The DIFC, Dubai’s, Common Law jurisdiction has recently amended its arbitration law in order to expand the jurisdiction of its Courts with regard to staying proceedings in favour of arbitration. Antonios Dimitracopoulos, Partner and Head of Arbitration at Bin Shabb Associates LLP, DIFC, looks at the long-term repercussions of this recent development, on the basis of his firm’s involvement in one of the matters that signalled the need for legislative change.

Does the DIFC have its own arbitration law?

Yes. The DIFC legislature promulgated the Arbitration Law (DIFC Law No. 1 of 2008) (“the Arbitration Law”), which codified the arbitration process from the form of agreement to the enforcement of awards. The Arbitration Law is based upon the UNICRI Model Law on International Commercial Arbitration 1985 (“the Model Law”), with the provisions thereof being largely adopted to reflect the intentions of the DIFC legislature. The Arbitration Law has now been amended by virtue of DIFC Law No. 1 of 2013.

Under what circumstances could the DIFC Courts stay an action under the Arbitration Law where an arbitration agreement is shown to exist?

The Arbitration Law has always permitted the DIFC Courts to stay proceedings where an arbitration agreement existed in respect of DIFC seated arbitrations. However, the Arbitration Law in its original form did not provide for the DIFC Courts to stay proceedings where the seat of the arbitration in question was not within the confines of the DIFC. In this regard the Arbitration Law did not conform to the provisions of the Model Law.

How did the original Arbitration Law depart from the Model law in relation to non-DIFC seated arbitrations?

The original version of the Arbitration Law stated at Article 7(2), which provisions of the Arbitration Law, the original version of the Arbitration Law stated that the DIFC Courts could stay proceedings in favour of the non-DIFC seated arbitration.

However, the contract relevant to this case, contained a provision that the London seat would be considered by the DIFC Courts. As such, the Arbitration Law in its original version did not provide for the DIFC Courts to stay proceedings where the seat of the arbitration in question was not within the confines of the DIFC. In this regard the Arbitration Law did not conform to the provisions of the Model Law.

How was this issue assessed by the DIFC Courts?

This issue was considered in detail in two cases, which were heard before the DIFC Courts.

(1) Injazat Capital Limited and (2) Injazat Technology Fund BSC v Denton Wilde Sapte and Co (CFT 019/2010) (the “Injazat Case”)

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The judgment issued in the IEMS Case established a continuing uncertainty in the processes between the DIFC Courts and the Dubai Courts. However, the Dubai Courts have yet to be ratified by the Dubai Courts. Hence, the DIFC Courts do not yet have jurisdiction over the parties to the arbitration. Hence, the DIFC Courts are not able to enforce the award on the basis of their perception as to the validity of the arbitration agreement itself. This results in a continuing uncertainty in the processes between the two jurisdictions.

What should be considered to redress the potential problems?

Changes in the law should aim to assist the parties in arbitration, not to compound confusion which already exists. The amendments to the Arbitration Law have the potential to exacerbate problems.

One must question what (if any) underlying processes have been considered to minimise the risks referred to above. In order to fully redress the dangers that face claims in relation to potentially invalid arbitration agreements, the DIFC Courts and the Dubai Courts must reach a consensus to co-create a standard for the assessment of an arbitration agreement’s validity.

Until such a consensus is confirmed, there can be no certainty that the two court systems are aligned so as to ensure a synchronicity of approaches – and as such uncertainty will continue to prevail.