

SUMMARY

The recently created world class financial hub, the Dubai International Financial Centre (DIFC), is under an independent, common law-based, parallel legal and judicial system intended to be outside the general jurisdiction of the legal systems of the Emirate of Dubai (hereinafter "Dubai") and the United Arab Emirates (hereinafter "UAE"). It shares some similarities with the China/Hong Kong principle of "one country, two systems," where two different and independent legal and judicial systems apply within one country. However, as with most such efforts, there is some gap between theory and practice. Only if such a legal and judicial system is completely independent from government interference will foreign investors gain full confidence and trust in it. This policy brief tries to identify what can be done to further strengthen the legal and judicial independence of the DIFC in order to better attract foreign investment.



STRENGTHENING THE LEGAL AND JUDICIAL INDEPENDENCE OF THE DUBAI INTERNATIONAL FINANCIAL CENTRE (DIFC)

By Alejandro Carballo Leyda

DIFC LAWS

Enactment and interpretation of DIFC (civil and commercial) laws

UAE Federal Law No. 8 of 2004, enacted following passage of UAE Constitutional Amendment No. 1 of 2003,¹ allowed for the establishment by Federal Decree of a financial free zone in any emirate of the UAE. Its Article 3 exempted financial free zones from all federal civil and commercial laws. However, the financial free zones are not exempt from other provisions of federal law, such as federal criminal laws (UAE Federal Law No. 4 of 2002, on the Criminalisation of Money Laundering and the UAE Penal Code), nor from any constitutional provisions, which continue to apply. Consequently, Article 7.3 of UAE Federal Law No. 8 of 2004 allows financial free zones to create their own legal and regulatory framework, covering all civil and commercial matters, subject to those international treaties to which the UAE has adhered or will adhere (Article 5).

In the Hong Kong system, the Chief Executive—although accountable to the Central People's Government—has the power to sign bills passed by the Hong Kong Legislative Council and to promulgate law. In contrast to this, in Dubai it is the Ruler who enjoys exclusive authority to enact (and override) DIFC laws. The President of the DIFC (Article 5 of Dubai Law No. 9 of 2004, the Law of the Dubai International Financial Centre) may only propose laws to the Ruler of Dubai and issue regulations (covering any civil and commercial issue within the territory of the DIFC) drafted by the DIFC Authority Legislature or the Financial Services Authority (in the event of regulation of financial services). Therefore, although the DIFC has extensive powers to propose the relevant civil and commercial legislation, after a process of public consultation which allows for great transparency, DIFC laws depend, in the end, on the Government of Dubai. The role played by the executive power of Dubai weakens the appearance of independence for DIFC laws.



The executive power's role is the primary hindrance to the DIFC's legal independence, since otherwise the power of interpretation of DIFC laws is vested exclusively in the DIFC Court of Appeal (Article 5B of Dubai Law No. 12 of 2004, establishing the DIFC Judicial Authority, and Article 27 of DIFC Court Law No.10 of 2004). As with any other common law jurisdiction, such interpretation has the power of law, and judges are allowed extensive discretion. Therefore, DIFC laws are to be integrated and applied independently, without the intervention of the Dubai and UAE judicial and executive powers.

Applicable law before the DIFC courts

Unless the parties to a dispute have explicitly chosen a different legal system (including *shari'a*-based legislation) which is not "in conflict with the public policy and public morals," the courts shall apply the common law-based DIFC laws and regulations (Article 6 of Dubai Law No. 12 of 2004, and Articles 8 and 9 of DIFC Law No. 3 of 2004, on the application of civil and commercial laws). Therefore, UAE and Dubai laws regarding civil and commercial issues would not be applicable unless explicitly chosen by the parties.

There is, however, an interesting problem of interpretation in Article 8.2.a of DIFC Law No. 3 of 2004. According to that article, if any DIFC Law or "any other law in force in the DIFC" has a "regulatory content," its application would prevail over the law chosen by the parties. It is clear that if any DIFC law has a "regulatory content,"

such law will prevail over the chosen law. But, just what does the expression "any other law in force in the DIFC" mean? In principle, it should mean only those UAE/Dubai laws which are not of civil/commercial character (because federal civil and commercial laws are not in force in the DIFC), as well as international law. However, as it is not completely clear, that expression should be clarified by the DIFC Court of Appeals.

Impact of Article 7 of the UAE Constitution: Shari'a as "a" main source of law

Finally, it must be stressed that although the DIFC is subject to Article 7 of the UAE Constitution, it looks very unlikely that DIFC laws would be challenged as being contrary to the *shari'a*. The wording of Article 7 enshrining the *shari'a* as "a" main source of law, on an equal footing with other sources of law, supports the idea that Article 7 of the UAE Constitution does not limit the DIFC Authority Legislature in its choice of principles of legislation to the *shari'a* alone. This approach is in line with the pro-commercial position of the Constitutional Chamber of the UAE Supreme Court and the Constitutional Courts of other jurisdictions in the Middle East (such as in Kuwait, where Article 2 of the Constitution mirrors the language of Article 7 of the UAE Constitution).

DIFC COURTS

The principle of judicial independence in the Arab world

In order to regionally endorse the principle of judicial independence (with deep roots

also in Islamic culture), the Arab Center for the Independence of the Judiciary and the Legal Profession (ACIJLP) has already held two regional Arab conferences on justice.² The first one, in 1999, produced the Beirut declaration which, having in mind the UN Basic Principles on the Independence of the Judiciary,³ included the following relevant recommendations:

- (i) The state shall guarantee an independent budget for the judiciary.
- (ii) The appointment of judges shall be made through the higher councils of the concerned judicial bodies.
- (iii) The law shall stipulate the rules for appointing, delegating, transferring, promoting and disciplining judges, as well as for all matters related to their affairs.... The aim of this is to guarantee in all cases their independence from the executive.

A second Arab conference on justice was held in 2003 in Cairo. Participants in the conference adopted the Cairo Declaration on Judicial Independence, which restated the following relevant recommendations:

- (i) Guarantee the financial independence of the judicial authority.
- (ii) Reform the appointment, promotion and disciplinary procedures against judges in order to lessen interference from the executive (which is seen as an obstacle to establishing an independent judiciary), and refer judicial affairs to high judicial councils.

Jurisdiction of the DIFC courts

Dubai Law No. 12 of 2004, establishing the DIFC Judicial Authority, defines and sets out the jurisdiction of the courts, allowing for the independent and exclusive administration of justice in relation to all commercial and civil claims and disputes arising from or within the DIFC.

The Court of First Instance (Article 5A of Dubai Law No. 12 of 2004, and Articles 19-25 of DIFC Law No. 10 of 2004) has exclusive jurisdiction over “(a) civil or commercial cases and disputes involving the Centre or any of the Centre’s Bodies or any of the Centre’s Establishments; (b) civil or commercial cases and disputes arising from or related to a contract that has been executed or a transaction that has been concluded, in whole or in part, in the Centre or an incident that has occurred in the Centre; (c) objections filed against decisions made by the Centre’s Bodies, which are subject to objection in accordance with the Centre’s Laws and Regulations; (d) any application over which the Courts have jurisdiction in accordance with the Centre’s Laws and Regulations.” However, parties may agree to submit any of those disputes to the jurisdiction of any other court, except objections to decisions made by the DIFC bodies.

The Court of Appeal (Article 5B of Dubai Law No. 12 of 2004, and Article 26 of DIFC Law No. 10 of 2004) enjoys exclusive jurisdiction over appeals to judgments and awards made by the Court of First



Instance. Its judgments are binding and final, without any right of appeal to the Dubai Court of Cassation, reaffirming the autonomy of the DIFC judicial system.

Appointment and removal of judges

DIFC Law No.10 of 2004, providing for the “independent administration of justice in the DIFC” (Article 6), develops in more detail the powers, procedures, functions and administration of the Court. In particular, its Article 9, which stipulates the qualifications and requirements for appointing judges, seeks to reduce discretion of the executive in the appointment process. However, the Chief Justice, Deputy Chief Justice and judges are appointed by a decree issued by the Ruler of Dubai (Article 3.4 of Dubai Law No. 12 of 2004), and they can be removed from office (Article 10 of DIFC Law No. 10 of 2004) by a decree issued by the Ruler for reasons of inability, incapacity or misbehavior that is found to have taken place by an independent inquiry established by the Ruler.

The role of the Ruler of Dubai in the appointment and removal of judges seems to be in contradiction with the Beirut and Cairo Declarations. Similar to the Hong Kong case, the DIFC Chief Justice (or the President of the DIFC in case of appointment or removal of the Chief Justice) should have the exclusive power—without the intervention of the Government of Dubai—to appoint or remove judges in accordance with legal procedures and on the recommendation of

an independent commission appointed by the DIFC Chief Justice (or the President of the DIFC in case of appointment or removal of the Chief Justice).

Applicable procedural rules and service of documents outside the DIFC

According to Article 30 of DIFC Law No. 10 of 2004, in exercising their jurisdiction, the DIFC courts shall apply either a procedural law chosen by the parties (giving broad autonomy to the parties, in clear contrast with the international practice of applying the *lex forum*) or the Rules of Court Practice Direction, No. 1 of 2008.⁴ Therefore, unless expressly agreed by the parties, neither the UAE Federal Civil Procedures Law nor the UAE Federal Law of Evidence in Civil and Commercial Transactions will apply.

Part 9 of the Rules of the Court applies to the service of documents not only in the DIFC, but also in Dubai (without the intervention of the courts of Dubai). In a further exercise of independence from the courts of Dubai, Part 9 of the Rules of the Court do also apply to service out of the DIFC or Dubai, without the intervention of the courts of Dubai. A claim to be served out of the DIFC or Dubai may be served “by any method permitted by the law of the place in which it is to be served.” Furthermore, the Rules also provide for service in the DIFC—through DIFC courts and without the intervention of the courts of Dubai—of any court process in connection with civil or commercial proceedings in another court or tribunal

(i.e., foreign courts, or courts from Dubai or any other emirate of the UAE).

Inside enforcement of foreign judgments/awards and outside enforcement of DIFC judgments/awards

DIFC courts have sole and exclusive jurisdiction regarding inside enforcement of foreign and domestic judgments, orders and awards (Article 7 of Dubai Law No. 12 of 2004, Article 24 of DIFC Law No. 10 of 2004, and Article 42.1-44 of DIFC Arbitration Law No. 1 of 2008). There is no need for a foreign judgment or arbitral award (including any judgment or award rendered in any other emirate of the UAE different from Dubai) to previously pass through any court of Dubai. In so doing, Article 24.2 of DIFC Law No. 10 of 2004 and Article 42.1 of DIFC Arbitration Law compel the DIFC Court of First Instance to comply with the terms of any applicable treaty for the mutual enforcement of judgments, orders or awards to which the UAE has entered (i.e., the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards⁵ or the GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications⁶).

However, the outside enforcement should be carried out through an executive judge at the courts of Dubai (who has no jurisdiction to review the merits) if it complies with the requirements of finality, translation into Arabic and is considered “appropriate for enforcement” (Article 7 of Dubai Law No. 12 of 2004, and

Article 42.4 of DIFC Arbitration Law). This last requirement (to be considered by the judge at the Court of Dubai at his sole discretion) is ambiguous, leaving open the possibility of control over DIFC judgments when outside enforcement is sought. As an example, a Dubai judge could invoke by analogy the requirements for enforcement contained in Article 2 of the GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications in order to decide that a DIFC judgement is not “appropriate for enforcement.” According to that article, enforcement can be denied if the judgment is in violation of the provisions of the Islamic *shari’a*.

Therefore, in order to avoid ambiguity and lack of independence, the requirement of “appropriateness for enforcement” needs to be clearly defined, clarified and interpreted by the DIFC Court of Appeal, which is the only competent authority to interpret the law (Article 8 of Law No. 9 of 2004, Article 5B of Dubai Law No. 12 of 2004, and Article 27 of DIFC Law No. 10 of 2004).

Enforcement of DIFC judgements, orders and awards against the Centre’s bodies or the Government

In principle, the DIFC and its bodies are under the jurisdiction of the DIFC law (Article 13 of Law No. 9 of 2004 and Article 19 of DIFC Law No. 10 of 2004) and, as well as the Government of Dubai in case of contracts executed in the DIFC or incorporating an arbitration clause



providing for DIFC arbitration,⁷ it can be sued before the DIFC courts or DIFC arbitral tribunals in relation to civil and commercial issues. However, the General Rules on Enforcement of Judgments and Orders (Part 45 of the Rules of the Court) and other enforcement mechanisms do not apply to any order against the Centre, to any of the Centre's bodies or to the Government. It must be stressed that, in such cases, we are dealing with civil and commercial cases where the Government of Dubai is not acting by virtue of its sovereignty (or as a public power: *iure imperii*), but as a commercial private actor (*iure gestionis*).

The lack of clarity regarding the enforcement procedure in such cases undermines the principle of independence: *Justice should not only be done, but should manifestly and undoubtedly be seen to be done*. There is no manifest and undoubted justice without enforcement of the obtained judicial or arbitral resolution. Therefore, the DIFC should have clear and effective rules on enforcement of DIFC judgments, orders and awards (dealing with civil and commercial cases) against the Centre, any of the Centre's bodies or the Government.

Financial independence

The DIFC courts are financially dependent on the Government of Dubai (Articles 12, 56 and 57 of DIFC Law No. 10 of 2004). As the financial resources are provided by the Government of Dubai (not by the DIFC itself), the DIFC Chief Justice has

to submit estimates of the annual income and expenditure of the DIFC courts (including remuneration and expenses of judges) to the Government of Dubai (not to the President of the DIFC) for approval. Therefore, according to Article 57.4 of DIFC Law No. 10 of 2004, the "Government of Dubai may reject such estimates within 45 days of receiving them." Although such rejection must be addressed in writing with reasons to the Chief Justice, nothing is provided in case the Government does not approve such estimates. In the end, it is the Government of Dubai (not the DIFC itself or the DIFC Chief Justice) that effectively controls the DIFC's judiciary budget.

In order to further promote the independence of the DIFC courts, its financial dependence on the Government of Dubai should be removed in accordance with (i) the DIFC's financial independence recognised by Article 3 of Dubai Law No.9 of 2004, and (ii) the recommendation on financial independence of the judicial authorities contained in the Beirut and Cairo Declarations. Therefore, its annual budget should be assessed by the DIFC and provided from independent DIFC funds. Such budget should be determined by the DIFC Chief Justice without the intervention of the Government of Dubai.

RECOMMENDATIONS

According to the previous assessment of the legal and judicial independence of the DIFC, the following recommendations could be raised:

Strengthen the independence of the DIFC legislative process

The President of the DIFC should have the power to sign bills (regarding civil and commercial matters) drafted by the DIFC Authority Legislature or the Financial Services Authority.

Clarify the potential application of UAE/Dubai laws of regulatory content

The DIFC Court of Appeal should clarify and interpret the meaning of Article 8.2.a of DIFC Law No. 3 of 2004. Does the expression “any other law in force in the DIFC” refer only to UAE/Dubai non-commercial/civil laws and international law? Or does it include also commercial and civil UAE/Dubai laws of a regulatory content?

Strengthen the independent administration of justice

The DIFC Chief Justice (or the President of the DIFC in case of appointment or removal of the Chief Justice) should have the exclusive power—without the intervention of the Government of Dubai—to appoint or remove judges in accordance with legal procedures and on the recommendation of an independent commission appointed by the DIFC Chief Justice (or the President

of the DIFC in case of appointment or removal of the Chief Justice).

Strengthen the independent enforcement of DIFC judgments/awards

The requirement of “appropriateness for enforcement” (Article 7 of Dubai Law No. 12 of 2004 and Article 42.4 of DIFC Arbitration Law) regarding outside enforcement of DIFC judgments and awards should not be construed by the Dubai courts on a case-by-case basis. On the contrary, it needs to be clearly and uniformly defined and interpreted by the DIFC Court of Appeal.

Furthermore, the DIFC should establish clear and effective rules on enforcement of DIFC judgments, orders and awards (dealing with civil and commercial cases) against the Centre, any of the Centre’s bodies or the Government.

Establishing financial independence for DIFC courts

The DIFC’s annual budget should be assessed solely by the DIFC and provided from independent DIFC funds. Such budget should be determined by the DIFC Chief Justice without the intervention of the Government of Dubai. ♥

ENDNOTES

- 1 The relevant laws can be found, in English, at http://www.difc.ae/laws_regulations/laws/enacted_laws.html
- 2 <http://www.acijlp.org/home.htm>
- 3 http://www.unhchr.ch/html/menu3/b/h_comp50.htm



- 4 http://www.difccourts.ae/legislation_and_rules/court_rules/
- 5 http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html
- 6 <http://www.diac.ae/idias/rules/GCC/>
- 7 According to Article 19.1.c of DIFC Law No. 10 of 2004, the DIFC Court of First Instance has original jurisdiction to hear *any* civil or commercial dispute “arising from or related to a contract that has been executed or a transaction that has been concluded, in whole or in part, in the Centre or an incident that has occurred in the Centre.”

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Alejandro Carballo Leyda is a Visiting Fellow at the Lauterpacht Centre for International Law (Cambridge) and a member of the ILA Committee on Islamic Law and International Law.

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DUBAI SCHOOL OF GOVERNMENT
Convention Tower, Level 13
P.O. Box 72229
Dubai, United Arab Emirates
Tel: 971-4-329-3290
Fax: 971-4-329-3291