

A Few Good Clauses: Choose the right jurisdiction clause and avoid a code red!

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Introduction

In the mad dash to get a deal over the line, in-house and transactional lawyers may neglect to give due attention to the jurisdiction clause; a “boilerplate clause” that sits at the back of an agreement. Given the panoply of sub-systems that comprise the UAE legal system, a failure to give due consideration to a jurisdiction clause can result in wasted legal costs or an unenforceable judgment. This article considers the consequences of choosing the wrong jurisdiction for your agreement and identifies considerations relevant to choosing the right one.

At the outset, it is worth defining plainly what we mean by a jurisdiction clause. In short, a jurisdiction clause allows the parties to agree, at the start of an agreement, which court or dispute resolution forum will hear any dispute under it. This is to be contrasted to a governing law clause, which allows the parties to agree the substantive law that will govern the agreement.

Dispute resolution in the UAE

The UAE legal system is comprised of several legal jurisdictions with their own court systems. These court systems are contenders for any jurisdiction clause in an agreement (even one that does not involve a connection to the UAE in the case of the UAE’s English language common law courts) and can be broadly categorised as follows:

1. the Arabic language onshore courts of the various Emirates (i.e. the Courts of Dubai, Abu Dhabi, Sharjah, Ras Al-Khaimah, Umm Al Qawain, Ajman and Fujairah), which shall be referred to as the

- ‘Onshore Courts’ in this article;
2. the English language common law courts of the UAE, comprising the Dubai International Financial Centre Courts (the ‘DIFC Courts’) and the Abu Dhabi Global Market Courts (the ‘ADGM Courts’, together with the DIFC Courts, the ‘Common Law Courts’). The Common Law Courts boast some of the most senior judges from common law jurisdictions around the world and are well equipped to deal with the most sophisticated commercial disputes.
 3. arbitration, whether this be administered by a UAE-based or international institution (e.g. DIAC, DIFC-LCIA or ICC), or be an ad-hoc arbitration. Although clearly not a court system, and technically a form of dispute resolution rather than a jurisdiction, for convenience any reference to “jurisdiction” in this article should be taken to include arbitration, and references to “jurisdiction clause” should be taken to include arbitration clauses.

Why it is worth thinking about the right jurisdiction clause

There are a whole host of unwelcome outcomes resulting from a failure to properly consider and choose the right jurisdiction for your jurisdiction clause. One of these is the incurring of avoidable legal costs through satellite litigation. A failure to include a clear and express jurisdiction clause in your agreement will likely result in a jurisdiction challenge being made as soon as a claim is filed. A timely reminder of the need to draft jurisdiction clauses as precisely as possible is the Court of Appeal’s recent judgment in *Goel and Others v Credit Suisse (Switzerland) Limited* [2021] DIFC CA 002, where “the courts of Dubai” was taken to mean the DIFC Courts rather than the onshore Dubai Courts. The outcome would have been quite different if the jurisdiction clause had been drafted to expressly exclude the DIFC Courts.

Further, choosing the wrong jurisdiction can result in any governing law clause agreed by the parties being without legal effect, thereby frustrating the parties’ intentions. This is the case where the courts of a jurisdiction chosen by the parties have a tendency to apply the law of the forum, rather than any law stipulated in the agreement. A relevant example of such courts are the Onshore Courts, which will generally apply UAE law notwithstanding the choice of an alternative law by the parties. More seriously, if a jurisdiction clause is chosen without regard for the location of the counterparty’s assets, the winning party in legal proceedings may be left with an unenforceable judgment.

Relevant considerations when choosing a jurisdiction

What follows is a list of factors to be considered when choosing between the Onshore Courts, Common Law Courts and arbitration when drafting a commercial agreement involving any connection to the UAE. As will be seen, one overarching consideration that pervades the below factors is whether you are likely to sue, or be sued, under the relevant agreement.

By way of example, a financial institution that is party to a facility agreement is more likely to be the suing party and will want to ensure that its claim for its debt against the borrower will be relatively inexpensive to pursue, determined quickly, afford interim relief options (e.g. a precautionary attachment or freezing injunction) and result in an enforceable judgment against the borrower. The borrower, on the other hand, is likely to have different motives. Where negotiation on the jurisdiction clause is possible, the parties should attempt to choose a jurisdiction that aligns with their interests.

Procedural considerations

A major difference between the Onshore Courts, the Common Law Courts and arbitration is the recoverability of legal costs. In the Common Law Courts and most forms of arbitration, the winning party will usually recover somewhere between 65 and 90 per cent of its legal costs. By contrast, costs' recovery in the Onshore Courts is limited to relatively nominal amounts for advocates' fees.

The ability to recover your legal costs might prompt you to opt for the Common Law Courts or arbitration in your agreement. However, this must be counterbalanced against the relative costs of pursuing claims in the various fora. Generally speaking, the costs of pursuing a claim in the Common Law Courts and through arbitration are significantly more than the costs of pursuing a claim in the Onshore Courts. As a result, even in straightforward cases, proceedings before the Common Law Courts and in arbitration will require a significant initial investment in costs before these are recovered.

Another advantage of the Common Law Courts is the availability of default or immediate/summary judgment in appropriate cases. A default judgment is issued by the Common Law Courts in cases where a claim is undefended and can potentially be issued within one month of service of the claim. An immediate/summary judgment is available where the counterparty has no real prospect of success and there is no other reason why the case should proceed to trial.

In addition, the Common Law Courts have the power to issue various types of interim relief including prohibitive injunctions, freezing orders and worldwide freezing orders ("**WWFO**"). Although interim relief is available from the Onshore Courts and often the courts of the seat of an arbitration, the WWFO is unique in that it freezes a respondent's assets worldwide and therefore can exert immense pressure on the respondent to settle the dispute.

The Onshore Courts also offer an effective form of interim relief by way of precautionary attachment orders. These are the onshore equivalent of freezing injunctions but involve the court writing directly to banks and governmental authorities to request that assets up to the value of the relevant claim be frozen. Further, an efficient means of securing an enforceable judgment against a defendant in the Onshore Courts is by way of a payment order. This is an order obtained without notice to the debtor in as little as 3 days in respect of an admitted debt that arises from a commercial contract or instrument.

Arbitration affords parties additional benefits, such as the ability to choose arbitrators with specialist expertise and confidentiality of the proceedings. The importance of these considerations will depend on the parties involved and the nature of their dispute.

Enforceability of a governing law clause

It should not be assumed that a governing law clause providing for a particular law to govern the agreement will always be upheld. Although arbitral tribunals and the Common Law Courts will uphold a choice of governing law made by the parties (subject to some limited exceptions), the Onshore Courts may determine a dispute under UAE law even where the parties have specified an alternative law (e.g. English law) in their governing law clause as mentioned above. As a result, in cases where parties wish to adopt a law other than UAE law in their governing law clause for reasons of familiarity or otherwise, they should be wary of opting for the Onshore Courts in their jurisdiction clause.

Efficiency of proceedings

The time taken from the point of filing a claim to obtaining a judgment or an award is an important consideration for a litigant. Apart from being deprived of a form of relief for years for a claimant, the longer a case takes, the more significant the legal costs will be for the parties.

Although the time involved in resolving a dispute depends on a number of factors, including the number of witnesses and the complexity of the case, an indication of the time involved in pursuing a relatively straightforward contractual claim to a first instance judgment in the Onshore Courts is 6 to 12 months (subject to whether an expert is appointed), whilst in the Common Law Courts proceedings may take anywhere between 9 to 18 months for a judgment at first instance. In the case of arbitration, a rule of thumb is 1 year to 1.5 years, although much depends on the efficiency of the tribunal and the expedience with which the parties conduct the proceedings.

However, these estimates do not take account of the time taken up with appeals, the likelihood of which varies drastically between the options above. By way of example, permission to appeal is not required in the Onshore Courts, and given that proceedings are relatively inexpensive to pursue in the Onshore Courts, a losing party will typically appeal an adverse judgment to the Court of Appeal and then to the Court of Cassation if required. This results in an additional 6 – 9 months being added to the estimate above for proceedings before the Onshore Courts.

Although appeals are possible before the Common Law Courts, these require the Court's permission before the substantive appeal can be made and appeals are relatively expensive to pursue. This means an appeal of a judgment of the Common Law Courts may not always be possible as compared to a judgment of the Onshore Courts. In contrast to both the judgments of the Onshore and Common Law Courts, arbitral awards are generally not appealable at all (though they can be set aside).

A fairer assessment of the efficiency of each jurisdiction would include the time taken to appeal, which for a relatively straightforward contractual claim would be 1-1.5 years in the Onshore Courts and around 1.5 years in the Common Law Courts. Given that arbitral awards are generally speaking not appealable, there is very little between all three options once appeal periods are taken into account.

Certainty and predictability of outcome

A less tangible consideration is certainty of outcome. The Onshore Courts are part of a civil law jurisdiction and therefore do not have a system of binding precedent. Further, since they are courts in their early years as compared to other jurisdictions (i.e. the UAE was only formed in 1971), the jurisprudence on many commercial issues is still in the process of development.

By contrast, the ADGM Courts and DIFC Courts rely heavily on the well-developed body of English case law when determining cases (subject to the choice of a non-forum law by the parties). Despite only being recently established, the ADGM Courts have achieved this by importing English law wholesale (with some limited statutory exceptions) and applying it directly. The DIFC Courts apply DIFC law (subject to the parties' agreement and the relevance of any other applicable law) rather than English law, however this often makes little difference since DIFC law is largely based on English law. As a result, there is a sophisticated jurisprudence available to these courts to deal with complex legal issues. Further, both the DIFC and ADGM Courts apply a system of binding precedent.

The cumulative effect of these factors is that, generally speaking, it is easier to predict the outcome of a case before the Common Law Courts and more difficult to do so in a case before the Onshore Courts. This greater predictability and certainty of outcome in the Common Law Courts can also be matched in arbitration given the parties' freedom to choose the governing law.

Enforcement

In the context of enforcement, choice of jurisdiction should be informed by the location of the counterparty's assets and the portability of any judgment or award obtained. Ideally, the jurisdiction clause will specify the jurisdiction of the counterparty's assets so that a judgment from that jurisdiction need not be transported to an alternative jurisdiction for enforcement. By way of example, if you are contracting with a UK-based corporate entity with assets in the UK, and are likely to be the party suing

under the agreement, the ideal jurisdiction for the dispute in terms of enforcement would be the English Courts.

However, the reality is that parties may be influenced by a number of factors to opt for alternative courts or arbitration. For example, a UK-based company may not feel comfortable in the Onshore Courts where the proceedings are in Arabic and the law is unfamiliar. In these circumstances, it is important to consider the enforceability of any judgment or award from the parties' preferred jurisdiction in the jurisdiction of the counterparty's assets or, in short, the portability of the judgment or award.

Arbitration provides a far reaching enforcement prospect. The New York Convention now has 168 state parties, which means that awards rendered in one of these states can be enforced in other signatory states with relative ease. The enforcement of UAE awards (i.e. those awards issued further to proceedings seated in the UAE) is possible within and outside of the UAE.

In the context of opting for the Onshore and Common Law Courts for a jurisdiction clause and enforcing judgments from those courts within the UAE, there are reciprocal enforcement mechanisms in place that facilitate the enforcement of such judgments within all seven Emirates, including financial free zones such as the ADGM and DIFC, albeit in a convoluted manner in some cases.

In relation to the enforcement of Common Law Court and Onshore Court judgments in other jurisdictions outside the UAE, this is an issue to be determined by the law of the enforcing state. Care must be taken to ensure that UAE Court judgments are enforceable in the jurisdiction of the counterparty's assets and there is not a risk of an unenforceable judgment when opting for the Common Law Courts or the Onshore Courts in a jurisdiction clause. In this regard, it is worth mentioning that the UAE is party to a surprisingly significant number of bilateral and international treaties on the reciprocal enforcement of judgments. There is no reason to assume that any of the states that are parties to these treaties would differentiate between judgments of the Common Law and Onshore Courts.

Finally, with respect to the inward enforcement of foreign judgments in the Onshore and Common Law Courts, there is a divergence of approach between the two sets of courts. The Common Law Courts apply the common law test and therefore are reasonably receptive to the enforcement of foreign judgments (although it should be noted that the ADGM Courts only enforce judgments from a limited list of recognised courts). By contrast, the Onshore Courts apply a more restrictive criterion to the enforcement of foreign judgments. Most notably, the Onshore Courts will not enforce judgments in respect of claims over which they would have had exclusive jurisdiction as a matter of UAE law and which fall foul of the requirement of reciprocity.

The more restrictive approach of the Onshore Courts is not without remedy. It is possible to use the DIFC Courts as a "conduit jurisdiction" for the enforcement of foreign judgments. Under this approach, a foreign judgment is taken to the DIFC Courts for recognition and enforcement, even if there are no assets in the DIFC, and the resulting DIFC Court judgment (i.e. issued on the same terms as the foreign judgment) is then taken for execution in the Onshore Courts against any assets located in the wider UAE, pursuant to the reciprocal enforcement mechanisms mentioned above. This conduit route is a reason not to entirely exclude from consideration a jurisdiction clause in favour of a non-UAE court in agreements that have a connection to the UAE.

Conclusion

Although the expediency and inexpensive nature of Onshore Court proceedings are a consideration in choosing the right jurisdiction for a jurisdiction clause, they must be counterbalanced against the greater likelihood of appeals and the inability to recover costs in the Onshore Courts. Once the time taken to pursue appeals is taken into consideration there is, in many cases, little difference between the Onshore Courts, Common Law Courts and arbitration in terms of efficiency.

Similarly, although the highly touted enforceability of arbitral awards is a consideration, judgments of the

Onshore and Common Law Courts have a high degree of enforceability within and outside of the UAE. The main determinants of the correct jurisdiction for a jurisdiction clause are likely then to be context-specific ones, such as the parties' preferred governing law, confidentiality and procedural considerations.

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A Few Good Men underpins the choice of profession for many lawyers of my generation. Unlike Santiago in the great classic, in-house lawyers can avoid the extrajudicial punishment of their colleagues by carefully selecting the right jurisdiction for their jurisdiction clause.