

Technology Contracts: Exercise Care In Choosing A Governing Law

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From time to time we act for foreign corporations who are looking to supply technology solutions to customers the UAE and who wish to do so using their "standard" technology supply contracts.

Generally speaking, these standard contracts have been prepared in the UK, Europe, or the United States having regard to local laws applicable to the foreign corporation in its home country. The "Governing Law" clause tends to be towards the back of the contract, and the parties may come to consider this towards the end of the negotiations. There may be a tendency on the part of the foreign corporation, in the interests of closing the deal, to agree with the request of the local customer that the contract be governed by UAE law (with UAE courts having jurisdiction). That could be an entirely reasonable commercial approach for the foreign corporation to take. What can be of concern is when the foreign corporation takes the view that, if there is a dispute under the contract at a later time, this choice of UAE law and UAE courts is unlikely to make much of a difference to the foreign corporation's position. That, quite simply, is not the case.

We do not have the space here to provide a detailed comparison of UAE law with the laws of other key "technology-originating countries" such as the US or the UK (although we are asked to provide such advices on a case-by-case basis). For the purpose of this article we wanted to highlight some key issues in the context of technology contracts, which may come as a surprise to lawyers and clients more familiar with the laws of their home countries.

Liquidated damages

Liquidated damages clauses are widely used in technology contracts. Article 390 of the UAE Civil Code (translated) states that: "(1) The contracting parties may fix the amount of compensation in advance by making a provision therefore in the contract or in a subsequent agreement, subject to the provisions of the law. (2) The judge may in all cases, upon the application of either of the parties, vary such agreement so as to make the compensation equal to the loss, and any agreement to the contrary shall be void." This gives the Court the ultimate right (upon the application of one of the parties) to examine the level of pre-agreed, fixed compensation and increase or decrease the amount to reflect the actual loss suffered by a party. Liquidated damages are deemed to be ancillary contractual obligations, in the sense that they will not apply unless a primary obligation has been established in the first place. In other words, liquidated damages are not, per se, a cause of action for a claim for damages. Rather, they can only be invoked for establishing the amount of damages claimed. Recent cases have shown that something referred to as "a penalty", being a more strict imposition of an amount regardless of whether a loss has been incurred, may not be upheld by a court, whereas a liquidated damages clause intended to reasonably quantify the loss likely suffered is more likely to be upheld.

Interest on claims

Vendors often include interest clauses for late payments in supply contracts (although sometimes the interest may be referred to as an "administrative fee" or something similar). If the amount claimed was quantified at the time the claim was filed, then the court will grant to the claimant, in the money judgment, interest as from the time of filing the claim – or the date of judgment, it varies – until final payment. If the debt is confirmed by a contract, the court may even grant interest on

the debt from the time the claimed amount became due until final payment. Under the UAE Commercial Code, if the subject matter of the commercial obligation is a sum of money of ascertained amount at the time the obligation arises, and the debtor delays in paying it, he will then be obliged to pay the creditor interest at the rate agreed in the contract, provided that it does not exceed 12% per annum. If there is no agreement in the contract for the payment of interest, then the judicial practice in the emirate of Dubai is that interest will be calculated at the rate of 9% per annum, with effect from the date the debt fell due for payment.

Indemnities

There are no UAE law prohibitions on contracts containing indemnities in respect of any matters, either in respect of commercial matters generally or specifically in respect of intellectual property issues (the latter common in technology supply contracts). The UAE courts will generally require solid evidence to support the sums claimed under an indemnity. There are certain articles in the UAE Commercial Transactions Law which limit the amount of any indemnity in certain specific situations, but these are not relevant for present purposes. Article 290 of the UAE Civil Code states that it shall be permissible for the judge to reduce the level of indemnity or not to enforce an indemnity at all if the person suffering harm participated by his own act in bringing about or aggravating the harm. In all cases the indemnity shall be assessed according to the amount of harm suffered by the victim, together with loss of profit, provided that that is a natural result of the harmful act. Article 293 of the UAE Civil Code states that the right to indemnity for harm shall include moral harm, and an infringement of the liberty, dignity, honor, reputation, social standing or financial credit of another shall be regarded as being moral harm. The right to receive indemnification for moral harm may not be transferred to a third party unless the amount of it has been fixed by agreement or by a final judicial order. Further article 294 allows that the indemnity be made payable by installments or by way of a regular income.

Limit of liability for breach

It is said that, in general, the UAE courts will uphold limitation of liability clauses, unless there has been fraud or gross negligence, pursuant to Article 383 of the Civil Code. However, the concept of liability in this context must be appreciated. This is liability for failure to comply with a particular obligation, not financial liability (which is dealt with separately – see further below). The relevant article states (translated): “If that which is required of an obligor is the preservation of a thing, or the management thereof or the exercise of care in the performance of his obligation, he shall have discharged that obligation if, in the performance thereof, he exercises all such care as the ordinary man would exercise, notwithstanding that the intended object is not achieved, unless there is an agreement or provision of law to the contrary. In all cases, the obligor shall remain liable for any fraud or gross error on his part.” The article actually proposes a “reasonable efforts” level when assessing compliance but leaves this subject to agreement between the parties. With respect to total exemptions of liability, Article 296 of the Civil Code provides that “Any condition purporting to provide exemption from responsibility for a harmful act shall be void.” This is intended to deal with a prior stipulation of non-liability in respect of an unlawful act done by one person causing harm to another. As regards financial liability, Article 390 of the Civil Code provides (translated): “The contracting parties may fix the amount of compensation in advance by making a provision therefore in the contract or in a subsequent agreement, subject to the provisions of the law. The judge may in all cases, upon the application of either of the parties, vary such agreement so as to make the compensation equal to the harm, and any agreement to the contrary shall be void.”

Self-help means are valuable

We generally recommend to clients that any time spent in a technology contract negotiation on means of self-help, which could avoid the need to litigate disputes at a later point, is time well-

spent. It is preferable not to have key issues such as those above before a Court. Thus it is our recommendation that if a technology vendor is considering adopting UAE law for a contract with a local customer, it should also consider building into the contract self-help means which they might not typically use in other countries, or for which they may not always negotiate as rigorously. For instance:

- Payment milestones linked to time milestones, or at least deliverables which the vendor can control.
- Deemed acceptance upon a particular period of time expiring after testing, regardless of use or payment.
- It is an obligation of the customer to execute and deliver an acceptance certificate.
- Letters of credit for milestone payments which are to be made down the track.
- Avoid set off clauses including in relation to SLC's.
- Right to suspend service upon breach of threatened breach by customer.
- Vendor has ultimate responsibility for determining whether change control takes the project outside of the original scope.
- Maintenance starts from acceptance, and payment of maintenance is another deemed acceptance event.