

Arbitration in the UAE: 2020 in Review

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Abstract

This article provides an overview of both on and offshore arbitration developments in the United Arab Emirates in the year 2020.

Keywords

Arbitration, international arbitration, arbitral awards, enforcement

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Introduction

The United Arab Emirates (UAE) are the leading arbitration hub in the Middle East. No other Middle Eastern jurisdiction offers the width of arbitration services that the UAE do. The UAE arbitration landscape provides a choice of both onshore and offshore arbitration. Being seated in mainland UAE, onshore arbitration operates on the basis of traditional mainland resources, i.e., the UAE Federal Arbitration Law (the “FAL”)¹, which replaced the former UAE Arbitration Chapter with effect from 16 June 2018. Offshore arbitration, seated in one of the UAE’s judicial free zones, i.e., the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM), is, in turn, governed by the DIFC Arbitration Law² and the ADGM Arbitration Regulations³ respectively. Onshore arbitration engages the curial competence of the mainland UAE courts⁴ whereas arbitration offshore proceeds with the curial assistance of the DIFC and ADGM Courts, as the case may be.

Importantly, the DIFC and ADGM Courts are common law courts that follow a system of binding precedent. The UAE Courts, by contrast, are of a civil law origin and as such are not bound by case law precedent. That said, the rulings of the court of cassation are respected by the lower courts and are as such capable of giving rise to – to borrow from the French - a *jurisprudence constante*. Against this background, it is important for a full contextual understanding of the operation of the provisions of the FAL and those of either of the free zone arbitration laws to follow the rulings of the competent courts to determine the extent to which they contribute to the formation of a body of *jurisprudence constante* or case law precedent in the construction of the respective laws over time.

In addition, arbitration in the UAE, both onshore and offshore, is guided by legislative and/or soft law instruments as well as arbitration rules (provided that the arbitrating parties have contracted into a form of institutional arbitration) that are subject to change over time.

In the light of the foregoing, this article seeks to provide a summary of all developments onshore and offshore relevant to arbitration in the UAE in 2020. In doing so, it will focus on (i) developments onshore, summarising dicta of relevant court rulings both under the former UAE Arbitration Chapter and the FAL as well as arbitration-relevant rulings of the Dubai-DIFC Joint-Judicial Tribunal in the terms further defined below⁵; and (ii) developments offshore, summarising dicta of relevant case law precedent of the DIFC Court of First Instance (DIFCCFI) under the DIFC Arbitration Law. The article also provides initial insights into the revised provisions of the DIFC-LCIA Rules and recent legislative developments in the ADGM, such as arbitration-relevant amendments to the ADGM Founding Law, the first revision of the 2015 ADGM Arbitration Regulations and the adoption by the Memorandum of Understanding between the Ministry of Justice and the ADGM on enforcement of awards.

1. Developments onshore

Developments onshore have seen some of the first case law precedent under the FAL since its adoption and subsequent entry into force with effect from 16 June 2018. That said, a number of cases continue to be processed under the former UAE Arbitration Chapter⁶. These are primarily cases that were originally initiated in the onshore UAE Courts shortly before entry into force of the FAL. As stated elsewhere before⁷, these retain their relevance to the interpretation of the FAL in relevant part to the extent that they address the construction of provisions of the FAL which originate in case law precedent under the former UAE Arbitration Chapter or in the text of the former UAE Arbitration Chapter itself. Finally, there is also some case law precedent emanating from the Dubai-DIFC Joint Judicial Committee in the terms defined below.

¹ UAE Federal Law No. 6/2018 Concerning Arbitration.

² DIFC Law No. 1/2008 on Arbitration.

³ 2015 ADGM Arbitration Regulations as amended.

⁴ And more specifically of the President of the Court of Appeal of the Emirate in which the arbitration is seated, with an option for further recourse to the competent Court of Cassation.

⁵ See section 1.3.

⁶ I.e., Articles 203-218 of the UAE Civil Procedures Code. For a full commentary, see G. Blanke, *Commentary on the UAE Arbitration Chapter*, Thomson Reuters/Sweet&Maxwell, 2017.

⁷ G. Blanke, “The UAE Federal Arbitration Law: In With the New, Out With the Old”, 3 ICC Dispute Resolution Bulletin (2018), pp. 25-28.

1.1 Case law precedent under the former UAE Arbitration Chapter⁸

Despite the fact that Article 60(1) FAL repealed the provisions of the former UAE Arbitration Chapter, some arbitration-related actions continue to be processed under it given that these were initiated before entry into force of the FAL on 16 June 2018.⁹

Incorporation by reference. In application of former Article 203(2) CPC,¹⁰ it has been found that where there are two separate main contracts independent from each other, an arbitration clause contained in one can usually not be implied into the other absent express wording to that effect, unless the two contracts are closely connected, e.g., one contract being concluded in implementation of the other.¹¹

Extension of time-limit. A ruling of 18 December 2019 of the Dubai Court of Cassation¹² confirms that the 6-month time-limit for rendering an award under former Article 210(1) CPC was capable of being extended implicitly by reference to Article 36 of the DIAC Rules within the meaning of former Article 210(2) CPC.¹³

Challenge of award. In its ruling in Case No. 250/2019¹⁴, the Dubai Court of Cassation confirmed that the list of grounds for nullification at former Article 216(1) CPC¹⁵ constituted an exhaustive list of grounds for the nullification of arbitration awards under the former UAE Arbitration Chapter. In Case No. 932/2019,¹⁶ claims for breach of a contract for the lease of marine equipment have been found not to fall within the public policy definition under Article 3 of the UAE Civil Transactions Code (hence not invalidating the underlying arbitration agreement within the meaning of former Article 216(1)(a) CPC) and could therefore be arbitrated. Finally, it has been confirmed¹⁷ that to award Counsel fees (or other party costs other than the tribunal's fees and expenses and the administrative costs of the administering arbitration institution) without express authorization in the underlying arbitration agreement or the terms of reference could ground the partial nullification of an award within the meaning of former Article 216(1)(c) CPC.

Enforcement and execution. A recent UAE court ruling¹⁸ has found that pursuant to Article 36 of the GCC Commercial Arbitration Regulation, an award rendered under the auspices of the GCC Arbitration Centre requires enforcement directly through the competent execution judge, and not the court of first instance, which was traditionally competent as the enforcement forum under the former UAE Arbitration Chapter.

1.2 Case law precedent under the UAE Federal Arbitration Law¹⁹

⁸ This section is based on G. Blanke, "UAE Onshore Arbitration: Key 2020 Case Law Precedent Revisited (Part 1)", Westlaw Middle East, Thomson Reuters, January 2021.

⁹ As a variation of the theme, the Dubai Court of Cassation declined to consider the application of Article 19 FAL to the case before it in Case No. 417 & 427/2018, Dubai Court of Cassation, ruling of 6 February 2019, given that the subject award was rendered before entry into force of the FAL. To similar effect with respect to the application of Article 53 FAL, see Case Nos 18 & 94/2019, Dubai Court of Cassation, ruling of 21 April 2019.

¹⁰ For further guidance on the construction of former Articles 216(1) CPC, see G. Blanke, *Commentary on the UAE Arbitration Chapter*, Thomson Reuters/Sweet&Maxwell, 2017, II-016 *et seq.*

¹¹ Case No. 132/2019, ruling of the Dubai Court of Cassation of 6 October 2019.

¹² Case No. 250/2019 – Real Estate, ruling of the Dubai Court of Cassation of 18 December 2019.

¹³ For further guidance on the construction of former Articles 210(1) and (2) CPC, see G. Blanke, *Commentary on the UAE Arbitration Chapter*, Thomson Reuters/Sweet&Maxwell, 2017, II-089 *et seq.*

¹⁴ Case No. 250/2019 – Real Estate, ruling of the Dubai Court of Cassation of 18 December 2019.

¹⁵ For further guidance on the construction of former Article 216(1) CPC, see G. Blanke, *Commentary on the UAE Arbitration Chapter*, Thomson Reuters/Sweet&Maxwell, 2017, II-133 *et seq.*

¹⁶ Ruling of the Abu Dhabi Court of First Instance of 22 September 2019, reported in "Parties not indicated, Court of First Instance of Abu Dhabi, Case No. 932/2016, 22 September 2019, in 12(1) IJAA (2020), 117-121.

¹⁷ See Case No. 250/2019 – Real Estate, ruling of the Dubai Court of Cassation of 18 December 2019.

¹⁸ See Case No. 64/2020 – Commercial, ruling of the Dubai Court of Cassation of 11 March 2020.

¹⁹ This section is based on G. Blanke, *Blanket on UAE Arbitration Legislation and Rules*, Thomson Reuters/Sweet & Maxwell, forthcoming 2021. Also see G. Blanke, "UAE Onshore Arbitration: Key 2020 Case Law Precedent Revisited (Part 1)", Westlaw Middle East, Thomson Reuters, January 2021; and G. Blanke, "UAE Onshore Arbitration: Key 2020 Case Law Precedent Revisited (Part 2)", Westlaw Middle East, Thomson Reuters, February 2021.

Apart from the case law precedent under the former UAE Arbitration Chapter, which for the reasons stated above retains some relevance to the construction of the FAL, both 2019²⁰ and 2020 have also seen the arrival of case law precedent under the FAL proper.

Scope of application. The UAE Courts have confirmed that the FAL does not find application in free zone seated arbitrations (unless perhaps in the unlikely event that the parties have expressly contracted into the application of the FAL to an arbitration with a free zone seat). Where the parties have agreed to the application of a free zone law as the procedural or curial law of the arbitration, such as the DIFC Arbitration Law, that law applies.²¹

In another type of case, involving the DIFC-LCIA as an administering institution, the UAE Courts have given preference to the DIFC Courts as the supervisory courts on the basis of a combined reading of Article 8 of DIFC Law No. 9/2011 as amended and DIFC Law No. 9/2004 without reference to the location of the seat or of the award debtor's assets²² and considering that the DIFC-LCIA qualifies as a body of the DIFC within the meaning of Article 2 of DIFC Law No. 12/2004 as amended by DIFC Law No. 16/2011.²³

Article 2(1) has been found to be subject to the overarching principle of party autonomy, whereby the contracting or arbitrating parties are free to contract into a procedural law or an arbitration law of their choice.²⁴ The exercise of party autonomy is subject to the requirements of UAE public policy.²⁵

Finally, arbitration rules, such as the DIAC Rules, which have been adopted by Ruler's Decree, have been considered to constitute special legislation within the meaning of Article 2(3) FAL.²⁶

Arbitration: definition. According to recent case law precedent of the UAE Courts, arbitration in the terms defined at Article 1 FAL is based on two main pillars, the will of the parties, i.e., party consent, and the legislator's acceptance of arbitration as a private form of dispute resolution.²⁷ The arbitral instance is considered a "*neutral party to settle the dispute between [the parties] without resorting to the judiciary*,"²⁸. In doing so, the Courts have emphasised the impartiality and independence of arbitrators as a fundamental feature of arbitration.²⁹

Case law precedent of early 2019, albeit not consistent,³⁰ questions the qualification of arbitration under the FAL as an *exceptional* - as opposed to an *alternative* - form of dispute resolution. Thus, the Dubai Court of Appeal held in a ruling of 16 January 2019 as follows:

"[...] arbitration is the agreement of parties to a specific legal relationship (whether contractual or otherwise) to settle a dispute which has arisen or which may arise between them by referring it to persons selected as arbitrators. The parties would determine the identities of the arbitrators or request the arbitral tribunal or a permanent arbitral institution to administer the arbitral process. [...] As such, arbitration is not an exceptional means of resolving disputes but an alternative means that shall be followed once its conditions are satisfied. Arbitration is a matter of the parties' intent and giving expression to their intent in a written agreement, whether in the form of a separate

²⁰ Some of which has been reported late and as such is taken account of in relevant part here.

²¹ See, e.g., Case No. 992/2020 – Commercial, ruling of the Dubai Court of Cassation of 23 December 2020.

²² See Case No. 665/2020 – Commercial, ruling of the Dubai Court of Cassation of 27 September 2020; also, Case No. 43/2020, ruling of the Dubai Court of Appeal of 9 December 2020.

²³ See Case No. 930/2020 – Commercial, ruling of the Dubai Court of Cassation of 23 December 2020.

²⁴ See, e.g., Case No. 272/2019 – Commercial, ruling of the Dubai Court of Cassation of 4 August 2019; and Case No. 293/2019 – Commercial, ruling of the Dubai Court of Cassation of 30 June 2019.

²⁵ See, e.g., Case No. 272/2019 – Commercial, ruling of the Dubai Court of Cassation of 4 August 2019; and Case No. 293/2019 – Commercial, ruling of the Dubai Court of Cassation of 30 June 2019.

²⁶ See Case No. 437/2018 – Real Estate, ruling of the Dubai Court of Cassation of 20 February 2019.

²⁷ See Case No. 55/2020 – Labour, ruling of the Dubai Court of Cassation of 6 February 2020; and Case No. 692/2020 – Commercial, ruling of the Dubai Court of Cassation of 23 September 2020.

²⁸ See, e.g., Case No. 324/2020 – Civil, ruling of the Dubai Court of Cassation of 26 November 2020; Case No. 960/2020 – Commercial, ruling of the Dubai Court of Cassation of 9 December 2020; and Case No. 1037/2020 – Commercial, ruling of the Dubai Court of Cassation of 9 December 2020.

²⁹ See Case No. 36/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020.

³⁰ See Case No. 218/2020 – Commercial, ruling of the Dubai Court of Cassation of 20 May 2020. See also earlier case law precedent to similar effect: Case No. 883/2018 – Commercial, ruling of the Dubai Court of Cassation of 12 May 2019; and Case No. 903/2018 – Commercial, ruling of the Dubai Court of Cassation of 12 May 2019.

agreement or as a clause within a contract. In all cases, the law requires that such agreement be evidenced in writing.”³¹

Since then, there has been a line of case law precedent emphasising the *traditional* position, i.e., that arbitration qualifies as an *exceptional* form of dispute resolution³² and that a party’s submission to arbitration constitutes a waiver of the *fundamental right* to have its case heard in court³³.

Arbitration defence. The arbitration defence pursuant to Article 8 FAL has been found to operate as an exception to the general rule in favour of the jurisdiction of the courts in civil and commercial disputes.³⁴ According to the arbitration defence, a court before which an action on the merits has been initiated is obligated to dismiss that action in the event that the opponent raises the existence of an obligation to arbitrate unless the underlying arbitration agreement is found to be unenforceable, whether for being invalid or otherwise.³⁵ For this latter purpose, an arbitration agreement will be found unenforceable in circumstances where the parties fail to make payment of the advance on costs prescribed under the DIAC Rules and the case is considered withdrawn and the arbitration procedure is consequently closed within the meaning of 9(2) of the Appendix on Costs of the DIAC Rules.³⁶

Importantly, as confirmed by the UAE Courts, an opponent party must raise the arbitration defence before making any submissions on the merits (rather than at the “first hearing”, as used to be the case under the former UAE Arbitration Chapter³⁷), otherwise the opponent will be considered to have waived the right to enforce the arbitration obligation against the claimant,³⁸ in which case the courts – to the exclusion of an arbitral tribunal – will be properly competent to hear the action on the merits³⁹. The UAE Courts have found that for this purpose, pleadings on the merits include submissions before an expert appointed by the court to assist in the resolution of the parties’ dispute.⁴⁰ With this in mind, under Article 8(1) FAL, an opponent party will be allowed to request an adjournment before the court to review the case file before formally raising the

³¹ See Case No. 8/2018, ruling of the Dubai Court of Appeal of 16 January 2019.

³² See Case No. 153/2020 - Commercial, ruling of the Dubai Court of Cassation of 8 March 2020; Case No. 567/2020 – Commercial, ruling of the Dubai Court of Cassation of 26 July 2020; and Case No. 803/2020 – Commercial, ruling of the Dubai Court of Cassation of 25 October 2020.

³³ See, e.g., Case No. 293/2019 – Commercial, ruling of the Dubai Court of Cassation of 30 June 2019, stating that “*the agreement to arbitrate means waiving the right to the state’s jurisdiction, including the guarantees of litigants.*”. See also Case No. 5/2020 – Real Estate, ruling of the Dubai Court of Cassation of 19 March 2020; and Case No. 803/2020 – Commercial, ruling of the Dubai Court of Cassation of 25 October 2020.

³⁴ See Case No. 1071/2019 – Commercial, ruling of the Dubai Court of Cassation of 16 February 2020.

³⁵ See, e.g., Case No. 300/2019 – Real Estate, ruling of the Dubai Court of Cassation of 13 February 2020; Case No. 319/2019 – Commercial, ruling of the Dubai Court of Cassation of 8 December 2019; Case No. 399/2019 – Commercial, ruling of the Dubai Court of Cassation of 23 February 2020; Case No. 521/2019 – Commercial, ruling of the Dubai Court of Cassation of 30 January 2020; Case No. 581/2019 – Commercial, ruling of the Dubai Court of Cassation of 15 September 2019; Case No. 604/2019, ruling of the Dubai Court of Cassation of 24 November 2019; Case No. 685/2019 – Commercial, ruling of the Dubai Court of Cassation of 10 November 2019; and Case No. 853/2019 - Commercial, ruling of the Dubai Court of Cassation of 2 February 2020; Case No. 903/2019 – Commercial, ruling of the Dubai Court of Cassation of 11 November 2020; Case No. 986/2019 – Commercial, ruling of the Dubai Court of Cassation of 15 December 2019; Case No. 1646/2019 – Commercial, ruling of the Dubai Court of First Instance of 3 March 2020; Case No. 5/2020 – Real Estate, ruling of the Dubai Court of Cassation of 19 March 2020; Case No. 135/2020 – Civil, ruling of the Dubai Court of Cassation of 14 May 2020; Case No. 142/2020 – Real Estate, ruling of the Dubai Court of Cassation of 3 November 2020; Case No. 153/2020 – Commercial, ruling of the Dubai Court of Cassation of 8 March 2020; Case No. 156/2020 - Commercial, ruling of the Dubai Court of Cassation of 11 March 2020; Case No. 161/2020 – Commercial, ruling of the Dubai Court of Cassation of 4 October 2020; Case No. 218/2020 – Commercial, ruling of the Dubai Court of Cassation of 20 May 2020; Case No. 224/2020 – Civil, ruling of the Dubai Court of Cassation of 27 August 2020; Case 276/2020 – Commercial, ruling of the Dubai Court of Cassation of 20 May 2020; Case No. 315/2020 – Commercial, ruling of the Dubai Court of Cassation of 13 September 2020; Case No. 367/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 August 2020; Case No. 421/2020 – Commercial, ruling of the Dubai Court of Cassation of 4 October 2020; Case No. 441/2020 – Commercial, ruling of the Dubai Court of Cassation of 27 September 2020; Case No. 732/2020 – Commercial, ruling of the Dubai Court of Cassation of 30 September 2020; Case No. 803/2020 – Commercial, ruling of the Dubai Court of Cassation of 25 October 2020; Case No. 865/2020 – Commercial, ruling of the Dubai Court of Cassation of 11 October 2020; Case No. 960/2020 – Commercial, ruling of the Dubai Court of Cassation of 9 December 2020; and Case No. 1037/2020 – Commercial, ruling of the Dubai Court of Cassation of 9 December 2020.

³⁶ See Case No. 215/2019 – Commercial, ruling of the Dubai Court of Cassation of 7 July 2019.

³⁷ See G. Blanke, *Commentary on the UAE Arbitration Chapter*, Thomson Reuters/Sweet&Maxwell, 2017, at II-040 – II-041.

³⁸ See, e.g., Case No. 1159/2018 – Commercial, ruling of the Dubai Court of Cassation of 21 July 2019; Case No. 319/2019 – Commercial, ruling of the Dubai Court of Cassation of 8 December 2019; Case No. 399/2019 – Commercial, ruling of the Dubai Court of Cassation of 23 February 2020; and Case No. 156/2020 - Commercial, ruling of the Dubai Court of Cassation of 11 March 2020.

³⁹ See Case No. 156/2020 - Commercial, ruling of the Dubai Court of Cassation of 11 March 2020.

⁴⁰ See Case No. 604/2019, ruling of the Dubai Court of Cassation of 24 November 2019.

arbitration defence in the second hearing (or indeed at a later hearing to the extent that it reserves its position on the merits): The UAE Courts have thus been seen to entertain an arbitration defence that was raised by an attorney at a second hearing following a successful application for adjournment of the first hearing in order to review the file.⁴¹

The UAE Courts have found that for an arbitration defence under Article 8(1) FAL to succeed, it must meet three cumulative conditions:⁴² (i) the opponent files a case before the courts in violation of an existing arbitration agreement; (ii) the aggrieved party raises the arbitration defence before arguing the case on the merits; and (iii) the subject arbitration agreement is valid and as such enforceable as between the parties. It has been found that condition (ii) allows a party to request an extension of time in the first hearing before the competent court to appoint a legal representative, who in turn raises the arbitration defence in the second hearing before the court.⁴³ An arbitration defence requires submission of the underlying arbitration agreement - in Arabic translation, in the event that the original is in a language other than Arabic, e.g. in English⁴⁴ - only, to the exclusion of the entire main contract,⁴⁵ nor is there a requirement for submission of the original of the underlying main contract, including the arbitration agreement, a photocopy thereof having been found to be sufficient.⁴⁶

In the event of multiple parties, some of which are signatories and some of which are non-signatories to the arbitration agreement, and provided that the dispute between the parties is indivisible, the UAE Courts have found that they have general jurisdiction on the basis that arbitration is an exceptional form of dispute resolution⁴⁷:

“even if the arbitration obligation - as an exception from the principle requiring the jurisdiction of the courts to consider all civil and commercial disputes - is only binding on its parties and therefore it does not apply to others, so if a lawsuit is filed against several litigants or filed by a number of plaintiffs and one of them is the one who agreed to an arbitration obligation in the contract that is the subject of the dispute concluded with them and the claim in the case is related to this contract, so the proper functioning of justice requires that the dispute not be divided because it relates to a single transaction with multiple parties, and then it must be considered before one party, which is the court, as it is the holder of general jurisdiction in hearing any lawsuit according to the origin and that the arbitration court.”⁴⁸

Where no indivisible link can be established between a first contract that contains an arbitration clause and a second contract that does not, a tribunal will be competent to hear the dispute arising from the first contract to the exclusion of the general jurisdiction of the UAE Courts.⁴⁹ The arbitration defence has failed with respect to matters that fall within the proper competence of the courts, in particular those that qualify as of public policy, including, e.g., the registration of off-plan real estate;⁵⁰ and in circumstances where a party was not a signatory of the underlying sale contract that contained the subject arbitration agreement⁵¹. Subject to party agreement otherwise, the courts will also regain general jurisdiction in the event that an arbitration agreement cannot be performed for whatever reason, including, e.g., the parties' failure to defray the costs of the arbitration within, e.g., the meaning of the DIAC Rules, resulting in the closure of the DIAC reference.⁵² The UAE Courts have been seen to dismiss the arbitration defence where the dispute between the parties did not fall within the scope of the disputed arbitration agreement and as such arose from circumstances not

⁴¹ See, e.g., Case No. 1159/2018 – Commercial, ruling of the Dubai Court of Cassation of 21 July 2019.

⁴² See Case No. 300/2019 – Real Estate, ruling of the Dubai Court of Cassation of 13 February 2020.

⁴³ *Id.*

⁴⁴ See Case No. 581/2019 – Commercial, ruling of the Dubai Court of Cassation of 15 September 2019.

⁴⁵ See Case No. 319/2019 – Commercial, ruling of the Dubai Court of Cassation of 8 December 2019.

⁴⁶ See Case No. 399/2019 – Commercial, ruling of the Dubai Court of Cassation of 23 February 2020.

⁴⁷ See Case No. 153/2019 – Commercial, ruling of the Dubai Court of Cassation of 28 April 2019; Case No. 300/2019 – Real Estate, ruling of the Dubai Court of Cassation of 13 February 2020; and Case No. 17/2020 – Real Estate, ruling of the Dubai Court of Cassation of 14 May 2020.

⁴⁸ See Case No. 5/2020 – Real Estate, ruling of the Dubai Court of Cassation of 19 March 2020.

⁴⁹ See Case No. 803/2020 – Commercial, ruling of the Dubai Court of Cassation of 25 October 2020.

⁵⁰ See, e.g., Case No. 5/2020 – Real Estate, ruling of the Dubai Court of Cassation of 19 March 2020; and Case No. 84/2020 – Real Estate, ruling of the Dubai Court of Cassation of 21 May 2020.

⁵¹ See Case No. 224/2020 – Civil, ruling of the Dubai Court of Cassation of 27 August 2020.

⁵² See Case No. 791/2019 – Commercial, ruling of the Dubai Court of Cassation of 19 January 2020.

covered by that agreement.⁵³ Further, in a recent case,⁵⁴ the UAE Courts refused to entertain as a debt enforcement action a claim for payment of a debt which the debtor party had admitted was outstanding by email, declining the court's jurisdiction in favour of the existence of an arbitration clause under Article 8 FAL. The UAE Courts have also refused to accept that a final payment certificate within the meaning of the FIDIC Conditions is suitable for enforcement as a debt by the competent courts irrespective of the existence of an arbitration clause.⁵⁵

In exercising their powers under Article 8(1) FAL, the UAE Courts respect the parties' choice to submit their dispute to arbitration in a foreign forum.⁵⁶

Agreement to arbitrate. The agreement to arbitrate has been recognised as the source of the tribunal's mandate and powers under the FAL.⁵⁷ It has been confirmed⁵⁸ that pursuant to Article 4(1) FAL, both natural and legal persons, i.e., individuals and body corporates, are empowered to enter into arbitration agreements. Given the similarity in wording between Article 4(1) FAL and former Article 203(4) CPC, the Dubai Court of Cassation has been seen to rely on the UAE Courts' analysis of former Article 203 in relevant part in construing Article 4(1) FAL.⁵⁹ Given the exceptional nature of arbitration, arbitration clauses and agreements are interpreted narrowly.⁶⁰

Subject to the application of the doctrine of apparent authority in the terms set out under a separate heading below, the UAE Courts have confirmed that a third party that seeks to submit to arbitration for and on behalf of and/or represent the original rightsholder, whether an individual or a body corporate, in an arbitration must be specifically authorised to do so by means of a special power of attorney in accordance with Article 58(2) CPC⁶¹ or a board resolution, subject to a number of well-defined exceptions, such as the legal presumption in favour of the binding authority of a director of a UAE-incorporated limited liability company.⁶² To this effect, the Dubai Court of Cassation has found in Case No. 153/2020⁶³ that “[t]he director of a limited liability company is the holder of full authority in its management and has the capacity to dispose of the rights related to its activity including the agreement on arbitration in the contracts concluded between it and others unless the company's articles of incorporation specify its authority to deprive him of certain actions or expressly prevent him from agreeing to arbitration [...]”

According to more recent case law precedent of the UAE Courts, a lack of special authority may only be invoked by a principal against its agent or attorney, and not by the opponent party.⁶⁴ It has also been held that where a board of directors only counts two members and the articles of association authorise one director on his or her own to carry out the company affairs, one director on his own is considered authorised to bind the company to arbitration.⁶⁵

⁵³ See Case No. 1071/2019 – Commercial, ruling of the Dubai Court of Cassation of 16 February 2020.

⁵⁴ See Case No. 265/2020 – Commercial, ruling of the Dubai Court of Cassation of 28 June 2020.

⁵⁵ See Case No. 692/2020 – Commercial, ruling of the Dubai Court of Cassation of 23 September 2020.

⁵⁶ See, e.g., Case No. 685/2019 – Commercial, ruling of the Dubai Court of Cassation of 10 November 2019, providing for arbitration seated in Seoul, Korea, under Korean procedural and substantive law.

⁵⁷ See, e.g., Case No. 114/2020 – Commercial, ruling of the Dubai Court of Cassation of 18 March 2020; and Case No. 324/2020 – Civil, ruling of the Dubai Court of Cassation of 26 November 2020.

⁵⁸ See, e.g., Case No. 293/2019 – Commercial, ruling of the Dubai Court of Cassation of 30 June 2019; Case 276/2020 – Commercial, ruling of the Dubai Court of Cassation of 20 May 2020; and Case No. 329/2020 – Commercial, ruling of the Dubai Court of Cassation of 20 September 2020.

⁵⁹ See, e.g., Case No. 236/2019 – Real Estate, ruling of the Dubai Court of Cassation of 11 December 2019.

⁶⁰ See, e.g., Case No. 329/2020 – Commercial, ruling of the Dubai Court of Cassation of 20 September 2020; Case No. 441/2020 – Commercial, ruling of the Dubai Court of Cassation of 27 September 2020; Case No. 459/2020 – Commercial, ruling of the Dubai Court of Cassation of 4 October 2020; and Case No. 567/2020 – Commercial, ruling of the Dubai Court of Cassation of 26 July 2020.

⁶¹ See, e.g., Case No. 205/2019 – Commercial, ruling of the Dubai Court of Cassation of 23 June 2019; Case No. 236/2019 – Real Estate, ruling of the Dubai Court of Cassation of 11 December 2019; and Case No. 5/2020 – Real Estate, ruling of the Dubai Court of Cassation of 19 March 2020.

⁶² See, e.g., Case No. 236/2019 – Real Estate, ruling of the Dubai Court of Cassation of 11 December 2019; Case No. 1013/2019 – Commercial, ruling of the Dubai Court of Cassation of 19 January 2020; and Case No. 870/2020 – Commercial, ruling of the Dubai Court of Cassation of 25 November 2020.

⁶³ Case No. 153/2020 – Commercial, ruling of the Dubai Court of Cassation of 8 March 2020.

⁶⁴ See, e.g., Case No. 205/2019 – Commercial, ruling of the Dubai Court of Cassation of 23 June 2019; Case No. 685/2019 – Commercial, ruling of the Dubai Court of Cassation of 10 November 2019; Case No. 1118/2019 – Commercial, Dubai Court of Cassation of 19 February 2020; and Case No. 247/2020 – Real Estate, ruling of the Dubai Court of Cassation of 13 October 2020.

⁶⁵ See Case No. 153/2020 – Commercial, ruling of the Dubai Court of Cassation of 8 March 2020.

More recently, the UAE Courts have confirmed that the requirement for a special power of attorney extends to the delegation of any powers to be conferred upon a tribunal in arbitration, including the power to award party costs more specifically:

“[...] the decision according to the text of the first and third paragraphs of Article 4 of the Arbitration Law No. 6 of 2018 that 1- The agreement on arbitration is concluded only by a natural person who has the capacity to dispose of rights or from the person’s representative, the legal person who is authorized to conclude an agreement on arbitration, otherwise the agreement will be void ... 3- And that in the cases in which this law permits the parties to agree on the procedure to be followed to decide on a specific issue, then each of them may authorize others to choose this procedure or decide on it, and it is considered among others in this regard every natural person or arbitration institution inside or outside the country. And that the text of Article (216/4) of the Civil Procedures Law under which the arbitration procedures were conducted is that resorting to arbitration is only valid for those who have the capacity to act in the disputed right and who are not qualified to resort to the judiciary, for the agreement on arbitration implies that if a person relinquishes filing a case to the state’s judiciary, including the guarantees it contains for the litigants, which is an exceptional way to settle disputes, the legislator is required to agree on a private agency and that it is in the private agency that the agent has nothing but to undertake the matters assigned to it and the necessary consequences required by the nature of the behaviour and the current custom, it is not permissible to depart from the limits of this authorization, and if it exceeds those limits, then it does not apply to the right of the delegated person unless he permits this behaviour.”⁶⁶

Finally, in keeping with Article 5(1) FAL, a recent ruling of the Abu Dhabi Court of Cassation⁶⁷ recognises that by virtue of the principle *lex specialis derogat legi generali*, whereby more specific rules apply to the exclusion of more general rules, disputes in relation to service charges and community fees may be carved out of the arbitration clause contained in a real estate sale and purchase agreement by making them subject to proceedings before the courts by a simple express reference to that effect in terms appended to the sale and purchase agreement in the form of a declaration.

Separability. In accordance with Article 6(1) FAL, the UAE Courts have confirmed the isolation of the arbitration agreement from the main contract and its continued integrity despite the nullity, rescission or termination of the main contract,⁶⁸ always provided that the agreement to arbitrate is itself not affected by an instance of invalidity.⁶⁹

Against this background, it has been held by the UAE Courts that the invalidity of a board resolution (intending to confer powers upon new management to submit a company to arbitration) does not extend to an existing arbitration agreement contained in the main contract between the parties in circumstances where the existing arbitration agreement was lawfully executed by previous management of the company.⁷⁰

The net consequence of Article 6(1) FAL is that the arbitration agreement survives the termination (including in the form of a rescission) or invalidity of the main contract: “[...] it is also decided that the invalidity of the original contract that includes the arbitration clause, or its annulment or termination, does not prevent the arbitration clause from remaining valid and producing its effects with respect to the effects of the nullity, annulment or termination of the original contract unless the nullity extends to the arbitration clause itself [...]”⁷¹ As a result, the arbitral tribunal retains jurisdiction to determine the question of the termination or invalidity of the main contract.⁷²

⁶⁶ See Case No. 990/2019 – Commercial, ruling of the Dubai Court of Cassation of 5 January 2020.

⁶⁷ Reported in S. Nagar, “Tailoring the scope of arbitration agreements: A recent judgment of the Abu Dhabi Court of Cassation”, Al Tamimi Law Update (October 2020).

⁶⁸ See, e.g., Case No. 156/2020 - Commercial, ruling of the Dubai Court of Cassation of 11 March 2020; Case No. 516/2020 – Commercial, ruling of the Dubai Court of Cassation of 15 July 2020; and Case No. 1115/2020 – Commercial, ruling of the Dubai Court of Cassation of 20 December 2020.

⁶⁹ See, e.g., Case No. 516/2020 – Commercial, ruling of the Dubai Court of Cassation of 15 July 2020.

⁷⁰ See Case No. 946/2019 – Commercial, ruling of the Dubai Court of Cassation of 24 November 2019.

⁷¹ See Case No. 516/2020 – Commercial, ruling of the Dubai Court of Cassation of 15 July 2020.

⁷² *Id.*

In-writing requirement. The UAE Courts have confirmed the in-writing requirement of arbitration agreements within the meaning of Article 7(1) FAL⁷³ and that as such, an agreement to arbitrate is never presumed⁷⁴. A failure to sign an arbitration provision contained in schedules to the original main contract will render that provision null and void *ab initio*.⁷⁵ It has been found that the simple amendment of a main contract without specific reference to the underlying arbitration clause does not displace the obligation to arbitrate.⁷⁶ In order to meet the in-writing requirement, it will be sufficient for an agreement to arbitrate to fall within one of the circumstances listed at Article 7(2) FAL, thus qualifying as having been concluded in writing.⁷⁷

Importantly, according to the UAE Courts,⁷⁸ an arbitration agreement is only binding *inter partes*, i.e., only binds (authorised) signatory parties. That said, like the position under the former UAE Arbitration Chapter,⁷⁹ the UAE Courts have endorsed the express or implied assignment of the obligation to arbitrate to a third party provided the circumstances leave no room for doubt that the assignment has met with party acceptance.⁸⁰

Further, albeit that pursuant to Article 1028 CPC the arbitration agreement of an insurance contract is required to be contained in an agreement separate from the general conditions of the insurance,⁸¹ in circumstances where this had not been done, the insurer, which was the originator of those conditions, was not able to rely upon its own failure to insert the arbitration agreement into a separate agreement to overcome an arbitration defence advanced by the insured.⁸² It has further been held that a settlement agreement between two parties with respect to a dispute arising from a main contract that contained an arbitration clause was not referable to arbitration where that agreement did not make reference to the obligation to arbitrate.⁸³ Equally, a letter agreement adopted to replace an earlier agreement on the same subject without making reference to the arbitration clause contained in the earlier agreement was found not to give rise to an obligation to arbitrate.⁸⁴

Incorporation by reference. In application of Article 5(3) FAL, a generic reference in a subcontract to dispute resolution in the terms provided for in the main contract has been found sufficient for incorporation into a subcontract of a FIDIC dispute resolution clause contained in a main contract.⁸⁵

Further, the UAE Courts have found, taking account of the language of Article 7(2)(b) FAL more specifically, that for incorporation by reference to operate, the required reference must point to the arbitration provision in the referenced document and *expressly state* that the referenced arbitration provision forms an integral part of the subject contract.⁸⁶

“[...] an agreement to arbitrate is considered any referral contained in a contract drawn up between two parties to another contract that includes an arbitration clause if the referral is clear and explicit in adopting this condition, and the effect of the referral is not achieved unless it includes a specific reference to the arbitration clause. If the referral to the aforementioned contract is merely a general reference to the provisions of this contract without specifying the aforementioned arbitration clause

⁷³ See, e.g., Case No. 293/2019 – Commercial, ruling of the Dubai Court of Cassation of 30 June 2019; Case No. 315/2020 – Commercial, ruling of the Dubai Court of Cassation of 13 September 2020; and Case No. 441/2020 – Commercial, ruling of the Dubai Court of Cassation of 27 September 2020.

⁷⁴ See Case No. 224/2020 – Civil, ruling of the Dubai Court of Cassation of 27 August 2020.

⁷⁵ See Case No. 476/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 August 2020.

⁷⁶ See Case No. 315/2020 – Commercial, ruling of the Dubai Court of Cassation of 13 September 2020.

⁷⁷ See, e.g., Case No. 293/2019 – Commercial, ruling of the Dubai Court of Cassation of 30 June 2019.

⁷⁸ See Case No. 43/2019 – Real Estate, ruling of the Dubai Court of Cassation of 8 May 2019; and Case No. 5/2020 – Real Estate, ruling of the Dubai Court of Cassation of 19 March 2020.

⁷⁹ See G. Blanke, *Commentary on the UAE Arbitration Chapter*, Thomson Reuters/Sweet&Maxwell, 2017, at II-018.

⁸⁰ See Case No. 43/2019 – Real Estate, ruling of the Dubai Court of Cassation of 8 May 2019; and Case No. 503 – Commercial, ruling of the Dubai Court of Cassation of 15 June 2019.

⁸¹ To this effect, see G. Blanke, *Commentary on the UAE Arbitration Chapter*, Thomson Reuters/Sweet&Maxwell, 2017, at II-008.

⁸² See Case No. 236/2020 – Civil, ruling of the Dubai Court of Cassation of 13 August 2020.

⁸³ See Case No. 567/2020 – Commercial, ruling of the Dubai Court of Cassation of 26 July 2020; and Case No. 667/2020 – Commercial, ruling of the Dubai Court of Cassation of 4 October 2020.

⁸⁴ See Case No. 358/2020 – Civil, ruling of the Dubai Court of Cassation of 26 November 2020.

⁸⁵ See Case No. 1139/2020 – Commercial, ruling of the Court of Appeal of 19 August 2020.

⁸⁶ See Case No. 441/2020 – Commercial, ruling of the Dubai Court of Cassation of 27 September 2020; Case No. 459/2020 – Commercial, ruling of the Dubai Court of Cassation of 4 October 2020; and Case No. 567/2020 – Commercial, ruling of the Dubai Court of Cassation of 26 July 2020.

specifically indicating that the parties know of its existence in the contract, then the referral does not extend to it and the arbitration is not agreed upon between the parties to the contract, [...].”⁸⁷

In similar terms, the Dubai Court of Cassation found in a ruling of 20 September 2020 with respect to the incorporation by reference within the context of the FIDIC Conditions of Contract as follows:

“[...] and that the arbitration clause must be interpreted narrowly, yet accurately, and since what was previously mentioned was the evidence for this court of its review of the contracting agreement and the first and second parts and their appendices deposited in the file of the primary case, which showed that the arbitration clause contained in Appendix D, Part Two, Article (67) came without the signature of the legal representative of the two parties. The dispute, as well as the body of the original contract signed by them, did not refer to that appendix and expressly stipulate the consideration of the arbitration clause. In compliance with the requirements of Article (7-2-b) of the [FAL], and as the appealed ruling concluded in favour of the rejection of the arbitration defence based on that, then it would have worked true to the law [...].”⁸⁸

Apparent authority. A consistent line of recent case law precedent suggests that the UAE Courts now recognise a legal presumption in favour of the binding effect of a person’s signature upon a company in one of the following two situations:

- (i) where that person is not specifically designated as the company’s legal representative in the preamble of the underlying contract that contains an arbitration clause, yet – regardless of its true association with the company - signs the contract⁸⁹ with a legible signature⁹⁰: *“[...] if the name of a specific company is mentioned in the preamble of the contract and another person signed at the end of this contract, this establishes a legal claim that whoever signed it signed in the name and account of the company, regardless of whether his name is associated with its name or added to it, and this will affect the rights and obligations of the company.”*⁹¹; or
- (ii) where that person is specifically designated as the company’s legal representative in the preamble of the contract but the signature placed under the contract is illegible⁹²: *“If the name of the legal person is mentioned in the preamble of the contract only and not associated with the name and description of the legal representative and the end of the contract is signed with an illegible signature and the contract includes the arbitration clause, in this case there is a conclusive legal presumption that the signature is attributed to the legal representative of the person possessing the capacity to act and the capacity to agree to arbitration and it is not accepted from him in this case to challenge this signature in accordance with the principle of good faith [...].”*⁹³

Conversely, where a person is specifically designated as the company’s legal representative in the preamble to the contract that contains the arbitration clause, yet the signature under the contract is legible and as such identifiable or identified as that of another person, the legal presumption in favour of binding authority is

⁸⁷ See Case No. 329/2020 – Commercial, ruling of the Dubai Court of Cassation of 20 September 2020.

⁸⁸ *Id.*

⁸⁹ See, e.g., Case No. 236/2019 – Real Estate, ruling of the Dubai Court of Cassation of 11 December 2019; Case No. 293/2019 – Commercial, ruling of the Dubai Court of Cassation of 30 June 2019; Case No. 581/2019 – Commercial, ruling of the Dubai Court of Cassation of 15 September 2019; Case No. 51/2020 – Real Estate, ruling of the Dubai Court of Cassation of 14 May 2020; Case No. 236/2020 – Civil, ruling of the Dubai Court of Cassation of 13 August 2020; and Case No. 870/2020 – Commercial, ruling of the Dubai Court of Cassation of 25 November 2020.

⁹⁰ See Case No. 2/2020, ruling of the Dubai Court of Appeal of 6 October 2020.

⁹¹ See Case No. 276/2020 – Commercial, ruling of the Dubai Court of Cassation of 20 May 2020.

⁹² See, e.g., Case No. 236/2019 – Real Estate, ruling of the Dubai Court of Cassation of 11 December 2019; Case No. 293/2019 – Commercial, ruling of the Dubai Court of Cassation of 30 June 2019; Case No. 581/2019 – Commercial, ruling of the Dubai Court of Cassation of 15 September 2019; Case No. 2/2020, ruling of the Dubai Court of Appeal of 6 October 2020; Case No. 51/2020 – Real Estate, ruling of the Dubai Court of Cassation of 14 May 2020; Case No. 236/2020 – Civil, ruling of the Dubai Court of Cassation of 13 August 2020; Case No. 265/2020 – Commercial, ruling of the Dubai Court of Cassation of 28 June 2020; and Case No. 870/2020 – Commercial, ruling of the Dubai Court of Cassation of 25 November 2020.

⁹³ See Case No. 276/2020 – Commercial, ruling of the Dubai Court of Cassation of 20 May 2020.

displaced⁹⁴: “If the name of the legal person is mentioned in the preamble of the contract coupled with the name and description of the legal representative and the end of the contract is signed with a legible signature of another person and the contract includes the arbitration clause, then in that case the legal person may claim the nullity of the arbitration clause for its signature by a person other than the legal representative who has the capacity to agree to arbitration.”⁹⁵

For the avoidance of doubt, a legible signature at the end of a contract in the absence of any (contradictory) designation of the legal representative in the preamble to the contract will not displace the legal presumption in favour of binding authority.⁹⁶ It has hence been found that employees of a corporate entity that did not hold a managerial position nor were furnished with special authority, did bind that entity to arbitration by signing (legibly) a settlement agreement that contained an arbitration clause.⁹⁷ The UAE Courts also appear to have recognised that the placement of a company seal on the arbitration agreement (bar proof of fraudulent interference by the agent) binds the company to arbitration and as such serves as conclusive evidence of the proper execution of the arbitration obligation by a legal person in its own right (irrespective of any other signature requirements).⁹⁸

In finding in favour of the application of apparent authority, the UAE Courts have relied upon an overarching obligation of good faith⁹⁹ in the terms set out at Article 70 of the UAE Civil Transactions Code:

“[I]n accordance with the principle established by Art. 70 of the Federal Civil Transactions Law No. 5/1085, whoever is seeking to set aside what he has concluded on this part will be rejected, and the defendant may not take from his own actions/ grounds to validate/constitute his claim against [a] third party, which is an application of the general principle that is based on moral and social considerations to combat such behaviour and not to deviate from the seriousness of the principle of good faith that must be complied with in all actions and procedures.”¹⁰⁰

On occasion, the courts have also found support in Article 14(2) CPC:

“It is not permissible – according to Article 14(2) of the Civil Procedure Law – to claim nullity that is not related to public order from the party who caused it, whether it was caused intentionally or by negligence or the one who caused it was the same person or someone working for them. It is established that a party to the arbitration may not claim before the court a defence that leads to the

⁹⁴ See, e.g., Case No. 236/2019 – Real Estate, ruling of the Dubai Court of Cassation of 11 December 2019; Case No. 293/2019 – Commercial, ruling of the Dubai Court of Cassation of 30 June 2019; Case No. 581/2019 – Commercial, ruling of the Dubai Court of Cassation of 15 September 2019; Case No. 51/2020 – Real Estate, ruling of the Dubai Court of Cassation of 14 May 2020.

⁹⁵ See Case No. 276/2020 – Commercial, ruling of the Dubai Court of Cassation of 20 May 2020.

⁹⁶ See Case No. 581/2019 – Commercial, ruling of the Dubai Court of Cassation of 15 September 2019.

⁹⁷ See Case No. 246/2020 – Civil, ruling of the Dubai Court of Cassation of 24 September 2020.

⁹⁸ See Case No. 685/2019 – Commercial, ruling of the Dubai Court of Cassation of 10 November 2019; Case No. 2/2020, ruling of the Dubai Court of Appeal of 6 October 2020; Case No. 51/2020 – Real Estate, ruling of the Dubai Court of Cassation of 14 May 2020, in which the court emphasised the appellant party’s approval of the company seal that it had placed on the subject arbitration agreement; Case No. 161/2020 – Commercial, ruling of the Dubai Court of Cassation of 4 October 2020; Case No. 236/2020 – Civil, ruling of the Dubai Court of Cassation of 13 August 2020; Case No. 865/2020 – Commercial, ruling of the Dubai Court of Cassation of 11 October 2020; and Case No. 870/2020 – Commercial, ruling of the Dubai Court of Cassation of 25 November 2020, emphasising the placement of the company seal on the contract that contains the arbitration clause, together with the signature of the company representative; possibly *contra*, however, see Case No. 960/2020 – Commercial, ruling of the Dubai Court of Cassation of 9 December 2020; and Case No. 1037/2020 – Commercial, ruling of the Dubai Court of Cassation of 9 December 2020, in which two respondent parties were found not to be bound by the underlying arbitration clause for not signing that clause irrespective of the presence of the company seal.

⁹⁹ See, e.g., Case No. 161/2020 – Commercial, ruling of the Dubai Court of Cassation of 4 October 2020; Case No. 276/2020 – Commercial, ruling of the Dubai Court of Cassation of 20 May 2020; and Case No. 870/2020 – Commercial, ruling of the Dubai Court of Cassation of 25 November 2020.

¹⁰⁰ See Case No. 236/2019 – Real Estate, ruling of the Dubai Court of Cassation of 11 December 2019. To similar effect, see also Case No. 293/2019 – Commercial, ruling of the Dubai Court of Cassation of 30 June 2019; Case No. 581/2019 – Commercial, ruling of the Dubai Court of Cassation of 15 September 2019; Case No. 681/2019 – Commercial, ruling of the Dubai Court of Cassation of 10 November 2019; Case No. 51/2020 – Real Estate, ruling of the Dubai Court of Cassation of 14 May 2020; Case No. 236/2020 – Civil, ruling of the Dubai Court of Cassation of 13 August 2020; Case No. 276/2020 – Commercial, ruling of the Dubai Court of Cassation of 20 May 2020; Case No. 265/2020 – Commercial, ruling of the Dubai Court of Cassation of 28 June 2020; and Case No. 870/2020 – Commercial, ruling of the Dubai Court of Cassation of 25 November 2020.

nullity of the arbitration award due to defects related to the arbitration agreement or to the arbitration procedures resulting from its own actions.”¹⁰¹

Legal successorship. The UAE Courts have confirmed that pursuant to Article 4(4) FAL, the legal successor of a deceased (or bankrupted) party to the arbitration will adopt the full liability of the obligation to arbitrate that was originally binding on the party that ceases to exist. In this sense, in a ruling of 24 November 2019, the Dubai Court of Cassation held that an obligation to arbitrate contained in an existing arbitration agreement devolved to new management after the decease of the previous management regardless of the invalidity of the board resolution that, *inter alia*, sought to confer the power upon the new management to submit the company to arbitration.¹⁰²

Arbitrator eligibility. Recent case law precedent suggests that the prohibition under Article 10(2) FAL does not apply to appointments that preceded entry into force of the FAL. In a ruling of 19 February 2020,¹⁰³ Dr. Tarek Riad, then member of the DIAC Board of Trustees, was found not to be in violation of Article 10(2) FAL, having been appointed in the DIAC reference in question in 2016, *i.e.*, well before entry into force of the FAL.

Default-appointment and substitution. The UAE Courts have confirmed that in accordance with Article 11(1) FAL, parties are free to contract into an institutional set of rules, which provide for their own appointment regime, such as, *e.g.*, the DIAC Rules¹⁰⁴ or the DIFC-LCIA Rules.¹⁰⁵ For the avoidance of doubt, the decision of the competent court default-appointing an arbitrator is final and binding and can therefore not be appealed.¹⁰⁶

Further, it has been held by the UAE Courts that the substitution of an arbitrator within the meaning of Article 17 FAL, whether for dismissal, recusal or otherwise, does not affect the existence of the arbitration agreement and allows the redefinition of the arbitral mandate before a newly appointed tribunal.¹⁰⁷

Arbitrability. Given the similarity between the wording of former Article 203(4) CPC¹⁰⁸ and Article 4(2) FAL, the existing case law precedent on the interpretation of former Article 203(4) has guided the UAE Courts in their construction of Article 4(2) FAL.¹⁰⁹ Some case law precedent suggests that the courts are even content to examine questions of arbitrability by reference to former Article 203(4) CPC even after entry into force of the FAL.¹¹⁰

Both contractual and tortious actions have been found arbitrable within the meaning of Article 2(3) FAL.¹¹¹ That said, objective arbitrability under the FAL remains subject to exceptions, such as labour disputes.¹¹² The UAE Courts have further found that an investment agreement collateral to, but not conditional on an employment relationship, did not qualify for a dispute arising from a labour relationship and was, as such, capable of arbitration.¹¹³ More recent case law precedent appears to suggest that disputes with respect to the existence, registration and maintenance of agency agreements fall within the exclusive competence of the UAE Courts and are therefore not arbitrable whereas disputes relating to outstanding payments under a

¹⁰¹ See Case No. 51/2020 – Real Estate, ruling of the Dubai Court of Cassation of 14 May 2020. To similar effect, see also Case No. 236/2020 – Civil, ruling of the Dubai Court of Cassation of 13 August 2020.

¹⁰² See Case No. 946/2019 – Commercial, ruling of the Dubai Court of Cassation of 24 November 2019.

¹⁰³ See Case No. 1118/2019 – Commercial, Dubai Court of Cassation of 19 February 2020.

¹⁰⁴ See, *e.g.*, Case No. 198/2020 – Commercial, ruling of the Dubai Court of Cassation of 13 May 2020; and Case No. 492/2020 – Commercial, ruling of the Dubai Court of Cassation of 15 July 2020.

¹⁰⁵ See, *e.g.*, Case No. 421/2020 – Commercial, ruling of the Dubai Court of Cassation of 4 October 2020.

¹⁰⁶ See, *e.g.*, Case No. 938/2019 – Commercial, ruling of the Dubai Court of Cassation of 15 December 2019.

¹⁰⁷ See Case No. 36/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020.

¹⁰⁸ For a full analysis, see G. Blanke, *Commentary on the UAE Arbitration Chapter*, Thomson Reuters/Sweet&Maxwell, 2017, at II-032 *et seq.*

¹⁰⁹ See, *e.g.*, Case No. 231/2019 – Real Estate, ruling of the Dubai Court of Cassation of 4 December 2019, which draws direct analogies to Article 203 CPC; and Case No. 55/2020 – Labour, ruling of the Dubai Court of Cassation of 6 February 2020, which notes that Article 4(2) FAL repealed and as such replaced former Article 203(4) CPC with effect from entry into force of the FAL.

¹¹⁰ See, *e.g.*, Case No. 492/2020 – Commercial, ruling of the Dubai Court of Cassation of 15 July 2020.

¹¹¹ See, *e.g.*, Case No. 293/2019 – Commercial, ruling of the Dubai Court of Cassation of 30 June 2019.

¹¹² See, *e.g.*, Case No. 55/2020 – Labour, ruling of the Dubai Court of Cassation of 6 February 2020.

¹¹³ *Id.*

registered agency agreement are.¹¹⁴ Equally, matters reserved for determination by the UAE public authorities, such as the registration of title in the interim real estate register¹¹⁵ cannot be arbitrated. By contrast, the termination of agreements relating to the sale and purchase of land¹¹⁶ (short of matters of registration) and more generally the performance or breach of any such contract¹¹⁷ do not qualify as of public policy and can as such be arbitrated. For the avoidance of doubt, matters of registration with respect to off-plan lands or estates do and therefore cannot be arbitrated.¹¹⁸

Further, in digression from the position under the former UAE Arbitration Chapter, which required party consent, the UAE Courts have found that multi-contract claims arising from identically-worded arbitration clauses (and subcontracts) in disputes between the same parties (a subcontractor and a main contractor) in relation to the same project are arbitrable in a single DIAC arbitration proceeding in circumstances where neither the FAL nor the DIAC Rules contain provisions to the contrary.¹¹⁹ The Courts have rejected the proposition that both the FAL and the DIAC Rules refer to “Arbitration Agreement” in the singular, hence requiring separate arbitration processes for claims arising out of each Arbitration Agreement, on the basis that Article 1(2) of the DIAC Rules expressly provides that “[w]ords used in the singular include the plural and vice versa [...]” and that the FAL does not prohibit the filing of multi-contract claims in a single proceeding “*provided the case will be assessed on the value of each contract and the fees will be calculated on that basis*”.¹²⁰ According to the Courts,¹²¹ it is established law that even though, in principle, each action must be filed separately, this does not preclude the filing of multiple actions by one statement of claim provided that that statement includes all the relevant information required for each action in accordance with Article 42 CPC.

Procedural flexibility. The UAE Courts have confirmed the procedural flexibility of arbitrations conducted under the FAL. More specifically, pursuant to Article 4(3) FAL, parties are free to contract into the application of a specific set of procedural rules dispensed and administered by a local arbitration institution, such as DIAC,¹²² ADCCAC¹²³ or the Arbitration Centre of the UAE Society of Engineers.¹²⁴ This also includes free zone institutions, such as the DIFC-LCIA,¹²⁵ and international arbitration institutions,¹²⁶ and extends to the rules of evidence in the terms determined under the chosen institutional set of rules, such as Article 27(2) of the DIAC Rules.¹²⁷ Recent case law precedent confirms the parties’ liberty to contract into

¹¹⁴ See Case No. 362/2019 – Commercial, ruling of the Dubai Court of Cassation.

¹¹⁵ See Case No. 5/2020 – Real Estate, ruling of the Dubai Court of Cassation of 19 March 2020.

¹¹⁶ See, e.g., Case No. 217/2019 – Commercial, ruling of the Dubai Court of Cassation of 19 May 2019; and Case No. 231/2019 – Real Estate, ruling of the Dubai Court of Cassation of 4 December 2019) or real estate (see Case No. 247/2020 – Real Estate, ruling of the Dubai Court of Cassation of 13 October 2020; and Case No. 492/2020 – Commercial, ruling of the Dubai Court of Cassation of 15 July 2020).

¹¹⁷ See, e.g., Case No. 296/2020 – Real Estate, ruling of the Dubai Court of Cassation of 24 November 2020.

¹¹⁸ See Case No. 5/2020 – Real Estate, ruling of the Dubai Court of Cassation of 19 March 2020.

¹¹⁹ See Case No. 19/2020, ruling of the Dubai Court of Appeal of 9 September 2020.

¹²⁰ *Id.*; arguably in pursuit of a similar logic, see Case No. 1003/2019 – Commercial, ruling of the Dubai Court of Cassation of 1 January 2020, in which the claimant ultimately amended its claims to focus on those arising out of one of the two originally adduced contracts only, apparently having limited payment of the DIAC advance on costs to those claims only.

¹²¹ See Case No. 19/2020, ruling of the Dubai Court of Appeal of 9 September 2020.

¹²² See, e.g., Case No. 205/2019 – Commercial, ruling of the Dubai Court of Cassation of 23 June 2019; and Case No. 198/2020 – Commercial, ruling of the Dubai Court of Cassation of 13 May 2020, both confirming the application of the DIAC Rules as amended from time to time in accordance with Article 2 of those Rules; and Case No. 142/2020 – Real Estate, ruling of the Dubai Court of Cassation of 3 November 2020; and Case No. 492/2020 – Commercial, ruling of the Dubai Court of Cassation of 15 July 2020, both of which confirm the application of the 2007 DIAC Rules with effect from 5 May 2007 replacing the 1994 Rules of Arbitration of the Dubai Chamber of Trade and Industry.

¹²³ See, e.g., Case No. 19/2019, ruling of the Dubai Court of Appeal of 13 November 2019.

¹²⁴ See, e.g., Case No. 735/2020 – Commercial, ruling of the Dubai Court of Cassation of 4 October 2020.

¹²⁵ See, e.g., Case No. 992/2018 – Commercial, ruling of the Dubai Court of Cassation of 23 June 2019; Case No. 300/2019 – Real Estate, ruling of the Dubai Court of Cassation of 13 February 2020; Case No. 51/2020 – Real Estate, ruling of the Dubai Court of Cassation of 14 May 2020; Case No. 224/2020 – Civil, ruling of the Dubai Court of Cassation of 27 August 2020; Case No. 240/2020 – Commercial, ruling of the Dubai Court of Cassation of 6 March 2020; and Case No. 421/2020 – Commercial, ruling of the Dubai Court of Cassation of 4 October 2020.

¹²⁶ See, e.g., Case No. 134/2018 – Commercial, ruling of the Dubai Court of Cassation of 29 July 2018; Case No. 236/2019 – Real Estate, ruling of the Dubai Court of Cassation of 11 December 2019; and Case No. 246/2020 – Civil, ruling of the Dubai Court of Cassation of 24 September 2020, in all three of which the parties contracted into UAE-seated arbitration under the ICC Rules; see also Case No. 265/2020 – Commercial, ruling of the Dubai Court of Cassation of 28 June 2020.

¹²⁷ See Case No. 205/2019 – Commercial, ruling of the Dubai Court of Cassation of 23 June 2019.

institutional sets of rules to govern the submission of witness evidence, such as Article 29 of the DIAC Rules.¹²⁸

In this context, it has further been confirmed by the UAE Courts that arbitrators appointed under the FAL are free, subject to party autonomy, to determine the arbitration procedure and are not bound by the procedural rules prevailing under the UAE Civil Procedures Code.¹²⁹

Language of the arbitration. The statutory presumption in favour of Arabic as the language of arbitration under Article 29(1) FAL has been found to be displaced by the English language by operation of Article 21 of the DIAC Rules in circumstances in which the arbitration agreement was drafted in English and the respondent party filed a counterclaim in English.¹³⁰

Article 19 FAL. The UAE Courts have confirmed that Article 19(1) contains the principle of *kompetenz-kompetenz*, according to which a tribunal serving under the FAL has the power to determine its own jurisdiction as a preliminary matter to the exclusion of the courts.¹³¹ The Courts have confirmed that pursuant to Article 19(1), the tribunal may decide on an issue of jurisdiction as a preliminary matter (by way of a “preliminary decision”), allowing a tribunal to bifurcate the proceedings into an initial phase on jurisdiction and a subsequent phase on the merits.¹³²

The UAE Courts have further found that a failure to comply with the FIDIC conditions precedent in the terms of Clause 67 of the FIDIC Standard Form 1987, 4th edition, and in particular to make a timely referral to the Engineer under Clause 67.1, renders the commencement of arbitration proceedings premature.¹³³ Further, according to the Courts, in circumstances where the Employer has failed to give the Contractor written notice of a change of Engineer, the Contractor is allowed to refer to arbitration under Clause 67.3 FIDIC without a Clause 67.1 referral for an Engineer’s decision.¹³⁴ It has also been found that service of a request for arbitration following escalation of the parties’ differences confirms a lack of willingness on part of the parties to reach amicable settlement within the meaning of Clause 67.2 FIDIC and allows the commencement of arbitration in order to avoid unnecessary delay in the arbitral proceedings: “[T]he escalation of the differences between the parties and the [...] request for arbitration confirms a lack of willingness to reach an amicable settlement. To ensure the effective performance of the parties’ contract containing the arbitration clause, arbitration should be commenced after the parties invoked the arbitration clause for their dispute. Anything else would unnecessarily protract the proceedings.”¹³⁵ Further, a party’s silence in response to an invitation to settle amicably followed by escalation to arbitration within the contractual time-limits demonstrates a failure to settle amicably.¹³⁶ Similarly, an architect’s refusal to entertain settlement discussions between two contracting parties has been found to exhaust a pre-arbitral obligation by the parties to refer a dispute for settlement by the architect.¹³⁷ Conversely, the conditions precedent under Clause 67 FIDIC and in particular the requirement to attempt amicable settlement have been found unenforceable in circumstances where the courts retained their general jurisdiction over the subject dispute due to the unenforceability of the underlying arbitration agreement.¹³⁸

Article 19(2) FAL only comes into play where a tribunal has adopted a ruling affirming its own jurisdiction.¹³⁹ A negative ruling on jurisdiction can only be challenged by recourse to the formal challenge

¹²⁸ *Id.*

¹²⁹ See, e.g., Case No. 29/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020; and Case No. 34/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020.

¹³⁰ See Case No. 492/2020 – Commercial, ruling of the Dubai Court of Cassation of 15 July 2020.

¹³¹ See Case No. 358/2020 – Civil, ruling of the Dubai Court of Cassation of 26 November 2020.

¹³² See, e.g., Case No. 933/2018, ruling of the Dubai Court of Cassation of 10 February 2019; and Case No. 1059/2018, ruling of the Dubai Court of Cassation of 17 March 2019, in both of which the parties agreed to bifurcate.

¹³³ See Case No. 32/2019, ruling of the Dubai Court of Appeal of 5 February 2020, affirmed by Case No. 339/2020, ruling of the Dubai Court of Cassation of 8 June 2020.

¹³⁴ See Case No. 8/2018, ruling of the Dubai Court of Appeal of 16 January 2019.

¹³⁵ *Id.*

¹³⁶ See Case No. 19/2020, ruling of the Dubai Court of Appeal of 9 September 2020.

¹³⁷ See Case No. 864/2020 – Commercial, ruling of the Dubai Court of Cassation of 4 November 2020.

¹³⁸ See Case No. 215/2019 – Commercial, ruling of the Dubai Court of Cassation of 7 July 2019.

¹³⁹ See Case No. 32/2019, ruling of the Dubai Court of Appeal of 5 February 2020, affirmed by Case No. 339/2020, ruling of the Dubai Court of Cassation of 8 June 2020; and Case No. 38/2019, ruling of the Dubai Court of Appeal of 8 January 2020.

provisions contained in Articles 53-54 FAL.¹⁴⁰ Under Article 19(2), a party is empowered to request the competent curial court to rule on the matter of jurisdiction within 15 days from the date it has been notified of an affirmative ruling on jurisdiction.¹⁴¹ The 15-day time-limit is strictly enforced by the competent court in accordance with Article 3 CPC.¹⁴² For the avoidance of doubt, the competent court for present purposes is the court of appeal, and not the court of first instance, at the seat of the arbitration;¹⁴³ choice of the wrong court will likely affect the timely filing of the challenge, as a result of which the challenging party will be considered to have waived its right to challenge under Article 19(2).¹⁴⁴ According to prevailing court practice, the 30-day time-limit is regulatory and as such not strictly binding. Importantly, the UAE Courts have confirmed that the curial court's decision under Article 19(2) is final and binding and cannot be appealed.¹⁴⁵ Pending an application under Article 19(2), the arbitration proceedings will be stayed unless decided otherwise by the tribunal upon the request of a party¹⁴⁶. In this sense, the stay of the proceedings is automatic.¹⁴⁷

Under Article 19(2) FAL, the curial courts appear to enjoy a comparatively wide margin of discretion, being invited to review the actual merits of the tribunal's findings on jurisdiction and hence to decide the matter of jurisdiction afresh on the basis of the text of and the information provided by the award.¹⁴⁸ A supervisory court's negative finding on jurisdiction will result in the nullification of the tribunal's affirmative ruling on jurisdiction,¹⁴⁹ and require the parties to initiate a fresh arbitration unless they decide otherwise.

The UAE Courts have further confirmed that pursuant to Article 20(1) FAL, jurisdictional objections must be filed by the time of the submission of a statement of defence and counterclaim within the meaning of Article 30 FAL.¹⁵⁰ In the alternative, an objection that the other party's pleadings fall outside the proper limits of the tribunal's mandate and are as such *extra petita* must be raised in the hearing following the hearing in which those pleadings were originally made.¹⁵¹ Failure to do so has been held to be tantamount to a waiver of right.¹⁵²

Right to be heard. The UAE Courts have confirmed that a respondent's right to be heard is not violated by the exercise of a tribunal's discretion under Article 26.2 of the DIAC Rules to refuse the admission of counterclaims late in the arbitration process, especially in circumstances where those counterclaims were initially considered withdrawn given the respondent's failure to make payment of the corresponding DIAC advance on costs.¹⁵³

¹⁴⁰ See, e.g., Case No. 19/2020, ruling of the Dubai Court of Appeal of 9 September 2020.

¹⁴¹ See Case No. 3/2018, ruling of the Dubai Court of Appeal of 26 September 2018; Case No. 8 of 2018, ruling of the Dubai Court of Appeal of 16 January 2019; Case No. 2/2020, ruling of the Dubai Court of Appeal of 6 October 2020; Case No. 7/2020, ruling of the Dubai Court of Appeal of 4 November 2020; Case No. 12/2020, ruling of the Dubai Court of Appeal of 21 October 2020; and Case No. 23/2020, ruling of the Dubai Court of Appeal of 9 September 2020.

¹⁴² See Case No. 198/2020 – Commercial, ruling of the Dubai Court of Cassation of 13 May 2020; see also Case No. 33/2020, ruling of the Dubai Court of Appeal of 25 November 2020.

¹⁴³ See Case No. 198/2020 – Commercial, ruling of the Dubai Court of Cassation of 13 May 2020.

¹⁴⁴ *Id.*

¹⁴⁵ See Case 225/2019, Dubai Court of Cassation.

¹⁴⁶ See Case No. 32/2019, ruling of the Dubai Court of Appeal of 5 February 2020.

¹⁴⁷ See Case No. 8 of 2018, ruling of the Dubai Court of Cassation of 16 January 2019.

¹⁴⁸ See Case No. 32/2019, ruling of the Dubai Court of Appeal of 5 February 2020, affirmed by Case No. 339/2020, ruling of the Dubai Court of Cassation of 8 June 2020.

¹⁴⁹ See Case No. 32/2019, ruling of the Dubai Court of Appeal of 5 February 2020 affirmed by Case No. 339/2020, ruling of the Dubai Court of Cassation of 8 June 2020, in which the tribunal found in favour of its own jurisdiction despite the claimant's failure to comply with the FIDIC conditions precedent.

¹⁵⁰ See Case No. 3/2018, ruling of the Dubai Court of Appeal of 26 September 2018; Case No. 8/2018, ruling of the Dubai Court of Appeal of 16 January 2019; Case No. 1078/2019 - Commercial, ruling of the Dubai Court of Cassation of 22 January 2020; Case No. 5/2020, ruling of the Dubai Court of Appeal of 12 August 2020; Case No. 26/2020, ruling of the Dubai Court of Appeal of 30 September 2020; Case No. 33/2020, ruling of the Dubai Court of Appeal of 25 November 2020; Case No. 240/2020 – Commercial, ruling of the Dubai Court of Cassation of 6 March 2020; and Case No. 324/2020 – Civil, ruling of the Dubai Court of Cassation of 26 November 2020.

¹⁵¹ See, e.g., Case No. 5/2020, ruling of the Dubai Court of Appeal of 12 August 2020; and Case No. 870/2020 – Commercial, ruling of the Dubai Court of Cassation of 25 November 2020.

¹⁵² See, e.g., Case No. 324/2020 – Civil, ruling of the Dubai Court of Cassation of 26 November 2020; and Case No. 870/2020 – Commercial, ruling of the Dubai Court of Cassation of 25 November 2020.

¹⁵³ See Case No. 217/2019 – Commercial, ruling of the Dubai Court of Cassation of 19 May 2019.

Waiver of right. According to the waiver of right provision at Article 25 FAL, a party that fails to raise an objection to the violation of or a failure to comply with any requirement of the underlying arbitration agreement or a non-mandatory provision of the FAL within an agreed period of time or within seven days from becoming aware of the instance of the violation or non-compliance is deemed to have waived its right to object.¹⁵⁴ This has been found to include the challenge of arbitrators for lack of impartiality and independence or competence.¹⁵⁵ In reliance on this Article, the UAE Courts have found that an award debtor had waived its right to object to the appointment of a tribunal, the scope of the tribunal's jurisdiction and the language of the arbitration in favour of Arabic rather than English in circumstances where such objections were only raised by way of challenge under Article 53 FAL.¹⁵⁶

Governing law. The UAE Courts have acknowledged that pursuant to Article 37(1) FAL, the parties are free to agree the rules applicable to the resolution of the merits of the dispute between them, including foreign, non-UAE law, such as English law.¹⁵⁷

Court-ordered interim measures. In a ruling of 22 May 2019,¹⁵⁸ the Dubai Court of Appeal confirmed that pursuant to Article 18(2) FAL, the summary judge of the Dubai Court of First Instance – as opposed to the chief justice of Dubai Court of Appeal – was no longer competent to hear applications for interim and conservatory measures, including a freezing order over an award debtor's assets pending the arbitration process unless the parties expressly agree to refer to the summary judge.

Tribunal-ordered interim measures. Under Article 21(1)(c) FAL, the UAE Courts have considered tribunals empowered to adopt attachment orders, i.e., orders to ring-fence assets against which a prospective award creditor might be able to enforce a future award debt owed by the (prospective) award debtor.¹⁵⁹

Hearings. It has been confirmed that in accordance with Article 33(1) FAL, hearings are to be held in private (“*in camera*”) in arbitrations under the FAL unless otherwise agreed by the parties.¹⁶⁰

Further, according to recent case law precedent, Article 33(3) FAL allows hearings before the tribunal to be conducted electronically (“*through modern means of telecommunication*”).¹⁶¹

Finally, the UAE Courts have held that the choice of representatives within the meaning of Article 33(5) FAL includes foreign law firms, whether in their capacity as legal advisors registered with, e.g., the Dubai Legal Affairs Department (DLAD) or as non-resident legal consultants so registered.¹⁶²

Electronic communication. According to the UAE Courts, under Article 28 FAL, the tribunal is empowered to conduct arbitration hearings remotely¹⁶³ through modern means of communication, such as video-conference and phone.¹⁶⁴ The use of electronic means of communication in the conduct of the arbitration process and the tribunal's deliberations has been found to take after UAE Law No. 10 of 2017, which introduces electronic communication into the conduct of civil procedures before the courts:

¹⁵⁴ See, e.g., Case No. 247/2020 – Real Estate, ruling of the Dubai Court of Cassation of 13 October 2020; and Case No. 27/2019, ruling of the Dubai Court of Appeal of 11 November 2019.

¹⁵⁵ See Case No. 36/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020.

¹⁵⁶ See Case No. 492/2020 – Commercial, ruling of the Dubai Court of Cassation of 15 July 2020.

¹⁵⁷ See, e.g., Case No. 205/2019 – Commercial, ruling of the Dubai Court of Cassation of 23 June 2019; and Case No. 271/2019 – Commercial, ruling of the Dubai Court of Cassation of 15 December 2019.

¹⁵⁸ Reported in H. Arab, S. Koleilat-Aranjo and M. Darwish, “Dubai Court Clarifies the Competent Authority to Rule on Interim and Conservatory Measures”, *Al Tamimi Law Update* (October 2019).

¹⁵⁹ See Case No. 123/2019 – Real Estate, ruling of the Dubai Court of Cassation of 25 December 2019; Case No. 252/2019 – Real Estate, ruling of the Dubai Court of Cassation of 25 December 2019; and Case No. 281/2019 – Real Estate, ruling of the Dubai Court of Cassation of 25 December 2019.

¹⁶⁰ See, e.g., Case No. 29/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020; and Case No. 34/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020.

¹⁶¹ See, e.g., see Case No. 36/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020.

¹⁶² See Case No. 400/2019 – Commercial, ruling of the Dubai Court of Cassation of 27 October 2019.

¹⁶³ See, e.g., Case No. 29/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020; and Case No. 34/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020.

¹⁶⁴ See, e.g., Case No. 247/2020 – Real Estate, ruling of the Dubai Court of Cassation of 13 October 2020.

“Decree-Law No. 10 of 2017 added a new section to the Civil Procedures Law related to the use of remote communication technology in civil procedures, with the aim of facilitating litigation procedures, as it allowed for the conduct of the trial to take place remotely, so that the litigants would attend and plead the case, express their defence and take evidence procedures in it. The deliberation of judges, the issuance of judgments, their implementation and appeals against them is done remotely by using the means of audio-visual communication and modern electronic technologies, in a manner that does not require the personal presence of the litigants before the court in order to facilitate the procedures of litigation and to achieve with it the principle of confrontation between the litigants in a way that guarantees allowing them to present their defence aspects in the lawsuit remotely; and that the new Arbitration Law No. 6 of 2018 came in line with the provisions of this Chapter Six of the Civil Procedure Code, as stipulated in Articles 28 and 33 of the permissibility of holding arbitration sessions with the parties to the dispute and deliberating the ruling between the arbitrators through means of communication and modern electronic technologies and the unnecessary presence of litigants in person.”¹⁶⁵

Signing of award. Recent case law precedent¹⁶⁶ confirms the public policy nature of the signature requirement and requires signature of both the reasoning and dispositive parts of the award in the same way and manner as used to be the case under former Article 212(5) CPC.¹⁶⁷ In doing so, the UAE Courts have acknowledged that in the event that the reasoning and the dispositive parts of the award overlap on one and the same page of the award, it is sufficient to sign that page of the award in addition to the final page provided that the dispositive part of the award extends beyond the overlapping page:

“It is also established by the case law precedent of this Court that the arbitrator’s signature is a form and content requirement that should be included in the award, given that the signature is the only evidence affirming that the award lawfully exists. If the award is not signed by the arbitrator, no one may attribute the award to the arbitrator. For that purpose, the arbitral award means the reasoning and the dispositive parts of the award. The arbitrator should sign both the reasoning and the dispositive part of the award. Otherwise, the award will be invalid. This excludes the case in which the reasoning of the award, or part thereof, is connected to the page which contains the dispositive part of the award and which is signed by the arbitrator. The legal effect of such a signature is that it extends to the reasoning of the award in a way that satisfies the legislator’s intention with respect to the signature of the award. However, if the reasoning is contained in a page that are all separated from the dispositive part of the award, all pages shall be signed by the arbitrator in addition to the final page that contains the dispositive part of the award. Otherwise, the award will be invalid. Such invalidity is of public order, to be raised of the courts’ own motion.”¹⁶⁸

Further, the UAE Courts have denied any requirement to sign the cover page of an award provided that the data that typically feature on that page, such as the names and addresses of the parties and their representatives, the seat of the arbitration, the (institutional) rules applicable to the arbitration and the date of issuance, are also contained in the body of the award.¹⁶⁹

Further form and content requirements of award. It has been found that failure to state an arbitrator’s nationality in the text of the award pursuant to Article 41(5) FAL will not be a valid ground for setting aside or nullifying the award.¹⁷⁰ An accurate summary of the underlying arbitration agreement has been found sufficient for inclusion in the arbitral award to satisfy Article 41(5) FAL.¹⁷¹

Time-limit for award. In application of Article 42(1) FAL, which empowers the parties to agree on a time-limit for rendering the award, the UAE Courts have found that to the extent that there are no specific

¹⁶⁵ See Case No. 36/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020.

¹⁶⁶ See Case No. 1083/2019 - *Ali & Sons Marine Engineering Factory LLC v E-Marine FZC*, ruling of the Dubai Court of Cassation of 14 June 2020.

¹⁶⁷ See G. Blanke, *Commentary on the UAE Arbitration Chapter*, Thomson Reuters/Sweet&Maxwell, 2017, at II-108.

¹⁶⁸ See Case No. 1083/2019 - *Ali & Sons Marine Engineering Factory LLC v E-Marine FZC*, ruling of the Dubai Court of Cassation of 14 June 2020.

¹⁶⁹ See, e.g., Case No. 51/2020 – Real Estate, ruling of the Dubai Court of Cassation of 14 May 2020.

¹⁷⁰ See, e.g., Case No. 29/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020; and Case No. 34/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020.

¹⁷¹ See Case No. 933/2018, ruling of the Dubai Court of Cassation of 10 February 2019; and Case No. 1059/2018, ruling of the Dubai Court of Cassation of 17 March 2019.

provisions in the selected arbitration rules, such as the DIFC-LCIA Rules, that govern the time-limit for rendering an award, no such time-limits find application to the arbitration.¹⁷² Further, a party who is responsible for a delay in the arbitration process that prompts the expiry of the time-limit may not raise the expiry of that time-limit as a ground for challenge on the basis that a party must not benefit from its own wrongdoing.¹⁷³

Notification of award. According to recent case law precedent, notification of the award under Article 44 FAL needs to be effected on the parties in person as opposed to their legal representative¹⁷⁴ on the basis that pursuant to Article 45(1) FAL, an arbitral award terminates an arbitration process and as such, the notification provisions that apply over the course of that process do not extend to the notification of the award.¹⁷⁵ The burden to prove that the award has not been received on time rests upon the aggrieved party.¹⁷⁶

Costs. In a ruling of 28 April 2019,¹⁷⁷ the Dubai Court of Cassation confirmed a restrictive interpretation of Article 46(1) FAL to exclude a tribunal's power to award party costs:

“The text [...] the meaning of th[e] text [of the first paragraph of Article (46) of Law No. (6) of 2018 regarding arbitration] is that the arbitration expenses assessed by the arbitral tribunal [...] are the fees and expenses incurred by any member of the arbitral tribunal in order to implement its duties and the expenses of appointing experts by the tribunal. Therefore, the costs that the parties pay to the legal representatives who represent them in the arbitration procedures or prepare and attend the lawsuit and advise the parties before the start of the arbitration procedures do not fall within these legal expenses. And in the absence of a legal text or explicit wording in the arbitral clause to that effect and given that the arbitration deed concluded between the two parties to the lawsuit did not include an agreement that one of the parties would bear the legal expenses, so it is not obligatory [...] and the agreement concluded between the two parties did not include an agreement on fees, expenses and legal costs [...]”¹⁷⁸

More recent case law precedent suggests that legal or party representatives are unable to confer upon a tribunal a power to award counsel fees unless having been specifically authorised to do so by the original rightsholder (e.g., by a special power of attorney in accordance with Article 58(2) CPC) on the basis that the entitlement to such fees arises from the contractual engagement between the legal or party representative and the original rightsholder, which in turn is distinct and as such separate from the contract subject to and of the dispute in arbitration.¹⁷⁹ Further, case law precedent of the UAE Courts confirms that in derogation from the limited scope of recoverable costs under the DIAC Rules, parties are free to confer an express power on the tribunal to award party costs.¹⁸⁰

¹⁷² See, e.g., Case No. 51/2020 – Real Estate, ruling of the Dubai Court of Cassation of 14 May 2020); to the extent that there are, such as Article 36 of the DIAC Rules, they do (see Case No. 764/2019 – Commercial, ruling of the Dubai Court of Cassation of 16 October 2019; and Case No. 1003/2019 – Commercial, ruling of the Dubai Court of Cassation of 1 January 2020).

¹⁷³ See Case No. 36/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020.

¹⁷⁴ See Case No. 1201/2018 – Commercial, ruling of the Dubai Court of Cassation of 26 May 2019; and Case No. 242/2019 – Commercial, ruling of the Dubai Court of Cassation of 26 May 2019.

¹⁷⁵ See Case No. 1201/2018 – Commercial, ruling of the Dubai Court of Cassation of 26 May 2019.

¹⁷⁶ See Case No. 33/2020 – Commercial, ruling of the Dubai Court of Cassation of 4 October 2020.

¹⁷⁷ Case No. 1029/2018 – Commercial, ruling of the Dubai Court of Cassation of 28 April 2019.

¹⁷⁸ See Case No. 1029/2018 – Commercial, ruling of the Dubai Court of Cassation of 28 April 2019.

¹⁷⁹ See Case No. 990/2019 – Commercial, ruling of the Dubai Court of Cassation of 5 January 2020.

¹⁸⁰ See, e.g., Case No. 205/2019 – Commercial, ruling of the Dubai Court of Cassation of 23 June 2019.

Challenge of awards. The UAE Courts have found that the grounds for challenge under the FAL are strictly limited to those listed at Article 53 FAL¹⁸¹ and must be interpreted narrowly¹⁸² and as such must not be expanded by analogical reasoning.¹⁸³ In their supervisory role under Article 53 FAL, the courts are limited to an examination of the form and content requirements of the subject award, its compliance with public policy, compliance of the arbitration process with due process (the “*basic principles of litigation*”)¹⁸⁴ and the absence of any conflict with a previous court ruling involving the same parties.¹⁸⁵ The burden to prove that the subject award is affected by one of the listed grounds rests with the challenging party;¹⁸⁶ according to more recent case law precedent, there is a presumption in favour of compliance unless proven otherwise¹⁸⁷.

All the grounds listed at Article 53(1) FAL are *procedural* in nature, go either to the existence or form of the underlying arbitration agreement or the conduct of the arbitration process¹⁸⁸ and do not allow the re-opening of the substance of the arbitrator’s decision-making.¹⁸⁹ Accordingly, only procedural errors and not errors of assessment can form a successful ground for nullification.¹⁹⁰

Public policy. The UAE Courts have found that the public policy concept under Article 53(2)(b) FAL encapsulates the definition of UAE public policy within the meaning of Article 3 of the UAE Civil Transactions Code:¹⁹¹

“although [the Law] does not specify what is meant by public order, but it is agreed that it includes the rules that aim to achieve the supreme interest of the country, whether in terms of political, social

¹⁸¹ See, e.g., Case No. 1029/2018 – Commercial, ruling of the Dubai Court of Cassation of 28 April 2019; Case No. 205/2019 – Commercial, ruling of the Dubai Court of Cassation of 23 June 2019; Case No. 217/2019 – Commercial, ruling of the Dubai Court of Cassation of 19 May 2019; Case No. 231/2019 – Real Estate, ruling of the Dubai Court of Cassation of 4 December 2019; Case No. 236/2019 – Real Estate, ruling of the Dubai Court of Cassation of 11 December 2019; Case No. 1003/2019 – Commercial, ruling of the Dubai Court of Cassation of 1 January 2020; Case No. 1013/2019 – Commercial, ruling of the Dubai Court of Cassation of 19 January 2020; Case No. 36/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020; Case No. 168/2020 – Commercial, ruling of the Dubai Court of Cassation of 18 March 2020; and Case No. 198/2020 – Commercial, ruling of the Dubai Court of Cassation of 13 May 2020; Case No. 412/2020 – Commercial, ruling of the Dubai Court of Cassation of 1 July 2020; Case No. 414/2020 – Commercial, ruling of the Dubai Court of Cassation of 1 July 2020; Case No. 516/2020 – Commercial, ruling of the Dubai Court of Cassation of 15 July 2020; Case No. 607/2020 – Commercial, ruling of the Dubai Court of Cassation of 11 October 2020; Case No. 735/2020 – Commercial, ruling of the Dubai Court of Cassation of 4 October 2020; and Case No. 807/2020 – Commercial, ruling of the Dubai Court of Cassation of 25 October 2020.

¹⁸² See Case No. 372/2019 – Commercial, ruling of the Dubai Court of Cassation of 7 July 2019; Case No. 1003/2019 – Commercial, ruling of the Dubai Court of Cassation of 19 January 2020; Case No. 1013/2019, ruling of the Dubai Court of Cassation of 19 January 2020; Case No. 1078/2019 – Commercial, ruling of the Dubai Court of Cassation of 22 January 2020; Case No. 1118/2019 – Commercial, Dubai Court of Cassation of 19 February 2020.

¹⁸³ See Case No. 205/2019 – Commercial, ruling of the Dubai Court of Cassation of 23 June 2019; Case No. 29/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020; Case No. 34/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020; Case No. 412/2020 – Commercial, ruling of the Dubai Court of Cassation of 1 July 2020; and Case No. 414/2020 – Commercial, ruling of the Dubai Court of Cassation of 1 July 2020.

¹⁸⁴ See, e.g., Case No. 29/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020; Case No. 34/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020; Case No. 35/2020, ruling of the Dubai Court of Appeal of 30 December 2020; Case No. 247/2020 – Real Estate, ruling of the Dubai Court of Cassation of 13 October 2020; and Case No. 492/2020 – Commercial, ruling of the Dubai Court of Cassation of 15 July 2020.

¹⁸⁵ See Case No. 22/2019 – Real Estate, ruling of the Dubai Court of Cassation of 27 March 2019; Case No. 199/2020 – Commercial, ruling of the Dubai Court of Cassation of 20 May 2020; and Case No. 205/2020 – Commercial, ruling of the Dubai Court of Cassation of 20 May 2020.

¹⁸⁶ See, e.g., Case No. 236/2019 – Real Estate, ruling of the Dubai Court of Cassation of 11 December 2019; Case No. 1003/2019 – Commercial, ruling of the Dubai Court of Cassation of 1 January 2020; Case No. 1013/2019 – Commercial, ruling of the Dubai Court of Cassation of 19 January 2020; and Case No. 168/2020 – Commercial, ruling of the Dubai Court of Cassation of 18 March 2020.

¹⁸⁷ See Case No. 1003/2019 – Commercial, ruling of the Dubai Court of Cassation of 1 January 2020; Case No. 1013/2019 – Commercial, ruling of the Dubai Court of Cassation of 19 January 2020; and Case No. 735/2020 – Commercial, ruling of the Dubai Court of Cassation of 4 October 2020.

¹⁸⁸ See, e.g., Case No. 205/2019 – Commercial, ruling of the Dubai Court of Cassation of 23 June 2019; Case No. 29/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020; Case No. 34/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020; Case No. 36/2020 – Commercial, ruling of the Dubai Court of Cassation of 7 December 2020; Case No. 412/2020 – Commercial, ruling of the Dubai Court of Cassation of 1 July 2020; Case No. 607/2020 – Commercial, ruling of the Dubai Court of Cassation of 11 October 2020; and Case No. 870/2020 – Commercial, ruling of the Dubai Court of Cassation of 25 November 2020.

¹⁸⁹ See, e.g., Case No. 492/2020 – Commercial, ruling of the Dubai Court of Cassation of 15 July 2020; and Case No. 246/2020 – Civil, ruling of the Dubai Court of Cassation of 24 September 2020.

¹⁹⁰ See, e.g., Case No. 372/2019 – Commercial, ruling of the Dubai Court of Cassation of 7 July 2019; Case No. 446/2019 – Commercial, ruling of the Dubai Court of Cassation of 21 July 2019; Case No. 909/2019 – Commercial, ruling of the Dubai Court of Cassation of 29 January 2020; and Case No. 144/2020 – Commercial, ruling of the Dubai Court of Cassation of 18 March 2020.

¹⁹¹ See, e.g., Case No. 1003/2019 – Commercial, ruling of the Dubai Court of Cassation of 1 January 2020.

or economic and related to the natural, material and moral condition of an organized society in it; this interest takes precedence over the interests of individuals, and its idea is based on the interest of the whole group, ‘with what it leads’, the idea of public order affecting the entity of the state or relating to a basic and general interest of the group. This and what I consider public order is stipulated in Article (3) of the Federal Civil Transactions Law promulgated by Law No. (5) of 1985 amended by Federal Law No. (1) of 1987. Among them are those related to personal status, freedom of trade and the circulation of wealth and other rules and foundations upon which society is based that do not violate the peremptory provisions and the basic principles of Islamic law.”¹⁹²

Given its public policy nature, failure to comply with the signature requirement prompts the absolute invalidity of the award, i.e., renders the award null and void *ab initio*¹⁹³ and as such constitutes a valid ground for nullification. That said, courts are required to give priority to the procedural validity of the arbitration process over reasons for annulment of an award in accordance with Article 54(6) FAL, including where the ground for annulment is one of violation of public policy, and allow the rectification of any clerical shortcomings within the meaning of Article 54(6) FAL:

“under the new Arbitration Law [i.e., the FAL], the legislator reduced the causes of invalidity by stating that the requirements of procedural action should supersede the grounds of its invalidity or deficiency, considering that the objective of the action is to serve the right. For such purpose, the legislator provided for Art. 54(6) [FAL], allowing the tribunal – upon request from a party – to correct an invalidity in the form of the award, which in turn complies with the general principles of procedure according to which no invalidity may be adjudicated if the instance of invalidity is rectified [...]”¹⁹⁴

The termination of agreements relating to the sale and purchase of land (short of matters of registration) do not qualify as of public policy and are as such capable of being arbitrated.¹⁹⁵ Conversely, matters of registration with respect to off-plan lands or real estate do and therefore cannot be arbitrated.¹⁹⁶ The UAE Courts have also refused to nullify an award of contractually-agreed compound interest, which, according to the courts, does not constitute *riba* or usurious interest and falls within the arbitrator’s discretionary powers to assess compensation, which in turn does not constitute a valid ground for nullification:

“[I]t is well established that the contractually-agreed [compound] interest that is payable to the creditor upon the debtor’s delay in paying the debt despite its due date does not qualify as *riba*, but rather is a form of compensation for the harm suffered by the creditor as a result of the debtor’s delay in paying the debt despite its due date, and prevents the creditor from benefiting from it, which is a presumed damage that does not admit proof to the contrary and the creditor must be compensated for it in exchange for a debtor’s fault, just for the delay in payment by itself, it does not change its nature as compensation and its legitimacy in determining it in a certain percentage as agreed upon by the two parties at the conclusion of the contract. The legislator did not intend to criminalize dealing with interest in civil and commercial transactions except between natural persons as explicitly stipulated in Article 409 of the Penal Code. [...] As for the claim that the plaintiffs are not entitled to these benefits, it is in fact a controversy over the arbitrator’s discretionary authority to assess compensation that does not fit a ground of nullity of the arbitration award, and then the court decides to reject this reason [...]”¹⁹⁷

More recently, the UAE Courts have confirmed that contracting parties cannot contract out of requirements of public policy.¹⁹⁸ As the UAE Courts stated in a ruling of 19 May 2019:

“[I]t is decided that the legal rules that are considered public order are rules intended to achieve a general political, social or economic interest related to the higher society system and override the

¹⁹² See Case No. 22/2019 – Real Estate, ruling of the Dubai Court of Cassation of 27 March 2019.

¹⁹³ See Case No. 1083/2019 - *Ali & Sons Marine Engineering Factory LLC v E-Marine FZC*, ruling of the Dubai Court of Cassation of 14 June 2020.

¹⁹⁴ *Id.*

¹⁹⁵ See, e.g., Case No. 231/2019 – Real Estate, ruling of the Dubai Court of Cassation of 4 December 2019; and Case No. 84/2020 – Real Estate, ruling of the Dubai Court of Cassation of 21 May 2020.

¹⁹⁶ See Case No. 5/2020 – Real Estate, ruling of the Dubai Court of Cassation of 19 March 2020; and Case No. 84/2020 – Real Estate, ruling of the Dubai Court of Cassation of 21 May 2020.

¹⁹⁷ See Case No. 217/2019 – Commercial, ruling of the Dubai Court of Cassation of 19 May 2019.

¹⁹⁸ See, e.g., Case No. 1003/2019 – Commercial, ruling of the Dubai Court of Cassation of 1 January 2020.

interest of individuals, so that all individuals must take into account and realize this interest and they may not oppose it by agreements among themselves even if they have concluded these agreements for their own individual interests.”¹⁹⁹

Survival of arbitration agreement. Contrary to the position that prevailed under the former UAE Arbitration Chapter,²⁰⁰ the UAE Courts have confirmed that the nullification or annulment of the award will not affect the underlying arbitration agreement, which in turn survives a successful challenge of the subject award, unless the ground for annulment is the absence, extinction, nullity or lack of enforceability of the arbitration agreement itself.²⁰¹ This will be the case in circumstances where the parties to a DIAC arbitration fail to defray the costs of the arbitration within the meaning of the DIAC Rules, resulting in the closure of the DIAC reference.²⁰²

New York Convention. Importantly, applying Article 88 of Cabinet Decision No. 57 of 2018²⁰³, the UAE Courts have confirmed that by adoption of Federal Decree No. 43 of 2006, the provisions of the New York Convention form part of the domestic laws of the UAE and as a result, the courts are obliged to enforce foreign awards in accordance with the provisions of the New York Convention.²⁰⁴ Enforcement of foreign awards may only be refused on one of the grounds listed under Article V. of the Convention.²⁰⁵

1.3 Case law precedent of the JT

The Dubai-DIFC Joint Judicial Tribunal (the “JT”) was established by Decree of the Ruler of Dubai²⁰⁶ to deal with conflicts of jurisdiction between the onshore Dubai and the offshore Dubai International Financial Centre (“DIFC”) Courts. Generally speaking, the JT’s competence is confined to situations of genuine jurisdictional conflict, that is where both the onshore and offshore courts have been seized simultaneously in related proceedings or where both courts have declined jurisdiction on the same or related subject-matter. In an arbitral context more specifically, a qualifying conflict of jurisdiction typically arises in circumstances where an award creditor seeks to enforce a domestic (whether on- or offshore) award before the DIFC Courts pending an action for nullification of the same award initiated by the award debtor before the onshore Dubai Courts. Some of these cases have given rise to the operation of the DIFC Courts as a conduit jurisdiction for the recognition and enforcement of onshore non-DIFC awards for onward execution against the award debtor’s assets offshore by virtue of the area of free movement of judicial instruments, including ratified awards, established by Article 7 of the Judicial Authority Law (the “JAL”).²⁰⁷

In a ruling of 11 December 2019,²⁰⁸ the JT was required to deal with the conflicting jurisdiction between the onshore Dubai and the offshore DIFC Courts for nullification and enforcement of a domestic DIFC-award rendered under the DIFC Arbitration Law. In doing so, the JT essentially confirmed that the DIFC Courts were properly competent to hear actions for nullification of awards rendered under the DIFC Arbitration Law. Unwittingly, the JT also confirmed the DIFC Courts’ role as a conduit for the enforcement of DIFC awards for onward execution against non-DIFC assets of award debtors based in Abu Dhabi. Interestingly, albeit that the present case appears straightforward on its face, dealing with the nullification and enforcement

¹⁹⁹ See Case No. 217/2019 – Commercial, ruling of the Dubai Court of Cassation of 19 May 2019.

²⁰⁰ See G. Blanke, *Commentary on the UAE Arbitration Chapter*, Thomson Reuters/Sweet&Maxwell, 2017, at II-147.

²⁰¹ See Case No. 134/2018 – Commercial, ruling of the Dubai Court of Cassation of 29 July 2018; and Case No. 215/2019 – Commercial, ruling of the Dubai Court of Cassation of 7 July 2019.

²⁰² See Case No. 215/2019 – Commercial, ruling of the Dubai Court of Cassation of 7 July 2019; and Case No. 791/2019 – Commercial, ruling of the Dubai Court of Cassation of 19 January 2020.

²⁰³ In relation to the Executive Regulation of the UAE Civil Procedures Law, 9 December 2018.

²⁰⁴ See Case No. 1016/2020 – Commercial, ruling of the Dubai Court of Cassation of 27 December 2020.

²⁰⁵ *Id.*

²⁰⁶ Decree No. (19) of 2016 forming the Judicial Committee of the Dubai Court and the DIFC Courts, dated 9 June 2016.

²⁰⁷ Dubai Law No. 12 of 2004, as amended by Dubai Law No. 16 of 2011.

²⁰⁸ See Cassation No. 8/2019 (JT) – *Al Taena: AF Construction Company LLC (formerly Al Futtaim Carillion – Abu Dhabi LLC v. Power Transmission Gulf* <https://www.difccourts.ae/wp-content/uploads/2019/12/Cassation-No-8-2019-AL-TAENA-AF-CONSTRUCTION-COMPANY-LLC-v-POWER-TRANSMISSION-GULF.pdf>). This section is based on G. Blanke, “The Judicial Tribunal confirms DIFC Courts’ proper jurisdiction for challenge of awards under the DIFC Arbitration Law and the role of the DIFC Courts as a conduit”, *Kluwer Arbitration Blog*, 13 February 2020, available online at <http://arbitrationblog.kluwerarbitration.com/2020/02/13/the-judicial-tribunal-confirms-difc-courts-proper-jurisdiction-for-challenge-of-awards-under-the-difc-arbitration-law-and-the-role-of-the-difc-courts-as-a-conduit/>.

of a DIFC Award through the DIFC Courts, it is evident that given the registration of both Parties in onshore Abu Dhabi, this is, more likely than not, a case that will ultimately require *execution* of the award, once ratified by the DIFC Courts, against assets of the award debtor in onshore Abu Dhabi, and in this sense require the DIFC Courts to act as a conduit. To say the least, no mention is made in the JT's ruling of the presence of any of the award debtor's assets in the DIFC.²⁰⁹

By way of background, the Appellant, Al Taena, a subcontractor with registered offices in mainland Abu Dhabi, entered into a subcontract agreement with the respondent, Power Transmission Gulf, equally registered in mainland Abu Dhabi, for the supply, manufacture, installation, operation and testing of mechanical and electrical works and the plumbing for New York University in Abu Dhabi (the "Subcontract"). The Subcontract contained an arbitration clause providing for any disputes between the Parties to be referred to arbitration under the Arbitration Regulations of the Abu Dhabi Commercial Conciliation and Arbitration Centre (the "ADCCAC"), to be held in Abu Dhabi before a sole arbitrator (the "Arbitration Clause"). The Arbitration Clause was subsequently amended, shifting the arbitral forum from ADCCAC to the DIFC-London Court of International Arbitration (the "DIFC-LCIA") and providing for a three-member panel to conduct any arbitration under the Rules of Arbitration of the DIFC-LCIA (the "DIFC-LCIA Rules") and the DIFC Arbitration Law (the "Arbitration Agreement"). In addition, Clause 10 of the Subcontract provided for the exclusive jurisdiction of the DIFC Courts in relation to any dispute arising between the Parties with respect to the Arbitration Agreement.

Subsequently, a dispute arose between the Parties and was referred to DIFC-LCIA arbitration under the DIFC Arbitration Law.²¹⁰ The arbitral proceedings were conducted in Dubai Marina, that is onshore, i.e., outside the DIFC. On 15 March 2019, the Tribunal rendered an award in favour of the respondent. In further course, the respondent in its capacity as award creditor filed for recognition and enforcement before DIFCCFI.²¹¹ Around the same time, the Appellant in its capacity as award debtor applied for the nullification of the award to the onshore Dubai Courts²¹² on the basis of the purported invalidity of the award and the purported exclusive jurisdiction of the Dubai Courts given the fact that the arbitral proceedings had been conducted in mainland Dubai and hence outside the DIFC.

Against this background, the JT held as follows:

- To start, the JT cited in relevant part Article 5(1) and (2) of the DIFC Courts Law²¹³ in order to conclude:

"Although the DIFC and the DIFC Arbitration Centre - London International Arbitration Tribunal are separate entities, the DIFC Arbitration Centre is an established institution in the DIFC, and therefore pursuant to Article 5, paragraph 1 / a above, the DIFC Court shall be responsible for monitoring the aforementioned arbitration award and not the Dubai Court."²¹⁴

It is somewhat difficult to follow this type of reasoning. The DIFCCFI's competence to hear actions for recognition and enforcement of DIFC awards stems from Article 42(1) of the DIFC Arbitration Law, which provides that "[a]n 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". Further, the DIFC Courts' powers conferred by the DIFC Arbitration Law originate in Article 5(1)(E) of the DIFC Court Law, which provides for the "exclusive jurisdiction" of the DIFCCFI "to hear and determine [...] any [a]pplication or action that the courts have the power to consider under the Centre's laws and regulations", one of those laws being the DIFC Arbitration Law. Contrary to the JT's proposition, the DIFCCFI's competence in the present circumstances does not result from Article 5(1)(A), which confers exclusive

²⁰⁹ Despite the passing reference to the purported *execution* of the subject award by the DIFC Courts, see the ruling in Cassation No. 8/2019 (JT), at para. 4.

²¹⁰ See Arbitration Case No. 16068 DL.

²¹¹ See DIFCCFI Case No. ARB-009-2019.

²¹² See Petition No. 13/2019.

²¹³ See DIFC Law No. 10/2004.

²¹⁴ See the ruling in Cassation No. 8/2019 (JT), at para. 9.

jurisdiction upon the DIFCCFI for any “[c]ivil or commercial applications and claims to which the Centre or any of the Centre’s bodies, the Centre’s institutions or the Centre’s licensed institutions are a party” (no such bodies or institutions being involved in the present proceedings).

- The JT also emphasised the apparent agreement between the Parties to arbitration in the terms set out in the Arbitration Agreement, including in particular the DIFC Courts’ competence to hear actions for recognition and nullification of awards under the DIFC Arbitration Law.²¹⁵ This, no doubt, is a correct assessment of the position under the DIFC Arbitration Law, including in particular Article 42(1) in the terms set out above.
- The JT further confirmed that according to Article 16(2) of the DIFC-LCIA Rules, a DIFC-LCIA tribunal is empowered to hold meetings and hearings outside the legal place or the seat of the arbitration: A resultant award would still be considered issued by the DIFC-LCIA.²¹⁶ This proposition is correct in principle, but would benefit from the clarification that Article 38(3) of the DIFC Arbitration Law equally confirms that “[t]he award shall be deemed to have been made at the Seat of the Arbitration” and according to Article 27(2) of the DIFC Arbitration Law, “the Arbitral Tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties [...].”
- That said, the JT also made reference to the “general jurisdiction” of the onshore Dubai Courts.²¹⁷ It is not clear what this general jurisdiction is. Given that there is no judicial hierarchy between the onshore Dubai and the offshore DIFC Courts, the two courts are of equal status and are as such empowered to determine the limits of their own jurisdiction, neither of the having a “general” jurisdiction that trumps the jurisdiction of the respectively other.

In the light of the foregoing, the JT, correctly in our view, concluded in favour of the DIFC Courts’ jurisdiction. For the avoidance of doubt, even without the provision at Clause 10 of the Subcontract, the DIFC Courts are competent to hear actions for nullification in their curial capacity in the terms of Article 41 of the DIFC Arbitration Law. To the extent that parties contract into the DIFC Arbitration Law, the DIFC Courts have competence to exert such curial functions.

On a further note, the JT’s ruling in *Al Taena v. Power Transmission Gulf* raises the question of the extent to which the DIFC Courts are competent to serve as a conduit for the enforcement of awards (whether on- or offshore) for onward execution outside the DIFC, here in mainland Abu Dhabi. This could be facilitated by the operation of Article 7 JAL, which establishes a system of mutual recognition of DIFC Court orders for enforcement of on- and offshore awards before onshore Dubai Courts, without a review on the merits. A mainland Dubai Court order recognizing the DIFC Court order for recognition and enforcement would in further course be subject to recognition by the Abu Dhabi onshore courts under Article 11 of the UAE Federal Law No. 11/1973.²¹⁸

In the alternative, the DIFC Court order might benefit directly from the terms of UAE Federal Law No. 11/1973, the DIFC Courts qualifying as a court of the Federation. In a further alternative, the DIFC award itself might be enforceable in the terms of Article 13 of UAE Federal Law No. 11/1973,²¹⁹ there being no need for the more cumbersome enforcement process via the Dubai onshore courts or even the DIFCCFI.

²¹⁵ *Id.*, at para. 8.

²¹⁶ *Id.*, at para. 10.

²¹⁷ *Id.*, at para. 10.

²¹⁸ Concerning the Organization of Judicial Relationships Amongst Emirates Members in the Federation, issued 25 July 1973.

²¹⁹ Which provides verbatim as follows: “The decisions of the arbitrators issued in one of the emirates shall be executable in any other emirate member of the federation. The juridical body being demanded to carry out the execution cannot reinvestigate the same incident concerning which the decision of the arbitrators was issued.”

2. Developments in the DIFC²²⁰

The DIFC has seen a number of positive developments in 2020, both at the level of case law precedent and in terms of its regulatory framework, giving rise in particular to the launch of the 2021 DIFC-LCIA Rules.

2.1 Case law developments

The DIFCCFI has issued at least five arbitration-relevant rulings in 2021 that deserve specific mention.

2.1.1 *Loralia Group LLC v. Landen Saudi Company*²²¹

In a ruling published in 2020²²², the DIFCCFI contemplated the application of UAE public policy within the meaning of Articles 41(2)(b)(iii) and 44(1)(b)(vii) of the DIFC Arbitration Law. These Articles encapsulate the public policy exception as a ground for challenging or refusing to enforce an arbitral award rendered in the DIFC. More specifically, Article 41(2)(b)(iii) empowers the DIFC Courts to nullify or set aside an award that “*is in conflict with the public policy of the UAE*” whereas Article 44(1)(b)(vii) provides a corresponding tool to the DIFC Courts to refuse enforcement for violation of that same public policy. Importantly, the public policy concerned here is that of the UAE and as such suggests that the public policy applicable in the DIFC is identical to the public policy applicable onshore. Albeit that the ruling under discussion appears to confirm as much, it suggests that even though UAE public policy is identical as a concept and in content onshore and offshore, it might *apply differently* in the DIFC.

By way of background, in the main action, the DIFCCFI was asked to deal with a Part 8 application for the setting aside of a DIFC award rendered under the DIFC-LCIA Rules in favour of Landen Saudi Company (“LSC”), the respondent. LSC was awarded US\$ 7,356,016.22 plus costs and post-award interest for breach by Loralia Group LLC (“Loralia”), the applicant, of a distribution agreement in relation to the promotion and sale of the applicant’s products in the Kingdom of Saudi Arabia. Importantly, the costs element of the award included an award of the respondent’s legal fees in an amount of US\$ 692,002.66, US\$ 514,921.11 of which were calculated on the basis of 7% of the amount awarded to the respondent in the terms of the award and as such, according to the applicant, constituted a contingency fee in violation of UAE public policy, both under Article 41(2)(b)(iii) and under Article 44(1)(b)(vii) of the DIFC Arbitration Law, the latter in response to the LSC’s cross-application for enforcement of the award.

In Loralia’s submission, public policy within the meaning of these Articles was to be construed as federal UAE public policy, a public policy that was unitary and indivisible in its application throughout the UAE. According to Loralia, there was more specifically a UAE public policy against contingency fees, derived from and supported by the following sources, both onshore and offshore:

- Article 31 of Federal Law No. 23/1991 regarding the Regulation of the Legal Profession (“Law No. 23”), according to which “*it shall not be permitted for a lawyer to buy all of part of the rights which are in dispute, nor to agree to take a part thereof in respect of fees.*”;
- Ministerial Resolution No. 666/2015 on the Code of Ethics and Professional Conduct of the Legal Profession in the UAE (“Resolution No. 666”), which ensured that Law No. 23 applied to all lawyers providing legal services in the UAE, including those acting in the DIFC and those involved in arbitration;

²²⁰ For some background on free zone arbitration in the DIFC, see G. Blanke, “Free Zone Arbitration in the United Arab Emirates: DIFC v. ADGM (Part I)”, 35(5) J. of Int. Arb. (2018), pp. 541-573.

²²¹ This section is based on G. Blanke, “UAE public policy at the crossroads between onshore and offshore: a variable geometry of sorts”, Practical Law Arbitration Blog, Thomson Reuters, 18 June 2020, available online at <http://arbitrationblog.practicallaw.com/uae-public-policy-at-the-crossroads-between-onshore-and-offshore-a-variable-geometry-of-sorts/>. For a contextual analysis, taking account of an inchoate differentiation of the UAE public policy concept onshore and offshore, see G. Blanke, “UAE Public Policy in the DIFC: Towards a Differentiated Approach”, Westlaw Middle East, Thomson Reuters, May 2020.

²²² See *Loralia Group LLC v. Landen Saudi Company* [2018] DIFC ARB 004.

- Article 7(c) of the Draft Charter for the Conduct of Advocates and Legal Consultants in the Emirate of Dubai, which stated that fees “*must not be a share in kind of the disputed property rights.*”;
- Article 9.3 of the DIFC Courts’ Code of Best Legal Professional Practice (the “DIFC Courts’ Best Practice Code”), according to which “[a] Lawyer may not receive a contingency fee in respect of any litigious or contentious action.”; and
- Article 8(2) of the Mandatory Code of Conduct for Legal Practitioners in the DIFC Courts (the “DIFC Courts’ Mandatory COC”), according to which “[p]ractitioners shall not [...] undertake work in a manner which improperly increases the fees payable to them.” For the avoidance of doubt, LSC’s lawyers in the arbitration being registered with the DIFC Courts and representing a party in a DIFC-seated arbitration under the DIFC-LCIA Rules, Loralia submitted that the disputed contingency fee arrangement fell within the scope of Article 8(2), DIFC Courts’ Mandatory COC.

In response, LSC essentially contended for a transnational approach to UAE public policy, which did not prohibit contingency fee arrangements, failing which LSC invited the Court to differentiate between DIFC and onshore Dubai public policy, advocating in favour of a transnational approach to public policy in the DIFC, which – according to LSC – was allowed to operate differently from onshore Dubai.

Against this background, H.E. Justice Shamlan Al Sawaheli, handing down the ruling of the DIFCCFI, concurred with the submission that contingency fees formed part of onshore UAE public policy, placing reliance in particular on Law No. 23 read together with Resolution No. 666. According to the Justice, the prohibition of contingency fees applied both to litigation and arbitration. That said, the Justice ultimately concluded against the linear application to the DIFC of the prohibition on contingency fees that prevailed in the UAE and introduced a variable geometry of sorts in the application of UAE public policy onshore/offshore.

More specifically, in the Justice’s reasoning, the structured body of legal instruments with respect to lawyer conduct and remuneration applicable in the DIFC warranted a *differentiation* in the application of the UAE public policy against contingency fees in the DIFC and onshore Dubai. Focusing on the DIFC as the main area of concern, the Justice concluded that even though contingency fee arrangements applied to lawyers’ fees might be illegal *per se* in onshore Dubai (on the basis of a plain reading of Article 31 of Law No. 23, combined with the various provisions of Resolution No. 666)²²³, the legal instruments in place with respect to lawyers’ fees in the DIFC warranted a more *nuanced* approach (the DIFC Courts’ Mandatory COC not containing any express reference to contingency fees)²²⁴, inviting in turn – in the Justice’s words – a “*case-by-case scrutiny in the DIFC*”²²⁵. In the Justice’s reasoning, the common point of reference to which considerations on the admissibility of contingency fee arrangements were anchored both onshore and offshore was the question as to whether they qualified as “*reasonable fees*”²²⁶. Whereas the onshore answer to this question might be categorically in the negative in that contingency fees were regarded as falling within the category of unreasonable legal fees by definition, in the Justice’s view, not all contingency fees were unreasonable within the DIFC: To the extent that they were not, they would be regarded as being compliant with UAE public policy.²²⁷ Whether or not a specific contingency fee arrangement qualified as reasonable and was hence compliant or not was a question left for determination by the merits judge or an arbitral tribunal on a case-by-case basis.

Applied to the facts at hand, Justice Shamlan found that the subject Tribunal had made sure in its award that the assessment of LSC lawyers’ fees was reasonable and concurred with that assessment. On that basis, the Justice concluded that the award of costs, including the contingency fee arrangement, did not violate UAE public policy under Articles 41(2)(b)(iii) and 44(1)(b)(vii) of the DIFC Arbitration Law, rejected Loralia’s

²²³ Ruling in *Loralia v. Landen*, at para. 38.

²²⁴ *Id.*, at paras 39-40.

²²⁵ *Id.*, at para. 43.

²²⁶ *Id.*, at para. 43.

²²⁷ *Id.*, at para. 44.

application for setting aside and granted LSC's cross-application for recognition and enforcement of the award.

In long hand, Justice Shamlan held in the relevant part as follows:

38. I find that it is clear from the Applicant's arguments that UAE Federal Law prohibits contingency or success fees for legal representatives in onshore-Dubai, as regards both litigation and arbitration. This is established by Article 31 of Law No. 23, combined with the various provisions of Resolution [No.] 666. It is therefore possible that the application of these provisions contributes to a public policy against all contingency fees in onshore-Dubai and most other parts of the UAE such that an arbitral award which gives effect to a contingency fee arrangement may be set aside in full or in relevant part. However, I need only be concerned with UAE public policy as it correctly applies within the DIFC and thus I make no comment as to the content of UAE public policy as to contingency fees outside of the DIFC.
39. Therefore, I must move on to whether this alleged public policy against contingency fees can be said to apply within the DIFC. In speaking to this issue, it is important to note that Law No. 23, enacted well before the establishment of the DIFC, cannot be said to apply in full within the DIFC. The DIFC Courts have a separate system for registering legal practitioners and governing their conduct. The qualifications and requirements of lawyers under Law No. 23 are not compatible with the requirements to register before the DIFC Courts and vice versa. Furthermore, Resolution [No.] 666, which the Applicant contends applies the provisions of Law No. 23 to all lawyers within the UAE, is a Resolution and cannot have the effect of changing the law such that Law No. 23 will apply in full within the DIFC.
40. Even if Law No. 23 does not specifically apply within the DIFC, it is still possible that Article 31 of Law No. 23, combined with Resolution [No.] 666, support an overarching UAE public policy that outlaws contingency fees even within the DIFC. However, I find that the structure of legal instruments applicable within the DIFC as regards the conduct of lawyers supports the finding that while UAE public policy may outlaw contingency fees outside of the DIFC, it does not do so within the DIFC. Instead, the DIFC Courts' Mandatory COC does not mention contingency or success fees. While the DIFC Courts' Best Practice Code does specify that contingency fees were not considered best practice at the time of the guide's issuance in 2015, this guide does not have the status of law or mandatory regulation. It is of note that the DIFC Courts' Mandatory COC has been amended since the issuance of the DIFC Courts' Best Practice Code and no provisions regarding contingency fees have been added.
41. While the Applicant argues that Part C-8(2) of the DIFC Courts' Mandatory COC prohibits the improper increase of fees, which may cover contingency fee agreements, I find that this provision does not prohibit all contingency fees. The specific identification of contingency fee arrangements would clearly have been mentioned should the DIFC Courts' Mandatory COC have been intended to outlaw all such arrangements. Failure to mention contingency fee arrangements implies that they are not de facto outlawed, however they may constitute a violation of Part C-8(2) if they improperly increase the fees payable.
42. It is not my place at this time to assess whether the contingency fee in question would fail scrutiny under Part C-8(2) of the DIFC Courts' Mandatory COC as this would constitute reopening the merits of the arbitral dispute. Violation of the DIFC Courts' Mandatory COC itself requires disciplinary action against the lawyer in question and would not necessarily require invalidation of a corresponding judgment or award. In any event, I can see from the Award that the Tribunal took care to assess whether the fees awarded were reasonable given the circumstances of the arbitral dispute as a whole and therefore there is no need to reinvestigate this matter.
43. Based on the legal instruments in place in the DIFC and in onshore-Dubai, contingency fees for legal representatives may be de facto illegal onshore. However, they merit more case-by-case scrutiny in the DIFC. They may not be considered "best practice" in the DIFC

but this label cannot be sufficient to create and support a public policy against contingency fees within the DIFC. Instead, the public policy followed in all of the UAE towards ensuring that reasonable fees are granted to legal representatives applies with slight differences within the DIFC. Within the DIFC, unreasonable fee arrangements may include contingency fee arrangements but not all contingency fee arrangements are automatically invalid. Instead, judges and arbiters are required to assess whether a fee arrangement is reasonable and proper, and this requirement speaks to the overall public policy as regards legal fees.

44. In sum, unreasonable contingency fee arrangements are prohibited in the DIFC and may in fact violate the public policy of the UAE as it applies within the DIFC. In this case, I need not assess further whether the contingency fee arrangement was reasonable. Instead, I look to the Award itself, where the Arbitral Tribunal made sure to assess the reasonable nature of the fees awarded. I have no criticism of the Award in this regard. Thus, it is not required for me to determine whether or not there is a public policy against unreasonable fee agreements within the DIFC strong enough to merit setting aside part or all of an otherwise valid arbitral award. This is because the Award in question gives effect to reasonable fees in the assessment of the Arbitral Tribunal, an assessment I find no reason to reopen at this time.²²⁸

In the light of the forgoing, it is compelling to conclude that the Justice's ruling in *Loralia Group LLC v. Landen Saudi Company* lays the foundation stone for a variable geometry of UAE public policy onshore/offshore across the Emirates. This will allow the UAE's judicial free zones, including both the DIFC and the Abu Dhabi Global Market (ADGM), to develop their own application of binding concepts of UAE public policy without running the risk of violating the public policy parameters set by the courts for application in the wider Union. As a result, this will enable the informed *practical differentiation* of the application of the UAE public policy concept at the crossroads between onshore and offshore, which in turn, from a comparative law perspective, will facilitate the deeper systemic integration between the offshore common law and the onshore civil law legal systems. For all intents and purposes, the DIFCCFI's ruling in *Loralia* demonstrates integrational (judicial) forces at their best in full motion.

2.1.2 *Lucinethlucineth v. Lutinalutina*²²⁹

In this ruling,²³⁰ the DIFCCFI declined to grant an extension of time to Lutina Telecom Limited ("Lutina"), a company registered in the DIFC, to enable it to apply, under Article 44(2) of the DIFC Arbitration Law read together with RDC²³¹ Part 43, for the setting aside of an Order for Recognition and Enforcement issued by the DIFC Courts with respect to a Final Award rendered in favour of Lucineth Universal Inc. ("Lucineth") under the Rules of Arbitration of the International Chamber of Commerce International Court of Arbitration (the "ICC Rules") in a Paris-seated arbitration. In the terms of the Final Award, Lutina was ordered to pay Lucineth in excess of USD 5 million for the sale and purchase of shares in a third-party telecommunications company ("Lurina") owned by Lucineth. The DIFCCFI's Order for Recognition and Enforcement was issued on 1 April 2019, and the 14-day time-limit accorded to Lutina as the award debtor to apply for setting aside expired, Lutina's application for an extension of time being made on 17 June 2019 and thus being two months out of time. Meanwhile, Lucineth, in its capacity as the award creditor, proceeded with execution of the Order for Recognition and Enforcement, securing in support an interim charging order over shares held by Lutina in a third-party company in accordance with Article 43 of the DIFC Law of Damages²³² read together with RDC 46.17, an order confirmed by the instant ruling. In the meantime, Lurina had gone into liquidation, reducing its share value to nil, and Lutina had commenced an action for nullification of the Final Award before the Paris Court of Appeal.

The DIFCCFI's reasons for rejecting Lutina's application for an extension of time were two-fold:

²²⁸ *Id.*, at paras 38-44.

²²⁹ *Lucinethlucineth v. Lutinalutina Telecom Group Ltd* [2019] DIFC ARB 005, Order with reasons of H.E. Justice Sir Jeremy Cooke.

²³⁰ Published on the DIFC Court website portal in early 2020, hence reported on in this 2020 annual review only.

²³¹ Rules of the DIFC Courts.

²³² DIFC Law No. 7 of 2015, DIFC Law of Damages and Remedies.

- According to the Court, relying on the factors that require consideration for granting an extension of time for challenging an arbitral award in *Terna v. Al Shamshi*,²³³ “[c]ogent reasons are required for the extension of time and a distinction is drawn between inadvertent delay, incompetence or honest mistakes on the one hand and deliberate decisions on the other” and “[t]he length of the delay is to be judged against the yardstick of the prescribed period”.²³⁴ In application to the facts of the case, the DIFCCFI concluded that delays caused by Lutina’s counsel seeking clarification from the onshore Dubai Courts on the question of whether they were competent to hear an action for nullification on grounds of violation of UAE – as opposed to DIFC – public policy were completely unwarranted in circumstances where it was evident that the DIFC Courts had proper competence, Lutina being based in the DIFC and did, as such, not provide any good reason for an extension to be granted.²³⁵
- In addition, the DIFCCFI confirmed that Lutina’s grounds for challenge of the Final Award were “*extremely weak*”.²³⁶ In doing so, the Court rejected Lutina’s submission that
 - (i) enforcement of the Final Award would be contrary to UAE public policy in circumstances where the outstanding payment for the shares in Lurina – given their loss of value – would result in unjust enrichment on part of Lucineth, the purpose and subject-matter of the share sale being vitiated and the outstanding payment being made without any consideration moving from Lucineth.²³⁷ According to the DIFCCFI, Lutina’s argument in favour of the application of UAE public policy had no prospect of success. To start, Lutina had failed to adduce any relevant case law precedent in support of the sole possible basis of a challenge of the DIFCCFI’s Order for Recognition and Enforcement, which – according to the Court – was the UAE public policy defence under Article 44(1)(b)(vii) of the DIFC Arbitration Law, which in turn only applied in very limited circumstances.²³⁸²³⁹ The ordered payment having been outstanding since 2010, there was an obvious risk that the value of the shares might start fluctuating over time. In the DIFCCFI’s conclusion: “*There is no injustice in a party [here Lutina] being kept to its bargain and being required to pay a sum which it agreed to pay for the assets in question [i.e., the shares in Lurina], even if the value of those shares has diminished to zero. No question of unjust enrichment can arise. No question of disproportionate payment can arise. No question of lack of consideration can arise.*”²⁴⁰ According to the Court, there was equally no prospect of Lutina’s arguments succeeding under French law, Lutina having relied upon a 2010 French Court of Cassation relating to disproportionate payments and Articles 1131²⁴¹ and 1303²⁴² of the French Civil Code in support.²⁴³ As confirmed by French law evidence adduced before the Court: “*In the present case the whole arbitration case was about a contractual breach unrelated to Lurina’s insolvency. Furthermore, it is apparent both that the debt has a cause and that the amount is due. In consequence, neither Article 1302 nor 1303 of the Civil Code applies, still less could the result of which the defendant [i.e., Lutina] complains achieve the status of a wrong that would be contrary to international public policy.*”²⁴⁴ With this in mind, the

²³³ *Terna Bahrain Holding Company WI v. Al Shamshi* [2013] 1 All ER (Comm) 580, at paras 27-31.

²³⁴ Ruling in *Lucinethlucineth v. Lutinalutina*, at para. 7.

²³⁵ *Id.*, at paras 8-9.

²³⁶ *Id.*, at para. 9.

²³⁷ *Id.*, at para. 11.

²³⁸ *Id.*, at para. 13: “*As articulated in earlier cases, the public policy defence can be applied only if the [a]rbitral award fundamentally offends the most basic and explicit principles of justice and fairness in the enforcing state or evidence shows intolerable ignorance or corruption on the part of the arbitral tribunal. Not every infringement of mandatory law amounts to a violation of public policy but without any such infringement it is hard to see how any question of public policy can arise unless the Award is contrary to the essential morality of the state in question or discloses errors that affect the basic principles of public and economic life.*”

²³⁹ *Id.*, at paras 12-16.

²⁴⁰ *Id.*, at para. 18.

²⁴¹ Which provides that “*an obligation without consideration or with a false consideration or with an unlawful consideration cannot have any effect.*”

²⁴² Which provides that “*the person who benefits from unjust enrichment to the expense of another person who is the latter compensation equal to the lower value between the enrichment and the impoverishment.*”

²⁴³ Ruling in *Lucinethlucineth v. Lutinalutina*, at para. 17.

²⁴⁴ *Id.*, at para. 19.

DIFCCFI concluded as follows: “*Lucineth will not be unjustly enriched in receiving the contractual purchase price to which it is entitled, both as a matter of contract and as a debt due under an award. There is no impossibility of performance nor vitiation of the purpose and subject matter of the Sale and Purchase Agreement. There is nothing disproportionate about such a payment being made nor any difficulty about consideration which was constituted by the contractual promises which can still be fulfilled.*”²⁴⁵

- (ii) Lucineth had deliberately and as such in bad faith waited with its application for enforcement of the Final Award until Lurina’s insolvency. The DIFCCFI rejected this argument, stating as follows: “*There can be no question of bad faith in enforcing contractual rights nor any abuse of such rights in circumstances where the arbitrators have considered in full the merits of the parties’ respective positions and come to a reasoned conclusion which is not the subject of challenge. Lutina specifically abjured any contention that the arbitrators had erred in any way, and relied solely on the ex post facto event of the liquidation of Lurina.*”²⁴⁶

In the light of the foregoing, the DIFCCFI concluded that there was no reason to extend the stay of the proceedings, ordered the stay to be lifted and the action for execution of the Final Award to proceed.²⁴⁷

2.1.3 Limeo v. Landia²⁴⁸

In this ruling, the DIFCCFI was asked to decide within the meaning of Article 23(3) of the DIFC Arbitration Law²⁴⁹ whether Landia Educational Services SAL (“Landia”) had properly commenced arbitration against Limeo Investment & Real Estate LLC (“Limeo”) before the DIFC-LCIA under the DIFC-LCIA Rules. The DIFCCFI held that it had. This being a question of construction, the Court focused more specifically on the interpretation of the underlying arbitration agreement. This was contained in Clause XVI of the subject contract between Limeo and Landia for the provision of educational services, from which the dispute between the parties referred to arbitration arose, (the “Contract”) and provided as follows:

Any dispute shall be finally settled in accordance with the rules of the London Court of International Arbitration (“LCIA”) (which rules are deemed incorporated by reference in this MOU). The arbitration shall take place in the LCIA Arbitration Centre in Dubai International Centre, in Dubai, the UAE. Arbitration shall be conducted in the English Language.²⁵⁰ (the “Arbitration Agreement”)

Importantly, to assist in the Court’s exercise of construction, the parties agreed to the application of DIFC law to the issue of construction and that in the terms of Article 23(3), the Court was mandated to decide upon the question of arbitral jurisdiction afresh (rather than reviewing the affirmative partial award on jurisdiction previously rendered by the sole arbitrator in the reference).²⁵¹ In doing so, the Court relied upon Articles 49(1) and (2)²⁵² of the DIFC Contract Law.²⁵³

²⁴⁵ *Id.*, at para. 20.

²⁴⁶ *Id.*, at para. 22.

²⁴⁷ *Id.*, at paras 24-25.

²⁴⁸ *Limeo Investment & Real Estate LLC v. Landia Educational Services S.A.L.* [DIFC] 2019 ARB 012, Amended Judgment of H. E. Justice Shamlan Al Sawalehi.

²⁴⁹ Which provides as follows: “*The Arbitral Tribunal may rule on a plea [by a respondent or other party that the Arbitral Tribunal does not have Jurisdiction] either as a preliminary question or in an award on the merits. If the Arbitral Tribunal rules as a preliminary question that it has jurisdiction, any party may request, subject to any process agreed between the parties, within thirty days after having received notice of that ruling, the DIFC Court of First Instance to decide the matter, which decision shall not be subject to appeal; while such a request is pending, the Arbitral Tribunal may continue the arbitral proceedings and make an award.*”

²⁵⁰ Ruling in *Limeo v. Landia*, at para. 2.

²⁵¹ *Id.*, at para. 9.

²⁵² Which provide as follows: “*Intention of the parties (1) A contract shall be interpreted according to the common intention of the parties. (2) If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.*”

²⁵³ DIFC Law No. 6 of 2004.

In Limeo's submission,²⁵⁴ adopting a literal interpretation in relevant part, the Arbitration Agreement required referral to arbitration under the LCIA Rules, the reference to the DIFC-LCIA being no more than a reference to the potential venue or the seat of the arbitration. Landia therefore erred in filing its request for arbitration with the DIFC-LCIA rather than the LCIA. In support of its argument, Limeo relied in particular on the fact that at the time that the parties concluded the Contract in 2012, the DIFC-LCIA had only been established for four years and as such could hardly have been within the common intention of the parties at the time as the administering institution of a prospective dispute whereas the LCIA had, at that time, been operating for well over 100 years and was known to both parties as a worldwide leading arbitral institution. Reasonable companies like Limeo and Landia and business common sense would dictate a contemporaneous preference for LCIA arbitration. Landia argued the reverse.²⁵⁵ In support, it contended that following their re-launch in 2014, the DIFC-LCIA, and not the LCIA, stood in the stead of the original joint-venture arrangement between the LCIA and the DIFC.

In the DIFCCFI's view, it was clear that the Arbitration Agreement had to be read as providing for arbitration administered by the DIFC-LCIA under the DIFC-LCIA Rules. In long hand, Justice Shamlan of the DIFCCFI reasoned as follows:

21. [...] insofar as there is no need to depart from a plain reading of "the LCIA Arbitration Centre," this reference must be to an LCIA arbitration centre which existed in the DIFC at the time that the Arbitration Agreement was entered into. This can only have been the DIFC-LCIA Arbitration Centre.

[...]

23. [...] It will be noted that both the choice of rules and centre provided for by the Arbitration Agreement are those of "the LCIA." As such – and leaving aside the reference to the centre as being "in the DIFC" for a moment – there is no reason to suppose that the Arbitration Agreement provides for arbitration rules other than those of the arbitration centre also stipulated therein. In other words, the choice of rules and centre provided for in the Arbitration Agreement pertain, prima facie, to one and the same institution, namely "the LCIA." Yet as has been shown above, the arbitration centre is referred to in the Arbitration Agreement as "the LCIA Arbitration Centre in the [DIFC]," while this could only have been the DIFC-LCIA Arbitration Centre. If, again, the choice of rules and centre provided for by the Arbitration Agreement pertain to one and the same institution, it follows that the rules which are the analogue of the DIFC-LCIA Arbitration Centre can only be those of the DIFC-LCIA. As such, far from being unimportant to the present Application, in my regard, the reference to "the LCIA Arbitration Centre in the [DIFC]" provides some of the clearest evidence that the rules provided for in the Arbitration Agreement are those of the DIFC-LCIA.

24. The position is strengthened when regard is had to Landia's submissions on the 2014 changes. At the time the Arbitration Agreement was entered into, the DIFC-LCIA was a joint venture within the DIFC, and so the LCIA still had a separate existence. In such circumstances, it can be argued that a reference to only the LCIA in an Arbitration Agreement that intended the DIFC-LCIA would not be, strictly speaking, deficient. While such a reference could indeed have been clearer, again, the LCIA had a separate existence and so it was capable of being referred to separately.

25. For me, the above is sufficient to demonstrate the common intention of the parties at the time of concluding the Arbitration Agreement for the purposes of Article 49 (1) of the [DIFC] Contract Law. The same observations would be made, I think, by reasonable

²⁵⁴ Ruling in *Limeo v. Landia*, at paras 10 *et seq.*

²⁵⁵ *Id.*, at paras 14 *et seq.*

persons or companies of the same kind as Limeo and Landia and in the same circumstances for the purposes of Article 49 (2) of the Contract Law, too.

26. Landia has asked the Court to consider how the 2014 changes might have changed the operation of the Arbitration Agreement: did the DIFC-LCIA Centre or the LCIA Centre in London replace the centre referred to in the Arbitration Agreement? That the LCIA itself considered the DIFC-LCIA to be a “relaunch” of the centre that preceded it is, for me, somewhat conclusive. And if the matter is to be resolved by reference to the presumed intention of the Parties pursuant to Article 49(2) of the [DIFC] Contract Law, I think it is hardly to be supposed that reasonable parties of the same kind as Limeo and Landia in the same circumstances would not have chosen to adopt the DIFC-LCIA as the centre for their arbitration. That would have produced the result closest to their original agreement and engaged supervisory and enforcement arrangements which were unchanged. This is quite clearly the case due to the continuing institutional links between the DIFC-LCIA Arbitration Centre and the LCIA, the fact that the seat would, on Limeo’s view, change to London and the virtual identity of the rules of the respective bodies.²⁵⁶

In the light of the foregoing, the DIFCCFI ultimately concluded in favour of the sole arbitrator having proper jurisdiction to hear and determine the parties’ dispute under the DIFC-LCIA Rules.²⁵⁷

2.1.4 *Limsa v. Lordon et al.*²⁵⁸

In this case, Limsa (Pty) Ltd (“Limsa”), a company registered for the trade of commodities on a trading platform owned by X Centre, an entity of the Government of Dubai, (“Lordon”) in the Dubai Multi-Commodities Centre (DMCC), filed for an order to set aside a disciplinary decision issued by Lordon pursuant to the bye-laws promulgated in relation to the operation of Lordon (the “Disciplinary Decision”) under Article 41(1) of the DIFC Arbitration Law. Realising in the further course of the proceedings that the Disciplinary Decision was not capable of qualification of an arbitral award and as such could not be challenged under Article 41(1), Limsa served a notice of discontinuance of all its claims (the “Notice of Discontinuance”) apart from a claim for costs.

In the circumstances, the DIFCCFI was prompted to consider the application of RDC 34.15, according to which “[u]nless the Court orders otherwise, a claimant who discontinues a claim is liable for the defendant’s costs incurred up to and on the date on which the Notice of Discontinuance was served on him or his legal representative.” In doing so, the DIFCCFI contemplated more specifically whether, in the prevailing circumstances, the presumption by reason of RDC 34.15 that the defendants recover their costs where the claimant discontinues the proceedings could be displaced in favour of the claimant. According to the Court, relying on its earlier decision in *Firas Esreb v. ES Bankers (Dubai) Limited (In Liquidation)*²⁵⁹, “[a] claimant must show some unreasonable conduct on the part of the Defendant for there to be a departure from [the] default rule [under RDC 34.15].” In Limsa’s submission, it was the defendants that had originally insisted on the qualification of the Disciplinary Decision as an arbitral award and only conceded the true nature of that decision after commencement of the proceedings for setting aside before the DIFCCFI. Therefore, the Court should exercise its discretion under RDC 34.15 to award costs against the defendants.

The DIFCCFI disagreed and found that in the prevailing circumstances, Limsa’s service of the Notice of Discontinuance confirmed its acceptance of the position that its claim for setting aside under Article 41(1) of the DIFC Arbitration Law had to fail and that the DIFCCFI lacked jurisdiction to entertain that claim, a

²⁵⁶ *Id.*, at paras 21-26.

²⁵⁷ *Id.*, at para. 27.

²⁵⁸ *Limsa (Pty) Ltd v. (1) Lordon A Trading Platform of Dubai Multi Commodities Centre (2) Lendi (3) Lander (4) Leone* [2020] DIFC ARB 008, Amended Judgment of Justice Wayne Martin.

²⁵⁹ CFI 035/2016 *Firas Esreb v ES Bankers (Dubai) Limited (In Liquidation)*, ruling of the DIFC Court of First Instance of 6 March 2017, at para. 15.

position also conceded by Lordon in oral argument before the Court.²⁶⁰ More specifically, the Court found that Limsa's assertion of jurisdiction was doomed to fail from the outset for two main reasons:

- (i) The decision presented for a challenge under Article 41(1) of the DIFC Arbitration Law, i.e., the Disciplinary Decision, did not constitute an arbitral award – but a disciplinary decision – in the first place and as such did not fall for considerations of setting aside within the meaning of Article 41(1), which is limited in its application to arbitral awards.²⁶¹
- (ii) On the assumption that the decision presented for a challenge, i.e., the Disciplinary Decision, did qualify as an arbitral award, it was, as a matter of fact, issued outside the DIFC, hence the seat of the underlying arbitration process was outside the DIFC.²⁶² As such, Article 41(1) of the DIFC Arbitration Law²⁶³ could not apply as its application was expressly limited to awards originating in a DIFC seat.²⁶⁴ Further, being contained in Part 3 of the DIFC Arbitration Law, Article 41 did not apply to a non-DIFC seat by virtue of Article 7(1) of the DIFC Arbitration Law, according to which “*Parts 1 to 4 [...] of this Law shall all apply where the Seat of the Arbitration is the DIFC.*” To reach this conclusion, the Court also relied on Justice Steel's dictum in *Meydan Group LLC v. Banyan Tree Corporation Pte Ltd*²⁶⁵ to the effect that “[a] challenge to the validity of an award (as a matter of DIFC law and practice) should prima facie only be made in the court of the seat of the arbitration.”²⁶⁶ From this it followed, according to the Court, that “*if what occurred is properly characterised as an arbitration, it was seated outside the DIFC, in the Emirate of Dubai, and that any challenge to an Award or purported Award should have been made under Articles 53 and 54 of the Federal Arbitration Law, in a court of competent jurisdiction. This Court is not such a court because, as I have noted, Federal civil and commercial laws (including the Federal Arbitration Law) do not form part of the substantive law of the DIFC.*”²⁶⁷

In addition, the DIFCCFI found that Limsa had failed to comply with the pre-action protocol relating to steps to be taken before commencing proceedings against an entity comprising the Dubai Government,²⁶⁸ such as Lordon.

In the light of the foregoing, the DIFCCFI held that Limsa had failed to displace the presumption under RDC 34.15 that it was to bear all the costs incurred by the parties in the proceedings.²⁶⁹

2.1.5 *Multiplex v. Elemec*

In a ruling of November 2020,²⁷⁰ which – to date – has remained unpublished (albeit not unreported²⁷¹), the DIFCCFI pronounced the first ever antisuit injunction over competing proceedings commenced in violation of an arbitration agreement before the onshore Dubai courts. By way of background, in 2015, Multiplex Constructions LLC, an Australian construction company, (“Multiplex”) entered into a contract with a Dubai-based subcontractor, Elemec Electromechanical Contracting LLC (“Elemec”), (the “Subcontract

²⁶⁰ Ruling in *Limsa v. Lordon et al.*, at para. 59.

²⁶¹ *Id.*, at paras 85-86.

²⁶² *Id.*, at para. 87.

²⁶³ Which provides verbatim as follows: “*Recourse to a Court against an Arbitral Award made in the Seat of the DIFC may be made only by application for setting aside in accordance with paragraphs (2) and (3) of this Article.*”

²⁶⁴ Ruling in *Limsa v. Lordon et al.*, at para. 90.

²⁶⁵ *Banyan Tree Corporate Pte Ltd v Meydan Group LLC* [2013] DIFC ARB 003, ruling of the Dubai Court of First Instance of 2 April 2015.

²⁶⁶ Ruling in *Limsa v. Lordon et al.*, at para. 93.

²⁶⁷ *Id.*, at para. 94; original footnotes omitted.

²⁶⁸ See in particular RDC 41.19, which requires service of a 15-day notice of intention to commence proceedings against the Government; and Article 3(d) of Dubai Law No. 3 of 1996, which prescribes further steps with respect to claims against the Government of Dubai, such as notification of the office of the Legal Advisor of the Government of Dubai and a period of two months for amicable settlement.

²⁶⁹ Ruling in *Limsa v. Lordon et al.*, at para. 105.

²⁷⁰ *Multiplex Constructions LLC v. Elemec Electromechanical Contracting LLC*, CFI.

²⁷¹ See J. Ballantyne, “DIFC courts block onshore lawsuit”, GAR, 17 November 2020.

Agreement”). The Subcontract Agreement was governed by UAE law but provided for arbitration under the DIFC-LCIA Rules with seat in the DIFC (and hence contemplating the application of the DIFC Arbitration Law to any prospective arbitration) in the event of any disputes (the “Arbitration Agreement”).

Before completion of the subcontract works, a dispute, the details of which are presently unknown, arose between the parties. As a result, Elemec filed proceedings before the onshore Dubai courts in violation of the arbitration clause contained in the Subcontract Agreement. Whilst reserving its position on jurisdiction in the onshore courts, Multiplex commenced arbitration proceedings before the DIFC-LCIA in accordance with the Arbitration Agreement. At the same time, it applied to the DIFC Courts in their capacity as the offshore supervisory courts of the arbitration for a declaration confirming the binding nature of the Arbitration Agreement coupled with an antisuit injunction restraining Elemec from continuing the onshore proceedings before the Dubai courts.

Given the clarity of the terms of the Arbitration Agreement, Justice Shamlan Al Sawalehi, rendering the ruling of the DIFCCFI, found in favour of the binding nature of the Arbitration Agreement and confirmed that the onshore court proceedings had been commenced in violation of the obligation to arbitrate under the Arbitration Agreement. On that basis, Justice Shamlan did not hesitate to pronounce an antisuit that required Elemec to discontinue the proceedings before the onshore Dubai courts. In support, he relied upon an *obiter dictum* of Justice Sir Jeremy Cooke in *Brookfield Multiplex Construction LLC v. DIFC Investments CFI 020/2016*,²⁷² which reads in relevant part as follows:

“If the seat of the Arbitration is DIFC, however, the position is different, because the primary responsibility for the enforcement of the arbitration agreement would lie on the courts of the seat, if relief was sought. This court would then be concerned, first to protect its own exclusive jurisdiction under the Judicial Authority Law and, secondly, as the court of the seat, to protect the agreement of the parties to refer their disputes to the determination of arbitrators, if there was some infringement of the parties right to arbitrate their dispute.”

In the light of the foregoing, it is evident that *Multiplex v. Elemec* goes beyond the previous limits set by *Brookfield* and confirms that the DIFCCFI have the power to pronounce anti-suit injunctions over competing proceedings before the onshore courts that have been commenced in disregard of a prevailing obligation to arbitrate offshore. Importantly, to lend its antisuit injunction the required force, the DIFCCFI also issued a penal notice, as a result of which Elemec may, at the hands of the Dubai Public Prosecutor, face criminal liability before the onshore courts should it fail to comply with the terms of the injunction.

By way of conclusion, it is important to note that under Article 7 JAL, which codifies a free area of movement of judicial instruments between the onshore Dubai and the offshore DIFC Courts and *vice versa*, the onshore Dubai Courts will be under an obligation to recognise the DIFCCFI’s antisuit order restraining Elemec from continuing the proceedings onshore without any review of the merits of that order. It is encouraging to see the resolve with which an Emirati judge of the DIFCCFI affirms the enforcement of an offshore arbitration agreement at the cost of local onshore court proceedings. It must evidently be borne in mind that the DIFCCFI’s antisuit operates *in personam*, i.e., as against Elemec, and not *in curiam*, i.e., against the local onshore Dubai courts, before which the competing proceedings have been commenced. Hence, little friction is to be expected in its implementation onshore.

2.2 Revised DIFC-LCIA Rules²⁷³

Following their adoption in November 2020, the revised DIFC-LCIA Rules of Arbitration (the “2021 DIFC-LCIA Rules”)²⁷⁴ entered into force with effect from 1 January 2021. Closely related to and taking guidance from the London-based LCIA, the DIFC-LCIA tends to follow any revisions to the LCIA Rules of Arbitration

²⁷² CFI 020/2016 – *Brookfield Multiplex Constructions LLC v. (1) DIFC Investments LLC (2) Dubai International Financial Centre Authority*, ruling of the DIFC Court of First Instance of 28 July 2016.

²⁷³ This section is based on G. Blanke, “A Happy New Year with the 2021 DIFC-LCIA Rules”, Kluwer Arbitration Blog, 13 February 2021, available online at <http://arbitrationblog.kluwerarbitration.com/2021/02/13/a-happy-new-year-with-the-2021-difc-lcia-rules/>.

²⁷⁴ See <http://www.difc-lcia.org/arbitration-rules-2021.aspx>.

(the “LCIA Rules”): The 2021 DIFC-LCIA Rules are no exception and take after the recent revisions introduced to the recently adopted 2020 LCIA Rules.²⁷⁵

The 2021 DIFC-LCIA Rules introduce a number of important changes, which – in their majority – are intended to assist the effective and efficient conduct of an arbitration process within a DIFC-LCIA forum. Such changes include the introduction of a so-called “early determination” procedure, improvements to the existing consolidation mechanism, and the digitalisation of the arbitration process coupled with the adoption of enhanced confidentiality measures and the establishment of a new data protection regime. Other changes include the formalisation of the role played by administrative secretaries in DIFC-LCIA arbitration, the expedition of tribunal appointments, the clarification of the emergency arbitrator’s powers, and enhanced transparency around the nationality requirement and *ex parte* communications with the Registrar. The following discusses these and other changes for some initial guidance.

Early determination. The 2021 DIFC-LCIA Rules allow summary treatment of claims, counterclaims and defences by introducing a regime of early determination. More specifically, according to Article 22.1(viii) of the 2021 DIFC-LCIA Rules, a DIFC-LCIA tribunal has the power to “*determine that any claim, defence, counterclaim, cross-claim, defence to counterclaim or defence to cross-claim is manifestly outside the jurisdiction of the Arbitral Tribunal, or is inadmissible or manifestly without merit; and where appropriate to issue an order or award to that effect.*” This will facilitate an early disposal of vexatious cases that do not stand a reasonable chance of success, whether by reason of a tribunal’s manifest lack of jurisdiction or a manifest lack of merit.

Consolidation. The new Rules allow for the submission of so-called composite Requests and Responses: These allow parties to file a single request for arbitration for a multi-party or multi-contract arbitration (involving more than one arbitration agreement), inviting, in turn, a composite Response²⁷⁶ albeit that it does not facilitate automatic consolidation (a subject that might benefit from closer scrutiny in a future revision of the existing rules).

In a related context, a new Article 22A introduces an enhanced consolidation regime which allows the consolidation of arbitrations that deal with related transactional disputes, there being no strict requirement for the identity of the parties and/or the underlying arbitration agreements. Consolidation is also facilitated upon express party agreement.

Digitalisation. The 2021 DIFC-LCIA Rules introduce the use of technology across the arbitration process, thus accommodating in particular requirements that have arisen from the currently pending pandemic. By way of example, the Request for Arbitration and the Response are now required to be submitted electronically, rather than in hard copy,²⁷⁷ “*either by email or other electronic means including via any electronic filing system operated by the DIFC-LCIA Arbitration Centre*”²⁷⁸. Further, written communications with respect to the arbitration must be delivered “*by email or any other electronic means of communication that provides a record of [...] transmission*” unless otherwise advised by the Registrar or the tribunal as the case may be.²⁷⁹

Article 19.2 of the 2021 DIFC-LCIA Rules expressly authorises the remote conduct of hearings, stating that “*a hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form).*”

Finally, Article 26.2 of the 2021 DIFC-LCIA Rules allows an award to be signed electronically, with the electronic copy of the award prevailing over any inconsistent paper copy.²⁸⁰

Taking account of the heightened use of digital communication under the 2021 DIFC-LCIA Rules, a new Article 30A introduces a set of powers and duties that require a DIFC-LCIA tribunal and the DIFC-LCIA to

²⁷⁵ See https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx.

²⁷⁶ See Articles 1.2 and 2.2, 2021 DIFC-LCIA Rules.

²⁷⁷ See Articles 1.3 and 2.3, 2021 DIFC-LCIA Rules.

²⁷⁸ See Article 4.1, 2021 DIFC-LCIA Rules.

²⁷⁹ See Article 4.2, 2021 DIFC-LCIA Rules.

²⁸⁰ See Article 26.7, 2021 DIFC-LCIA Rules.

protect personal data by adopting information security measures as appropriate with respect to references pending before them.

Administrative secretaries. The 2021 DIFC-LCIA Rules introduce a new Article 14A, which transposes in relevant part the provisions on tribunal secretaries contained in the LCIA Notes for Arbitrators into the Rules. Article 14A strictly prohibits delegation of the tribunal's decision-making function to tribunal secretaries, the tribunal remaining responsible for any tasks performed by them²⁸¹ and makes the appointment of a tribunal secretary subject to party approval.²⁸² Like arbitrators, administrative secretaries are under a standing disclosure obligation with respect to any conflicts of interest and must declare their availability to devote sufficient time to the reference.²⁸³ Any change in the scope of the tribunal secretary's works or increase in his or her fees²⁸⁴ must be approved by the parties.²⁸⁵ Importantly, the costs of the administrative secretary qualify as Arbitration Costs within the meaning of Article 28.1 of the 2021 DIFC-LCIA Rules²⁸⁶ and are as such readily awardable to a winning party in the arbitration.

Expedited tribunal appointments. The 2021 DIFC-LCIA Rules reduce the time within which the LCIA Court is to appoint a tribunal in the event of a respondent's failure to submit a Response: As a result, the LCIA Court must now appoint the tribunal promptly after 28 days – as opposed to 35 days under the old Rules – from the date of official registration of the reference (i.e., from receipt of the Request and the registration fee).

Nationality requirement. Nationality has now been further defined to allow a more precise assessment of the nationality requirement in the appointment of arbitrators. By way of reminder, a sole arbitrator or a chair must not share the nationality of either of the parties where these are of different nationalities unless agreed otherwise by the parties in writing.²⁸⁷ Pursuant to Article 6.2 of the 2021 DIFC-LCIA Rules, nationality means a natural person's citizenship and a legal person's seat of incorporation or effective management; where these differ, the legal person is treated as a national of both.

Communication with the Registrar. The strict prohibition to engage in unilateral communications with other stakeholders, in particular the tribunal members, the administrative secretary and the administrative staff of the DIFC-LCIA, in the arbitration in the terms of Article 3.3 read together with Article 13.4 of the 2021 DIFC-LCIA Rules is relaxed in favour of *ex parte* communication with the DIFC-LCIA Registrar with respect to "*administrative matters*".²⁸⁸ This will allow less experienced parties to engage in unilateral conduct with the Registrar for, e.g., a better understanding of the operation of the 2021 DIFC-LCIA Rules.

Amendments to Request/ Response. Under the 2021 DIFC-LCIA Rules, parties may now make amendments to the Request or the Response, as the case may be, with the permission of the LCIA Court prior to the constitution of the arbitral tribunal. Such amendments are expressly stated to be limited to the correction of "*any error in computation, any clerical or typographical error, any ambiguity or any mistake of a similar nature*" and are subject to the parties having been afforded "*a reasonable opportunity to state their views*" and to "*such terms as the LCIA Court may decide.*"²⁸⁹ Provided this provision is exercised to the letter, it is to be welcomed as no more than procedural common sense, there being no benefit to wait until later in the arbitration process for any correction of clerical mistakes (especially such that could materially affect the nature or value of the arbitration and thus the choice of arbitrators).

Confidentiality. In the interest of safeguarding the continued confidentiality of the arbitration process (and more specifically the deliberations of the tribunal, the arbitral award and any material divulged in the arbitration), confidentiality undertakings are now imposed on all participants in the arbitration: arbitrators,

²⁸¹ See Article 14.8, 2021 DIFC-LCIA Rules.

²⁸² See Article 14.10, 2021 DIFC-LCIA Rules.

²⁸³ See Articles 14.9 and 14.14, 2021 DIFC-LCIA Rules.

²⁸⁴ Ranging hourly between AED 370 and AED 860: See Schedule of Arbitration Costs 2021, DIFC-LCIA Rules, at Clause 6.

²⁸⁵ See Article 14.11, 2021 DIFC-LCIA Rules.

²⁸⁶ See Article 14.13, 2021 DIFC-LCIA Rules.

²⁸⁷ See Article 6.1, 2021 DIFC-LCIA Rules.

²⁸⁸ See Article 13.4, 2021 DIFC-LCIA Rules.

²⁸⁹ See Articles 1.5 and 2.5, 2021 DIFC-LCIA Rules.

administrative secretaries, party representatives, both fact and expert witnesses, and third-party service providers.²⁹⁰

New time-limit for awards. Article 15.10 of the 2021 DIFC-LCIA Rules seeks to expedite the issuance of awards, requiring a DIFC-LCIA tribunal to render an award “*as soon as reasonably possibly*” (replicating the old wording of Article 15.10), with an endeavour to do so “*no later than three months following the last submission from the parties*” (additional new wording).

Tribunal’s powers to expedite. The 2021 DIFC-LCIA Rules confer a number of powers on a DIFC-LCIA tribunal to expedite the proceedings. This includes a power to limit or dispense with a party’s written submissions, oral testimony or a hearing and to employ technology to promote the expeditious conduct of the proceedings, including the hearing.²⁹¹ The tribunal is more generally empowered to “*make any procedural order it considers appropriate with regard to the fair, efficient and expeditious conduct of the arbitration.*”²⁹² Evidently, to the extent that any of these powers limit a party’s right to be heard, they must be exercised with caution.

Emergency arbitrator’s powers. Under the new Rules, emergency arbitrators have been empowered to award costs, including legal costs, in the emergency arbitration proceedings, to revoke/vary/discharge any order they make, to issue additional orders, correct any clerical mistakes in any award rendered by the emergency arbitrator, and to render additional awards with respect to emergency relief previously overlooked.²⁹³

3. Developments in the ADGM²⁹⁴

The Abu Dhabi Global Market (ADGM) has pushed further ahead in its arbitration offering over the course of 2020, leading the way with the promulgation of a number of soft law measures that, apart from enhancing the perception of UAE free zone arbitration more specifically, assist in the conduct of arbitrations in the UAE more generally.

3.1 Legislative developments

There has been one major legislative development in the ADGM in 2020, championing amendments to the ADGM Founding Law.

3.1.1 *The ADGM Founding Law: Latest Amendment*²⁹⁵

Abu Dhabi Law No. 4/2013,²⁹⁶ which led to the foundation of the Abu Dhabi Global Market (ADGM), the Abu Dhabi-based financial free zone, in 2015 (the “ADGM Founding Law” or simply the “Founding Law”), has been amended in relevant part by the recent adoption of Abu Dhabi Law No. 12/2020²⁹⁷ (the “2020 Amendment”). The 2020 Amendment focuses on clarifying the application of the ADGM Founding Law to aspects of dispute resolution, in particular litigation and arbitration, in matters involving the ADGM, including ADGM-seated arbitrations. In order to afford some initial guidance to the core amendments as well as their scope and objectives, the ADGM Courts published - in tandem with the adoption of the 2020

²⁹⁰ See Article 30, 2021 DIFC-LCIA Rules.

²⁹¹ See Article 14, 2021 DIFC-LCIA Rules.

²⁹² See Article 14.5, 2021 DIFC-LCIA Rules.

²⁹³ See Article 9, 2021 DIFC-LCIA Rules.

²⁹⁴ For some background on free zone arbitration in the ADGM, see G. Blanke, “Free Zone Arbitration in the United Arab Emirates: DIFC v. ADGM (Part II)”, 35(6) J. of Int. Arb. (2018), pp. 1-19.

²⁹⁵ This section is based on G. Blanke, “The ADGM Founding Law: Latest Amendment”, Westlaw Middle East, Thomson Reuters, June 2020.

²⁹⁶ Concerning the Abu Dhabi Global Market.

²⁹⁷ Amending Some of the Provisions of Law No. 4 of 2013 Concerning the Abu Dhabi Global Market.

Amendment - a seven-page bi-lingual (English/Arabic) guide,²⁹⁸ with a focus on Article 13 of the Founding Law, which has been significantly amended to reflect changes relevant to ADGM dispute resolution.

In brief, the core amendments on ADGM dispute resolution introduced to Article 13 of the ADGM Founding Law by the 2020 Amendment can be summarized under the following main subject-matter headings.

Status of the ADGM Courts. Pursuant to Article 13(1) as amended, the ADGM Courts are expressly recognised as “*courts of the Emirate*”, i.e., as courts of Abu Dhabi. For the avoidance of doubt, this does not mark any fundamental change to the status quo, according to which the ADGM Courts have always been regarded as courts of the Emirate. Having been decreed by the Ruler of Abu Dhabi, the ADGM Courts form, constitutionally speaking, part of the UAE family of courts and are as such considered an integral part of the UAE and more specifically the Abu Dhabi court system. In recognition of the close affinity of the ADGM Courts to the Ruler of Abu Dhabi, pursuant to Article 13(2) as amended, judgments of the ADGM Courts are to be issued in the Ruler’s name going forward.

According to the Guide, “[t]his may become of particular relevance when it comes to the enforcement of ADGM Courts’ judgments and awards under international treaties and conventions to which the United Arab Emirates is a signatory.”²⁹⁹ This will include the New York Convention³⁰⁰ as the primary international enforcement instrument with respect to foreign arbitral awards as well as instruments designed for the regional enforcement of both judgments and arbitral awards, including in particular the Riyadh³⁰¹ and the GCC³⁰² Conventions. Judicial instruments emanating from the ADGM Courts – whether ADGM Court judgments or ratified awards – that have been endorsed by the onshore Abu Dhabi Courts will no doubt benefit from an enhanced recognition effect, both regionally and internationally.

Exclusive jurisdiction of the ADGMCFI and ADGMCA. Article 13(7) as amended confers “*exclusive jurisdiction*” upon the ADGM Court of First Instance (ADGMCFI) in matters with an ADGM nexus, such as (i) civil and commercial disputes involving the ADGM or any of its authorities or establishments, and (ii) civil and commercial disputes arising out of a contract executed or performed in whole or in part in the ADGM. With respect to these matters, Article 13(9) as amended allows contracting parties to opt into any other jurisdiction outside the ADGM³⁰³ whereas pursuant to Article 13(8) as amended, “*exclusive jurisdiction*” for appeals on these matters lies with the ADGM Court of Appeal (ADGMCA).

This is to provide some clarity of language for common law parties and practitioners where the ADGM Founding Law in its original 2013 version provided for the Courts to “*solely consider and decide*” rather than emphasising the “*exclusive*” nature of the ADGM Courts’ jurisdiction.³⁰⁴ In addition, taking account of practical reality, Article 13(7) now delegates statutory interpretation to the ADGMCFI in a first instance, with the ADGMCA hearing disputes on interpretation on appeal only.³⁰⁵

Opt-in for arbitration. Importantly, pursuant to Article 13(9) as amended, “[n]otwithstanding the provisions of paragraph (7) of this Article [i.e., Article 13(7) as amended], the parties may agree to refer their claims or disputes to arbitration”: This means that parties are at liberty to contract into ADGM arbitration in relation to *any* disputes, irrespective of whether these have an ADGM nexus or not.

This amendment addresses a criticism that had been levelled at the old wording of the corresponding provision in the original version of the Founding Law, which limited the application of ADGM arbitration to civil and commercial disputes with an ADGM nexus (i.e., essentially the disputes listed as attracting the

²⁹⁸ Guide to amendments to Article 13 of Abu Dhabi Law No. 4 of 2013, available online at <https://www.adgm.com/documents/courts/legislation-and-procedures/guidance-papers/adgm-courts-guide-to-amendments-to-article-13-of-the-founding-law.pdf>.

²⁹⁹ Guide, at para. 17.

³⁰⁰ On the recognition and enforcement of foreign arbitral awards, made in New York, 10 June 1958.

³⁰¹ Riyadh Convention on Judicial Cooperation between States of the Arab League (1983).

³⁰² GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications (1987).

³⁰³ For the avoidance of doubt, this excludes matters of statutory interpretation with respect to ADGM law (or regulations).

³⁰⁴ To this effect, see Guide, at paras 6-7.

³⁰⁵ *Id.*, at para. 10.

exclusive jurisdiction of the ADGMCFI above).³⁰⁶ By way of explanation, a plain reading of Articles 13(6)³⁰⁷ and (7)³⁰⁸ in their original version suggested that under the ADGM Founding Law, arbitration in the ADGM was limited to disputes with an ADGM nexus. This is because Article 13(7) made strict reference to the first and second paragraphs of Article 13(6) as the limits within which parties may agree to resort to arbitration in the ADGM. More specifically, only the disputes that were listed at those paragraphs, each of which had a nexus with the ADGM, qualified for referral to arbitration. In other words, referrals to arbitration of disputes that fell outside this scope, i.e., those without any ADGM nexus, would be unenforceable.³⁰⁹

Against this background, the amended Article 13(9) is a welcome amendment that dispels any doubt as to the true permissible scope of ADGM arbitration and confirms that international commercial disputes may be submitted for resolution by ADGM arbitration (subject, evidently, to the usual threshold question of arbitrability). In addition, the Guide reminds that any contractual opt-in, e.g., in favour of the exclusive jurisdiction of the ADGM Courts in matters without an ADGM nexus or in favour of ADGM-seated arbitration requires an agreement in writing.³¹⁰

Codification of the ADJD-ADGM MoU. ³¹¹ Articles 13(15) and 13(16) as amended³¹² codify the corresponding provisions of the ADJD-ADGM MoU, facilitating the mutual recognition and enforcement of judicial instruments, including in particular judgments, orders and ratified awards issued by the respective other court without a re-examination on the merits by the receiving court before which enforcement is sought.³¹³ The regime, which is one for “*expedited enforcement*”, allows either for direct enforcement before

³⁰⁶ With respect to the original limitations, see in particular G. Blanke, “The Arbitral Jurisdiction of The ADGM: How Far Does It Reach ... Really?”, Kluwer Arbitration Blog, 23 August 2019, available online at <http://arbitrationblog.kluwerarbitration.com/2019/08/23/the-arbitral-jurisdiction-of-the-adgm-how-far-does-it-reach-really/>, contending for a limited reading of then Article 13(7) of the Founding Law. *Contra*, see J. P. Gaffney, “The Abu Dhabi Global Market: An Arbitral Seat Open to All”, Kluwer Arbitration Blog, 14 May 2019, available online at http://arbitrationblog.kluwerarbitration.com/2019/05/14/the-abu-dhabi-global-market-an-arbitral-seat-open-to-all/?doing_wp_cron=15912072.53.1764960289001464843750.

³⁰⁷ Which provided in pertinent part as follows: “6. *The [ADGM or Global Market] Court of First Instance shall solely consider and decide on matters relating to the activities of the Global Market according to the following:*

- *Civil or commercial cases and disputes involving the Global Market or any of the Global Market’s Authorities or any of the Global Market’s Establishments;*
- *Lawsuits and civil or commercial disputes arising out of or relating to a contract or a transaction conducted in whole or in part in the Global Market or to an incident that occurred in the Global Market;*
- *[...]*
- *Any request which the Global Market Courts has the jurisdiction to consider under the Global Market Regulations.”*

(emphasis added)

³⁰⁸ Which provided as follows: “7. *Notwithstanding the provisions of paragraph (6) of this Article, the parties in relation to the issues specified in the first and second paragraphs may agree in their commercial contracts and transactions to the jurisdiction of any court other than the Global Market Court of First Instance or agree to refer their disputes to arbitration.”*

³⁰⁹ Importantly, the fourth paragraph of Article 13(6), which might have allowed for a wider reading, was excluded from the reference to arbitration under Article 13(7).

³¹⁰ See the Guide, at para. 4.

³¹¹ Executed Memorandum of Understanding between the Judicial Department of the Emirate of Abu Dhabi and Abu Dhabi Global Market Courts concerning the Reciprocal Enforcement of Judgments, dated 11 February 2018. For comment, see G. Blanke, “The Abu Dhabi Global Market adopts Memorandum of Understanding with Abu Dhabi Judicial Department on enforcement of awards”, Practical Law Arbitration Blog, Thomson Reuters, 3 May 2018, available online at <http://arbitrationblog.practicallaw.com/the-abu-dhabi-global-market-adopts-memorandum-of-understanding-with-abu-dhabi-judicial-department-on-enforcement-of-awards/>.

³¹² Which provide in relevant part as follows: “*Subject to the provisions of paragraph 13 of this Article, the following shall be taken into consideration when judgments or orders made by the Global Market’s Courts[/the courts of the Emirate], or arbitral awards recognised by the Global Market’s Courts[/such courts] are to be enforced by the courts of the Emirate[/Global Market’s Courts]: a) A judgment creditor may, upon direct application to any of the Emirate’s courts[/Global Market’s Courts], request that court to take any measure or action to enforce any judgments or orders made by the Global Market’s Courts[/courts of the Emirate], or arbitral awards recognised by the Global Market’s Courts[/such courts]; b) The Global Market’s Courts[/Courts of the Emirate] may, upon the application of a judgment creditor, deputise an enforcement judge from the courts of the Emirate[/Global Market’s Courts] to take any measure or action to enforce any judgments or orders made by the Global Market’s Courts[/courts of the Emirate], or arbitral awards recognised by the Global Market’s Courts[/such courts]; c) The enforcement judge of the court of the Emirate[/Global Market’s Courts] shall apply the enforcement procedures set out in the Federal Law No. (11) of 1992[/Global Market’s Courts’ procedural rules] referred to without re-examining the merits of the judgment, order or recognised arbitral award.”*

³¹³ In the terms of the Guide, para. 15: “*This provides for the mutual enforcement by the Abu Dhabi sister courts of each other’s judgments and recognised or ratified arbitral awards – without any review on the merits being undertaken by the enforcing court.”*

the execution judge at the enforcing court³¹⁴ or for deputisation of an Abu Dhabi or ADGM Court enforcement judge³¹⁵ as the case may be. That said and for the avoidance of doubt, the ADJD-ADGM MoU has not been repealed by the 2020 Amendment and remains in force in its own right.

This amendment no doubt assists in promoting the full mutual integration of the onshore and offshore legal systems in the Emirate of Abu Dhabi and as such will provide reassurance to ADGM Court and arbitration users that ADGM judgments and ratified awards will have full legal force and will as such be enforced in mainland Abu Dhabi.³¹⁶ In the terms of the Guide,

[t]hese amendments to the Founding Law are an important development because it elevates the enforcement mechanism contained in the Memorandum of Understanding [i.e., the ADJD-ADGM] to a matter of law – and should provide parties with increased confidence that ADGM Courts' judgments and recognised awards will be enforced by its sister court, Abu Dhabi Judicial Department.³¹⁷

For the avoidance of doubt, Articles 13(5) and 13(6) are expressly stated to be subject to the limitations of the ADGM as a conduit (on which see below).

ADGM as a conduit. Article 13(11) in its original 2013 version enabled the operation of the ADGM as a conduit jurisdiction, whereby the ADGM Courts could be regarded as competent to entertain the recognition and enforcement of non-ADGM judgments and awards for onward execution outside the ADGM (even absent any assets of a judgment or award debtor from the ADGM). A new Article 13(14) appears to limit the operation of the ADGM Courts as a conduit to judgments and orders issued by “*a court inside the Emirate*”,³¹⁸ hence apparently retaining the potential role of the onshore Abu Dhabi and offshore ADGM Courts as a conduit with respect to each other's judgments and orders. By contrast, arbitral awards are systematically excluded from the scope of the ADGM Courts' conduit jurisdiction.³¹⁹ The Guide provides the following guidance, which – given the importance of the subject – deserves citation in full:

11. Article 13(14) of the Amended Founding Law deals with what some members of the legal profession refer to as the “conduit route” for the enforcement of judgments and orders (“judgments”) that originated outside the Emirate and awards made outside ADGM. Put simply, parties cannot use ADGM for the enforcement of non-ADGM judgments and awards in other jurisdictions – the limited exception being where the originating judgment comes from another court within the Emirate.
12. As a matter of principle, it has always been ADGM Courts' position that parties should go to the place where the relevant assets are located for the purpose of enforcement.³²⁰ This principle has now been given effect through the amendments to the Founding Law.

³¹⁴ Requiring the judgment or award creditor to apply to the execution judge for enforcement.

³¹⁵ Requiring the judgment or award creditor to apply to the issuing court for it to deputise an enforcement judge before the courts where execution is sought.

³¹⁶ For confirmation of this latter point, also see the Guide, at para. 16.

³¹⁷ See the Guide, at para. 16.

³¹⁸ See Article 14(a) as amended, according to which Article 13 as amended, which codifies the obligation of the onshore Abu Dhabi and offshore ADGM Courts to deal with the recognition and enforcement of each other's judicial instruments, including judgments, orders and ratified awards, by reference to the applicable court rules and any memoranda of understanding designed for that purpose, including the ADJD-ADGM MoU, “*shall not apply to a judgment or order rendered by the Global Market's Courts in respect of (a) a judgment or order issued by a court outside the Emirate*”.

³¹⁹ See Article 14(b) as amended, expressly excluding from the above-described regime “*any arbitral award rendered by a tribunal where the seat is outside the Global Market*”, i.e. non-ADGM awards in general, i.e. any arbitral awards rendered outside the ADGM as a seat, including awards rendered in onshore Abu Dhabi.

³²⁰ This is reflected in Memorandum of Understanding entered into by ADGM Courts with Abu Dhabi Judicial Department on 11 February 2018, Ras Al Khaimah Courts on 5 May 2019 and Ministry of Justice on 4 November 2019. [Footnote 5 in the original. Note, however, that on the basis of their arguably broader language, the referenced instruments did give reasoned ground for the ADGM Courts' service as a conduit jurisdiction. To this effect, see Blanke (2018), *op. cit.*, at fn 16; G. Blanke, “The ADGM adopts memorandum of understanding with Ras Al Khaimah Courts on enforcement of awards”, Practical Law Arbitration Blog, Thomson Reuters, 11 July 2019, available online at <http://arbitrationblog.practicallaw.com/the-adgm-adopts-memorandum-of-understanding-with-ras-al-khaimah-courts-on-enforcement-of-awards/>; and G. Blanke, “The ADGM courts adopt memorandum of understanding on enforcement of awards with UAE MoJ”, Practical Law Arbitration Blog, Thomson Reuters, 18 May 2020, available online at <http://arbitrationblog.practicallaw.com/the-adgm-courts-adopt-memorandum-of-understanding-on-enforcement-of-awards-with-uae-moj/>.]

13. What that means is that if parties wish to take advantage of the favourable enforcement framework that ADGM Courts have in place with other jurisdictions (including with Abu Dhabi Judicial Department), they must submit their original dispute for determination by ADGM Courts or by arbitration in ADGM. If parties do not do this, and execution against debtor assets is to take place in a jurisdiction other than ADGM, then the judgment or award creditor must bring an enforcement application in that other jurisdiction.
14. In practice, parties are still able to apply to ADGM Courts for the recognition and enforcement of non-ADGM judgments and awards even if there are no relevant assets in ADGM. But, save for the limited exception referred to in paragraph 11, the Registry of ADGM Courts will not affix the “executory formula” to any subsequent ADGM Courts judgment or order for the purpose of enforcement (including execution) in other jurisdictions.

The carve-out or exception in favour of judgments rendered inside the Emirate stands confirmed by a combined reading of paras 14 and 11 of the Guide. Needless to say that what must be understood as the abolition of the ADGM as a conduit causes great disappointment³²¹ and adversely impacts, in our view, the considered forum shopping opportunities offered by the conduit regime option across on- and offshore, promoting the mutual integration between the UAE’s mainland and free zone jurisdictions.

For the avoidance of doubt, albeit marking a set-back for the enforcement of foreign judgments and arbitral awards, the limitations of the ADGM as a conduit were arguably foreshadowed by the ADGMCFI’s ruling in *A4 v. B4*^{322, 323}. In this case, Smith J considered an award rendered under the LCIA Rules in London for recognition and enforcement in the ADGM, without any reported nexus to the ADGM and absent any assets of the award debtor from the ADGM. Importantly for present purposes, on the assets point more specifically, J Smith stated *obiter* as follows:

[...] there is no evidence that B4 do not have assets within the ADGM, and still less is there any proper basis to conclude that they will not have assets within the ADGM in the foreseeable future or that A4 have no reason to believe that they will do so. Accordingly, there is no proper reason to suppose that A4 seek recognition and enforcement in these proceedings simply as a device to execute against assets elsewhere in the UAE.³²⁴

The question that this analysis raised more specifically was whether the ADGM courts were able to operate as a conduit jurisdiction for the recognition and enforcement of non-ADGM awards for onward execution against award debtor’s assets onshore. Smith J seemed to intimate that if the sole purpose behind the offshore enforcement application was execution outside the ADGM (no assets of the award debtor being present within), the ADGMCFI should not entertain the application. In similar terms, Smith J asked the following rhetorical questions:

B4 are an Abu Dhabi registered company, as indeed are A4. Should this Court be concerned about whether A4 might be seeking recognition and enforcement of the Award not in order to enforce it against assets in the ADGM, but as a device to have an order of this Court (rather than the Award itself) enforced elsewhere in the UAE, and in particular elsewhere in Abu Dhabi, without having other UAE Courts, including those of the Abu Dhabi Judicial Department (“ADJD”), examine for themselves whether the Award should be recognised and enforced within their jurisdictions?³²⁵

Netting agreements. Last but not least, Article 13(17) as amended provides for the application of the recognition and enforcement regime under the ADGM Founding Law with respect to non-ADGM judicial instruments, including judgment, order and ratified awards, as well as (foreign) arbitral awards more generally

³²¹ The Guide referring to the conduit option as an “impermissible device for enforcement”: See the Guide, at p. 5.

³²² [2019] ADGMCFI 0007, ruling of 8 October 2019.

³²³ For comment, see G. Blanke, “The First Arbitration-Related Cases of the ADGM Courts (Part 2): [2019] ADGMCFI 0007”, Practical Law Arbitration Blog, Thomson Reuters, 16 January 2020, available online at <http://arbitrationblog.practicallaw.com/the-first-arbitration-related-cases-of-the-adgm-courts-part-2-2019-adgmcfi-0007/>. See also G. Blanke, “Arbitration in the UAE: 2019 in Review”, in G. Al Hajeri and Z. Penot (eds), *The UAE Arbitration Yearbook 2019*, LexisNexis, 2020, pp. 54-85, at pp. 70-73.

³²⁴ Ruling in *A4 v. B4*, at para. 23.

³²⁵ *Id.*, at para. 20.

for the protection of so-called Netting Agreements. In the terms of the 2020 Amendment, qualifies as a netting agreement “any agreement or master agreement between two parties which provides for the netting of present or future payment or delivery obligations or entitlements and any related margin, collateral or security arrangements, in connection with those types of qualified financial contracts as the Board of Directors may designate.”³²⁶

Taking all the amendments to Article 13 of the ADGM Founding Law in the round, it difficult to hide some disappointment at the more radical changes, in particular the quasi prohibition of the ADGM Courts to operate as a conduit jurisdiction. This is no doubt a trade-off initiated by the onshore Abu Dhabi authorities out of a desire to remain a *primus inter pares*.

That said, to conclude on a positive note, the expansion of the opt-in to go to arbitration marks a welcome end to the more limited scope of the arbitration option under the original version of the Founding Law, severing the ADGM arbitration option from any geographic nexus to the ADGM (bar the seat of the arbitration or the application of the 2015 ADGM Arbitration Regulations).

3.2 Soft law measures of the ADGM

The ADGM has adopted a number of soft law measures that assist in the conduct of arbitration in the UAE more generally and enhance the perception of UAE free zone arbitration more specifically. Importantly, this includes measures to support the mutual recognition and enforcement of ADGM awards by courts within the UAE.

3.2.1 MoJ-ADGM MoU on enforcement of awards³²⁷

In another push to expand the area of free movement of onshore and offshore ratified awards, the ADGM Courts have recently entered into a memorandum of understanding with the Ministry of Justice of the United Arab Emirates.³²⁸ Following its adoption on 4 November 2019, the 2019 MoJ-ADGM MoU entered into force with immediate effect.³²⁹ It follows the adoption of the related MoU on judicial co-operation between the UAE Ministry of Justice and the ADGM Courts³³⁰, which has for one of its main objectives the pursuit of the reciprocal recognition and enforcement of arbitral awards between the federal and the ADGM Courts and *vice versa*.³³¹

The 2019 MoJ-ADGM MoU is closely aligned with and as such modelled on the wording of two previous memoranda that were adopted with corresponding objectives in mind: The MoU between the ADGM Courts and the Abu Dhabi Judicial Department of 16 April 2016 on the one hand³³² and the MoU between the ADGM Courts and the Ras Al Khaimah Courts of 5 May 2019 on the other,³³³ both deal with the

³²⁶ See Article 1 as amended.

³²⁷ This section is based on G. Blanke, “The ADGM courts adopt memorandum of understanding on enforcement of awards with UAE MoJ”, Practical Law Arbitration Blog, Thomson Reuters, 18 May 2020, available online at <http://arbitrationblog.practicallaw.com/the-adgm-courts-adopt-memorandum-of-understanding-on-enforcement-of-awards-with-uae-moj/>.

³²⁸ See Memorandum of Understanding between Ministry of Justice United Arab Emirates and Abu Dhabi Global Market Courts Concerning the Reciprocal Enforcement of Judgments, dated 4 November 2019 (the “2019 MoJ-ADGM MoU” or simply the “MoU”).

³²⁹ See Clause 19.

³³⁰ See Memorandum of Understanding between Ministry of Justice and Abu Dhabi Global Market Courts concerning cooperation in legal and judicial matters, dated 15 May 2016 (the “2016 MoJ-ADGM MoU”). For contemporaneous commentary, see G. Blanke, “Recent Developments of Arbitration in the UAE: The Year in Review” in G. Al Hajeri and Z. Penot (eds), *The UAE Arbitration Yearbook 2016, 2017*, pp. 80-102, at pp. 93 *et seq.*

³³¹ See Clause 3(4) read together with Clauses 3(3) and 2(5), 2016 MoJ-ADGM MoU.

³³² For contemporaneous commentary, see G. Blanke, “The Abu Dhabi Global Market adopts Memorandum of Understanding with Abu Dhabi Judicial Department on enforcement of awards”, Practical Law Arbitration Blog, Thomson Reuters, 3 May 2018, available online at <http://arbitrationblog.practicallaw.com/the-abu-dhabi-global-market-adopts-memorandum-of-understanding-with-abu-dhabi-judicial-department-on-enforcement-of-awards/>. Also see G. Blanke, “Arbitration in the UAE: 2018 in Review”, in G. Al Hajeri and Z. Penot (eds), *The UAE Arbitration Yearbook 2018*, LexisNexis, 2019, pp. 31-61, at pp. 54-56.

³³³ For contemporaneous commentary, see G. Blanke, “The ADGM adopts memorandum of understanding with Ras Al Khaimah Courts on enforcement of awards”, Practical Law Arbitration Blog, Thomson Reuters, 11 July 2019, available online at <http://arbitrationblog.practicallaw.com/the-adgm-adopts-memorandum-of-understanding-with-ras-al-khaimah-courts-on-enforcement-of-awards/>. Also see G. Blanke, “Arbitration in the UAE: 2019 in Review”, in G. Al Hajeri and Z. Penot (eds), *The UAE Arbitration Yearbook 2019*, LexisNexis, 2020, pp. 54-85, at pp. 79-81.

onshore/offshore recognition and enforcement of judicial instruments, including ratified awards, between the respectively designated courts, proscribing any review on the merits of the instrument of which recognition and enforcement is being sought before the enforcing court. Taken together, these MoUs strive for the judicial integration between onshore and offshore by establishing a UAE-wide regime of mutual recognition and enforcement of judicial instruments, including ratified awards. Importantly, the MoU extends to the federal UAE Courts, i.e., those courts that form part of the federal UAE court system, i.e., the courts of the Emirates of Sharjah, Ajman, Umm Al Quwain and Fujairah.³³⁴ This means that taking account of the number of onshore courts that have now entered into an MoU with the ADGM Courts for creating a pan-UAE area of free movement, only the Dubai courts, including their free zone counterparts, the DIFC Courts, stay marginalised and will have to rely on the terms of UAE Federal Law No. 11 of 1973 for want of a better-suited and more avantgarde instrument to assist in the enforcement of an onshore Dubai or offshore DIFC award in the ADGM or *vice versa*.

The reference in the title of the 2019 MoJ-ADGM MoU to “reciprocal” recognition and enforcement is a misnomer of sorts given the ambition of the MoU to create a regime for *mutual* recognition and enforcement that dispenses with a *substantive* review by the enforcing court of the instrument presented for enforcement, i.e., that requires enforcement “*without re-examining the substance of the dispute on which [the instrument] has been issued*”³³⁵. In this sense, the 2019 MoJ-ADGM MoU expressly prohibits a re-examination on the merits by the respectively other court of awards ratified by the Federal Courts³³⁶ or of awards ratified by the ADGM Courts³³⁷, as the case may be. This approach is also confirmed by the definition of arbitral awards under the MoU, according to which “[a] ratified or recognised arbitral award by the Federal Courts or the ADGM Courts has the same force as a judgment of either of the courts and therefore does not require any further ratification or recognition by the other court”³³⁸, thus proscribing any form of double *executatur*. Following the regime introduced by the previous two MoUs, in order to qualify for mutual recognition and enforcement without a second look by the enforcing court, the ratified arbitral award presented for enforcement must be accompanied by an official translation into the working language of the enforcing court, i.e., English in the case of the ADGM³³⁹ and Arabic in the case of the Federal Courts³⁴⁰ and bear the following executory formula³⁴¹:

“The authorities and competent bodies must proceed to execute this instrument and to carry out the requirements thereof, and they must give assistance in the execution thereof even by force if so requested.”

In order to ensure the seamless operation of the 2019 MoJ-ADGM MoU in practice, each of the Federal and the ADGM Courts is required to assign officers to assist award creditors whose ratified awards have been referred to the respectively other court for enforcement³⁴² and to ensure that there is no duplication in court actions between the on- and offshore courts.³⁴³

Taken in the round, the 2019 MoJ-ADGM MoU promotes the establishment of a pan-UAE regime of mutual recognition and enforcement of ratified awards between the onshore UAE and the offshore ADGM Courts. Once perfected, this regime will lead to the full judicial integration of the civil law courts in mainland UAE and the ADGM free zone courts. From a comparative law perspective, the adoption of these MoUs unleash integrational forces that will consolidate the systemic interaction between the civil and common law traditions in everyday legal practice and in particular in the enforcement of domestic onshore and offshore awards.

³³⁴ See Clause 2, 2019 MoJ-ADGM MoU.

³³⁵ See Clause 2, 2019 MoJ-ADGM MoU.

³³⁶ See Clause 10, 2019 MoJ-ADGM MoU.

³³⁷ See Clause 15, 2019 MoJ-ADGM MoU.

³³⁸ See Clause 5(a)(ii), 2019 MoJ-ADGM MoU.

³³⁹ See Clause 7(b), 2019 MoJ-ADGM MoU.

³⁴⁰ See Clause 12(b), 2019 MoJ-ADGM MoU.

³⁴¹ See Clauses 7(a) and 12(a), 2019 MoJ-ADGM MoU.

³⁴² See Clause 16(a)(ii), 2019 MoJ-ADGM MoU.

³⁴³ See Clause 16(a)(i), 2019 MoJ-ADGM MoU.

3.3 Revised 2015 ADGM Arbitration Regulations³⁴⁴

The ADGM Arbitration Regulations³⁴⁵ have recently been subject to their first revision: Amendment No. 1 of 2020,³⁴⁶ as it is known, was enacted just before Christmas, that is on 23 December 2020, and has entered into full force at the time of writing. The Amendment focuses on a number of areas to enhance the efficient operation of the 2015 ADGM Arbitration Regulations, including in particular a clarification of the scope of an arbitration agreement under the Regulations, the ADGM Courts' powers to grant interim measures, the pervasive use of technology throughout the arbitration process, the summary disposal of claims, counterclaims and defences, the imposition of certain disclosure requirements with respect to third-party funding, and the regulation of party and party representative conduct.

The following discusses each of these and other amendments together with their respective objectives in an attempt to provide some initial guidance. In doing so, it takes account of Consultation Paper No. 8 of 2020 – Proposed Amendments to the ADGM Arbitration Regulations 2015, dated 25 November 2020³⁴⁷ (the “Consultation Paper”), which was circulated to inform and assist the public consultation process initiated by the ADGM before adoption of the amended Regulations. The Consultation Paper explains the rationale behind a number of the amendments that were ultimately adopted.

The scope of the arbitration agreement. Inspired by Section 5 of the 1996 English Arbitration Act, Section 14(2) of the Regulations as amended allows arbitration agreements to qualify as having been made in writing if their recording in written form is by a(n) (authorised) third party as opposed to the contracting party that is subject to the obligation to arbitrate itself. As a corollary, Section 14(2) also expressly recognises the formation of arbitration agreements that are in writing but have not been signed orally or by conduct. This is intended to facilitate the conclusion of binding arbitration obligations arising from bills of lading that provide for arbitration or from articles of association that provide for arbitration in shareholder disputes.³⁴⁸

A new Section 14(6) expressly recognizes the enforceability of unilateral arbitration options under the Regulations as amended: “*An arbitration agreement giving any party a unilateral or asymmetrical right to refer a dispute either to an arbitral tribunal or a court does not contravene these Regulations and shall not be rendered invalid for that reason.*” This helpfully clarifies the position under the Regulations on a subject that remains unclear in onshore arbitration albeit that unilateral options to resort to court rather than arbitration have been found enforceable onshore.³⁴⁹

The ADGM Courts' powers to grant interim measures. A new Section 29 confers upon the ADGM Courts the power to order a claimant to provide security for the costs of the arbitration irrespective of the claimant's place of residency or incorporation, even if outside the ADGM.

Amended Section 31 has been significantly broadened in its application and now empowers the ADGM Courts to adopt “*any interim measure in relation to arbitration proceedings as [they] ha[ve] in relation to proceedings in the Court*”³⁵⁰, reflecting corresponding powers of the DIFC Courts in DIFC-seated arbitrations under the 2008 DIFC Arbitration Law. In addition, Section 31(3) now relieves the ADGM Courts' power to award interim relief from any geographic nexus to the ADGM in circumstances where the seat of arbitration is outside the ADGM (other than the location of the subject of the relief being in the ADGM). In addition, it expressly empowers the ADGM Courts to adopt interim measures against third parties, i.e., non-parties to the underlying arbitration agreement. This will facilitate the Courts' role in providing interim relief outside a strictly curial context and - taking guidance from recent case law precedent

³⁴⁴ This section is based on G. Blanke, “Amendment No. 1 of 2020: The 2015 ADGM Arbitration Regulations in focus”, Kluwer Arbitration Blog, forthcoming March 2021.

³⁴⁵ For a consolidated text, see https://en.adgm.thomsonreuters.com/sites/default/files/net_file_store/ADGM1547_19075_VER231220.pdf.

³⁴⁶ See https://en.adgm.thomsonreuters.com/sites/default/files/net_file_store/ADGM_Arbitration_Regulations_Amendment_No_1_of_2020-23122020.pdf.

³⁴⁷ See <https://www.adgm.com/documents/legal-framework/public-consultations/2020/consultation-paper-no-8/consultation-paper-no-8-of-2020--adgm-arbitration-regulations.pdf>.

³⁴⁸ See Consultation Paper, at para. 12.

³⁴⁹ See Case No. 116/2018, ruling of the Dubai Court of Cassation of 16 September 2018.

³⁵⁰ See Section 31(2), amended Regulations.

of the English Court of Appeal in *A v. C.* [2020] EWCA Civ. 409³⁵¹ - the production of third-party witness evidence by non-parties in an ADGM-seated arbitration. *Ex parte* applications for interim relief by parties and non-parties alike are permissible in cases of urgency only.³⁵²

Finally, an amended Section 48(1) now provides for a non-exhaustive list of self-explanatory measures that may be adopted by the ADGM Courts to lend assistance in the taking of evidence:

- (a) the examination of witnesses, either orally or in writing;
- (b) the production of documents;
- (c) the inspection, photographing, recording, preservation, custody or detention of any property; and
- (d) the taking of samples of any property and the carrying out of any experiment on or with any property.

Procedural rules. In an endeavour to assist in the fair and efficient procedural conduct of the arbitration, a new Section 34(2) expressly authorises the adoption – in whole or in part – of the ADGM Arbitration Centre Arbitration Guidelines³⁵³. These entered into force in September 2019 with the objective to “*provide parties and tribunals with a set of innovative best practice procedures to assist in bringing greater certainty and efficiency to the arbitral process, while ensuring fairness, equality and due process*”.³⁵⁴

The use of technology. A new Section 34(5) introduces seven “*technology-related solutions*”³⁵⁵ that facilitate the remote procedural conduct of an ADGM-seated arbitration:

- (a) the submission, exchange or communication of documents by electronic means;
- (b) the use of electronic signatures for documents submitted, exchanged or communicated;
- (c) documents being provided in electronic searchable form;
- (d) the use of an electronic document review system for disclosure or document production;
- (e) the use of an electronic document management system for hearings;
- (f) the use of an online case management platform;
- (g) conducting hearings, in whole or in part, by video conference, telephone or other communication technology;

Section 34(5) also offers a residual solution which leaves it to an ADGM tribunal to identify any other suitable technological measures for the expeditious and efficient conduct of the arbitration. Helpful guidance is also provided by the Consultation Paper, which states that “*the technology-related solutions set out in section 34(5) are not mandatory as the tribunal retains a broad discretion as to whether they are appropriate to use in any particular case*” and that “[*t*]he seven solutions are also not exclusive, as there is an eighth catch-all

³⁵¹ See Consultation Paper, at para. 16.

³⁵² See Section 31(4) and (5), amended Regulations.

³⁵³ See <https://www.adgmac.com/wp-content/uploads/2019/09/ADGM-Arbitration-Centre-Guidelines.pdf>. For some initial commentary, see G. Blanke, “The ADGM Arbitration Centre Guidelines: soft law hardcore...”, Practical Law Arbitration Blog, Thomson Reuters, 8 November 2019, available online at <http://arbitrationblog.practicallaw.com/the-adgm-arbitration-centre-arbitration-guidelines-soft-law-hardcore/>. See also G. Blanke, “Arbitration in the UAE: 2019 in Review”, in G. Al Hajeri and Z. Penot (eds), *The UAE Arbitration Yearbook 2019*, LexisNexis, 2020, pp. 54-85, at pp. 75-77.

³⁵⁴ See Introduction to the Guidelines.

³⁵⁵ See Consultation Paper, at para. 19.

category which relates to any other technology that will enhance the efficient and expeditious conduct of the arbitration".³⁵⁶

Further, a new Section 35(5) confirms that arbitration under the Regulations may be conducted at any venue by electronic means, *"in whole or in part, in person or by video conference, telephone or other communications technology (or any combination thereof) in one or more geographical places."* This creates an opportunity for the remote hearing of the parties' legal pleadings and for remote oral testimony tendered by both fact and expert witnesses.³⁵⁷ In similar terms, Section 43, which deals with the conduct of hearings and the written proceedings in ADGM arbitration, has been amended to reflect the permitted use of technology throughout: hearings may hence be held *"[...], in whole or in part, in person, by video conference, telephone or other communication technology"*,³⁵⁸ a party having liberty to apply for the hearing of expert or fact witnesses in the same manner;³⁵⁹ legal pleadings together with evidence may be *"supplied or communicated electronically"*.³⁶⁰

Finally, the amended Regulations provide that an award is deemed made at the seat of the arbitration even if *"signed by electronic means"*³⁶¹ and that *"[a]n award signed by electronic means shall have the same legal validity and enforceability and constitute the original award for the purposes of section 61(2)(a) of these Regulations [i.e., for enforcement purposes], as an award with manually executed signatures of arbitral tribunal"*³⁶², with a soft copy of the award being delivered to a party upon issuance, subject to delivery of an original hard copy upon party request.³⁶³ Amended Section 55(6) also expressly includes within the term of (recoverable) *"cost of the arbitration"* *"other costs for the conduct of the arbitration, including those for [...] technological solutions such as electronic document management and virtual hearing platforms [...]"*.³⁶⁴

To be sure, the pervasive use of technology throughout the arbitration process under the amended Regulations follows recent trends in favour of digitalization prompted by the currently pending pandemic across the arbitration industry. That said, it bears mentioning that the regime for the treatment of electronic awards and the digitalization of the arbitration process is by far the most comprehensive and advanced in any arbitration law to date. As explained by the Consultation Paper, *"technology-related solutions are part of ADGM's arbitration DNA"*.³⁶⁵

Seat of arbitration. Following the wording of Article 14(b) of the ADGM Founding Law as amended,³⁶⁶ a new Section 35(2) disassociates the application of the Regulations from an ADGM-nexus requirement other than the seat of the arbitration being the ADGM. This finally settles the debate on the proper scope of application of the 2015 ADGM Arbitration Regulations in favour of their application absent any geographic nexus to the ADGM other than the seat of the arbitration.³⁶⁷

Disclosure and third-party funding. Following contemporary trends in international arbitration more generally, a new Section 37 requires a party to disclose to the tribunal and the other parties in the arbitration third-party funding arrangements and the identity of any third-party funder in order, inter alia, to avoid conflicts of interest.

Summary dismissal. A new Section 42 introduces a regime for the early summary disposal of claims, counterclaims and defence in whole or in part on the basis that there is *"no real prospect of success in respect*

³⁵⁶ *Id.*, at para. 21.

³⁵⁷ See Section 35(4), amended Regulations.

³⁵⁸ See Section 43(2), amended Regulations.

³⁵⁹ See Section 43(3), amended Regulations.

³⁶⁰ See Section 43(6), amended Regulations.

³⁶¹ See amended Section 55(3).

³⁶² See amended Section 55(4).

³⁶³ See amended Section 55(5).

³⁶⁴ See amended Section 55(6)(e).

³⁶⁵ See Consultation Paper, at para. 20.

³⁶⁶ See L. Pitts, Y. Hefti-Rossier and K. Kalantarian, "ADGM Courts: Not Open for Business as a Conduit Jurisdiction?", Kluwer Arbitration Blog, 7 October 2020, available online at <http://arbitrationblog.kluwerarbitration.com/2020/10/07/adgm-courts-not-open-for-business-as-a-conduit-jurisdiction/>.

³⁶⁷ For further discussion, see G. Blanke, "The Arbitral Jurisdiction of The ADGM: How Far Does It Reach ... Really?", Kluwer Arbitration Blog, 23 August 2019, available online at <http://arbitrationblog.kluwerarbitration.com/2019/08/23/the-arbitral-jurisdiction-of-the-adgm-how-far-does-it-reach-really/>.

of the relevant part or whole of the claim, counterclaim or defence”.³⁶⁸ It bears mentioning that the Consultation Paper also expressly envisages a summary disposal on the basis that the tribunal “manifestly” lacks jurisdiction (referred to as the “jurisdiction limb”) in addition to the “merits limb”³⁶⁹ albeit that the jurisdictional limb is in any event dealt with in detail under Chapter 4 of the 2015 ADGM Arbitration Regulations (“*Jurisdiction of arbitral tribunal*”). Importantly, in order to preserve the efficiency of the arbitral process, the summary disposal procedure is at the tribunal’s “full discretion” following consultation with the parties albeit that the tribunal’s summary determination must be in the form of an award, thus making it enforceable before the competent courts.³⁷⁰

Tribunal-appointed expert. New Subsections 47(4) and (5) require the communication of a Tribunal-appointed expert report upon which tribunal relies in its decision to the parties but allows this to be done electronically unless otherwise agreed by the parties.

Party and party representative conduct. A new Section 44 regulates party and party representative conduct in the arbitration, providing for a sanctioning mechanism in the event of non-compliance. This regime is closely modelled on Module 6 of the ADGM Arbitration Centre Arbitration Guidelines.

Recognition and enforcement. Apart from the comments of relevance made with respect to the use of technology above, amended Section 61(2) dispenses with the requirement to submit an original or certified copy of the arbitration agreement in favour of a simple copy (to accommodate the unintended loss by a party of that agreement in its original). Amended Section 61(5) makes that Section expressly subject to Article 13 of the ADGM Founding Law as amended, which in turn prohibits the operation of the ADGM Courts as a conduit.

Conclusion

2020 has been another interesting year for both onshore and offshore arbitration in the UAE. Most importantly, a first body of case law precedent under the FAL has now gradually been shaping. From those developments it is evident that the UAE courts’ interpretation of the provisions of the FAL have so far remained closely aligned with case law precedent under the former UAE Arbitration Chapter. Similarly, offshore developments have further consolidated the attractive offering of free zone arbitration in the UAE by virtue of a targeted refinement of case law precedent and the regulatory framework for arbitration offshore

³⁶⁸ See Section 42(1), amended Regulations.

³⁶⁹ See Consultation Paper, at para. 27.

³⁷⁰ See Section 42(2) and (3), amended Regulations.