legislation. First and foremost, the arbitration process under domestic UAE law is not UNCITRAL Model Law jurisdiction and governed by a limited number of provisions from the UAE Civil Code¹⁶ and Civil Procedure that makes the state as an unreliable arbitration forum.¹⁷ This issue was particularly demonstrated in the decision of the Dubai Court of Cassation in *International*

¹⁴ “Overview” (Overview) <http://www.difc-lcia.org/overview.aspx> accessed December 2, 2016

¹⁵ DIFC law No. 8 of 2004 (hereinafter referred as “DIFCAL 2004”)

¹⁶ Civil Code of the UAE, Law No. 5 of 1985 as amended by Law No. 1 of 1987, Article 3 (hereinafter referred as “Civil Code”)

¹⁷ Reza Mohtashami and Sami Tannous, *Arbitration at the Dubai International Financial Centre: A Common Law Jurisdiction in the Middle East* (ARBITRATION INTERNATIONAL, Vol. 25, No. 2, LCIA, 2009) p 177

Bechtel Co. Ltd v. Department of Civil Aviation of the Government of Dubai.¹⁸ In that case, the court set aside the award rendered in Dubai on the basis that the arbitrator had neglected to swear in witnesses not in accordance with the procedure prescribed by UAE law.¹⁹ The Federal government of the UAE proposed to adopt a new arbitration law in order to tackle the issues but the draft has been still in the stage of discussion. Hence, the DIFCAL 2004 offered relatively more advanced, precise and at the same time flexible mechanisms for the parties opted for arbitration to settle their disputes.

Nevertheless, from the establishment of the DIFC onwards, arbitration was not a popular means of dispute settlement at the center. One of the serious grounds that prevented attractiveness of arbitration was the scope of application of DIFCAL 2004 and existence of compulsory connection to the DIFC. Reza Mohtashami and Sami Tannous assumed that unattractiveness of DIFC arbitration as such was, *inter alia*, associated with its limited scope. They argue that “the lack of enthusiasm for this new jurisdiction was principally due to the narrow scope of application of the 2004 Law, which was limited to disputes arising out of or in connection with the DIFC, and where at least one party was entitled to bring an action before the DIFC Courts. [We] are not aware of any arbitration seated at the DIFC under the 2004 Law. Nor have the DIFC Courts ever had cause to consider the 2004 Law.”²⁰ And therefore they concluded that DIFCAL 2004 itself “did not lead to a surge of arbitrations at the DIFC.”²¹

According to the data provided by official DIFC website, by 2008 the number of the DIFC-registered companies only amounted to 747.²² Taking into account these circumstances, it

¹⁸ *Bechtel Co. Ltd. v. Department of Civil Aviation of the Government of Dubai* 300 F. Supp. 2d 112

¹⁹ Reza Mohtashami and Sami Tannous (n 17) p 177

²⁰ Ibid

²¹ Ibid

²² “Journey through our history: 2004 - 2014” (Timeline | Dubai International Financial Centre) <http://10.difc.ae/timeline/> accessed December 18, 2016

could be justified why there was a weak demand for arbitration as a means of dispute resolution as a whole.

In 2008 the DIFC and London Court of International Arbitration made a decision to found DIFC/LCIA Arbitration Centre in Dubai with the LCIA's rules adapted to the local requirements.²³ Chief Justice Sir Anthony Evans, a distinguished international jurist and judge, the Chairman of the DIFC Courts, described this Centre as “essentially a joint venture between the DIFC and the London Court of International Arbitration (“LCIA”), one of the leading players in the arbitration world.”²⁴ DIFC/LCIA's goals were primarily to be a leading arbitration institution in the region and provide high quality arbitration and mediation services not only to the DIFC' members but also for regional and global players.

Notwithstanding that, there were several problems with regard to the legal status of the DIFC/LCIA from 2008 onwards. Notably, the problems were concerned with “the constitutionality and jurisdictional reach of DIFC-LCIA and its ability to provide services to the UAE and other companies incorporated outside the DIFC territorial jurisdiction.”²⁵ The Arbitration Center did not have official legal status within the DIFC and therefore it was technically impossible to provide its dispute resolution services to all willing parties. Consequently, the DIFC authorities contemplated the opportunity to handle these legal issues by overhauling its organizational system at the legislative level.

In 2014, there were amendments to the Law of the DIFC that changed dispute resolution system in the Centre so that addressed legal issues successfully be solved. Namely, Judicial Authority consisting only of the DIFC Courts was completely abolished and instead, new Dispute

²³“Launch of the new DIFC/LCIA arbitration centre” (Launch of the new DIFC/LCIA arbitration centre - Publications - Allen & Overy) <<http://www.allenoverly.com/publications/en-gb/Pages/Launch-of-the-new-DIFC-LCIA-arbitration-centre.aspx>> accessed January 8, 2017

²⁴ DIFC-LCIA, “Overview” (Overview) <<http://www.difc-lcia.org/overview.aspx>> accessed January 25, 2016

²⁵ Ibid

Resolution Authority consisting of the DIFC Courts, the Arbitration Institute, the Probate Registry, the DIFC Wills and the Academy of Law were founded. Following year, Arbitration Institute once again signed the agreements with LCIA to operate and administer the arbitration center. In the history of the DIFC this period was marked as “The Relaunch” of the DIFC-LCIA Arbitration Centre with the same goals to be one of the top arbitration institutions in the region. But for the attainment of these ambitious objectives, some of DIFCAL 2004 provisions were still substantial obstacles.

As it was mentioned earlier, DIFCAL 2004 contained several adverse provisions that limited the effects of arbitration. Acknowledging the ongoing critique from the different arbitration experts, the DIFC enacted a new Model law arbitration statute²⁶ which substituted previous arbitration DIFC law. Current DIFCAL 2008 took into consideration the previous negative elements and mistakes of the old arbitration act and provided reasonable solutions. Furthermore, DIFCAL 2008 also provided answers to some categories of the issues such as public policy, the role of DIFC Courts as a curial authority and other problems which were considered to be defective in DIFCAL 2004.

DIFCAL 2008 covers the aspects of arbitration such as scope of its application, requirements for arbitration agreement, composition of arbitral tribunal and its jurisdiction, conduct of arbitral proceedings and issues concerning recognition and enforcement of awards. In comparison to previous DIFCAL 2004, one of the distinct and main achievements of DIFCAL 2008 is radical but at the same time positive change of its scope of application. Initially, arbitration as an alternative to DIFC courts was designed only for “closed” members that were registered and operated at the DIFC. Enacted DIFCAL 2008 now no longer require direct connection with the DIFC allowing any party to choose arbitration and its regime to be seated

²⁶ DIFC Law No. 1 of 2008 (as amended by DIFC Law Amendment Law DIFC Law No. 1 of 2013) (hereinafter referred to as “DIFCAL 2008”)

at the DIFC. Apart from DIFCAL 2008, provisions that govern arbitration process are contained in legal statutes such as Law on the Judicial Authority at Dubai International Financial Centre, DIFC Court Law 2004 and other legal provision of DIFC Laws.

1.2. Recognition and enforcement of arbitral awards in the UAE and the DIFC

Over the past ten to fifteen years, the recognition and enforcement of both domestic and foreign arbitral awards in the United Arab Emirates (UAE) has become an increasingly important topic.²⁷ This is particularly due to the steady increase of foreign investments in the local economy, most notably in the Emirates of Dubai, Abu Dhabi and, and in the wider Gulf and Middle Eastern region.²⁸ As it was already mentioned, there is a three-tier legal system within the UAE: federal level issues that are governed by federal law, state level issues governed by each emirate's law and issues in special economic zones within some emirates with its own jurisdictions in certain spheres of activities. For instance, free zones the DIFC in Dubai and Abu Dhabi Global Market in Abu Dhabi.

The whole arbitration procedure including recognition and enforcement of arbitral awards differs depending where the recognition and enforcement is sought. In the Emirate of Dubai as well as other six emirates, arbitration matters are governed by federal law. It should be noted, so far there has been no specific statute devoted to arbitration in the federal state. Provisions that particularly deal with arbitration in general and recognition and enforcement procedure are contained in several articles of the UAE Civil Procedure Code²⁹ which is not based on UNCITRAL Model Law.³⁰ Like the laws of many Arab states, the Federal Code's arbitration

²⁷ Soraya Corm-Bakhos and Gordon Blanke, *Recognition and Enforcement of Foreign Arbitral Awards in the UAE: Practice and Procedure*, BCDR International Arbitration Review, (Kluwer Law International; Kluwer Law International 2014, Volume 1 Issue 1) p 3

²⁸ Ibid

²⁹ Federal Law No. 11 of 1992 (hereinafter referred as "CPC")

³⁰ UNCITRAL Model Law on International Commercial Arbitration, 24 ILM 1302 (1985), available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (hereinafter referred as "UN Model Law")

provisions do not formally distinguish between domestic and international arbitration making UAE arbitration law monist.³¹ An award is not subject to an appeal and the UAE or emirates courts are precluded from examining the merits of the tribunal's decision by operation of article 217 of CPC.³² The UAE courts decide whether ratify or annul the award based on certain grounds that are provided by CPC:

- 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 authorized 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.³³

1.2.1. Mechanism for recognition and enforcement of arbitral awards in the UAE.

On the domestic scale where parties are the UAE residents, pursuant to Article 215 of CPC, so as to be enforced in Dubai and other emirates, the award must be initially ratified and converted to judgement by a UAE court. It is done by standard court proceedings where parties bring a lawsuit and go through the litigation. In this stage losing party seeks to set aside an award based on procedural defenses stipulated by CPC.

Before acceding to New York Convention³⁴, mechanism for enforcement of arbitral awards rendered outside the UAE in the territory of emirates had been carried out in accordance with

³¹ Lutrell, (n 7) p 265

³² Ibid p 272

³³ CPC, Article 216 s 1

³⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, United Nations Treaty Series, vol. 330, No. 4739, p. 3 (hereinafter referred as "New York Convention") available at <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf> accesses December 14, 2016

the UAE's domestic legislation. Namely, arbitral awards were executed in the same way as foreign judgments pursuant to the Chapter IV of CPC that deals with execution of foreign judgements. Article 236 of CPC states that arbitral awards and judicial judgements are treated in the same way in terms of recognition and enforcement in the UAE.³⁵ This was changed when the UAE in 2006 ratified the New York Convention on the Recognition and Enforcement of Arbitral Awards 1958. Since signing and ratifying the Convention, although the shift in approach has been gradual, the UAE courts have changed its attitude to the strict provisions of domestic legislation for ratification of arbitral awards and have started to apply the more liberal enforcement regime of the New York Convention.³⁶ However, in practice it is not still clear whether the UAE courts abide by their international commitments and invoke provisions of New York Convention or still refer to the provisions of CPC that give broader grounds to resist enforcement.

One of first cases that was heard by the UAE courts to enforce foreign arbitral award after becoming a party to New York Conventions was *Maxtel*³⁷ case rendered in 2012. In this case the court held that the New York Convention exclusively governed the enforcement of foreign awards in Dubai.³⁸ This decision confirmed the prior pro-enforcement approach taken by other UAE courts with reference to the New York Convention.³⁹ Particularly, by the Fujairah Federal Court of First Instance ruling⁴⁰, by the Dubai Court of Appeal decision⁴¹. Nonetheless, there is a number of cases that did not follow the New York Convention approach. For instance, the Dubai Court of Cassation (the Supreme Court) upheld the decisions of lower courts in refusing

³⁵ Supra note 44, p 272

³⁶ Henry Quinlan, Sam Stevens and Natalie Wainwright, *Enforcing arbitration awards in the UAE, Practice Note*, DLA Piper, p 5

³⁷ *Maxtel International FZE v. Airmec Dubai LLC.*, Case No 132/2012, Judgement of the Dubai Court of Cassation dated 18 October 2012

³⁸ Baker & McKenzie, *Baker & McKenzie International Arbitration Yearbook:2013-2014* (Liz Williams ed.,Juris Publishing 2014) p 348

³⁹ Ibid

⁴⁰ Case No. 35 /2010, Judgement of the Fujairah Court of dated 27 April 2010

⁴¹ Case No. 531/2011, Judgement of the Dubai Court of Appeals dated 6 October 2011

to grant enforcement of several ICC arbitral awards seated in France against the Ministry of Irrigation of the Democratic Republic of Sudan.⁴² The Court reasoned that it did not have jurisdiction to grant enforcement since the parties in that case had not had residency in the UAE and the disputed matter had been performed outside emirates' territories. Apparently, the New York Convention as such was not invoked by the Courts which resulted in many debates among legal community. Another case was concerned with refusal to enforce ICC awards seated in London. In *Fluor*⁴³ case the Dubai Court of Appeal declined to enforce the arbitral awards not by invoking the grounds provided in Article V of the New York Convention, but on the grounds of the lack of evidence that the United Kingdom had been a Contracting state. Being a civil law country, the UAE courts are not bound by decisions of upper courts and hence the outcome may vary from case to case. The current situation in the UAE is described to be stable in terms of correct invocation and applicability of the New York Convention, but is at the same time unpredictable and inconsistent due to courts decisions in *CFE* and *Fluor* cases.

In addition, the UAE signed several numbers of bilateral and multilateral treaties with a number of states with regard to cooperation in recognition and enforcement of foreign arbitral award and judgements. In particular, Riyadh Arab Convention on Judicial Cooperation signed by the UAE, Bahrain, Qatar, Saudi Arabia and Oman; Agreement between the United Arab Emirates and the Republic of India on juridical and Judicial Cooperation in Civil and Commercial Matters for the Service of Summons, Judicial Documents, Judicial Commissions, execution of Judgments and Arbitral Awards and others; Abu Dhabi Agreement dated 16 March 2009 between the Republic of Kazakhstan and the United Arab Emirates on judicial assistance in civil and commercial matters; The Convention on Judicial Assistance in Civil and Commercial

⁴² CFE v. Ministry of Irrigation of the Democratic Republic of Sudan, Case No.156/2013, Judgement of the Dubai Court of Cassation dated 18 August 2013(hereinafter referred as "CFE case")

⁴³ Fluor Transworld Services v Petrixo Oil & Gas, Case No. 52-2016, Judgement of the Dubai Court of Appeals dated 30 March 2016

Matters between the United Arab Emirates and the Republic of China (PRC) (2004); The Legal and Judicial Cooperation Agreement between the UAE and the Arab Republic of Egypt and other treaties. With the help of these treaties, once ratified and completed by national courts, awards shall be enforced on the territories of that contracting states without examining merits of the case.

1.2.2. Mechanism for recognition and enforcement of arbitral awards at the DIFC

Enforcement of arbitral awards rendered at the DIFC is implemented in accordance with DIFCAL 2008 that basically mirrors the grounds of the New York Convention and UN Model Law for refusal to recognize and enforce awards. In particular, article 44 of DIFCAL 2008 reads the following:

[A] party to the Arbitration Agreement as defined at Article 12 of this Law was under some incapacity; or the said Arbitration Agreement is not valid under the law to which the parties have subjected it or, in the absence of any indication thereon, under the law of the State or jurisdiction where the award was made;

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

(iii) the award deals with a dispute 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;

(iv) the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, in the absence of such agreement, was not in accordance with the law of the State or jurisdiction where the arbitration took place; or (v) the award has not yet become binding on the parties or has been set aside or suspended by a Court of the State or jurisdiction in which, or under the which, that award was made; or

(b) if the DIFC Court finds that:

(vi) the subject-matter of the dispute would not have been capable of settlement by Arbitration under the laws of the DIFC; or

(vii) the enforcement of the award would be contrary to the public policy of the UAE.⁴⁴

After the DIFC Courts establish that there are no grounds for setting aside, the DIFC rendered award is enforced against the assets of the respondent at the DIFC. Also, an award rendered at the DIFC and recognized by DIFC Courts has exactly the same power and weight as a judgment of the Dubai Courts that are in turn constitutionally parts of the UAE court system. Hence these judicial judgements can be executed outside the UAE according to bilateral or multilateral treaties.⁴⁵ Moreover, outside the UAE, the DIFC rendered award is subject to the New York Convention that simplifies the enforcement of awards due to a wide number of contracting parties worldwide.⁴⁶

1.2.3. Mechanism for enforcement of the DIFC arbitral awards in Dubai

The procedure for enforcement of the DIFC rendered awards in on-shore Dubai and vice versa draws particular attention. The existing current mechanism and relationship between the DIFC Courts and Dubai courts and enforcement procedure itself serves as an effective way to speed up the procedure allowing parties to save time and resources. The DIFC and Dubai authorities proposed the model of recognition and enforcement of awards that subsequently has been used between on-shore and off-shore jurisdictions. Section 1 of Article 42 of DIFCAL 2008 stipulates:

(1) An arbitral award, irrespective of the State or jurisdiction in which it was made, shall be recognised as binding within the DIFC and, upon application in writing to the DIFC Court, shall be enforced subject to the provisions of this Article and of Articles 43 and 44.

⁴⁴ DIFCAL 2008, Article 44,

⁴⁵ DIFC Courts Enforcement Guide, 4th Ed., January 3.2016 para. 22, available at <http://difccourts.ae/wp-content/uploads/2016/01/ENFORCEMENT-GUIDE-2016-AW.pdf> accessed March 28, 2017

⁴⁶ Convention NY, “Contracting States” (New York Arbitration Convention) <http://www.newyorkconvention.org/countries> accessed March 29, 2017

(4) Awards recognized by the DIFC Court may be enforced outside the DIFC in accordance with the Judicial Authority Law and recognition under this Law includes ratification for the purposes of Article 7 of the Judicial Authority Law.⁴⁷

Under this provision the DIFC Courts do have jurisdiction to hear claims, recognize and enforce any award irrespective of a seat. This is common practice among countries which are parties to the New York Convention. However, this competence to recognize and enforce awards of the DIFC Courts is extended to the Dubai Courts and vice versa. This became possible due to the Protocol of Enforcement⁴⁸ signed in 2009 by both Courts. The main purpose of the Protocol is to ensure accurate mechanism of enforcement of judgements, awards, and orders in both Courts.⁴⁹ The enforcement procedure is laid down in Section 3 of the Protocol which provides that subject to specific provisions, both courts' judgements, ratified awards, orders shall be enforced in the both territories without any review on the merits.⁵⁰ In other words, after an award has been recognized by the relevant courts, it is subsequently subject to direct execution in respective territories. Afterwards, a package of amendments were introduced to the JAL.⁵¹ It is law of the Dubai Emirate that provides for general competence of the DIFC Courts. Consequently, Protocol mechanism already appeared at the statutory level. Particularly, Article 7 of JAL sets forth conditions for execution of judgements, order and awards:

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

⁴⁷ DIFCAL 2008, Article 42(1)(4)

⁴⁸ Protocol of Enforcement between DIFC and Dubai Courts dated April 23, 2009 (hereinafter referred as "Protocol"), available at <http://difccourts.ae/wp-content/uploads/2015/08/Protocol-of-Enforcement-between-the-DIFC-Courts-and-Dubai-Courts-23-April-2009.pdf> accessed March 30, 2017

⁴⁹ Protocol, s 2

⁵⁰ Ibid s 3

⁵¹ Law No.12 of 2004 in respect of The Judicial Authority at Dubai International Financial Centre as amended

adopted by such entities in this regard, as well as with any agreements or memoranda of understanding between the [DIFC] Courts and these entities.

[...]

The execution judge of Dubai Courts shall apply the execution procedure and rules stipulated in the aforementioned Federal Civil Procedure Code, including any objections to the execution; the execution judge may not reconsider the merits of the judgment.⁵²

This mechanism provides parties with greater extent of flexibility as well as speed and efficiency in the process of enforcement avoiding stage of additional court proceedings. According to the DIFC courts Enforcement Department, in the period between 2008 and 2014, there were 61 enforcement actions between local Dubai courts and the DIFC, all of which were successful.⁵³ Absence similar protocols with regard to recognition and enforcement of arbitral awards with other emirates in the UAE, the procedure is carried out in the manner according to the rules provided by CPC.

1.3. Public policy in recognition and enforcement of arbitral awards at the DIFC

Traditionally, what has distinguished arbitration is that it has been a private process where parties enjoy a large degree of autonomy and sufficiency where national courts' in enforcement stage interfere in areas with public interest or where the interests of third parties that are not subject to arbitration agreement may be affected.⁵⁴ The UN Model Law and the New York Convention contain a '4+2' list employed by courts to set aside an award, that is, four grounds invoked by losing party and two additional grounds which are examined *ex officio*: arbitrability and public policy.⁵⁵ The New York Convention provides that enforcement of an award may be

⁵² JAL, Article 7(3)(c)

⁵³ H. Quinlan, S. Stevens and N. Roberts, *"Enforcing arbitration awards in the UAE"*, Practical Law Company Practice Note.

⁵⁴ Tibor Várady, John J. Barceló III, Stefan Kröll, and Arthur Taylor von Mehren, *International commercial arbitration : a transnational perspective*. 522(6th Ed.2015) p 322

⁵⁵ Vladimir Pavic, *Annulment of Arbitral Awards In International Commercial Arbitration* (2010). Investment and commercial arbitration - similarities and divergences, Christina Knahr, Christian Koller, Walter Rechberger and

declined if it is contrary to public policy of the enforcing state.⁵⁶ Thus from the language of Article V of the New York Convention it is clear that the notion of public policy is interpreted by national courts in accordance with national law.

Based UN Model Law, arbitration laws⁵⁷ at the DIFC mirror the grounds for award annulment provided in Article V of the New York Convention. Nevertheless, it should be noted that first adopted DIFCAL 2004 stipulated that enforcement of award may be refused by the DIFC Courts if enforcement of an award would be in conflict with public policy of the DIFC.⁵⁸ This provision raised many questions as to what public policy of the DIFC might be since the DIFC is not a political unit as such but rather merely an economic zone within the UAE. With adoption of DIFCAL 2008, public policy of the DIFC was replaced with public policy of the UAE.⁵⁹ It means, when deciding annulment claims, the DIFC Courts would deal with interpretation of public policy according to the UAE legislation.

In the UAE, provisions that regulate arbitration are enshrined at the federal level in CPC and some other statutes. The UAE legislation in regard to arbitration as well as federal courts do not distinguish arbitrability and public policy to be separate grounds for annulment or refusal to enforce an award. Hassan Arab and Dalal Al Hout maintain that “[w]hilst the New York Convention provides for a separate ground for the non-arbitrability of disputes and the consequences arising there from, ostensibly, matters of arbitrability are intertwined with and are a component of the ground of public policy as a reason for refusal of the recognition and enforcement of an award.”⁶⁰ Hence one may conclude that when dealing with annulment and/or

August Reinisch, eds., p 136, Eleven International Publishing, 2010. Available online at SSRN <https://ssrn.com/abstract=1615333>

⁵⁶ The New York Convention, Article V(2)(a)

⁵⁷ DIFCAL 2004, DIFCAL 2008

⁵⁸ Lutrell (n 7) p 282

⁵⁹ DIFCAL 2008, Article 44 (b)(vii)

⁶⁰ Hassan Arab and Dalal Al Houti, *The Pendulum of Public Policy and the Enforcement of Arbitral Awards in the UAE*, International Journal of Arab Arbitration (International Journal of Arab Arbitration; International Journal of Arab Arbitration 2014, Volume 6 Issue 4) p 9

refusal to enforce an arbitral award and exercising *ex officio* powers, the UAE courts apply grounds of violation of public policy and non-arbitrability of subject matter as one ground in same dispute.⁶¹ Therefore, it is crucial to have understanding of what subject matters can be arbitrable under the UAE law.

The vast majority of contractual disputes in civil and commercial matters are arbitrable.⁶² Nonetheless, the UAE legislation directly or indirectly limits the scope of arbitrable disputes. For instance, in accordance with CPC, “the compromise or settlement of any dispute (an accord) must relate to permissible subject matters for contracts and not contradict mandatory law or UAE public policy.”⁶³ Hence it is derived from that provision that in effect, the subject matter might be defined to be non-arbitrable by existing legislation and if it contradicts public policy.⁶⁴ Current legislation lays down several matters which are in essence non-arbitrable and subject to exclusive competence of the UAE courts.⁶⁵ For example, these comprise but are not limited matters related to labor disputes⁶⁶ as well as bankruptcy, commercial agency agreements⁶⁷; disputes concerning deferred debt⁶⁸; criminal activity.⁶⁹ In addition, insurance disputes fall within arbitrable matters on condition that an arbitration clause in an insurance is not void.⁷⁰

⁶¹ This was based on case-law by the UAE Federal Courts. In particular, in Federal Supreme Court Criminal Appeal No. 493 of 18 dated 26 October 1997; Dubai Court of Cassation Case No.14 of 2012, judgment dated 16 September 2012; Dubai Court of Cassation Case No 180/2011; Dubai Court of Cassation Case No150 of 2014

⁶² Hassan Arab Jyothi Venugopal, *The UAE Country Report*, 2016 Research Project: Comparative Study of “Arbitrability” under the New York Convention, para 5, available online at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=5E4FDA6A-EC0E-4AF7-A668-29CEBAAB4CA7> accessed April 3, 2017

⁶³ CPC, Article 725

⁶⁴ Reza Mohtashami Antonia Bir, Lee Rovinescu, *Arbitration Guide IBA Arbitration Committee: United Arab Emirates*, (February 2013) p 5, available online at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=29FA7500-056A-4909-BFE3-28EB50E55077>, accessed April 3, 2017

⁶⁵ Ibid

⁶⁶ Federal Law No. 8 of 1980 (as amended), the Labour Law.

⁶⁷ Federal Law No. 18 of 1981 (as amended), the Commercial Agency Law, Art 6.

⁶⁸ Civil Transactions Law No. 5 of 1985 as amended by Law No. 1 of 1987, Art 733.

⁶⁹ Hassan and Dalal (n 60) p 9

⁷⁰ Ibid

Furthermore, as Article 733 of the Civil Code provides there are restrictions upon activities that cannot to be the subject matter of arbitration:

- (i) cancellation of a debt by another debt;
- (ii) sale of food by way of commutative contract prior to delivery;
- (iii) deferred exchange of gold against silver and vice versa;
- (iv) *riba al-nasi'a* (usurious interest in consideration of the deferment of the payment of a debt);
- (v) substituting part of a deferred debt owed by a debtor in consideration of advancing the date of payment;
- (vi) reducing the amount of a guarantee on a deferred debt owed by a debtor in consideration of accelerated payment with an increase and
- (vii) an advance involving a benefit⁷¹

Along with that definition of public policy (order) is provided in Civil Code that states as follows:

Public order shall be deemed to include matters relating to personal status such as marriage, inheritance, and lineage, and matters relating to sovereignty, freedom of trade, the circulation of wealth, rules of private ownership and the other rules and foundations upon which society is based, in such manner as not to conflict with the definitive provisions and fundamental principles of the Islamic Shari'ah.⁷²

It implies that if subject matter brought to arbitration is associated with matters laid down in Civil Code, they are considered to be non-arbitrable meaning arbitrator(s) do(es) not have jurisdiction and allowing the award to be enforced will be against public order of the UAE. However, the given definition is considerably general and vague to determine exactly what shall be understood under matters provided in Article 3 of Civil Code of the UAE. Thus this leaves the space for the courts to define whether enforcement of an award contradicts to public policy of the UAE or not. Case-law on the interpretation of public policy of the UAE suggests

⁷¹ Civil code, Article 733

⁷² Civil Code, Article 3

that courts provide similar views on that question. On the basis of existing cases dealing with public policy issues in annulment of arbitral awards, there is a common trend that violation of mandatory rules of law in which arbitration is prohibited constitute violation of public policy. For instance, Dubai court of Cassation held in *Baiti*⁷³ case that real estate disputes cannot be arbitrated, arbitrator had no jurisdiction and thus it was against public policy. Particularly, the judge stated:

[T]he disposition of units sold off-plan without compliance with Article 3 of Law No. 13 of 2008, which provides that these units must be registered in the Interim Real Estate Register, may not be subject matter of arbitration simply because this [i.e., the disposition without registration] contravenes public order⁷⁴

Abu Dhabi Courts followed the same approach that it is violation of public order where arbitrators act *ultra vires* in certain categories of matters which fall under exclusive jurisdiction of courts.⁷⁵ Based on that, one may come to conclusion that when dealing with public policy the UAE Courts contemplate violation of non-arbitrability of subject matter shall be a ground to annul the award.

Most importantly, there is a question of application of Islamic sharia principles in interpretation of public policy of the UAE. Luttrell maintains that sharia law will not apply to commercial disputes before the courts as long as questions of public policy were not raised.⁷⁶ What is

⁷³ *Baiti Real Estate Development v. Dynasty Zarooni Inc.* (Appeal No. 14/2012) Judgement of the Dubai Court of Cassation dated September 16, 2012

⁷⁴ Gordon Blanke, *Chapter III: The Award and the Courts, Recognition and Enforcement of Domestic and Foreign Arbitral Awards in the UAE: Practice and Procedure*. Christian Klausegger, Peter Klein, et al. (eds), Austrian Yearbook on International Arbitration 2015, Austrian Yearbook on International Arbitration, Volume 2015 (Manz'sche Verlags- und Universitätsbuchhandlung; Manz'sche Verlags- und Universitätsbuchhandlung 2015) p 433

⁷⁵ Essam Al Tamimi, *Arbitrators Dealing with Real Estate Property Disputes – Is it a matter of Public Policy?* (Arbitrators Dealing with Real Estate Property Disputes – Is it a matter of Public Policy? - Al Tamimi & Company) <http://www.tamimi.com/en/magazine/law-update/section-8/june-6/arbitrators-dealing-with-real-estate-property-disputes-is-it-a-matter-of-public-policy.html> accessed March 7, 2017

⁷⁶ Luttrell (n 7), p 262

understood by Western legal experts to be public law significantly differs under in Sharia.⁷⁷ As an example, arbitral awards in relation to licensing agreements for the sale of alcohol will not be enforced.⁷⁸ It is quite debatable but awards on debts with high interest may also be subject to annulment⁷⁹. Nonetheless, in comparison to Saudi Arabia, the UAE is considered to be surprisingly secular jurisdiction, where Sharia principles have a very subordinate role with little (if any) significant impact on arbitration.⁸⁰ The UAE judges do not follow Sharia principles so strictly and are reluctant to impose prohibition against interest (iba).⁸¹

It should be also emphasized that the legal system of the UAE is based on civil law traditions, thus court decisions do not have main source of law power and are not binding meaning that UAE courts examine every case individually depending on the facts and circumstances. Hence, legal issues that may arise in relation to annulment of awards on the grounds of public policy are construed on case-to-case basis.

Concluding this chapter, it is worth emphasizing the uniqueness of the DIFC. Amendments to the UAE Constitution made it possible for each emirate to create free economic zones. The Emirate of Dubai made use of this opportunity and established its own financial center with independent court system, exempted from civil and commercial matters common law jurisdiction and English as an official language. Arbitration as a dispute resolution mechanism at the DIFC plays important role since it provides investors with unique opportunities to settle disputes in accordance with UN Model Law based arbitration statute, with DIFC Courts as a curial authority and interesting mechanism of recognition and enforcement of awards in on-shore Dubai Emirate and vice versa. Having an overview and general ideas on what the DIFC

⁷⁷ Ibid at 263

⁷⁸ Ibid at 275

⁷⁹ Ibid

⁸⁰ Gordon Blanke, p 433

⁸¹ Ibid

is and how arbitration functions, the author will proceed to the legal issues concerning particular aspects of arbitration at the DIFC which will be analyzed in the second chapter.

CHAPTER II: UNDERLYING LEGAL ISSUES IN ARBITRATION AT THE DIFC

Despite the fact that the DIFC has been functioning since 2004, in the area of arbitration there are several legal issues that draw particular attention and deserve to be discussed in more detail in this chapter. The uniqueness of the DIFC project, namely the interaction of two jurisdictions with different legal systems within one Emirate makes arbitration process even more vulnerable to pitfalls which should be dealt with special care. In particular, the author contemplates that in practice the DIFC seat of arbitration raised some questions and hence it should be dealt with attention as DIFC Courts followed different approaches to establish it. In addition, specific mechanism of mutual recognition and enforcement of arbitral awards existing between Dubai and the DIFC may be considered to be a two-sided coin that resulted in various discussions. Finally, the problem of public of policy has always been important in arbitration law but at the DIFC it has become more debatable due to certain peculiarities connected with unique structural aspects of the center. These aspects will be analyzed in this chapter.

2.1. Issue of seat of arbitration at the DIFC

Bearing in mind the importance concerned with legal concept of seat and also its legal consequences, selection of seat of arbitration should be contemplated with special attention in the course of drafting of arbitration agreement. Otherwise, it may result in unpredictable consequences and even denial of desired forum, especially in the “on-shore-off-shore” jurisdictions such as Dubai and the DIFC. The issues of choosing of seat of arbitration at DIFC were addressed in two analogous DIFC cases: *Amarjeet Singh Dhir v. Waterfront Property Investment Limited and Linarus FZE*⁸² and *Five River Properties LLC and Renaissance*

⁸² *Amarjeet Singh Dhir v. Waterfront Property Investment Limited and Linarus FZE* (Claim No CFI 011/2009) (hereinafter referred as “Amarjeet case”)

Holdings and Developers FZE v Waterfront Property Investment Limited and Linarus FZE ⁸³

heard by the DIFC Court of First Instance in 2009. These cases dealt with several issues and among them was the issue of determining the seat of arbitration. In *Amarjeet* case, Claimant, an Indian citizen, entered into purchase agreement of plot of the land with Respondents, all of them are non-DIFC members.⁸⁴ The purchase agreement was subject dispute resolution clause that provided:

10.1 This Agreement shall in all respect be governed by and be construed, interpreted, and will take effect in accordance with the Laws of the Emirate of Dubai

10.2such resolution shall be resolved by the appointment of a single Arbitrator conducted in accordance with the DIFC-LCIA rules of arbitration applicable to the [DIFC]

10.3 The arbitration shall take place in the Emirate of Dubai⁸⁵

The DIFC-LCIA Rules, in turn, provided that “the parties may agree in writing on the seat (or legal place) of their arbitration. Failing such a choice, the seat of arbitration shall be the Dubai International Financial Centre, Dubai”.⁸⁶ Claimant argued that in accordance with the DIFC-LCIA Rules, the seat of arbitration was the DIFC as the parties had not agreed in writing. In addition, he invoked Article 27 (a) of DIFCAL 2008 that read: “The parties are free to agree on the Seat of the Arbitration, in the absence of such agreement, where any dispute is governed by DIFC law, the Seat of the Arbitration shall be the DIFC” and contended that the wording of clause 10.3 “...shall take place in the Emirate of Dubai” provided only for geographical place. The Respondents’ counterargument, among other things, was that clause 10.3 applied to the

⁸³ Five River Properties LLC and Renaissance Holdings and Developers FZE v. Waterfront Property Investment Limited and Linarus FZE (Claim no. CFI 012/2009) (hereinafter referred as “Five River Properties case”)

⁸⁴ *Amarjeet*, para 5

⁸⁵ *Ibid* para 42

⁸⁶ DIFC-LCIA Arbitration Rules 2016, adopted to take effect for arbitrations commencing on or after 1 October 2016, DIFC-LCIA Arbitration Center, Article 16.1

seat of Dubai and the whole meaning of that clause implied that had that clause referred to arbitration in its entirety, not to its separate parts, notably, hearings, meetings and deliberations. Chief Justice Michael Hwang stressed that this question of seat determination was merely of contractual interpretation what the parties had wished in their agreement. He came to conclusion that seat of arbitration shall be onshore Dubai and in his reasoning he gave several explanations as to why the choice of seat was not the DIFC.

Firstly, he stated: “There is a close connection with Dubai in the present case (the property is in Dubai, the governing law is Dubai law and the agreement is expressed to be executed in Dubai). In contrast, there is no significant connection with the DIFC because the DIFC-LCIA Arbitration Centre can administer an arbitration with a seat outside of the DIFC”.⁸⁷

Secondly, Justice Michael Hwang assumed that parties knew or should have known about the existence of two separate jurisdictions within Emirate of Dubai. In particular, he emphasized that “the Parties are not strangers to the various autonomous zones within the Emirates. Mr Dhir [Claimant] was involved in the negotiations for the land transaction in the related case of CFI 012/2009, and one of the Applicants (Renaissance) in that case is incorporated in the Sharjah Airport International Free Zone. Linarus FZE (Respondent in both cases) is a Jebel Ali Free Zone Company. It would be surprising if the Parties did not know that different laws applied in the DIFC or that they were content to describe the DIFC as simply “the Emirate of Dubai“. The DIFC is within the Emirate of Dubai but the two terms are clearly not synonymous or interchangeable. The Parties should have known that the DIFC and Dubai have two different arbitration laws”.⁸⁸

⁸⁷ Amarjeet (n 82) para 85

⁸⁸ Ibid para 87, para 90

In response to Claimant's argument that indication of DIFC-LCIA Rules in the agreement entailed a selection of the *lex arbitri*, the Court held that "choosing the procedural rules of a particular arbitration institution does not *ipso facto* necessitate a choice of the procedural law of the country in which that institution is located. The best example of this is the ICC Rules which governs arbitrations seated in many different countries with only a minority of cases seated in France, the country where the ICC is located. The choice of the [DIFC-LCIA] Rules does not automatically mean that the DIFC Arbitration Law applies. The normal rule is that the curial law is that of the seat".⁸⁹ Based on that considerations, the Court established that "if parties want[ed] the DIFC Arbitration Law to apply ..., they should expressly select the DIFC as the seat in their arbitration agreement"⁹⁰ It consequently ruled seat of arbitration was on-shore Dubai and hence the DIFC Court did not have jurisdiction to make procedural actions. In analogous *Five River Properties* case the circumstances and were identical and Justice Hwang just made a reference to the holding and reasoning of the previous case⁹¹ and followed the same holding.

The outcome of cases seems to be debatable. Even though it was unclear which seat the parties contemplated, surrounding circumstances demonstrated the opposite. The wording "shall take place in the Emirate of Dubai" did not necessarily indicate Dubai to a seat. Although parties had connection to Dubai, the transaction was not made at the DIFC, this wording of the arbitration clause could substantially mean to be a geographical place where hearings were conducted. What is important is that there was reference to DIFC-LCIA Rules which in turn suggested unequivocally that absence indication of seat the default rule is DIFC. Even if parties

⁸⁹ Ibid para 90

⁹⁰ Ibid para 92

⁹¹ Five River Properties case para 11

failed clearly to indicate seat, it does not deprive one of them of opportunity to arbitrate under DIFCAL 2008 since nexus is to the DIFC is no longer required by DIFC laws.

Surprisingly, the decision of the DIFC Courts in *Gavin v. Gaynor*⁹² case has established an interesting precedent that might be invoked to circumvent the holdings of the *Amarjeet* and *Five River Properties* cases concerning the determination of seat the of arbitration and hence relevant powers of competent courts. This case resulted in many discussions and debates among legal experts. With this in mind, this case shall be analyzed with more details due to the DIFC Court' holding and reasoning which is different from previous cases on that issue.

According to the facts of the case, the issue arose between the parties in connection with the alleged breaches of Stored Value Card Processing, Service and Marketing Agreement. In this agreement there were dispute resolution clauses. Clause 13.2 stated that “the validity, construction and interpretation of [the SVC Agreement] and the rights and duties of the parties hereto shall be governed by the internal laws of the UAE.” Clause 13.3 provided for “the jurisdiction of the courts in Dubai, the UAE.” Clause 13.5 read that “any controversy arising out of, or relating to this [SVC] Agreement, or the breach thereof, which cannot be resolved pursuant to Section 13.4 above [amicable resolution], shall be submitted to arbitration per the law of the United Arab Emirates.”⁹³ Defendant brought several lawsuits including tort claims against the claimant in the Federal District Court for the Central District of California in the USA. In turn, the Claimant filed equitable counterclaim against the defendant. At the same time, in response to claimant's counterclaims Defendant and its American subsidiary sought a declaratory relief enjoining the parties to arbitrate in California. Subject to dispute resolution clauses in the agreement, claimant brought an action before the DIFC Courts to confirm jurisdiction and appoint an arbitrator pursuant to under Article 17(3)(b) of DIFCAL 2008 to

⁹² Gavin v. Gaynor (Claim No. CFI 017/2015)

⁹³ Ibid para 3

settle the dispute. Claimant in support of their submissions argued that, *inter alia*, arbitration agreement was valid and the parties expressly agreed in it to submit to the jurisdiction of the courts in Dubai, the UAE and that the DIFC Courts “are constitutionally part of the Dubai judicial system.”⁹⁴ Secondly, in response to the defendant’s claims that the DIFC Courts do not have jurisdiction under DIFCAL 2008, claimants contended:

Defendant ignores Article 27 of the DIFC Arbitration Law which states that “the parties are free to agree on the Seat of Arbitration. In the absence of such agreement, where any dispute is governed by DIFC law, the Seat of Arbitration shall be the DIFC.” Furthermore, the Claimant states that the DIFC Courts derive jurisdiction not from the DIFC Arbitration Law, but rather from the Judicial Authority Law. The Claimant asserts that the law governing this dispute is DIFC law and thus Article 27 applies. This is because the DIFC Court Law allows application of such law and also because the parties have agreed to subject their dispute to the laws of the UAE, which includes DIFC law.⁹⁵

On the other hand, the defendant raised the several counterarguments. It contended that arbitration agreement did not contain any reference to the DIFC as a seat of arbitration and hence the DIFC Courts do not have jurisdiction and power to appoint an arbitrator. Furthermore, it presented the argument as follows:

Article 17(3)(b) of the DIFC Arbitration Law [authorizing the Courts to appoint an arbitrator] allows jurisdiction by the DIFC Courts only where the DIFC Courts are the courts of the Seat of Arbitration. Article 7 provides that the DIFC Arbitration Law applies only where the Seat of Arbitration is the DIFC, subject to certain specific exceptions. The Defendant contends that Article 17 is not one of the exceptions that may apply if the Seat of Arbitration is not the DIFC. Thus, the Defendant concludes, the DIFC Courts do not have jurisdiction under Article 17(3)(b) of the DIFC Arbitration Law and cannot appoint an arbitrator in this case.⁹⁶

Discussing the arguments put forward by both parties concerning the issue of jurisdiction based upon the DIFC seat, the Courts made following conclusions. The Court first resorted to and

⁹⁴ Ibid para 31

⁹⁵ Ibid para 33

⁹⁶ Ibid para 20

examined jurisdiction gateways stipulated by Article 5 of the Judicial Authority Law (Law No. 12 of 2004, as amended by Law No. 16 of 2011). Having examined the article, Justice Ali Al Madhani concluded:

[I]n my view, the only way for the Claimant to properly use the gateways of the Judicial Authority Law to compel this Court to accept their application and appoint the Arbitral Panel is for the Claimant to establish one of the following facts with reference to the Article 5 gateways cited above:

- a) That one of the parties is a DIFC Establishment or Licensed DIFC Establishment.
- b) The action arises out of or relates to a contract or promised contract which is partly or wholly concluded, finalised or performed within the DIFC or will be performed or is supposed to be performed within the DIFC.
- c) The action arises out of or relates to any incident or transaction which has been wholly or partly performed within the DIFC and is related to DIFC activities.
- d) The DIFC Courts have jurisdiction in accordance with DIFC Laws and DIFC Regulations as prescribed by the DIFC Arbitration Law.⁹⁷

Justice Ali Al Madhani began to focus on the last point as to whether the DIFC Arbitration Law confers jurisdiction upon this Court. He came to conclusion that the DIFC Courts did not have competence to hear the dispute and pointed out that “the Arbitration Clause (13.5) alone does not clearly nominate the DIFC to be the Seat of Arbitration and nothing in the entire SVC Agreement refers specifically to the DIFC. Therefore the DIFC Arbitration Law was not sufficient to confer jurisdiction to the DIFC Courts in this case.”⁹⁸ Having discussed and afterwards rejected the gateways a) and b, the Courts addressed the gateway that required action arose out of or related to any incident or transaction which had been wholly or partly performed within the DIFC and was related to DIFC activities. In the proceedings the claimant provided the letter dated 4 May 2009. This letter stated that meeting arrangements in the DIFC to occur

⁹⁷ Ibid para 47

⁹⁸ Ibid para 52

the next day. Moreover, the Deputy CEO of Gaynor Private Limited (Pakistan) discussed the 2nd Addendum to the Gavin – Gaynor Agreement that subsequently was signed by him on 21 January 2009.⁹⁹ Justice held that

This letter is quite clear evidence that the transaction between the parties took place, at least in part, within the DIFC, which means that the parties transacted business in the geographical territory of the DIFC and therefore must be governed by DIFC Laws including being subject to the jurisdiction of the DIFC Courts pursuant to Article 5 of the Judicial Authority Law.¹⁰⁰

Overall, analyzing the facts of this case the DIFC Court of First Instance held that they did have jurisdiction over the case and hence the DIFC shall be nominated as a seat. In its reasoning the Judge Ali Al Madhani stated:

Nothing in the DIFC Arbitration Law or in other rules governing arbitration in the DIFC provides that an Arbitration Clause would become unenforceable for failure to nominate a Seat of Arbitration. I see no reason why the Seat of Arbitration cannot be determined by reference to an implied choice, giving consideration to the Seat with the most connection with the Agreement, the parties, the transaction or any other relevant consideration.¹⁰¹

In my view, the SVC Agreement contains an implied agreement that the Seat of Arbitration is to be Dubai (DIFC) and not the US or any other place. Nothing in the Defendant's submissions suggests the contrary. In fact, reference to Dubai, UAE Law as the applicable substantive and procedural law, and reference to the Dubai, UAE Courts, which this Court earlier interpreted to be both DIFC Laws and Courts, give ample support to an implied Seat of Arbitration in Dubai (DIFC).¹⁰²

As one can see this case demonstrates provisions of DIFCAL 2008 do not suffice when dealing with determination of seat. The DIFC Courts ruling on their jurisdiction concluded that their competence was derived from another statutes, namely from JAL.

⁹⁹ Ibid para 63

¹⁰⁰ Ibid para 64

¹⁰¹ Ibid para 73

¹⁰² Ibid para 74

2.2.Issue in reciprocal mechanism between Dubai and the DIFC in recognition and enforcement of awards

Another significant issue is concerned with enforcement of awards. By applying reciprocal mechanisms existing between the DIFC and Dubai Courts, one may in turn raise some legal questions with regard to denial of justice and public policy issues in the process of enforcement. The matter is that arbitration models, court system, sources of law in general under the DIFC and the Emirate of Dubai substantially differ. The DIFC enjoys with its legislation in civil and commercial matters, and even system of justice while Dubai and other emirates are subject to federal and emirate's law and court system. Essentially, implementation of justice by 'foreign' courts and invocation of laws in the matters that directly affect one's rights and obligations contradicts fundamental principles of law. In almost all jurisdictions access and right to justice are regarded as being one of the essential human rights and therefore cannot be waived by agreement. Moreover, international law also provides that fair trial, due process shall be observed.¹⁰³ In enforcement stage, a losing party, especially if it is a national of its state, has an essential right to justice and right to be heard by its own state courts.

By recourse to the courts of the DIFC to recognize and enforce an award instead of proper Dubai courts, respondent is deprived of fundamental right to enjoy nexus to its state, that is, right to use its own national laws, right to be heard by national courts, right to use state language. In other words, having assets in Dubai respondent is expected to have opportunity to defend itself under domestic courts, under federal and emirate's law, to plead and provide evidence in its mother tongue. Thus, deprivation of these rights may constitute denial of justice,

¹⁰³ Article 10 of Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) (UDHR) Article 14 of International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

violation of due process and abuse of process which may be a ground to deny enforcement due to violation of public policy under the New York Convention.

These issues were raised and addressed in a number of cases before the DIFC courts. In *Banyan Tree*¹⁰⁴ case the DIFC Court of Appeal accepted jurisdiction on the basis of DIFCAL 2008 and JAL and recognized Dubai-rendered awards despite the absence of any nexus between parties and the DIFC and notwithstanding recognition from the Dubai courts. Claimant, Banyan Tree was a company incorporated in Singapore which carried out management and operation of premium resorts, hotels and spas around the world.¹⁰⁵ The Claimant brought a claim to Dubai International Arbitration Center seated in Dubai against the Defendant, Meydan Group LLC, the United Arab Emirates incorporated company that does real estate development, investment in enterprise and management of hotels and resorts in relation to the Hotel Management Agreement.¹⁰⁶ Sole arbitrator rendered an award in favor of Banyan declaring the Hotel Management Agreement had been breached.¹⁰⁷ Claimant applied to the DIFC Courts seeking to recognize and enforce the Arbitral Award while Respondent applied for dismissal of the claim based on the fact that the Dubai Courts, not the DIFC, is the proper venue for such a claim.¹⁰⁸ The respondent brought several allegations including abuse of process and *forum non conveniens*.¹⁰⁹ Nevertheless, the DIFC Court of Appeals declined both allegations. Justice Sir David Steel explained on the matter of *forum non conveniens* the following:

[T]he short answer to the contention by Meydan that this court should stay proceedings on forum non conveniens grounds is that there is no alternative (let alone more appropriate) forum for the determination of the question whether the

¹⁰⁴ Meydan Group LLC v Banyan Tree Corporate Pte Ltd, (Case CA-005-2014, DIFC Court of Appeal,) November 3 2014.

¹⁰⁵ Meydan (n 104) para 1

¹⁰⁶ Ibid para 2

¹⁰⁷ Ibid para 6

¹⁰⁸ Ibid para 8,12

¹⁰⁹ Ibid para 38, 41

award should be recognised and enforced in the DIFC. The DIFC Courts have exclusive jurisdiction and thus the point fails in limine.¹¹⁰

In other words, the principle of *forum non conveniens* is only applicable where there is an alternative court, even if a foreign court, but in this case the DIFC courts is the only ones who has competence.

As regarded the allegation of abuse of process, Justice Steel stated that existing machinery provided by JAL and Protocol was not necessarily to be considered an abuse of process. Claimant was legally entitled to invoke the path stipulated in DIFCAL 2008 and JAL. He concluded that “to pursue the claim for enforcement given the scope of the entitlement is again difficult to categorize as an abuse of this court’s procedures”¹¹¹

The similar issues were examined by the DIFC Courts in another *Farazi*¹¹² case. In comparison to the *Banyan Tree* case, here was invoked and discussed the ground of violation of public policy of the UAE caused by application of reciprocity mechanism between on-shore and off-shore jurisdictions. Claimants sought to obtain a leave from the DIFC Courts to enforce an arbitral award rendered in London against Dubai-based respondents who did not possess any assets and connection to the DIFC. Respondents claimed, *inter alia*, that the Court should deny recognition and enforcement based on the grounds that it would violate the public policy of the UAE. In particular, on behalf of defendants, expert in the UAE law, English solicitor Mr. James Whelan argued:

[D]ecisions of the UAE courts hold that the administration of justice is part of “systems of government...and the other rules and foundations upon which society is based” within the meaning of Article 3 of the Civil Code. Hence, procedural issues can be a matter of public policy. In relation to the enforcement

¹¹⁰ Ibid para 39

¹¹¹ Ibid para 48

¹¹² *Farazi (2) Faridoon v (1) Fanny (2) Felicia*, [2013] ARB 002 dated July 29, 2015

of foreign arbitration awards, as a general rule of UAE law, any person resident in the UAE is entitled to assume, upon entering into an arbitration agreement, that the enforcement provisions of the Federal Civil Procedure Code (“CPC”) will apply. These involve application by the non-DIFC Dubai Courts of the provisions relating to ratification set out in the CPC. If a person resident or company domiciled in non-DIFC Dubai is deprived of this judicial process of ratification as set out in the CPC, that would be a matter contrary to public policy, for were that to happen the arbitration debtor would have lost the benefit of judicial consideration of the issue of ratification in accordance with the CPC procedural regime for recognition and enforcement by reference to principles of shari’ah law. In other words, the underlying infringement of public policy would be the choice by the arbitration creditor of a “port of entry” into UAE which provided for a route to execution by way of consideration by the DIFC Court of the matters covered by Article V of the New York Convention rather than route to execution by way of a non-DIFC Dubai Court applying the CPC procedure in relation to the same Article V matters. The applicable procedure would thus not be that of the arbitration debtor’s place of residence or, in the case of a company, of domicile.¹¹³

By giving his expert opinion in his submission he mentioned that not only is natural right to be heard deprived but also that only Dubai courts shall have jurisdiction to interpret arbitration agreement in accordance with the principles of Shariya law:

If the Awards in the present case were to go through the DIFC recognition process and thence to ‘automatic’ enforcement in the Dubai Courts (based on the assumption stated above as to the application and effect of Article 7 of the JAL), the Defendants would be deprived not only of the Article 215 protection [under CPC], but also of their right to submit to the UAE courts, to whose jurisdiction they are in the normal course subject, any arguments under Article 216 [of CPC], including those concerning the correct interpretation of the arbitration agreement. Thus, enforcement of the Awards against the Defendants through the DIFC Court process under the Arbitration Law and the JAL would violate not only public order rights relating to jurisdiction under the CPC, but also the right to have the arbitration agreement correctly construed in accordance with the principles of the Islamic shari’ah. They would find that they were launched into a situation that is materially different from what they contracted for when they agreed to arbitrate.¹¹⁴

¹¹³ Farazi (n 112) para 46

¹¹⁴ Ibid para 47

In addition, defendants brought another argument that recourse to the DIFC Courts in lieu of Dubai ones will also deprive of certain procedural rights and benefits, i.e.:

[T]hat proceedings brought against it shall be in the Arabic language;

[...]

(g) that the rules of evidence under UAE law and Dubai law shall apply to the proceedings;

(h) that the rights of appeal against a judgment or order will be available to it; and

(i) that all other procedures and formalities of proceedings in the Dubai Courts outside the DIFC will apply.¹¹⁵

In the course of proceedings of that case, the issue of public policy with respect to recognition and enforcement of arbitral awards was raised for the first time before the DIFC Courts. By discussing and deciding on this particular issue whether this reciprocal mechanism constitutes violation of public policy, Justice Sir Anthony Colman made reference to the discussions of *Banyan Tree* case. Namely, he stated that “analysis with reference to abuse of process is helpful in relation to the approach that this court should take with regard to the Defendant’s submissions in reliance on breach of public policy.”¹¹⁶ He pointed out that application of mechanism for obtaining executory order to collect assets outside the DIFC could not be deemed to be abusive, on the contrary, the reciprocal scheme provided by both the DIFC and Dubai legislation within the same Emirate simplifies the whole procedure and it is not illicit per se and claimants “were doing no more than the enacted procedure of the Emirate permitted.”¹¹⁷ Most importantly, Justice Colman reasoned that the scope of the New York

¹¹⁵ Ibid para 49

¹¹⁶ Ibid para 60

¹¹⁷ Ibid para 60,62

Convention does not apply to domestic procedure of enforcement of awards and therefore he dismissed respondents' claims as regards public policy infringement:

[I]n the present case the public order or public policy defense is grounded not on any intrinsic characteristic of the award itself or on any alleged procedural defect in the course of the arbitration or the conduct of the arbitrators. Instead, it is founded on an allegation of impermissible use by the arbitration creditor of available recognition and enforcement procedure in respect of a pre-existing award. In my judgment, this is not a public policy complaint within Article V2 (b) of the Convention but rather an objection to the deployment of the procedural mechanism of enforcement in the country of domicile of the arbitration debtor, namely the UAE. It is therefore an objection which falls outside the scope of challenges permissible upon applications for recognition or enforcement under Article 44(1) of the DIFC Arbitration Law.¹¹⁸

Different approach was taken in another DIFC case to oppose claimant's decision to enforce an award through the reciprocal mechanism between the DIFC and Emirate of Dubai. Respondent brought two applications before the DIFC Court with the similar facts. More precisely, in the first application¹¹⁹ respondent invoked the ground of conflict of laws between the UAE and the DIFC, namely, CPC and JAL and DIFCAL 2008, sought stay of proceedings and referral of subject matter to the UAE Supreme Court. In the second application¹²⁰ it requested the DIFC Court directly to refuse enforcement of London-rendered awards invoking violation of public policy defense.

In the application for request for a stay and contradiction of laws, respondent contended that based on Article 31(1) of CPC, the UAE courts has jurisdiction within the territory where defendant is domiciled if not provided otherwise by law.¹²¹ Moreover, Article 31(3) stipulates that the UAE courts have jurisdiction over commercial matters in the territory where defendant is domiciled or where contract was concluded or performed partially or in whole, or where

¹¹⁸ Ibid para 65

¹¹⁹ (1) Fiske (2) Firmin v (1) Firuzeh (Claim No: ARB-001-2014) 5 Jan,2015 (hereinafter "Fiske 1")

¹²⁰ (1) Fiske (2) Firmin v (1) Firuzeh (Claim No: ARB-001-2014) Jul 12, 2015 (hereinafter "Fiske 2")

¹²¹ Fiske 1, para 8

contract was supposed to be performed.¹²² Defendant also provided an argument that the UAE court of the first instance shall have jurisdiction to enforce foreign award as the usual procedures pursuant to Articles 235 and 236 of CPC.¹²³

Respondent alleged that provisions of DIFCAL 2008 and JAL enacted by the center providing for an award to be executed in Dubai once ratified by the DIFC Courts would equal to ratification of an award by Dubai courts meaning that the DIFC exceeded its constitutional powers.¹²⁴ Under UAE law, the Emirates are empowered to enact legislation required within the scope of the objective of free zones.¹²⁵ Furthermore, respondent contended that the Emirate of Dubai enacts legislation of Dubai itself and the DIFC while CPC is federal law and constitutionally higher in hierarchy. And in case of contradiction or doubt, the issue shall either be in favor of CPC or be referred to Supreme Court to be decided.¹²⁶ According to the federal law of the UAE Supreme Court, “If the challenge of the constitutionality is raised through the plea of one of the litigants in the lawsuit and accepted by the court it shall fix a term for the challenger to submit its challenge to the Supreme Court... If the court rejects the plea, the refusal shall be by a justified decision... The court before which the action is examined shall order a stay of action until the Supreme Court decides on the constitutionality.”¹²⁷

One of the rules of previous case¹²⁸ on determination non-constitutionality states that case shall be referred to the Supreme Court if seriousness of the case is proven and the court before which case is brought has jurisdiction to hear it. Considering the request of referral to the UAE

¹²² Ibid

¹²³ Ibid, para 10.

Article 235(2) of CPC provides: Petition for execution order shall be filed before the Court of First Instance under which jurisdiction execution is sought under lawsuit filing standard procedures.

¹²⁴ Fiske 1 (n 119) para 14

¹²⁵ Ibid para 15

¹²⁶ Ibid para 20

¹²⁷ The UAE Federal Law No. 10 of 1973 (as amended by Federal Law No. 26 of 1992) concerning the Supreme Federal Court, Article 58, English version available at <https://uaelaws.wordpress.com/2010/07/15/uae-federal-law-no-10-concerning-the-supreme-federal-court/> accessed April 3, 2017

¹²⁸ Case No. 1/34 Constitutional dated 9 June 2008

Supreme Court, the DIFC Court held it had the competence to determine if there had been collision of laws and thus refer the dispute to the Supreme Court on condition respondent provides convincing evidence.

The arguments brought by respondent did not convince the DIFC Court and hence in first application it refused to stay proceedings and refer the case to the Supreme Court explaining that “the rules of the CPC are not applicable in the DIFC or before this Court by Federal legislation and that means there cannot (practically) be a conflict between an applicable rule and an inapplicable one.”¹²⁹ Thus, in its reasoning with regard to conflict of laws, there was a conclusion from the DIFC Courts that they act within the limits of powers conferred by the DIFC laws that operate separately at the Center while provisions of CPC operate in Dubai and they do not collide in principle.

In second application, considering the issue of infringement of public policy resulted in by reciprocal mechanism, the respondent contended that “the enforcement of awards against a person in Dubai outside the DIFC, with no connection to the DIFC, would be morally offensive and repugnant to the principles of the Islamic Shari’ah and, therefore, is contrary to UAE public policy pursuant to Article 44(1)(b)(vii) of the DIFC Arbitration Law.”¹³⁰ More specifically, respondent brought similar argument as in *Farazi* case:

[T]he enforcement of arbitral awards in the DIFC against a defendant domiciled in mainland Dubai would deprive individuals of:

- (i) protection of their ratification and enforcement rights under Article 215 of the UAE Civil Procedure Code, Federal Law No 11 of 1992 as amended by Federal Law No 30 of 2005 (the “CPC”);
- (ii) the right to be heard in the UAE Courts where the arbitration agreement could be construed in accordance with the principles of Islamic Shari’ah, principles which would not be taken into account in the DIFC Courts; and

¹²⁹ Ibid, para 51

¹³⁰ Fiske 2 (n 120) para 10

(iii) the legitimate expectation to plead in the Arabic language.¹³¹

In response, the Court reasoned that laws, notably statutes, regulatory measures, courses of action, regulations constitute a source public policy.¹³² And interestingly, Justice Ali Al Madhani provided the following statement:

[T]he DIFC Court should deal with matters before it according to the given laws, regulations, public policy or public order that are applicable to it within its capacity and jurisdiction. So that if the outcome of the DIFC Courts proceedings would result in conflict with the law or public policy of other or foreign courts' jurisdiction (or is expected to in any way) then it is for that Court according to its rules to decide whether to enforce the decision of the DIFC Court or not for legitimate reason.¹³³

Further, he continued that “the DIFC Court cannot and should not decide on behalf of other or foreign courts as to public policy or the right legal or judicial practice in that jurisdiction.”¹³⁴ Therefore determination of what can be public policy and how it should be interpreted shall be made by the DIFC Courts within the competence conferred by law and these courts are not entitled to apply and take the jurisdiction of foreign courts in respect to this issue.

In the given cases the DIFC Courts held the position that the absence of any connection to the DIFC made it possible anyway to enforce an award against respondents. They justified their position by explaining the existing mechanism was within the legal scope. Based on the DIFC law the Courts did have competence to rule on its own jurisdiction and all legal controversies were merely a matter of domestic law that provides for such mechanism. It is indeed observed

¹³¹ Ibid para 11

¹³² Ibid para 52

¹³³ Ibid para 55

¹³⁴ Ibid para 56

respondents may be indeed trapped in a situation when justice is denied even in their own jurisdiction because of that legal controversies.

2.3. Issue of public policy as ground for annulment of awards at DIFC

As was already mentioned earlier in Chapter I, one of the grounds for annulment of arbitral awards provided by DIFCAL 2008, is public policy violation. Under DIFC's *lex arbitri* the DIFC Courts may refuse enforcement of award if they find that the enforcement would be against the public policy of the UAE.¹³⁵ This provision has been introduced with new DIFCAL 2008 enactment. The mere fact that public policy of the UAE is interpreted by DIFC Courts raises several questions.

First and foremost, the DIFC itself is constitutionally free zone partly exempted from the UAE federal law and has a political right to constitute a body that implements justice in civil and commercial matters. Hence based on given competence, the DIFC established DIFC Courts where justice is administered by Courts' judges. As of today, the DIFC judges' panel comprise 10 judges, seven of them are foreign nationals from the UK, Malaysia, Singapore, Australia and only three are from the UAE.¹³⁶ The fact that justice at the DIFC is implemented by foreign nationals challenges not only basic constitutional law principles but also has an impact upon private law areas. This particularly applies to arbitration when judges decide whether or not to annul or enforce and an award. Mainly, when introducing the UAE public policy violation as a ground for annulment of an award into the DIFC arbitration law, there has been a question of how foreign judges apply and construe this notion. Notably, when sharia law is not significant but still a part of the UAE law, judges might be caught up in a situation when they will have to interpret and apply Islamic sharia law to make a decision to annul or enforce an award. In DIFC

¹³⁵ DIFCAL 2008, Article 44 (1)(b)(vii)

¹³⁶ "Judges" (DIFC Courts) <http://difccourts.ae/about-the-courts/courts-structure/judges/> accessed March 10, 2017

Courts' panel most judges are trained from common law jurisdictions or have at least education in leading English law institutions.¹³⁷ Thus this circumstance essentially may result in uncertainty whether the UAE law will be applied correctly.

Secondly, even if the Constitution of the UAE, federal laws, Dubai law exempt the DIFC from civil, commercial matters and also confer upon DIFC Courts competence to determine what UAE public policy is, then the DIFC Courts are considered to be part of the UAE law and thus will have to apply the entire UAE law in whole not only pursuant to DIFC laws. However, as seen from *Fiske 2* case, when dealing with the request to deny enforcement due to violation of public policy of the UAE, the DIFC Court differentiated itself from the UAE courts and held that the UAE was a "foreign jurisdiction." It stated that "DIFC Court should deal with matters before it according to the given laws, regulations, public policy or public order that are applicable to it within its capacity and jurisdiction"¹³⁸ and that guided only by the laws of the DIFC it "cannot and should not decide on behalf of other or foreign courts as to public policy or the right legal or judicial practice in that jurisdiction."¹³⁹ In fact, Article 44 of DIFCAL 2008 does give the DIFC Courts the jurisdiction to determine what the public policy of the UAE is, hence in *Fiske 2* case, the Court should have judged and interpreted what public policy was pursuant to the UAE law. Perhaps the outcome of *Fiske* case would have been different if the DIFC Court had "accepted" the UAE jurisdiction and applied public policy interpretation to that case.

Probably one of the most important questions that should be discussed is that if the DIFC Courts did apply and interpret public policy of the UAE, it would cause a big extent of complexity. When examining the issue whether enforcement of award would be contrary to public policy

¹³⁷ Ibid

¹³⁸ *Fiske 2*(n 102) para 55

¹³⁹ Ibid 56

of the UAE, then DIFC legislation seems in fact to be the mixture of common law and civil law with Islamic sharia principles. One of the main goals of the center is provide investors with comfortable investment environment that include, among other things, credible and flexible common law jurisdiction, courts with distinguished judges from common law countries. The exemption from the UAE legislation in commercial and civil matters must reassure investors that Dubai off-shore zone is indeed that comfortable environment. Therefore, application of the UAE legislation in terms of interpretation of the UAE public policy would undermine the investors' expectations and create certain level of unpredictability.

It was mentioned earlier that under the UAE law public policy is interpreted very broadly. In accordance with legislation and relevant case-law, the UAE courts regard public policy in combination with non-arbitrability of subject matters. Various sources of the UAE law provide that range of non-arbitrable matters can be wide and vague. For example, it is still unclear what exactly can be understood under "matters relating circulations of wealth, freedom of trade and other rules and foundations upon which society is based."¹⁴⁰

To conclude this chapter, on the basis of the examined cases, there are indeed some issues in arbitration at the DIFC. As seen from the recent cases in relation to seat of arbitration, the DIFC Courts are in the position that in order to enjoy DIFC as a seat, parties should expressly indicate it in agreements excluding any doubts. At the same time, when DIFCAL 2008 is not enough, JAL can confer competence upon the DIFC Courts to establish the link to the DIFC seat. Another issue is concerned with controversial reciprocal mechanism of award enforcement between Dubai and the DIFC Courts. The DIFC Courts upheld the decisions that this mechanism was legally valid and allowed claimants to enjoy DIFC legislation to enforce awards. Even though it is legally possible to use DIFC as a conduit, in this case respondents

¹⁴⁰ Civil Code, Article 3

faced problems of being denied justice in their own state. Finally, public policy issue of the UAE in DIFC Courts interpreted by foreign judiciaries. DIFCAL 2008 does confer upon the DIFC Courts jurisdiction to construe and apply public policy of the UAE. But as seen from some of cases, the Courts abstained from taking the UAE Court's competence as to public policy interpretation and preferred to abide by only the DIFC legislation. Even if the Courts accepted to do it, it would be still quite problematic since most judges are in fact foreign judges. Interpretation of domestic public policy by aliens looks incompatible in this respect.

CHAPTER III: OVERVIEW OF THE AIFC AND PERSPECTIVES IN ARBITRATION

3.1. The AIFC: general information, reasons, objectives, incentives for investors.

Main source of GDP and driver of Kazakh economy have been predominantly export of hydrocarbons, ferrous metals and other natural resources. Nevertheless, this model is very susceptible to external risks and considered to be inefficient in the modern economic realities. This approach relying upon the export of natural resources was considerably efficient when prices were sufficiently high on the commodity markets. Since 2014 Kazakhstan has fallen into recession and been undergoing serious economic difficulties particularly due to economic sanctions against Russia, recession in China, drop of prices on commodity markets. Many attempts proposed by the Government of Kazakhstan to diversify its economy have constantly faced failures because of various political and economic reasons.

After the victory on preliminary presidential elections in 2015, President of Kazakhstan adopted a program with reforms aimed at enhancing the state's economic attractiveness to tackle ongoing crisis. And one of those measures was the necessity to establish a financial center in Astana with special legal regime based upon EXPO-2017 high-tech infrastructure by analogy with leading global financial centers with its transparent laws and regulations, independent court system and dispute resolution facilities.¹⁴¹ Implementation of this project will contribute to diversification of Kazakhstan's economy and will also have an impact upon economic and social development factors.¹⁴² It is believed that by 2025 the AIFC's contribution

¹⁴¹ Qazaqsyan Respublikasy Ukimetinin jane Qazaqstan Respublikasy Ulttyq Bankynyn "Astana" halyqaralyq qarzhy ortalygyn quru men damytu jonindegi uzaq merzimdi perspektivaga arnalgan birlesken is-qymyl zhosparyn bekitu turaly Qazaqstan Respublikasy Ukimetinin 2015 zhylgy 30 mamyrdayy No. 393 qaulysy [Joint action plan of the government of the republic of Kazakhstan and national bank of the republic of Kazakhstan for establishment and development of Astana international financial centre in the long term, The Resolution of the Government of the Republic of Kazakhstan No.393 dated May 30, 2015]

¹⁴² Ibid

to Kazakhstan's GDP will have constituted 40 billion USD¹⁴³ not to mention the AIFC's indirect effect upon Kazakh economy with creation of thousands of new workplaces. Thus, this project has a particular economic value not only for Astana but also for the whole country's development, namely, it should serve as one of the leading drivers towards successful diversification of economy.

The AIFC is going to be an economic zone for certain financial activities with special legal status. In March 2017, the Constitution of Kazakhstan was amended providing that "within the boundaries of the City of Astana there might be special legal regime in financial area in accordance with constitutional law."¹⁴⁴ In legal terms, center's definition is provided in the Law of the AIFC but this statute does not determine the size and the borders and instead makes reference to the Presidential Decree. Currently, according to the Decree, the territory of the AIFC equals 250 000 square meters¹⁴⁵, nevertheless, the Governor of the AIFC Kelimbetov has positive hopes for successful operation and predicts that in the near future the territory of the center will be extended to the whole Right District of Astana.¹⁴⁶

During the public discussions concerning the strategy, goals, policies, plans on development of the AIFC, the authorities have shaped ultimate objectives for the center which were afterwards enshrined in the statute. For instance, pursuant to the Law on the AIFC, the strategic aims of the center shall be:

Attraction of investment into the economy of the Republic of Kazakhstan through the establishment of an attractive environment for investment in the

¹⁴³ Ibid, para 2.3

¹⁴⁴ Qazaqstan Respublikasynyn Konstituciyasy [The Constitution of the Republic of Kazakhstan] (08/30/1995) Art.3-1. English version is available online <http://www.constitution.kz/english/>

¹⁴⁵ "Astana haliqaraliq qarji ortaligi aumagynyn shekarasyn ayqyndau turaly" Qazaqstan Respublikasy Presidenttinyn 2015 zhylgy 31 zheltoqsandagy № 161 Zharlygy [The Decree of the President of the Republic of Kazakhstan "On determination of borders of the Astana International financial Center" № 161 dated December 30, 2015, Addendum

¹⁴⁶ Kayrat Kelimbetov, *MFCA zaymet ves' levyy bereg Astany* [The AIFC will occupy the whole Right District of Astana], i-News.kz (November 25, 2016) https://i-news.kz/news/2016/11/25/8417684-kairat_kelimbetov_mfca_zaimet_ves_levyi.html accessed March 19, 2016

financial services sphere; the development of capital markets in the Republic of Kazakhstan, ensuring their integration with the international capital markets; the development of markets for insurance and banking services and for Islamic financing in the Republic of Kazakhstan; the development of financial and professional services based on the principals of international best practice; and achieving international recognition as a financial center.¹⁴⁷

It is seen that the goals of both DIFC and AIFC are identical with the difference that at the AIFC they are more specific. Just like the DIFC, it is believed that the AIFC will attract local and foreign investors by providing them with certain incentives. First and foremost, it is separate jurisdiction within the AIFC based on the principles of English common law.¹⁴⁸ Secondly, the tax exemptions for the investors, two years free-of-lease offices as well as simplified employment regime are another features of the AIFC. Bodies and participants of the AIFC, as well as their employees are exempted from paying certain categories of taxes including corporate income tax, individual income tax, as well as property tax and land tax until 2066.¹⁴⁹ Thirdly, English language will be established as an official language of AIFC meaning that all legal documents issued by the AIFC, the language of court proceedings, transactions between participants, will be done in English language.¹⁵⁰ And lastly, the establishment of the special independent court system that will stand outside the judicial system of Kazakhstan is promised to be a key feature of the AIFC with the most reputable foreign specialists.¹⁵¹ It implies that prominent judges from common law jurisdictions are planned to be hired to implement justice within the center. The Kazakh authorities wanted to ensure that the future investors will be provided with widely acknowledged system of law and transparency that will effectively protect their interests.

¹⁴⁷ The Law on the AIFC, Article 2

¹⁴⁸ National plan (n 2) para 70

¹⁴⁹ Law on the AIFC, Art. 6

¹⁵⁰ The Law on the AIFC, Article 15

¹⁵¹ Ibid

Along with provision of independent court system, there will be international arbitration center that will settle disputes not only among the AIFC participants but rather it will be open for any parties who wish to have their disputes resolved according the center's arbitration law. Such measures are indeed aimed at increasing overall attractiveness of the entire project. Therefore, all official authorities in Kazakhstan including the government, parliament and central bank embarked on the implementation of this project.

Full operation of the AIFC is going to start from 2018 and as of today, there are only enactment of the Law on the AIFC and amendments to the Constitution of Kazakhstan that have given legal basis for functioning of the Astana Center. Enactments of the Center's laws, regulations which will govern certain areas of law including arbitration are forecasted in the near future and hence legal analysis will be made pursuant to existing legal acts. Based on that and analysis made on the DIFC experience in arbitration, in this chapter, the author will analyze the current legal developments related to the AIFC arbitration, raise questions on possible difficulties and problems that may occur in the process arbitration and finally discuss lessons from Dubai experience required to be taken into account.

3.2. Arbitration at the AIFC and in Kazakhstan

The Law on the AIFC provides for establishment of arbitration center that will resolve disputes which parties agreed to submit to. It is going to serve as a regional or international arbitration institution. It is planned to become the leading arbitration institutional center in Kazakhstan with goals to acquire top positions at the regional level. Different legislation based on credible legal system among international investors, trustworthy judicial courts with prominent judges and English language are hoped to contribute to development of the Astana arbitration center.

Unfortunately, information concerning arbitration itself and arbitration center in the Law on the AIFC contains only a few provisions in that reads as follows:

Article 14 named International Arbitration Center.

The International Arbitration Centre shall review disputes which the parties have agreed shall be settled by arbitration.

2. The International Arbitration Centre shall be established and act in accordance with the resolution of the Council “On the International Arbitration Centre”.

3. Recognition and enforcement of the awards of the International Arbitration Centre in the territory of the Republic of Kazakhstan shall be carried out in the same manner and on the same terms and conditions as the recognition and enforcement of arbitral awards rendered by arbitration institutions in the Republic of Kazakhstan. Thereat translation of the decisions of the International Arbitration Centre into the Kazakh or Russian languages shall be provided in the order defined by the Centre’s Regulations.

4. Recognition and enforcement of the arbitral awards in the territory of the Centre shall be carried out in accordance with the legislation of the Republic of Kazakhstan.¹⁵²

Section 1 provides that no nexus to the AIFC is required and parties are free to refer their disputes to Arbitration center similar to DIFC-LCIA Arbitration Center at DIFC. Section 2 states that International Arbitration Center will have its legal status, rights and obligations in accordance with the Center’s resolution. This resolution on the status if the arbitration institute will probably correspond to Article 8 of the Law of the DIFC providing legal ground for DIFC-LCIA Arbitration Center. Perhaps what is significant and draws special attention is a mechanism of recognition and enforcement of arbitral awards between two jurisdictions: the AIFC and the Republic of Kazakhstan. What follows from the wording of Section 3 is that awards rendered by arbitration center at the AIFC are treated in Kazakhstan as any other award. But awards rendered in Kazakhstan as well as any other award from foreign jurisdictions will be recognized and enforced at the AIFC pursuant to the legislation of Kazakhstan.

¹⁵² The Law on the DIFC, Article 14

This in turn raises a question of what was meant by Section 4 as its wording creates uncertainty as to the process of recognition and enforcement of arbitral awards at AIFC. Section 4 expressly refers recognition and enforcement to the legislation of Kazakhstan. However, does it mean substantive or procedural scope? Who will hear and decide a case whether to enforce an award or not? To understand whether it is true or not, one needs to refer to the Law on the AIFC in order to comprehend the hierarchy of sources of law at the center. Particularly, Article 4 provides the following:

The acting law of the Centre shall be based on the Constitution of the Republic of Kazakhstan and shall be comprised of:

- 1) this Constitutional Law;
- 2) the Centre's laws, regulations which do not contradict this Constitutional Law and which shall be based on the procedural principles and precedents of England and Wales and/or standards of other leading global financial centres adopted by the Centre's Bodies within the competence stipulated by this Constitutional Law;
- 3) acting legislation of the Republic of Kazakhstan which shall be applied to the part unregulated by this Constitutional Law and the Centre's Regulations.¹⁵³

As seen from Article, the Center's law, regulations stand behind the Law on the AIFC and shall not contradict it. Apparently, even if the Center enacts the AIFC Arbitration law in the future, it will be the Center's law in sense of Article 4 and it will be lower in hierarchy than the Law of the AIFC which in turn refers recognition and enforcement procedure to Kazakh law. Subsequently, one question arises of what recognition and enforcement process pursuant to law of Kazakhstan is. For these reasons, the overview of legislation of Kazakhstan in this respect should be provided.

¹⁵³ The Law on the AIFC, Article 4(1)

Arbitration in Kazakhstan is mainly governed by Kazakh Arbitration Act¹⁵⁴ and provisions of Code of Civil Procedure.¹⁵⁵ In Kazakh Arbitration Act Chapter 7 contains substantive and procedural part of recognition and enforcement of arbitral awards. Notably, Article 57 reflects the grounds provided in Article V of the New York Convention for refusal to enforce an award with several additional supplements. In addition to common grounds for annulment of awards, Kazakh Arbitration Act provides that an awards may be annulled if there is already valid award or judicial judgement between the same parties about with same case, and if an award was rendered in order to pursue criminal purposes.¹⁵⁶ By providing grounds for annulment, Kazakh Arbitration Act completes substantive part and further refers to procedural part that is governed totally by Code of Civil Procedure.¹⁵⁷

Code of Civil procedure covers merely procedural aspects of recognition and enforcement of an arbitral award.¹⁵⁸ The most significant fact in the whole process is that this procedure is administered by national courts of Kazakhstan, namely by Courts of First Instance, Court of Appeals, Courts of Cassation and Supreme Court.

As it is seen, the reference in the Law on the AIFC to legislation of Kazakhstan in recognition and enforcement primarily applies to Kazakh Arbitration Act and Code of Civil procedure. Based on that, it is very unclear what Kazakh legislative body wished in Section 4. In effect, this provision has a great impact on arbitration at the AIFC, especially in the stage of recognition and enforcement. Following this mechanism laid down in Section 4, one may infer that the process of enforcement of award irrespective of the origin at the AIFC shall be carried

¹⁵⁴ “Torelik turaly” Qazaqstan Respublikasynyn 2016 zhylgy 8 saeuirdegi № 488-V Zani [Law of the Republic of Kazakhstan № 488-V “On arbitration” dated April 8, 2016] (hereinafter referred as “Kazakh Arbitration Act”)

¹⁵⁵ “Qazaqstan Respublikasynyn Azamattiq Procestik Kodeksi» Qazaqstan Respublikasynyn 2015 zhylgy 31 qazandagy № 377-V Kodeksi [Code of the Republic of Kazakhstan №377-V “Code of Civil procedure of the Republic of Kazakhstan” dated October 31, 2015] (hereinafter referred as “Code of Civil Procedure”)

¹⁵⁶ Kazakh Arbitration Act, Article 57(1)(1)

¹⁵⁷ Ibid, Article 54(1)

¹⁵⁸ Code of Civil Procedure, Articles 253-255

in accordance with the rules of Kazakh law. If it is so, then arbitration at the AIFC does not make any sense as inventors would have to resort to lengthy, bureaucratic, burdensome Kazakh justice to enforce an award in the center. Furthermore, it would be even more illogical to imagine if the AIFC Courts apply legislation of Kazakhstan. On the basis of these considerations, these questions do need further clarification by legislators so as to have a clearer picture of what was meant in section 4 of the Law on the AIFC which in fact is a matter of time.

However, taking into account the procedural history and overall goals of the project, one may come to conclusion that the whole idea is spinning around investments. Because of investments, there have been serious measures taken to implement the project. For instance, alien jurisdiction within jurisdiction, different independent court system with foreign judges, different language, international arbitration center and other incentives. In essence, all this require substantial amendments to the entire political and legal system of Kazakhstan. Moreover, choosing the DIFC at highest level of political authorities as a model to follow, there seem to be purely poor legal technique in drafting Section 4 that will be either rectified or interpreted in clearer manner. Since so far there are no certain answers to the given questions and no legal development in regard to arbitration, the author considers to further view and limit arbitration at the AIFC similar to the DIFC's model unless later it will be established otherwise by Kazakh authorities. The DIFC Arbitration model regards existence of arbitration law, the AIFC Courts acting independently of judicial system of Kazakhstan within the limits of the competence conferred by the AIFC.

3.3. Issues that might arise in AIFC arbitration and lessons for Kazakhstan

Taking into consideration various aspects such as intention of Kazakh authorities to use the DIFC model as well as similar features of both Centers, their common plans and goals, it is

more likely that the AIFC bodies will enact its own UN Model Law based arbitration law. Once arbitration law has been enacted it will establish the AIFC as a seat of arbitration different from that of Kazakhstan with the AIFC Courts having supervisory authority. As the DIFC experience demonstrates, one mere arbitration statute might not be enough to govern arbitration. At the DIFC there are number of laws at the federal, emirate of Dubai and center's level that closely interact with one another. At the center's level, main statute that governs arbitration is DIFCAL 2008. In case DIFC arbitration law is silent or when there needs to be more elaboration on certain questions, these matters are governed by the provisions of JAL, Protocol between the DIFC and Dubai Courts, CPC other federal laws.

For the AIFC introduction of similar system will be particularly useful in situations when parties' arbitration agreement is uncertain and equivocal. For example, in a scenario when arbitration agreement submits parties' disputes to arbitration in Astana or even in more severe cases it submits to arbitration in Kazakhstan without indication of seat and governing law, the issue will arise under whose jurisdiction and which courts will have jurisdiction to decide a case. Just like in Dubai, one should care there are two jurisdictions in one state: Kazakhstan and the AIFC with respective arbitration laws that differ significantly in their contents. In this respect, the outcomes from Amarjeet case should be taken into consideration. On the one hand, in practice parties should be aware of two jurisdictions and directly indicate seat so as to avoid uncertainty in construction of arbitration agreement. On the other hand, the AIFC Courts shall not deny parties an opportunity to enjoy arbitration because of absence of direct link to the AIFC.

Important attention should be paid to competence of the AIFC Courts. In comparison to the DIFC Courts, the Courts of the AIFC are not the part of judicial system of Kazakhstan.¹⁵⁹

¹⁵⁹ The Law on the AIFC, Article 13(2)

Furthermore, as stated in Law on the AIFC, judgements of the AIFC Court of Appeal shall be final, cannot be appealed and are mandatory for physical and legal persons.¹⁶⁰ It implies that having their final and binding judgments and not being subject to Kazakh judicial system, the AIFC Courts can be, in essence, regarded as being second Supreme Court of Kazakhstan. Moreover, if one considers enforcement of judgements in Kazakhstan, it follows from the Law on the AIFC that they will be implemented in the same manner as the enforcement of judgements in Kazakhstan but without an opportunity for an appeal.¹⁶¹

In the context of arbitration, this may be very dangerous for Kazakhstan. In particular, if AIFC arbitration law mirrors UN Model Law as well as DIFCAL 2008 provision in the following that “an arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced...”¹⁶², then it can be used as a conduit to circumvent Kazakh law which will in fact resemble the DIFC reciprocal enforcement mechanism. In case Kazakh registered company or a national do not have any assets and connection to the Astana Center, claimants may use the AIFC jurisdiction and courts to enforce arbitral awards depriving them of chance to properly present the case. Unlike the UAE, in Kazakh realms, in this case there will not be even an opportunity to address and challenge constitutionality of such a decision, since the AIFC Courts are not the part of Kazakh justice system.

As followed from *Banyan Tree* and *Farazi* cases the DIFC Courts declined respondents’ claims of abuse of process, *forum non conveniens* and violation of public policy. The Courts primarily held the similar approach that reciprocal mechanism provided in the Dubai legislation does not constitute illegality as such. Also, addressing alleged violation of public policy, the Court took

¹⁶⁰ Ibid Article 13(7)

¹⁶¹ Ibid Article 13(8)

¹⁶² UN Model Law, Article 35(1), DIFCAL 2008, Article 42(1)

the position that DIFC Courts should be guided by its own laws and should not decide on behalf of “foreign” courts’ jurisdiction. These examples illustrate that using off-shore jurisdiction as conduit to enforce award without having any assets and connection to the DIFC raises serious issues and concerns. In Kazakhstan this aspect should be dealt with special attention. One of the solutions to current problem may be an attempt of introduction and integration the Courts of the AIFC into Judicial system of Kazakhstan. Further, within judicial system one requires to establish special judicial committee comprising the judges from Kazakhstan and foreign judges that will hear disputes pertaining to issues of jurisdiction as well as issues concerning to construction of public policy of Kazakhstan.

Since the AIFC is difficult to define whether it is purely economic or political project, the questions regarding public policy in enforcement of awards should be addressed in the AIFC arbitration law. It is very likely that the AIFC’s authorities will make use of previous experience of the DIFC and take into account the DIFCAL 2008. Thus in the recognition and enforcement procedure, *ex officio* ground for refusal to enforce an award is more like to include violation of public policy of the Republic of Kazakhstan. In this respect, similar problems that exist at the DIFC will also be of significance for Kazakhstan. Judges panel at the AIFC will be composed probably exclusively of foreign judges. Therefore, it is very complicated to understand how they will construe and apply the notion of public policy of foreign state. If in the DIFC Courts three are nationals of the UAE out of 10 judges, but in Kazakhstan there are so far no Kazakh judges specialized in common law at all. This issue should be taken into account by Kazakh authorities as it has special significance for arbitration at the AIFC and Kazakhstan. As one of the proposals it would be reasonable to educate Kazakh judges in common law jurisdictions and employ them for permanent basis in the AIFC Courts. Kazakh judges with domestic background and long experience in legal practice in Kazakhstan are more likely to be able to interpret public policy of Kazakhstan in comparison to foreign judges employed by the AIFC

authorities. The Courts in Astana Center shall not exclusively consist of foreign judges and have to consider the DIFC Courts situation where there are at least three nationals of the UAE on the panel.

This is particularly significant as the nature of public policy of Kazakhstan is difficult to construe not only at the AIFC but in mainland Kazakhstan. Kazakh judiciaries do not have the common single vision on this matter and interpret it quite differently. The issue of public policy has been dealt with by Kazakh courts in a few cases, however its application and construction are sufficiently unpredictable. In most recent controversial case the Almaty Court of Appeal upheld the decision of the Court of First Instance to annul the arbitral award rendered by the Kazakh International Arbitration Institution as enforcement of the award would contradict public policy of the Republic of Kazakhstan. In the Court of First Instance proceedings¹⁶³ the Court held that the arbitral tribunal by rendering the award violated “principle of legality”, that is, had incorrectly applied the law and thus enforcement of that rendered award constituted violation of public policy of Kazakhstan.¹⁶⁴ In the Court of Appeal¹⁶⁵ the decision was affirmed and stayed in effect. The Court of Appeal reasoned that:

[I]n accordance with Kazakh Arbitration Act, public policy (order) of the Republic of Kazakhstan shall be basics of law and order provided in the legislation of Kazakhstan. Pursuant to Article 3 of the same law, arbitration act in Kazakhstan is based on the Constitution and other legal statutes of Kazakhstan. Requirement to abide by public policy is a principle of international private law and its core purpose is to guarantee the protection of basics of law and order of that place where the an award has been rendered. This requirement serves as a guarantee to protect the basics of legal system as well as interests of society and the state. And fundamental principle of the entire legal system of Kazakhstan is legality.

¹⁶³ Opredelenie Specializirovannogo mezhrayonnogo ekonomicheskogo suda goroda Almaty No.16-00-2/5179 ot 27 iyunya 2016 goda [Decision of the Special economic intra-district court of the City of Almaty No. 16-00-2/5179 dated June 27 2016]

¹⁶⁴ Ibid p 2

¹⁶⁵ Opredelenie apellyacionnoy sudebnoy kollegii po grazhdanskim delam Almatinskogo gorodskogo suda No. 2a-4932/2016 ot 10 avgusta 2016 goda [Decision of the Judicial appellate panel in civil cases of the City of Almaty No. 2a-4932/2016 dated August 10, 2016]

Currently, this case has been pending in the Supreme Court of Kazakhstan and also has already caused the heated debates and criticism from arbitration experts. Not only did the Courts review the merits of the case but also interpreted the public policy in a controversial way when they regarded alleged violation of law by arbitral tribunal as a violation of public policy.

This ongoing case illustrated that the Courts of Kazakhstan may use extremely unexpected approaches to interpret public policy issue. Arbitrator Duisenova maintains the Courts of Kazakhstan when dealing with the issue of public policy misconstrue and misapply the provisions of Kazakhstan law and therefore there is a necessity for the Kazakh Supreme Court in cooperation with Arbitration House, Kazakh International Arbitration Institution and Scientific Research Institution of private law of Kazakhstan to develop judicial instruction for lower courts as to how to interpret and apply public policy correctly.¹⁶⁶ All this shows that public policy interpretation is in fact a tricky issue even in Kazakhstan among Kazakh courts not to mention for foreign judges. Hence the AIFC authorities should be really careful and take into consideration all the aspects when introducing the Astana Center' legislation.

Another problem and at the same time lesson from the DIFC current experience is concerned with application of non-arbitrability ground to deny enforcement of an award in Kazakhstan. Kazakh Arbitration Act and Code of Civil Procedure provide that Kazakh national courts shall refuse to grant enforcement of an award if, among other things, subject matter is non-arbitrable.¹⁶⁷ Subject matters that are not arbitrable include disputes regarding bankruptcy, between natural monopolies and their consumers, between state agencies and finally between

¹⁶⁶ Interview with Assel Duisenova, Arbitrator and Executive Director of Kazakh International Arbitration Institution, Chief Professor at Scientific Research Institution of private law of Kazakhstan (Almaty, Kazakhstan, 30 March, 2017)

¹⁶⁷ Kazakh Arbitration Act, Article 57(1)(2), Code of Civil Procedure, Article 255(2)

state-owned commercial companies. In addition, arbitration under Kazakh Arbitration Act covers only disputes in civil and commercial matters¹⁶⁸ meaning that employment issues are beyond the scope of arbitrable matters.

These provisions will certainly affect integrity of enforcement of awards procedure. The government of Kazakhstan is planning to go public and list stocks of several state-owned national oil companies, banking and insurance companies in the AIFC Stock Exchange.¹⁶⁹ These companies will have to register at the AIFC and make transactions. In the scenario, if an arbitral award rendered at AIFC is referred for enforcement in Kazakhstan, the Kazakh Courts are more likely to refuse enforcement against assets of state-owned companies since subject matter non-arbitrable pursuant to Kazakh law. In the second scenario, if there is a Kazakh national employed at the AIFC, most probably an employee will be subject to the AIFC law which will allow them to arbitrate employment disputes. Again, once an award submitted for enforcement to Kazakhstan, there would a high probability that this award would be denied due to non-arbitrability of subject matter. On these considerations state-owned and other companies, Kazakh employees that are subjects to Kazakh Arbitration Act will have some legal advantages in enforcement procedure in Kazakhstan. Hence this situation may create uncertainty and unwillingness of investors to have their disputes arbitrated in Kazakhstan. Based on above mentioned, it seems that there is going to be competition and contradiction of arbitration laws in Kazakhstan. What will be allowed in one jurisdiction will be forbidden in another and vice versa. There might be a situation when it will create distortion in the system.

¹⁶⁸ Ibid Article 8(5)

¹⁶⁹ Alexander Labykin, *Astana hochet stat mezhdunarodnym finansovym habom [Astana wants to be an international financial hub]* (April 1, 2016) «Expert Online» <http://expert.ru/2015/10/13/astana-hochet-stat-mezhdunarodnyim-finansovym-habom/> accessed April 5, 2016

Notably, when it comes to enforcement of an award, there will perhaps seem to be unsuccessful results that may result in concerns among claimants seeking to satisfy their interests.

Conclusion

The reason why the author chose the DIFC for analysis is due to close similarities in both projects. Both the DIFC and AIFC were established to be leading financial centers in the regions with the perspectives to be among world's top financial institutions. The features of both centers draw special attention because of their unique structures. They provide participants with different legal system based on common law, court system with distinguished common law judges, and English language.

The main goal of this thesis was to identify and discuss the problems in relation to arbitration as a dispute resolution mechanism at the DIFC in order find out what should be taken into account for Kazakh legislators in the process of establishment of legal basis for arbitration at the AIFC.

The author in the first chapter provided the information about the DIFC, arbitration process and short description of arbitration law at the DIFC. Along with that, the description about the mechanism for enforcement of arbitral awards in the UAE, in the Emirate of Dubai and the DIFC as well as description of the notion of public policy in the UAE were made.

In the second chapter the author discussed particular problems arisen in the DIFC Arbitration. Namely, the key focus was lying upon the seat of arbitration, mechanism for recognition and enforcement of arbitral awards between the Courts of Dubai and DIFC and also upon the issue of public policy and its interpretation. On the basis of conducted research, the author has come to the following conclusions.

The AIFC has been founded to facilitate diversification of Kazakh economy in the period of crisis. In order to be investments-friendly, it provides investors with special incentives such as special English common law-based legislation, courts, official language and arbitration center.

Due to absence of any legal development so far, it is still unknown how particular legal acts of the Astana Center will look like. Existing provisions on arbitration at the AIFC have already raised some questions with regard to the procedure of recognition and enforcement of awards rendered outside the Center stipulated in Section 4 of Article 14 of the Law on the AIFC. Because of that, further clarifications on the interpretation of Section 4 are required from legislative bodies since it has direct significance for future arbitration at the AIFC.

In decision-making and drafting the legislation of the AIFC relating to arbitration, one should take into account and learn the lessons from the experience of the DIFC in particular aspects. Seat of arbitration plays an important role since it entails certain legal implications. Two jurisdictions within one jurisdiction can confuse parties in their will to choose proper arbitration regime. Parties should not be denied AIFC arbitration by the Courts even if they do not have direct connection and do not specify the seat expressly even though the arbitration agreement impliedly stipulated the AIFC to be the seat.

By drafting legislation, special attention should also be paid to competences conferred upon the AIFC courts and their employment policy. Legally the AIFC Courts stay outside the judicial system of Kazakhstan and have binding force of their judgments in execution procedure in Kazakhstan. Together with prospective arbitration law that will allow any award irrespective of seat to be accepted, there may be undesirable consequences in the context of enforcement as the AIFC Courts can be used as a conduit for circumvention of Kazakh law and be as a tool to deprive local respondents of certain defenses.

The AIFC Courts should not exclusively consist of foreign judges as they will not be able to apply public policy of Kazakhstan since it is a substantial issue even Kazakhstan in the light of recent legal cases. And finally, substantial disparities of two arbitration laws in Kazakhstan can create distortion and violate integrity in the enforcement procedure. By enforcing an award,

certain categories of Kazakh companies as well as national employees will have procedural advantage because of non-arbitrability of subject matter under Kazakh Arbitration Act. These moments should be considered carefully and appropriate measures to harmonize Kazakhstan's legislation should be taken by Kazakh authorities.

Taking into consideration the ongoing process of establishment of the AIFC as well as absence of any legislation concerning arbitration in Astana Center, covered and discussed issues and subsequent findings based on analysis of certain aspects of arbitration at the DIFC, the outcomes of this thesis may be considered for further research into arbitration in Kazakhstan and the AIFC. The author believes that this thesis will be substantial contribution to legal development of arbitration in Kazakhstan and particularly to the AIFC. As the Center represents uniqueness and at the same time complexity, the findings of the thesis can be guidance for Kazakh policy makers and legislation drafters in the sphere of arbitration.

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