ARTICLE:

The enforceability of electronic arbitration agreements before the DIFC Courts and Dubai Courts

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Relying on modern technology to conclude arbitration agreements might raise some issues regarding the enforceability and formal requirements of the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (New York Convention or Convention), with special reference to Article II. This article [1] highlights the formal requirements and the legal issues of enforcing electronic arbitration agreements in accordance with the provisions of the Convention; analyses the ability to solve this issue in the Dubai courts and the Dubai International Financial Centre Courts (DIFC Courts) by examining possible solutions to enforce electronic arbitration agreements based on these provisions, including relying on electronic signature, interpreting Article II of the Convention broadly, and applying the principle of the most-favourable-law. It suggests possible solutions based on the principle of the most-favourable-law before the Dubai and DIFC Courts.

Introduction

The party that succeeds and wishes to enforce an arbitral award based on the provisions of the New York Convention will be required to consider the formal requirements set out in Article II of the Convention; failing to do so might lead to the nullity of the final award pursuant to Article V(1)(a). Article V of the New York Convention sets forth the only grounds that can be used to refuse enforcement of a foreign arbitral award. It states that: 'The … agreement referred to in article II ... is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.' Article II refers to the arbitration agreement, thus the validity of arbitration agreements is of great importance. In other words, the invalidity of an arbitration agreement will invalidate the entire arbitral procedure, rendering the award null and void.

Relying on modern technology to conclude arbitration agreements might raise some issues regarding the enforceability and the formal requirements pursuant to the New York Convention, with special reference to Article II. This article starts by exploring the legal issues of enforcing electronic arbitration agreements according to the provisions of the New York Convention by examining the meaning of the requirement for the agreement to be 'in writing', and highlights the obstacles to fulfilling the formal requirements of the Convention and how electronic agreements may not comply with the Convention.

The second part of the article examines various methods of enforcing the electronic arbitration agreement based on the provisions of the Convention, including relying on an electronic signature by encouraging the Dubai Courts and DIFC Courts to interpret Article II broadly, and by applying the principle of the most-favourable-law. These methods, together with the ability of the Dubai Courts and the DIFC Courts to implement them as solutions will be examined below.

Implementing the principle of the most-favourable-law solution enables the court to rely on national law rather than the provisions of the Convention. The core of the principle is that the provisions of the Convention shall not 'deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon'.[2] According to this approach, the applicable law determines the validity of an electronic arbitration agreement. Therefore, the last part of the article examines whether the principle

[1] The authors thank the peer reviews for their valuable comments and feedback.

[2] Giuditta Cordero Moss, 'Form of Arbitration Agreements: Current Developments within UNCITRAL and the Writing Requirement of the New York Convention', *International Court of Arbitration* Volume 18 No. 2, 2007, 51 – 63, available at http://folk.uio.no/giudittm/Form%20arb%20clause%20ICC.pdf .

of the most-favourable-law can be applied in Dubai and the DIFC by examining whether the legislation in those jurisdictions supports the validity of an electronic arbitration agreement.

The writing requirement under the New York Convention

Article II of the Convention states the formal requirements of an arbitration agreement, including that the arbitration agreement must be in writing in order to be considered valid, as follows:

> '1. Each Contracting State shall recognize an agreement in writing; under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> 2. The term 'agreement' in writing shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.'

Messrs Lew, Mistelis and Kröll identified the importance of the arbitration agreement as a method of proof that the parties consented to the submission of any future dispute to arbitration.[3] In addition to proving such consent,[4] an arbitration agreement is required to be in writing under the New York Convention to ensure that the agreement gives the arbitration tribunal authority to settle the dispute. It is also necessary to enforce the aware resulting from an arbitration, because the enforcement court requires the party seeking enforcement to produce a written arbitration agreement with the award.[5]

By setting out the requirements of the arbitration agreement, the Convention prevents enforcement courts from imposing stricter requirements other than those stated under Article II.[6] For example, the courts should not require a particular font size for the arbitration agreement, nor require the agreement to be on a separate page. While some laws require the arbitration agreement to be on a separate page in order to be valid,[7] this requirement is intended to assure that the parties are aware of the arbitration clause. Courts should also not require a separate signature by the parties under the arbitration clause, although some courts require the page on which the arbitration clause is set out to be signed by the parties in order to ensure that intention to arbitrate disputes.[8]

Based on the provisions of Article II(2), the term 'in writing' means that the arbitration agreement must be signed or contained in an exchange of letters or telegrams:

> '2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.'

However, a conflict may arise in interpreting the provisions of Article II(2). It can be argued that it requires only the arbitration agreement to be signed, or where it is not signed but contained in an exchange of letters or telegrams. The matter is whether both should be signed or not. Courts have taken different approaches in interpreting Article II(2). For example, in 1994 the United States Court of Appeals for the Fifth Circuit,[9] interpreted the meaning of Article II(2) the term 'agreement' in Article II(2) to include either: (a) the arbitral clause found in a contract; or (b) an arbitration agreement signed by the parties or found in an exchange of telegrams or letters. Other US courts have applied this clause differently by stating that both the arbitral agreement and clause must be

[3] Julian D. M. Lew, Loukas A. Mistelis and Stefan M. Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, Dordrecht, 2003*),* 6-2.
[4] Julian D. M. Lew, Loukas A. Mistelis and Stefan M. Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, Dordrecht, 2003*),* 7-7.
[5] H. Yu, 'Written arbitration agreements – what written arbitration agreements?', *Civil Justice Quarterly* 32(1) (2012), 68.

[6] J Julian D. M. Lew, Loukas A. Mistelis and Stefan M. Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, Dordrecht, 2003*),* 26-58; Albert van den Berg, *Consolidated Commentary on the New York Convention* (Kluwer Law International, Dordrecht, 2003), 584.
[7] Croatian Law, Law on Arbitration (Official Gazette no. 88/2001), article 6 (6). Jordan, Civil Code No. 43 of 1976, article 924(4).
[8] Bundesgerichtshof [BGH], Germany, 25 January 2011, XI ZR 350/08.
[9] *Sphere Drake Insurance plc v Marine Towing, Inc.*, 16 F.3d 666 (5th Cir. 1994), at 699, 1994 A.M.C. 1581, cert. denied, 513 U.S. 87, 1115 S.Ct. 195 (Mem), 130 L.Ed.2d 127; Yearbook Commercial Arbitration XX (1995), 937.

signed or contained in an exchange of letters or telegrams.[10]

The US District Court in *Sen Mar, Inc. v Tiger Petroleum Corporation*[11] took a different approach by affirming that either the arbitration clause or the arbitration agreement must be signed or contained in an exchange of letters or telegrams to be considered valid, although the judge determined that the arbitration clause failed to satisfy the requirement for writing in that particular instance. This approach was also applied in the case of *Krauss Maffei Verfahrenstechnik GmbH (Germany) v Bristol Myers Squibb (Italy)*,[12] as it was explained that Article II(2) requires both the arbitral clause and arbitration agreement to be signed or included in an exchange of letters or telegrams. The latter is a more expedient approach as it provides clear evidence of the real and explicit intention of the parties to arbitrate, and according to the cases above, requiring both the clause and the agreement will ensure unanimity of acceptance in all jurisdictions.

It can be concluded that the 'writing' requirement should be applied in relation to both the arbitral clause and the arbitration agreement. In other words, both an arbitration clause in a contract and a separate arbitration agreement must be signed by the parties or contained in an exchange of letters or telegrams. Nevertheless, in the wording of the Convention there is no reference to arbitration agreements concluded via modern communications in the wording of Article II.

Several scholars have highlighted the issue of the validity of the electronic arbitration agreement, arguing that an agreement in electronic form does not fulfil the formal requirements of the Convention.[13]

The problem is attributable to the drafters of the Convention not having been able to anticipate the possibility of electronic exchanges becoming a normal part of daily communication and transactions. However, several approaches have been adopted in order to enforce electronic arbitration agreements, such as relying on the electronic signature, interpreting Article II broadly, and reliance on the principle of the most-favourable-law. These are discussed below.

Approaches to the validity of electronic arbitration agreements under the New York Convention

The first approach is to rely on the electronic signature to enforce the online arbitration agreement, especially if the applicable law states that an electronic signature can replace a manual signature. The validity and enforceability of an electronic signature is not certain before the Dubai or DIFC Courts, which is an issue that is beyond the scope of this study.[14] Therefore the parties may not necessarily benefit from relying on this option. Moreover, if the parties exchanged documents via electronic methods using some forms of electronic signature, such as shrink wrap signatures (see *Electronic Signatures in Law* for an explanation), these may not be considered to fulfil the formal validity requirements of the validity under Article II of the Convention.

Much depends on the courts' interpretation of Article II, and whether they interpret the requirements exclusively. At the time of drafting the New York Convention, the most modern technologies available comprised an exchange of letters or telegrams. Hence, the intention of the Convention is to support and recognise modern technologies concluded by remote parties. In this regard, there are two approaches. One approach is to interpret Article II widely to include arbitration agreements concluded in

[10] *Chloe Z Fishing Co., Inc., v Odyssey Re (London) Limited,* 109 F.Supp.2d 1236 (S.D.Cal. 2000), where the term "in writing" found in Article II of the New York Convention includes both arbitral clause and arbitration agreement.

[11] *Sen Mar, Inc v Tiger Petroleum Corporation* 774 F Supp. 879 (S.D.N.Y. 1991), 17 UCC Rep.Serv.2d 376; note *Kahn Lucas Lancaster, Inc. v Lark Intern. Ltd.*, 186 F.3d 210 (2nd Cir. 1999) in this connection.

[12] *Krauss Maffei Verfahrenstechnik GmbH (Germany) v Bristol Myers Squibb (Italy)*, 10 March 2000, (Yearbook Commercial Arbitration XXVI (2001), 816.

[13] Stephen Mason, editor, *International Electronic Evidence* (British Institute of International and Comparative Law, 2008); Stephen Mason and Daniel Seng, editors, *Electronic Evidence* (4th edition, Institute of Advanced Legal Studies for the SAS Humanities Digital Library, School of Advanced Study, University of London, 2017); S. I. Strong, 'What Constitutes an "Agreement in Writing" in International Commercial Arbitration? Conflicts Between the New York Convention and the Federal Arbitration Act', 48 Stan. J. Int'l L. 47 (2012).

[14] Khaled Aljneibi, 'The scope of electronic transactions and electronic evidence in the courts of the United Arab Emirates', 11 *Digital Evidence and Electronic Signature Law Review* (2015), 37 – 45. However, see Stephen Mason, *Electronic Signatures in Law* (4th edn, Institute of Advanced Legal Studies for the SAS Humanities Digital Library, School of Advanced Study, University of London, 2016). Omar Qouteshat, 'Challenges of authentication and certification of e-awards in Dubai and before the Dubai International Financial Centre courts: the electronic signature.'13 *Digital Evidence and Electronic Signature Law Review* (2016), 97-112.

communications other than an exchange of letters or telegrams, as has been the approach by several courts[15] an which is an approach supported by Giuditta Cordero Moss:

> 'The question whether an arbitration clause entered into electronically meets the requirement of the written form, which is set by the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, seems relatively easy to answer affirmatively, on the basis of an extensive interpretation of the New York Convention.'[16]

The second approach is to treat the requirements under Article II(2) as exhaustive. In two cases,[17] the US Fifth and Second Circuits have stated that the main issue regarding the enforceability of the arbitration clause is whether it fulfils the requirements of the term 'in writing'. One of the questions considered by the United States District Court, Southern District of California was set out by the court thus:

> 'The term "Agreement In Writing" is defined solely by Article II, Section 2 of the Convention, and is not given any broadened scope by Congress's Implementing Legislation, specifically 9 U.S.C. § 202'.[18]

The court concluded that the requirements stated under Article II(2) of the Convention are not the minimum, rather they are the mandatory requirements to be applied.

Communication technology used between parties in transactions has developed considerably since the Convention was drafted in the era of letters and telegrams, and some courts have indicate that the telex fulfilled the formal requirements under Article II of the Convention despite not being expressly referred to in Article II.[19] Following the telex, the facsimile transmission was utilised between parties to exchange communications, and arbitration agreements concluded via facsimile communications were also recognised as valid by some courts.[20] In order to clarify and establish a uniform interpretation of Article II, the General Assembly adopted resolution 61/33 accordingly,[21] which recommended that Article II of the New York Convention should be interpreted widely. Further, the recommendation stated that the exchange of letters or telegrams was included in the Convention as an *example*, not an exhaustive list, meaning that it could include other means of communications. The recommendation is not binding on signatory states or courts, although some courts may still rely on them. Further, the recommendation might not be regarded as an authoritative interpretation of Article II, as the UNCITRAL is not considered an enacting body.[22]

It should be noted that in Dubai two particularly notable decisions have been issued by the Dubai Courts that relate to the Convention,[23] neither of which examined the formal requirements of Article II of the Convention because this matter was not raised in both decisions. In the DIFC, no cases have examined or interpreted the formal requirements under Article II(2).[24] Hence, it is difficult to determine whether the

[15] Pieter Sanders, *Yearbook Commercial Arbitration 1976 – Volume I* (Kluwer Law International, Dordrecht, 1976), 183; Albert van den Berg, *Yearbook Commercial Arbitration 1987 – Volume XII* (Kluwer Law International, Dordrecht 1987), 502. XXI (1996), 681; Albert van den Berg, *Yearbook Commercial Arbitration 1996 – Volume XXI* (Kluwer Law International, Dordrecht, 1996), 685.

[16] Giuditta Cordero Moss, 'Risk of Conflict Between the New York Convention and Newer Arbitration-Friendly National Legislation?', *Stockholm Arbitration Report* 2 (2003), 1-17, available at http://arbitrationlaw.com/files/free_pdfs/sar_2003-2_toc_title.pdf and http://folk.uio.no/giuditm/Form%20of%20arbitration%20clause.pdf .

[17] *Sphere Drake Insurance plc v Marine Towing, Inc.*, 16 F.3d 666 (5th Cir. 1994), 1994 A.M.C. 1581, cert. denied, 513 U.S. 87, 1115 S.Ct. 195 (Mem), 130 L.Ed.2d 127; *Kahn Lucas Lancaster, Inc. v Lark Intern. Ltd.*, 186 F.3d 210 (2nd Cir. 1999) at 215.

[18] *Chloe Z Fishing Co., Inc., v Odyssey Re (London) Limited,* 109 F.Supp.2d 1236 (S.D.Cal. 2000).

[19] Pieter Sanders, *Yearbook Commercial Arbitration 1976 Volume I* (Kluwer Law International, Dordrecht, 1976), 183. Albert van den Berg, *Yearbook Commercial Arbitration 1987 Volume XII* (Kluwer Law International, Dordrecht, 1987), 502.
XXI (1996), 681. Albert van den Berg, *Yearbook Commercial Arbitration 1996 Volume XXI* (Kluwer Law International, Dordrecht, 1996), 685.

[20] Pieter Sanders, *Yearbook Commercial Arbitration 1976 - Volume I* (Kluwer Law International, Dordrecht, 1976), 183. Albert van den Berg, *Yearbook Commercial Arbitration 1987 Volume XII* (Kluwer Law International, Dordrecht, 1987), 502. 02. XXI (1996), 681. Albert van den Berg, *Yearbook Commercial Arbitration 1996 Volume XXI* (Kluwer Law International, Dordrecht, 1996), 685.

[21] Recommendation regarding the interpretation of article II(2) and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session, available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/a61-33-e.pdf .

[22] A Guide to UNCITRAL Basic facts about the United Nations Commission on International Trade Law (Vienna, 2013), para 43.

[23] Dubai Court of Cassation, Petition No. 132 of 2012 issued on 22 February 2012. Dubai Court of Appeal, Petition No. 531 of 2011 issued on 6 October 2011.

[24] *Banyan Tree Corporate Pte Ltd v Meydan Group LLC* [2013] DIFC ARB 003, 27 May 2014; *Fiske and Firmin v Firuzeh* (Claim No: ARB-001-2014), available at https://www.difccourts.ae/2015/01/05/arb-0012014-1-x1-2-x2-v-1-y/ .

courts' approach in Dubai and the DIFC is to consider Article II exhaustive or not.

The two approaches examined above might help to enforce arbitral awards that include electronic arbitration agreement. According to the ICCA Guide,[25] arbitrations that are signed electronically are capable of being enforced, while the Convention itself does not support the exchange of unsigned documents. In addition, Article II could be interpreted by expanding the legal definition of writing or document. However, neither approach may be sufficient for Dubai courts and the DIFC to find enforce unsigned documents that are transferred electronically enforceable due to a lack of case law examining this particular issue. It is suggested that the courts should consider a broader interpretation of what is considered to be in writing to fulfil the requirements under the Convention. Such an approach has been applied in the courts of England and Wales.[26]

Applying the principle of the most-favourable-law

Some scholars have suggested applying the principle of the most-favourable-law.[27] The New York Convention is based on a pro-enforcement bias,[28] which means that the court should facilitate and safeguard the enforcement of arbitral awards. This was stressed in the *Guide to the Interpretation of the 1958 NYC: A Handbook for Judges* (2011 edition) (ICCA Guide), and Julian Lew also supported the idea of the pro-enforcement bias of the Convention,[29] and several cases have reiterated this idea,[30] for instance Mance LJ considered the pro-enforcement principle further in *Dardana Ltd v Yukos Oil Company*,[31] and Tomlinson LJ cited Mance LJ allegedly in *Dardana Ltd v Yukos Oil Company*[32] as follows:[33]

> 'As far as the object and purpose of the New York Convention are concerned, they are to facilitate the enforcement of arbitration agreements within its purview and of foreign arbitral awards. This object and purpose must, in the first place, be seen in the light of enhancing the effectiveness of the legal regime governing international commercial arbitration.'

The pro-enforcement approach means that the court is allowed to take a less strict approach to enforcing the arbitration awards by applying the principle of the most-favourable-law stated under Article VII(1) of the Convention, which provides that:

> 'The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.'

The most-favourable-law principle aims to ease the enforcement and recognition of arbitral awards, and reflects the pro-enforcement regime. The view that the courts have the ability to apply less strict rules than those found in the New York Convention is supported by the ICCA Guide, as it stated that the main objects and purposes of the New York Convention as follows:

[25] IV.2.2. Practice, (iii) Arbitration agreement contained in exchange of electronic communications, 50.
[26] *Electronic Evidence*, 3.27.
[27] *Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (International Council for Commercial Arbitration, 2011), 26, online at http://www.arbitration-icca.org/media/1/13890217974630/judges_guide_english_composite_final_jan2014.pdf .
[28] *Diag Human Se v Czech Republic* [2014] EWHC 1639 (Comm); Jahnavi Sindhu, 'Public policy and Indian arbitration: can the judiciary and legislature rein in the "unruly horse"?', (2017) 83(2) *Arbitration* 147; Mischa Balen, 'Using the DIFC's off-shore jurisdiction to enforce arbitration awards in on-shore Dubai', (2016) 82(3) *Arbitration* 233.
[29] Julian D. M. Lew, 'Report: The Law Applicable to the Form and Substance of the Arbitration Clause', in Albert van den Berg, editor, *Improving the Efficiency of Arbitration Agreements and Awards: 40* Years *of Application of the New York Convention* (Kluwer Law International, The Hague: 1999), 143.
[30] Including *Parsons & Whittemore Overseas Co., Inc., v Societe Generale De L'Industrie Du Papier (Rakta)*, 508 F.2d 969 (2nd Circuit, 1974).
[31] *Dardana Ltd v Yukos Oil Company* [2002] EWCA Civ 584; *Dardana Ltd v Yukos Oil Company* is also discussed in Masood Ahmed, 'In Practice: Legal Update: Civil Procedure: Foreign arbitral awards', (2014) LS Gaz, 22 Sep, 29 and Khawar Qureshi, 'Absolute power', 159 NLJ 1393.
[32] *Dardana Ltd v Yukos Oil Company* [2002] EWCA Civ 584; *Dardana Ltd v Yukos Oil Company* is also discussed in Masood Ahmed, 'In Practice: Legal Update: Civil Procedure: Foreign arbitral awards', (2014) LS Gaz, 22 Sep, 29 and Khawar Qureshi, 'Absolute power', 159 NLJ 1393.
[33] It has not been possible to find this quote from Mance LJ in any law report, even though it is cited by Tomlinson lJ at [36] in *Lombard-Knight v Rainstorm Pictures Inc* [2014] Bus LR 1196, [2014] 2 Lloyd's Rep 74, [2014] BUS LR 1196, [2014] EWCA Civ 356.

> 'The Convention is based on a pro-enforcement bias. It facilitates and safeguards the enforcement of arbitration agreements and arbitral awards and in doing so it serves international trade and commerce. It provides an additional measure of commercial security for parties entering into cross-border transactions.'[34]

Moreover, the principle of the most-favourable-law was affirmed by the drafters of the ICCA Guide,[35] which stated that the courts may rely on the principle stated under Article VII(1) to enforce an arbitral award. According to the UNCITRAL Recommendations, Article VII is only valid at the enforcement stage if the law of the enforcement court requires less formal standards than those required under the Convention. In other words, Article VII shall not be applied even if the law of the seat of arbitration provides less formal requirements.

The principle of the most-favourable-law is a helpful approach to determine the validity of online arbitration agreement, as it gives the courts the ability to apply the national law to enforce the electronic arbitration agreement if the national law has less formal requirements and supports the use of modern communications to promote arbitration. Otherwise, there is no advantage in relying on it.

Noticeably, in the new arbitration laws such as the UNCITRAL Model Law on International Commercial Arbitration,[36] the Arbitration Act 1996 that applies to England, Wales and Northern Ireland,[37] and the Jordanian Arbitration Act,[38] the arbitration agreement is defined widely in order to include arbitration agreements concluded via modern methods. However, under the DIFC and Dubai legislation, this issue is not expressly addressed, nor has it been examined in either of those jurisdictions.

The next part of this article is divided into two sections: the first section examines the approach under the DIFC legal system and explores whether the legislation supports arbitration agreements concluded via modern technology, while the second section examines the Dubai Courts' approach and whether the current statutes are sufficient to enforce electronic arbitration agreements. However, in order to achieve this aim, it is necessary to understand the formal requirements and the meaning of the arbitration agreement in both the DIFC and Dubai.

The writing requirement and validity of electronic arbitration agreements under the DIFC Arbitration Law

The DIFC Arbitration Law (DIFC Law No. 1 of 2008)[39] requires an arbitration agreement to be in writing, which was clarified and explained in terms of four situations in which the arbitration agreement is considered to fulfil this requirement as explained below:

1. Article 12(7) states the situation when an arbitration agreement might be considered valid under DIFC Arbitration Law by reference into another document:

> 'The reference in a contract to any document containing an arbitration clause constitutes an Arbitration Agreement in writing, provided that the reference is such as to make that clause part of the contract'.[40]

2. Article 12(6) states that if one of the parties allege the existence of an arbitration agreement otherwise than in writing, and the respondent does not deny it, if one of the parties then commences court proceedings, and the respondent claims that an arbitration agreement is effective, whether oral or written, and the claimant does not deny these litigations, this constitutes an agreement between those parties in writing to the effect alleged.

3. The DIFC Arbitration Law clearly states the ability of the parties to agree to arbitration by way of electronic communication.[41]

4. Under the provisions of the DIFC Arbitration Law, the parties may prove their arbitration agreement if it can be recorded 'in any form'. Several forms of arbitration

[34] Page xi.
[35] *Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (International Council for Commercial Arbitration, 2011), 75.
[36] 1985, With amendments as adopted in 2006 (United Nations, Vienna, 2008).
[37] Arbitration Act 1996, section 5.
[38] Arbitration Law 2001, article 10(a).
[39] Amended by Amendment Law, DIFC Law No. 6 of 2013.
[40] DIFC Arbitration Law 2008, article 12(7).
[41] DIFC Arbitration Law 2008, article 12(5).

> agreement may be considered valid if the content can be recorded. For example, if the parties agreed to the general terms of the contract, including the arbitration agreement, but they did not finalise the agreement on the other terms of the main contract.

Pursuant to the provisions of the DIFC Arbitration Law, it can be stated that the term 'in writing' under the DIFC Arbitration Law supports electronic communications. Article 12(5) states clearly that arbitration agreement may be concluded by an electronic communication, which has been defined as 'any communication that the parties make by means of data messages'.[42] Moreover, a 'data message' is defined under the same article as 'information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy'.[43] This clearly provides that the parties may agree to arbitrate by an exchange in any form, using any type of device, providing that they have stated clearly their intention to arbitrate when using such methods.

The writing requirement and validity of the electronic arbitration agreement under the Dubai legal system

Before introducing its Civil Procedure Code, the United Arab Emirates (UAE) legal system did not require an arbitration agreement to be in writing; even in Dubai, none of the applicable laws required an arbitration agreement to be in writing. However, article (1) of the Federal Civil Transaction Law states that Sharia shall be applied if there is no provision in regard to a particular matter. By applying the Islamic Law, an arbitration agreement does not need to be in written form, but the proof of agreement should be done 'by a statement of witnesses and by drawing back from the oath'.[44]

However, after the Civil Procedure Code was introduced in 1992, article 203(2) clearly stated that an arbitration agreement should be evidenced in writing:

> 'No agreement for arbitration shall be valid unless evidenced in writing'. The main aim of requiring the arbitration agreement to be in writing is to ensure that the real intention of parties is to refer any potential dispute to arbitration.[45]

It follows that the parties are no longer able to rely on witnesses to evidence the arbitration agreement, even though the general rules of evidence in the UAE allow the procuring of evidence by witness statements in several cases provided for in article 37 of the Federal Law of Evidence.[46] However, these rules cannot be applied to arbitration agreements for the reasons explained by Hamza Ahmad Haddad below:[47]

> 1. The Civil Procedures Code refers to the arbitration document, which means that it is essential that the arbitration agreement be in writing. For instance, article 216(2)(A) states that 'the arbitration award shall be subject to nullity if it is issued without the arbitration document or on the basis of an invalid arbitration document', and article 213(1) 'requires that the award should be filed with the original arbitration document'.
>
> 2. The written form of an arbitration agreement has been considered as a customary practice in the field of arbitration, and in Dubai custom is considered to be the first source of law after legislation in commercial transactions.[48]
>
> 3. Most countries at the international level require that the award should be in writing, otherwise the court may refuse to enforce the award.[49] This was stated clearly by the Dubai Supreme Court in one of its recent judgements. The court stated that if the party fails to produce a written arbitration

[42] DIFC Arbitration Law 2008, article 12(5).
[43] DIFC Arbitration Law 2008, article 12(5).
[44] Civil challenge No. 53 dd. 16/10/1991, Litigation and Legislation Journal, Issue 2, 466.
[45] Salonia Kantaria, 'Is your arbitration agreement valid in the United Arab Emirates?', *Arbitration* 80(1) (2014), 16.
[46] As example for the applications of this provision, see Dubai civil challenge No 345 dd. 14/12/1997, Litigation and Legislation Journal, issue 8, 1092.
[47] 'Written Form and Interpretation of the Arbitration Agreement in the Arab Law Egypt, Jordan and United Arab Emirates', not dated, available at http://www.aiadr.com/WrittenUAE.pdf .
[48] Article 2 of the Federal Law of Commercial Transactions; it is also worth noting that the customary practice is one of the sources for application of law in civil matters, as provided for in Article 1 of the Federal Civil Transactions Law.
[49] Hong-Lin Yu, 'Written arbitration agreements – what written arbitration agreements?', *Civil Justice Quarterly* 32(1) (2012), 68.

> agreement, it will give rise to the nullity of the award.[50]

Consequently, relying on oral agreement as evidence to prove the arbitration agreement might be challenged, and it might be considered insufficient to meet the requirements of the Civil Procedures Code. It should be noted that the draft Federal Arbitration Law explicitly validates the electronic arbitration agreement, as stated in article 8:

> a. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telegrams, or other communications that provide a record of the agreement or other means of telecommunication in accordance with the valid rules of electronic transaction.
>
> b. The reference in a contract to the provisions of a standard contract or to an international convention or any other document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference to such clause is clear in regarding that clause as a part of the contract.
>
> c. If the parties agree to arbitration while a court is reviewing the dispute, the court shall refer the dispute to arbitration and its decision shall be deemed as an arbitration agreement in writing.'

Under the new draft Federal Arbitration Law, electronic arbitration agreements fall within the meaning of 'writing'; however, the law remains in draft form. Under the current Civil Procedure Code, the use of modern technology to conclude an arbitration agreement is still not clear, due to the lack of explicit provisions that deal with the enforceability of electronic arbitration agreements. It is not helpful that there are only a small number of cases in the UAE that have examined this issue, as discussed above.

The DIFC Arbitration Law explicitly recognises an electronic arbitral agreement, however the situation might be different before the Dubai Courts because of the lack of a clear definition of the term 'in writing', and the absence of cases that have examined the enforceability of electronic arbitration agreements. This makes their enforceability before the Dubai Courts uncertain, although it does allow for an opportunity to establish a precedent and also allows the Dubai Courts to align their approach with the Convention. Therefore, it is suggested below that the validity of electronic arbitration agreements before Dubai Courts might include relying on the validity of unsigned documents under Federal Law No. (1) of the Year 2006 in Respect of the Electronic Transactions and Commerce (ECTL).

The validity of unsigned documents under the ECTL

The discussion below considers each form of electronic communication and discusses whether it is capable of fulfilling the writing requirement before the Dubai Courts. In the UAE, including Dubai, in order to meet the changes and developments that have been taking place at the international level in the field of electronic commerce and to implement the UNCITRAL Model Law on Electronic Commerce (1996) and other related documents, the UAE enacted Federal Law No. (1) of the Year 2006 in Respect of the ECTL, which applies to electronic records, documents and signatures pertaining to electronic transactions and commerce.[51] The ECTL defines the terms 'electronic information', 'electronic document' and 'electronic message' in article 1 as:

> *Electronic Information:* 'Data or information of electronic characteristics in the form of provisions or symbol or sounds or drawings or pictures or software or otherwise'.
>
> *Electronic Document:* 'Record or document composed or stored or extracted or copied or sent or intimated or received by an electronic means on tangible medium or any other electronic medium which shall be liable to a feedback in a manner which can be understood'.
>
> *Electronic Message:* 'Electronic information to be sent or received by electronic means whatsoever the manner of its reproduction in the place where it is received'.

Under the ECTL, the electronic message does not lose its legal effect or its capability of being executed

[50] Civil challenge 99 dd. 29/4/2001, Judicature and Legislation Journal, issue 12, 370.

[51] Federal Law No. 1 of 2006 concerning Electronic Transactions and Commerce Law, article 2.

owing to the fact that it is in an electronic form.[52] Article 7 of the ECTL states that:

> 'If the law requires any statement, document, record, transaction or evidence to be written, or if determines specific results upon non-writing, the electronic document or record shall satisfy this condition if the provisions of paragraph (1) of Article 5 of this Law is observed.'

Hence, the ECTL states several requirements under article 5(1) to consider the electronic record sufficient to fulfil the writing requirement:

> 1. It is in the same form as the original or is an accurate depiction of the information contained in the original.
>
> 2. The ability to retrieve and access the electronic record for use a later time.
>
> 3. The ability to determine the origin and destination of electronic record, and its dates of sending and reception, are stored.

The first condition to validate an electronic record and fulfil the writing requirement before the Dubai Courts is the ability to keep the electronic record in its original form. In this regard, article 9 of the ECTL sets out the requirements to consider the electronic message to be deemed original. According to the provisions of this article, the first requirement is that the parties shall use reliable technical evidence such that the information contained in the electronic message is technically correct as made for the first time in its final form as an electronic document or record, meaning the form that has been used cannot be altered, such as secured e-mail. However, the ECTL does not state what shall be considered as reliable technical evidence, and it is left to be determined based on the purpose for which the information was generated. This criterion raises some issues, as it is hard to determine the reliability based on the purpose of the information and it does not explain clearly the particular method of determining the degree of reliability.[53] The second requirement under article 9 is the ability to display the information in the electronic message in order to be submitted on demand, which is also the second condition required under article 5.

The third condition under article 5 is the ability to determine the origin and destination of the electronic record and its dates of sending and reception. In determining the sender or the origin, article 13(1) of the ECTL states that in order to assume that the electronic record was sent from a particular sender, the record should be issued by the sender himself. Article 13(2) provides for other circumstances in which the record is assumed to be sent from a particular sender, such as sending the record issued by the sender's agent, or transmitted by the sender's computer system. Furthermore, if there is insufficient evidence of the sender of the electronic record, the receiver may consider the electronic record was sent by a particular sender by (i) applying a particular verification procedure that is agreed previously with the sender, or (ii) if the electronic record was received as a result of the actions of a person having a relationship with the sender so that the person was able to retrieve the message after becoming aware of a method used by the sender to identify his messages.[54]

If the receiver knows that a message was actually sent by the sender, or is entitled to so assume, then the sender may also assume that the message is what the sender intended to send, and act accordingly.[55] If the receiver either knew or should have known that an error was made in the transmission, the receiver may not make this assumption.[56] Parties are allowed to separate each message in the transmitted messages, unless a reasonable person should have concluded that a second message was a duplicate of the first.[57] Nevertheless, the receiver is not entitled to consider that a particular sender has sent the electronic message in a number of circumstances, such as the sender has notified the receiver that he did not send the message; the receiver should know or have known that the sender did not send the message, and it would be irrational for the sender to assume that a particular sender actually sent the message, or to act on that assumption.[58]

[52] Federal Law No. 1 of 2006 concerning Electronic Transactions and Commerce Law, Article 4.

[53] The abstract reliability test is discussed, with the case law, in *Electronic Signatures in Law*, 113 and 292.

[54] Federal Law No. 1 of 2006 concerning Electronic Transactions and Commerce Law, article 13(3).

[55] Federal Law No. 1 of 2006 concerning Electronic Transactions and Commerce Law, article 13(4)(d).

[56] Federal Law No. 1 of 2006 concerning Electronic Transactions and Commerce Law, article 13(6).

[57] Federal Law No. 1 of 2006 concerning Electronic Transactions and Commerce Law, article 13(5).

[58] Federal Law No. 1 of 2006 concerning Electronic Transactions and Commerce Law, article 13(4).

Consequently, the electronic record is sufficient to fulfil the writing requirement before Dubai Courts subject to three conditions: (i) the ability to preserve the electronic record in its original form, (ii) to obtain access to the information later, and (iii) the ability to determine the origin, time and destination of the electronic message.

This part considers the common methods by which commercial contracts can be made by electronic means in order to verify whether these methods fulfil the required elements stated in ECTL. The most common methods to conclude online contracts examined are e-mail, click-wrap, browse-wrap and shrink-wrap.

E-mail

Parties may use the exchange of e-mails to make or to make and accept an offer. According to the ICCA Guide, an e-mail may fulfil the writing requirement under the New York Convention provisions.[59] It explains that the Convention aimed to cover the available communication that existed in 1958, and it assumed that 'there should be record in writing of the arbitration agreement',[60] and providing the communication can provide this criterion, it should be considered valid and to fulfil the requirements of Article II(2), including facsimile and e-mail.

Arbitration agreements made by way of an exchange of e-mails have been considered as sufficient and valid electronic communication that fulfils the writing requirement and to conclude online contracts. For example, in England, the court held that an e-mail is valid to communicate acceptance, despite having been treated as spam.[61] In another case in the US, that of *Rosenfeld v Zerneck*,[62] the court stated that an e-mail is a form of communication by which an offer can be accepted and validated. In South Africa, in the case of *Jafta v Ezemvelo KZN Wildlife*,[63] the court found that an SMS is an effective mode of communication analogous to an e-mail or another written document.

Nonetheless, courts have taken differing approaches toward the validity of an arbitration agreement contained in an exchange of e-mails pursuant to Article II of the Convention. On the one hand, in Norway the Court of Appeal of Halogaland[64] held that the arbitration agreement contained in the exchange of e-mails was not considered valid and did not fulfil the sense of Article II of the New York Convention. In addition, it was not signed by parties, which meant that it was just a copy that did not fulfil the requirement of the arbitration agreement according to the Convention requirements.

On the other hand, in the recent English case of *Lombard-Knight v Rainstorm Pictures Inc*,[65] the court stated that a copy of the e-mail should be enough to enforce the arbitration award, explaining that the court supported the principle of pro-enforcement of the New York Convention as it aims to ensure the enforcement of the arbitration award. In this case, the main concern was whether the court should enforce the award and accept a copy of the arbitration agreement without requiring the party to provide the court with the original document. However, the court held that it is hard to ask for the original copy of the arbitration agreement in modern business conditions, especially as the arbitration agreement in most cases is available in an exchange of e-mails, which makes it difficult for each party to provide the court with the original document.[66] Consequently, the court stated that the exchange of e-mails is equivalent to the exchange of facsimile and telex, and validates the arbitration agreement.

In Dubai, no cases have considered the enforceability of arbitration agreements concluded via e-mails pursuant to the Convention. As demonstrated in the discussion of case law from different jurisdictions above, there is no particular approach taken towards the enforceability of arbitration agreements concluded via e-mail. Courts vary in interpreting the

[59] *Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (International Council for Commercial Arbitration, 2011), 50.
[60] *Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (International Council for Commercial Arbitration, 2011), 50.
[61] *Bernuth Lines Ltd v High Seas Shipping Ltd* [2006] 1 All ER (Comm) 359, [2005] EWHC 3020 (Comm), [2006] 1 CLC 403, [2006] 1 Lloyd's Rep 537.
[62] *Rosenfeld v Zerneck*, 4 Misc.3d 193 (2004), 776 N.Y.S.2d 458, 2004 N.Y. Slip Op. 24143.
[63] *Jafta v Ezemvelo KZN Wildlife* (D204/07) [2008] ZALC 84; [2008] 10 B.L.L.R. 954 (LC); (2009) 30 I.L.J. 131 (LC) (1 July 2008).
[64] *Time Charterer v Shipowner*, (2002) XXVII YBCA 519, 521 (Norway, Hålogaland Court of Appeal 1999).
[65] [2014] Bus LR 1196, [2014] 2 Lloyd's Rep 74, [2014] BUS LR 1196, [2014] EWCA Civ 356.
[66] For the meaning of 'original' in the context of digital data, see Stephen Mason, 'Electronic evidence and the meaning of 'original'' *Amicus Curiae* The Journal of the Society for Advanced Legal Studies Issue 79 Autumn 2009 26-28, available at http://sas-space.sas.ac.uk/2565/1/Amicus79_Mason.pdf .

formal requirements of the Convention in the context of domestic legal requirements. Nevertheless, in case No. 277/2009, the Dubai Court of Cassation held that electronic dealings such as e-mail should be enforced and considered to be valid in accordance with the provisions of article 3 of the ECTL, providing they can be traced to the senders' sent folder, or when the e-mail in question relates to the point at issue, so that it can be used as proof.[67] According to the judgment in this case, the contents of an e-mail might be a source of evidence of binding legal agreements, including an arbitration agreement. Further, the ruling serves as strong evidence that any legal agreement, even if not signed by parties, can still be prayed in aid to support the validity of agreements as being binding on parties.[68]

The court stated that documents, electronic records and signatures are valid evidence under articles 2 and 4 of the ECTL if the contents of the electronic record are available for examination at the sender's system. Furthermore, according to article 10, electronic signatures or messages in original or copy can be accepted as evidence. E-mails fulfil the requirements stated under article 5 in order to fulfil the writing requirement, especially when the parties retain the original message and can obtain access to it at any time.[69] However, the term 'original' raises several issues. For example, it might have different meanings for lawyers and notaries, and also in different jurisdictions.[70] It could be argued that the better approach is to attach electronic signatures with a document present on physical media.[71] It has been stated that copies produced by a reprographic process such as photocopying are still considered as originals.[72]

In conclusion, the Dubai Courts may consider electronic communications via e-mail to comprise the same evidentiary proof as physical communications, and parties may agree and bind themselves into an arbitration agreement by sending an e-mail.

Click-wrap and browse-wrap

The other method of forming an online contract where the arbitration agreement may be included is the click-wrap agreement. Under this type of contract, the party agrees to the terms and conditions of the contract at the end of the transaction by filling an order and clicking 'Submit', 'I Accept' or something similar.[73] Browse-wrap is another method of forming contracts online. Browse-wrap refers to terms for which the provider or seller purports to obtain implicit acceptance through the customer's opportunity to view the terms while browsing the site.[74] It is most debatable whether this type of agreement is valid in the USA and it is unclear whether such acceptance can be validly given through this method elsewhere.[75] It is suggested that whether there has been an acceptance may depend on how the terms and conditions are arranged and displayed on the website.[76] It is also possible that the terms and conditions of browse-wrap agreements are accepted by conduct in some jurisdictions.[77]

The main difference between the click-wrap and browse-wrap is that in the former agreements, the user is provided with the terms and conditions of the contract, usually an end user agreement, at the end of which a dialogue 'I agree' box pops up on the screen or the user activates consent by responding to a parallel e-mail, with the possibility to download the agreement. On the other hand, in browse-wrap agreements, the user is not presented with the terms and conditions of the contract, but is provided with a hyperlink to another website on which those terms are included.[78]

By examining the Convention requirements in relation to browse-wrap and click-wrap agreements, it can be concluded that these two types of contract do not clearly fulfil the formal requirements under Article (II) of the Convention, as neither of them are signed by

[67] Civil Case of Cassation Court Dubai: UAE No. 277/2009 date of decision 13 December 2009, unpublished.
[68] See also an Australian case on point: *Stellard Pty Ltd v North Queensland Fuel Pty Ltd* [2015] QSC 119 per Martin J.
[69] Khaled Aljneibi, 'The scope of electronic transactions and electronic evidence in the courts of the United Arab Emirates', 11 *Digital Evidence and Electronic Signature Law Review* (2015), 37-45.
[70] The *Draft Convention on Electronic Evidence*, explanatory notes, para 10, at http://journals.sas.ac.uk/deeslr/article/view/2321.
[71] *Electronic Evidence*, 2.9.
[72] *Electronic Evidence*, 3.51; *Miller-Foulds v Secretary of State for Constitutional Affairs* [2008] EWHC 3443 (Ch).
[73] Stephen Mason, *Electronic Signatures in Law*, chapter 8.
[74] Stephen Mason, *Electronic Signatures in Law*, 188.
[75] Leon E. Trakman, 'The boundaries of contract law in cyberspace,' *International Business Law Journal* (2) (2009), 159-197; *Electronic Signatures in Law*, chapter 8.
[76] *Specht v Netscape* 306 F.3d 17 (2nd Cir. 2002).
[77] *Ryanair v Billigfluege.de* [2010] IEHC 4; *Brower v Gateway,* 246 A.D.2d 246, 676 N.Y.S.2d 569 (App. Div. 1998).
[78] See *Electronic Signatures in Law* generally.

the parties nor contained in an exchange of letters or telegrams.

However, by examining these contracts in the light of the provisions of article 5 of the ECTL, it can be argued that both types of contract may fulfil the first and second requirements of the Article, which is that they are capable of providing records of the original electronic message and being able to prove that it is the original document and it has not been altered or amended. The third condition under article 5, might be relevant here, where the sender in this type of contracts is familiar and it is not hard to determine who he is, as usually the party will obtain access to a particular website and he will assume that the sender is the owner of the website. However, it does not follow that the sender is the owner of the website, or that any links are accurate as to ownership, who runs it or whether the names listed on the website are genuine.

Both types of agreement could be sufficient and enforceable before the Dubai Courts, as long as the parties are able to provide the original agreement or agree that the provided document is the original one.

Shrink-wrap

A shrink-wrap agreement is usually used with software products and software licence agreements. The main feature of the shrink-wrap agreement is that the terms and conditions in some cases are not available for the consumer to read until he pays and starts to download the software on his computer or smartphone.[79] However, this type of contract might raise some issues, as some jurisdictions may not rely on the digital form of the written agreement, the other issue that might arise is the ability to determine the identity of the parties. It is suggested that to enable the parties to enter an enforceable arbitration agreement, they may rely on the exchange of e-mails, click-wrap and browse-wrap agreements, which may be sufficient methods to enforce an arbitration agreement.

Summary

In conclusion, it is suggested that parties may rely on e-mails, browse-wrap and click-wrap agreements to conclude an arbitration agreement, and these methods should be valid before the Dubai Courts, because the three communication methods fulfil the requirements in article 5: the ability to retrieve the original copy, the ability to obtain access to the information at any time later, and the ability to determine the origin and time of the electronic message.

To prove that the acceptance was sent from the machine of the sender

The enforcement of an electronic award is possible by confirming that the sender used his own machine to send the acceptance. In Petition No. 220 of 2004 issued on 17 January 2005, the Dubai Court of Cassation provided that:

> 'It is not compulsory for the parties' agreement to arbitration to be established within one document signed by both parties. It is permissible for one party's offer to refer their dispute to arbitration to be established in a document and for the other party's acceptance to be established in another document, provided that the offer confirms the acceptance and both are identical.[80] Furthermore, the parties' agreement to refer their dispute to arbitration can be proved either by a written document signed by both parties or by letter or any other means of written communications are signed by the sender or their transmission is proved to be made from the machine of the sender.'

According to this decision, the arbitration agreement should be in writing and signed. Alternatively, if the agreement was not signed by the parties, then it should be proven that the transmission was made from the machine of the sender.[81] In other words, there are two ways to conclude valid arbitration agreement: to establish a written arbitration agreement that is signed by the parties; or to

[79] The matter of validity of consumer arbitration agreement might arise here. See, Omar Qouteshat, 'The Enforceability of Unfair Arbitration Agreement in Consumer Disputes before Dubai Courts', *Arab Law Quarterly*, 31 (2017), 1-29.

[80] Nicholas Bohm and Stephen Mason, 'Identity and its verification' *Computer Law and Security Review*, Volume 26, Number 1, January 2010, 43 – 51.

[81] Dubai Court of Cassation, Petition No. 220 of 2004 issued on 17 January 2005.

establish a written arbitration agreement that was made from the machine of the sender, which is accessible only by him and subject to proof that the sender was the one who obtained access the machine at the time of agreement and caused the agreement to be sent and signed.

It is hard to guarantee this approach in terms of whether it expands the requirement of the machine of the sender to include other electronic communications such as e-mail. For example, each party has his own e-mail account, but the e-mail could be accessed from different computers, which means that the court may strictly demand the party to prove that the e-mail was sent from the sender's machine, otherwise it will not validate such an agreement.

Manuscript signature

It is possible to sign the documents with a manuscript signature and exchange them between parties via facsimile or any other electronic communication. The parties may rely on a signed document that includes an arbitration agreement or rely on a signed arbitration agreement in order to enforce an arbitration agreement.

For instance, in Petition No. 132 of 2012 issued on 22 February 2012, the Dubai Court of Cassation enforced an arbitration agreement signed by parties and concluded via facsimile transmission. In this case, the petitioner challenged the arbitration agreement on the grounds that it was not signed by an authorised person, and argued that the facsimile copy of the arbitration agreement should not be enforced. However, the court dismissed this argument and considered the arbitration agreement valid. This was because the petitioner was given an opportunity before the first court to prove the nullity of the agreement, and he failed to do so. This decision illustrates that the Dubai Courts consider the arbitration agreement valid as long as the parties have signed the agreement with a manuscript signature. Moreover, the parties are not required to submit the original documents, which means that any modern communication can be used to conclude the arbitration agreement if the arbitration agreement is signed. An arbitration agreement signed manually and transmitted via e-mail or any other type of modern communication is considered to be valid before the Dubai Courts.

To enforce the award before the DIFC Courts

As mentioned earlier, in Dubai the parties may be able to choose to have their awards enforced in either the Dubai Courts or the DIFC Courts, which apply UAE legislation and the DIFC legislation respectively. Each jurisdiction has different requirements regarding what constitutes a valid arbitration agreement.

Which approach to take will depend on whether an award creditor wishes to be subject to the lengthy enforcement procedures before the Dubai Courts, especially when debtors may delay matters by creating obstacles to frustrate the enforcement proceedings.[82] In recent years, award creditors have increasingly favoured the DIFC Courts to enforce domestic awards rather than the Dubai Courts, because the latter are more likely to reject enforcement on procedural and technical grounds.[83] Hence, award creditors may prefer the DIFC Courts as they tend to be more predictable and favourable towards arbitration, and less inclined to allow award debtors to frustrate enforcement proceedings. For instance, in the DIFC Court Case No. ARB 002/2013 – *(1) X1, (2) X2 v (1) Y1, (2) Y2*[84] it was held that the court has jurisdiction over the enforceability of domestic arbitral awards:

> 'Article 5(A)(1)(e) of the Judicial Authority Law must be read with Article 8(2) of Dubai Law No. 9 of 2004, as amended by Dubai Law No. 7 of 2011, which provides that the jurisdiction of the DIFC Courts is to be determined by 'the Centre's Laws'. Article 5(A)(1)(e) of the Judicial Authority Law reflects that provision.
>
> Article 42(1) of the DIFC Arbitration Law provides that an arbitral award, irrespective of the State or jurisdiction in which it was made, 'shall be recognized as binding within the DIFC'; subject to the provisions of Articles 43 and 44. Article 44(1) describes the circumstances (and the only circumstances) in which recognition may be refused by the DIFC Court.

[82] Freshfields Bruckhaus Deringer LLP, 'Enforcing awards and foreign judgments: using DIFC courts as conduit jurisdiction', 29 October 2015, available at https://www.lexology.com/library/detail.aspx?g=22eff53b-a425-4743-9a33-3411c597bab1 .

[83] Civil Procedure Code, article 216.

[84] See http://difccourts.ae/xx-1-x1-2-x2-v-1-y1-2-y2/ .

> It is important to appreciate that the jurisdiction, in relation to recognition, conferred on the DIFC Courts by Article 42(1) of the DIFC Arbitration Law is jurisdiction to recognize that the arbitral award is binding within the DIFC.'

The court concluded that it has jurisdiction to recognise and enforce domestic arbitral awards. In regard to foreign arbitral awards, in *Banyan Tree Corporate Pte Ltd v Meydan Group LLC*,[85] which was a domestic award, the court ruled that it has the right to enforce and recognise foreign arbitral awards seated in Dubai, even if there is no connection with the DIFC. Hence, the DIFC extended its jurisdiction to include the recognition and enforcement of foreign arbitral awards.

Accordingly, it can be argued that the winning party may rely on the DIFC Courts to enforce and recognise an award, as the DIFC Arbitration Law is considered more modern compared to the law applied by Dubai Courts. Pursuant to the Judicial Authority Law,[86] judgments of the DIFC Courts, including those enforcing arbitral awards, can be taken to the Dubai Courts for execution.

In order to avoid conflict of jurisdiction between the DIFC Courts and Dubai Courts, the Dubai government has established a Judicial Committee by Decree No. 19 of 2016 *Concerning the establishment of a Judicial Tribunal for the Dubai Courts and DIFC Courts*. which is expressly empowered by Decree 19/2016 to propose the necessary rules to regulate the matter of jurisdiction and to resolve intra-Emirate conflicts of jurisdiction between the Dubai Courts and the DIFC Courts. However, Decree 19 still needs more clarity in order to avoid unnecessary delays and costs and to be more efficient.[87] The parties may submit an application to the Judicial Committee to determine whether the court has jurisdiction. Accordingly, the Judicial Committee will be required to give a final ruling within 30 working days of the issue of an application.

Conclusion

The current arbitration provisions in the Civil Procedure Code applied by the Dubai courts do not explicitly address the enforceability of electronic arbitration agreements. However, award creditors may rely on other methods to have such agreements upheld. This analysis suggests four possibilities as follows: (1) to rely on the ECTL; (2) to prove that the acceptance was sent from the machine of the sender; (3) to sign the documents manually and exchange them electronically; and (4) and to seek enforcement of the award in the DIFC. To increase legal safeguards and encourage a uniform interpretation of the New York Convention regarding the enforceability of arbitration agreements concluded via electronic methods, it is suggested that the UAE and Dubai should implement the new draft Federal Arbitration Law (there is not citation for this law at present). This would remove any legal uncertainty regarding online contracts, and follow the approach applied by the DIFC Arbitration Law and in other countries. Indeed, it would be helpful to make the position clear that contracts concluded by electronic means have the same legal validity as contracts concluded by traditional means, because the methods set out above are optional and not mandatory.

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[85] [2014] DIFC CA 005.
[86] Law No.12 of 2004 in respect of The Judicial Authority at Dubai International Financial Centre.
[87] http://davidsoncolaw.com/news/dubai-judicial-committee/ ; http://www.tamimi.com/en/magazine/law-update/section-15/april-10/the-decree-19-judicial-tribunal-and-its-consequences-redefining-the-scope-of-the-difc-courts-jurisdi.html .