

Choice of law and jurisdiction provisions in the UAE

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What is the governing law clause and what does a jurisdiction clause do?

As their names suggest, the governing law clause in a contract specifies the laws that will govern the relevant contract, while a jurisdiction clause specifies the courts or arbitration tribunal that will have exclusive or non-exclusive jurisdiction to hear any disputes that may arise out of the contract. These clauses can sometimes be overlooked during drafting as they tend to be included in the “boiler plate” language towards the end of the contract.

However, it is important that these clauses receive as much attention as the substantive provisions of the contract. Failure by parties to agree or to include suitable governing law and jurisdiction clauses may lead to lengthy and potentially expensive disputes over the governing law and dispute resolution procedures to be applied to a given contract. This is obviously an unattractive prospect, since it may give rise to a lack of legal predictability and the risk of “forum shopping,” in which the contracting parties initiate proceedings before different courts and tribunals, resulting in parallel litigation in multiple fora.

Governing law clause

Recent statistics from the International Chamber of Commerce indicate that over 90% of the parties in [ICC arbitration](#) proceedings had included a governing law clause in their contract.

A typical governing law clause will provide that:

“This agreement shall be governed by and shall be construed in accordance with the law of [chosen law of the parties]”.

In choosing a suitable governing law, the following matters should be considered:

The suitability of the chosen law for determining any future dispute

The law of some jurisdictions, such as England and New York, are often used in international commercial contracts because there is a substantial body of sophisticated case law dealing with issues which arise in conflicts over commercial or financing contracts, which leads to greater legal certainty for the parties. The laws of other jurisdictions may be silent on many of these commercial issues; indeed, in some cases, they may not even recognize concepts addressed in the contract. Parties should not focus so much on applying a law of their home jurisdiction, but on applying a suitable law having regard to the nature and subject matter of the contract.

Parties should consider the jurisdiction they have selected for the resolution of any dispute.

Often parties will choose the law of the jurisdiction they wish to use to resolve the dispute in order to avoid complexity. For instance, a contract which chooses the English courts as having jurisdiction over disputes may specify English law as the governing law. However, this does not have to be the case. The courts of some legal systems are adept at applying foreign law to disputes of which they are seized. However, parties should be careful that this will often give rise to a burden of proving what the foreign law is should the parties not agree. Parties should also be aware that some national courts will not in practice apply the choice of law. Parties should also consider the risk of the courts applying the chosen law in a manner inconsistent with that of the courts of the country whose law has been chosen. Alternatively, the parties may specify arbitration. Sophisticated international tribunals are well-used to applying the laws of different countries to international disputes, with arbitrators often been appointed because of their familiarity or expertise in the law of a particular country.

Familiarity ought not to breed contempt.

Generally, the parties ought to choose a law with which they are each familiar, rather than attempting to choose a “neutral” law as a compromise. The latter choice can result in unpleasant surprises should a dispute arise between the parties concerning the meaning or application of the contract.

Governing jurisdiction clause

A typical jurisdiction clause will provide:

“The parties submit all their disputes arising out of or in connection with this agreement to [arbitration] [or] [the exclusive] [non-exclusive] jurisdiction of the courts of [insert country].”

As may be seen, the first point to consider is whether to choose arbitration or litigation as a mean of resolving disputes arising under the contract.

Arbitration offers a number of advantages over litigation in international contracts, notably the enforceability of awards under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; the finality of decisions (in another words, there are no appeals for arbitration decision); the ability to choose the arbitrators (although this not always the case); and the privacy of proceedings.

Where the parties believe that litigation is to be preferred over arbitration, there are a number of significant factors to consider:

Same jurisdiction as governing law

As noted above, it is common to choose the courts of a country whose law is to govern the contract. However, this does not necessarily have to be the case, since there are other factors to consider.

Enforceability of judgments

In order for any judgment to be effective, it must be enforceable against the assets of the losing party in the litigation. Hence, one party may wish to select the jurisdiction of a country where the other party’s assets are located, unless it would be possible to enforce a judgment in other jurisdictions pursuant to international agreements and conventions on the recognition and enforcement of judgments in civil and

commercial matters. The importance of enforceability cannot be overstated when it comes to drafting an appropriate jurisdiction clause as ensuring recovery is just as important as achieving a favourable judgment or award.

Procedural issues

The parties should consider other procedural issues in their choice of court, including:

- Whether it is practicable to litigate in the language of the chosen court
- Whether the chosen court will actually apply the governing law of the contract
- The speed and procedural flexibility of proceedings in the chosen courts
- The suitability of remedies available from the courts of the chosen country, including interim and provisional measures
- The finality of judgments in the chosen jurisdiction.

Use of an arbitration institute

Arbitration clauses, in addition to choosing a jurisdiction and applicable laws, often identify a particular institute to administer the arbitration.

There are a number of UAE-based institutions, including (but not limited to) the Dubai International Arbitration Center (DIAC), DIFC-LCIA Arbitration Centre, and the Abu Dhabi Commercial Conciliation and Arbitration Center (ADCCAC). Equally, however, parties can elect to use the rules and/or facilities of other institutions such as the ICC in Paris, the LCIA in London, or SIAC in Singapore.

Parties should give careful thought to selecting an arbitration institute when drafting their contract as it can help ensure that a potential arbitration is managed effectively and efficiently. Given these advantages, we generally recommend the use of arbitral institutions.

Mandatory law & UAE-specific issues

So far, this article has assumed that the courts of most countries will accept governing law and governing jurisdiction clauses. However, this is not always the case, and the United Arab Emirates is one jurisdiction in which issues can arise.

The UAE courts will not uphold an agreement which gives jurisdiction to a foreign court where the UAE courts would otherwise enjoy jurisdiction. This includes disputes involving:

- the ownership of properties situated within the UAE
- Proceedings involved an transaction that was made, formed or supposedly formed in the UAE
- An event occurring in the UAE.

Moreover, the UAE will not accept and recognize jurisdiction clauses, which provide for a foreign court or arbitration tribunal to determine disputes, which involve:

- Commercial agencies
- Employment
- Certain real estate matters connected to the UAE.

Furthermore where the UAE courts have jurisdiction, they will usually apply UAE law instead of the governing law chosen by the parties.

Further conflict issues may arise within the UAE legal system itself as regards the allocation of jurisdiction between UAE courts depending on the subject matter of the agreement, which requires careful consideration.

Do's and Don'ts

In light of the above we conclude with the follows do's and don'ts:

- Do address governing law and jurisdiction in the contract. Omission can cause serious ramifications should a dispute arise.
- Don't assume that national laws are all broadly the same; they can vary considerably in important aspects such as damages and the ability to limit liability.
- Do review both governing law and jurisdiction in light of legal advice, taking into account the factors mentioned above. This will minimize the risk of an unfavorable resolution to a future dispute.
- Don't simply cut and paste from a previous agreement.
- Do carefully consider which arbitral institution to use if choosing arbitration.
- Don't assume that national courts will always respect such clauses.

This article was co-authored with Jacob Heyka, Intern at Al Tamimi & Company.

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