

Is the legal concept “Without Prejudice” recognised by the UAE courts?

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It allows parties involved in settlements, compromises, negotiations and mediations the right to make offers and concessions in the interest of resolving a dispute without harming (prejudicing) their formal positions. The opposing party will be forbidden from referring to the without prejudice communication in the court proceedings, except perhaps when the issue of costs is being decided.

Many legal systems recognise the value in allowing such communications. It enables parties to enter into frank and open discussions, encouraging settlements that save both the parties and the courts time and money. In common-law countries the concept is well established and relied on by parties, whereas it has only gradually emerged in some civil law countries.

The United Arab Emirates is unique because although the UAE is governed by a civil law system, it has established the Dubai International Financial Centre (“DIFC”) which operates according to a common-law system with its own laws, regulations, independent judicial authority and courts. In the DIFC Courts the concept of without prejudice communication is upheld and relied on by parties.

Without prejudice communication is not however recognised or referred to before the UAE local courts. Therefore documents marked “Without Prejudice” and specifically used for the purpose of settlement throughout the negotiation process can be submitted to the court and later relied on if a settlement is not achieved. Consequently, the expatriate adaptation of using the term is closely linked to the idea of good practice, rather than the term being relied on in the local UAE courts. Additionally, communications that are “off record” also have no legal implications and can be referred to in proceedings.

Alternative Solutions

Although the UAE courts do not recognise the concept of without prejudice communication, there are alternative solutions which can be utilised in order to ensure correspondence cannot later be relied on in legal proceedings. The alternatives are summarised below.

1. Pre Settlement:

1. Include in the settlement agreement detailed and express provisions regarding confidentiality to avoid any kind of publication.
2. Include in the settlement agreement an express provision stating that the parties cannot be called as witnesses in any litigation or arbitration in relation to the dispute and would not act in any such capacity without the prior written agreement of all the parties.
3. Nominate the DIFC courts as the governing jurisdiction in the original agreement between the parties (i.e. dispute resolution clause) in the event the settlement fails.
4. Qualify every document or communication with statements that any offer or communication does not constitute an admission of liability. Avoid simply marking correspondence as ‘without prejudice’ as when considered by a local court in its Arabic translation it is unlikely the translator will understand the phrase as a term of art and will likely give the phrase an insufficiently clear meaning.
5. Propose and suggest conditional concessions, compromises and/or acknowledgments.

6. Insist that all parties to the dispute sign an undertaking that any information disclosed in the communications will not be used as evidence before the courts.
7. Restrain from documenting any settlement negotiation.
8. Keep any concession or compromise in relation to liability or settlement oral.

2. Post Settlement:

Submit all documentation, notes and comments to the Notary Public (who most likely is a lawyer) because they are also bound by the ethical duty of confidentiality as per the professional conduct handbook (article 42).

The Without Prejudice rule is not absolute and is subject to many exceptions, even in common-law jurisdictions where the courts may ignore the principle if it is in the interests of justice. For example, the parties settling a dispute might at a later stage disagree over the interpretation of a clause in the settlement agreement, or fail to honor the terms, which might necessitate a court reviewing the otherwise privileged material. Parties might also agree to waive the legal privilege for some reason, or it might be that an issue of public policy arises or the matter becomes subject to fraud or criminal allegations. Moreover, any statement or admission contained within the document in question that is unrelated to the settlement subject or negotiations will not be covered by the privilege.

'Save as to costs'

In common law jurisdictions communications are often marked "without prejudice save as to costs". This term means that the privilege applies until the court delivers judgment. After judgment the court will consider awarding costs to the successful party. In certain jurisdictions the courts have a wide discretion to order one party to pay the legal costs of its adversary. The court is entitled to review the without prejudice offers made during the proceedings when determining the cost order it makes. Additionally, if a party can show they made an offer more favourable than that awarded by the court, they can claim they should be awarded a portion of legal costs even if they were unsuccessful at trial. By marking the correspondence 'without prejudice save as to costs', that party is informing the other party that it reserves the right to rely on the communication when the issue of costs falls to be decided.

Confidentiality

Unlike the Without Prejudice concept, the confidentiality of documents and correspondences can be relied on in the UAE. Confidential communications cannot be disclosed without the party's consent and the party receiving the communications may be under a fiduciary duty in relation to the information. The scope of confidentiality is however vague, especially if it is to be applied outside the concept of the attorney/client relationship. What has been established under the UAE's advocacy laws and a number of cases in the UAE is the existence of a confidential obligation and liability between the client and the attorney. However, it is not clear under the UAE's laws and in most Middle Eastern countries whether responsibility for confidentiality exists between attorney and attorney or between the parties in any correspondence or dealing.

There is no law in the UAE which upholds that it is a duty to respect confidentiality especially when a document is marked confidential or to hold a person responsible for using documents in court or arbitration or to even rely upon anything that is marked confidential.

There are however, two exceptions as follows:

1. If the documents were obtained fraudulently or stolen

In such cases the other party may rely on the fact that the documents were stolen or fraudulently obtained and stop the person relying on the document's confidentiality. However, the offence is not that they have used confidential documents but that the documents were obtained illegally.

2. In the event one of the parties was entrusted with confidential information because of his/her profession or position

Article 379 of the UAE Penal Code may apply in this case. The article states the following:

“[A person shall] be sentenced to detention for a minimum period of one year and/or to a minimum fine of twenty thousand Dirhams, whoever by virtue of his profession, craft, position or art is entrusted with a secret and divulge it in cases other than those allowed by law or if used for his own personal interest or for the interest of another person, unless authorized by the confiding person to disclose or use it.

The penalty shall be imprisonment for a term not exceeding five years where the perpetrator is a public servant or a person in charge of a public service who was confided the secret because or on the occasion of discharging his duties or performing his service.”

The Dubai Court of Cassation in Criminal Appeal No. 262/2009 dated 12 July 2009 ruled that there are four elements for disclosing confidential information that must be satisfied in order for the act to be considered a crime under Article 379:

1. The material element of the crime must be the disclosure of the confidential information;
2. The disclosed information must be confidential;
3. The confidential information must have been given to or accessed by the accused by virtue of his/her profession, craft, or position;
4. There must be criminal intent (i.e. the accused disclosed the confidential information knowing that he/she was not authorized to disclose such information or is divulging it in cases other than those allowed by law).

If a person wishes to rely on confidential document during a confidential process (such as mediation or arbitration) it would be advisable to make reference to Article 379 of the UAE's Criminal Law when doing so. This will ensure that the recipient is aware that it would likely be a crime under the UAE Criminal Law for the recipient to disclose the document to others.

It also advisable for a party to seek legal advice when engaging in settlement negotiations to ensure that statements are not made which may later prejudice any court case.