

The Expansion of the Jurisdiction of the DIFC Courts

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Historically, the Dubai International Financial Centre (DIFC) Courts which consist of a Small Claims Tribunal, Court of First Instance and Court of Appeal, have had limited jurisdiction to hear disputes and were initially intended to act solely as a forum to settle civil or commercial disputes between entities registered in the DIFC. Specifically, parties not registered in the DIFC or who entered into contracts in the UAE without a nexus to the DIFC were not able to opt into the DIFC Courts jurisdiction and would typically be subject to the jurisdiction of the UAE Courts.

Before describing the significance of recent changes in respect of the jurisdiction of the DIFC Courts, it is important to consider the jurisdiction of the UAE courts. In general terms, the UAE Courts have a significant jurisdictional net.

Whilst parties are in theory free to choose (pursuant to the provisions of the UAE Civil Code) the law and governing jurisdiction of their commercial arrangements, in practice this is not the case.

The UAE Courts are incredibly guarded in respect of their jurisdiction. Consequently where commercial or civil disputes with a nexus (whether, for example, by virtue of place of contract performance or the identity of the contracting parties) to the UAE have been subject to foreign law and jurisdiction clauses, and overseas litigation, a party seeking to enforce an overseas judgment in such circumstances in the UAE has typically been frustrated. This is generally a result of the UAE Courts determining that the subject matter of such overseas judgment should have been within the confines of their jurisdiction. Consequently, in such cases, overseas judgments have not been automatically enforced but instead have been subject to an effective “retrial” by the UAE Courts, in effect defeating the purpose of the award of the overseas judgment.

For established international businesses well versed in litigation matters in developed common law jurisdictions such as the US and UK, the UAE court system can be a daunting prospect for the reasons detailed below:

- The UAE Courts system is civil law based and does not have a developed principal of binding precedent. In turn this can give rise to inconsistent judgments;
- The entire UAE court process is undertaken using the Arabic language. Importantly, this extends to all documentation related to the claim being translated and interpreted in the

Arabic language. Consequently, it is our experience that this leads to issues of legal concepts and principals being “lost in translation”; and

- From a practical perspective, restrictions on rights of audience in the UAE Courts prevents a significant proportion of international law firms from being able to represent their clients in the court process. As such, for many clients involved in contentious matters in the UAE Courts, there will be an additional cost and administrative burden of having two sets of counsel involved in a dispute.

In light of this context, the recently announced changes in respect of the jurisdiction of the DIFC Courts (as more particularly detailed below) have been broadly welcomed by Dubai’s international legal community.

The New Law – Expanding the Jurisdiction of the DIFC Courts

On 31 October 2011 Law No. 16 of 2011 amending law No. 12 of 2004 (the “Law”) was enacted.

Specifically the Law (under Article 5) grants exclusive jurisdiction to the DIFC Court of First Instance to hear and determine:

- Civil or commercial claims and actions to which the DIFC or any DIFC Body, DIFC Establishment or Licensed DIFC Establishment is a party;
- Civil or commercial claims and actions arising out of or relating to a contract or promised contract, whether partly or wholly concluded, finalised or performed within the DIFC or will be performed or is supposed to be performed within the DIFC or will be performed or is supposed to be performed within the DIFC pursuant to express or implied terms stipulated in the contract;
- Civil or commercial claims and actions arising out of or relating to any incident or transaction which has been wholly or partly performed within the DIFC and is related to DIFC activities;
- Appeals against decisions or procedures made by the DIFC Bodies where DIFC Laws and DIFC Regulations permit such appeals; and
- Any claim or action over which the Courts have jurisdiction in accordance with DIFC Laws and DIFC Regulations.

In addition, the Court of First Instance may hear and determine any civil or commercial claims or actions where the parties agree in writing to file such claim or action with it whether before or

after a dispute arises, provided always that such agreement is made pursuant to clear and express provisions.

DIFC Courts – The Litigation Benefits

The passing of the Law means that parties no longer require a nexus with the DIFC in order to utilise the DIFC Courts. Now parties can freely contract to have their civil and commercial disputes heard by the DIFC Courts, save where jurisdiction vests with an alternative competent authority. For example an attempt to circumvent the jurisdiction of the specially created Commercial Agency Committee and UAE Courts in respect of a dispute relating to a UAE commercial agency agreement registered pursuant to the UAE's Commercial Agency Law would not be binding.

The principal benefits of the DIFC Courts are that:

- The court system is based on common law, with binding precedent and procedures which borrow heavily from the English Civil Procedure Rules;
- Court proceedings are undertaken in the English language;
- International lawyers registered with the DIFC Courts can appear before the courts and local counsel are not required; and
- The system allows a successful litigant to claim their legal fees from the losing party. By comparison in the UAE Courts, it is very rare for legal fees to be awarded to a successful litigant by a judge.

On the binding precedent point, it is clear that as the DIFC Court's system matures so will its body of case law. In the interim the DIFC Court's judiciary has the ability to call on English common law precedent to help determine DIFC Law governed matters.

Enforcement of DIFC Judgments in the UAE

The Law clearly specifies that a DIFC Court judgment be automatically enforced in the Dubai Courts. Whilst there was initial concern in respect of whether a DIFC Court's judgments would be enforced in neighbouring emirates, recent announcements seem to have quelled such concern.

Memoranda of understanding with respect to the recognition and enforcement of DIFC Court's judgments have been signed with the courts in Ras Al Khaimah and the UAE Federal Ministry of Justice. We further understand that the DIFC Courts are in discussions with the Abu Dhabi Courts in respect of entering into a similar recognition and enforcement arrangement. With the

same in mind, we will be keeping a “watching brief” on the progress of this issue and will provide additional updates as required.

Conclusion

From an international standpoint, the extension of the jurisdiction of the DIFC Courts particularly for international businesses contracting in the UAE is a welcome development, providing a common law alternative to the current civil law courts system.

In addition it is a desirable expansion of the international dispute resolution forums in the UAE and may prove an interesting alternative to the DIFC’s arbitration centre.

Notwithstanding the distinct positives flowing from the Law, it is our view that the success of the DIFC Courts from a pure UAE dispute resolution perspective, will very much be determined by the willingness of UAE nationals and Emirati controlled businesses consenting to the resolution of commercial and civil disputes other than through the UAE Courts. As such, only time will tell as to whether these changes will have a marked effect on the local dispute resolution market.

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