

# Family disputes in the common law courts of the GCC



Family businesses fall into dispute for a large number of reasons, from quarrels over succession, the assignment of management or control rights, to arguments around the generation, preservation and distribution of assets and income, and personal animosities and competition.

When disputes arise, it is in the family business' best interests to have a pre-selected form of dispute resolution. For many family businesses, several viable options are offered by the GCC's three common law courts: the Courts of the Dubai International Financial Centre ('DIFC'), the Abu Dhabi Global Market ('ADGM') and the Qatar Financial Centre ('QFC'; also known as the Qatar International Court and Dispute Resolution Centre).

## Features of the common law courts beneficial to family businesses

There are a large number of general features common to all of the GCC's common law courts which may be beneficial to family businesses entering disputes. These include:

1. **Applicable law:** The applicable law in each court is modelled on the common law. In the DIFC and QFC, DIFC and QFC law is a distinct body of rules based on common law principles; in the ADGM, the applicable law is a modified form of English law. Many families actively want their affairs to be governed by laws that respect their freedom to contract and to make legal arrangements (including testamentary freedom). All three courts are also familiar with handling disputes governed by other laws, such as UAE or Qatari law applicable outside of the financial free zones, and with Sharia law. The common law courts therefore provide flexibility and adaptability by entertaining disputes governed by external or foreign laws yet having recourse to a developed body of internal laws.
2. **Privacy of proceedings:** As a general rule, disputes are managed openly. This means that, unlike in the national courts outside of the financial free zones, hearings are open to the public (and sometimes

available on the internet), and listing dates, judgments, orders and other documents are easily accessible online. Yet parties to family disputes are unlikely to want to resolve their disputes under the glare of publicity. As a solution, the common law courts have the ability to restrict public access to information by holding hearings privately and redacting or omitting to publish sensitive documents, so as to protect the privacy and confidentiality of families involved in a dispute.

3. **Default language:** Disputes are conducted in English as the dominant language in the common law courts. Hearings are usually held in English and documents are published in that language. This may suit families who have members based overseas, where English may be their first language, or where a number of different languages are spoken by family members. However, translation services are available for use in each court and many judges in the common law courts are fluent in languages other than English, in particular Arabic.
4. **Court organisation:** The personnel, processes and use of technology in the common law courts may provide appropriate expertise, flexibility and convenience to family businesses and particularly families and businesses spanning multiple jurisdictions. All three courts are analogous to the English Courts, with a court of first instance similar to the English High Court and a final Court of Appeal that superintends its work. They are staffed by very experienced judges and officials drawn from around the common law world, as well as Qatari and Emirati nations with backgrounds in both civil and common law. Small claims processes are available, mainly for employment and low-value claims, as are specialist divisions such as for technology and construction disputes. The rules and procedure of the common law courts are modelled on the English Civil Procedure Rules, and the courts have embraced modern information technology such as 'e-bundling' (filing documents online), paperless hearings and trials, and advocates, witnesses and even judges appearing remotely via video conferencing software.
5. **International connectivity:** Each court will enforce judgments rendered by other foreign and domestic courts and arbitral tribunals, although the precise grounds on which they will so do varies. Equally, judgments and orders rendered by the DIFC, ADGM and QFC Courts may be enforced in other jurisdictions around the world, depending on the rules applicable in those jurisdictions.

## Jurisdiction

It is important to bear in mind that family business disputes can only be captured by a formal process if that process has jurisdiction to deal with the dispute in question. The DIFC, ADGM and QFC Courts have similar jurisdictional gateways which, in overview, are as follows.

1. disputes can be brought before the courts if one or both parties have a connection to the jurisdiction, e.g. because they are incorporated, registered or regulated within the jurisdiction or geographically based within the territory of the jurisdiction;
2. if the dispute involves a contract or an incident related to the jurisdiction, e.g. because the contract was in part or wholly concluded or performed, or a tort was committed in part or in whole, within the jurisdiction;
3. if the parties opt into the jurisdiction without having any other connection to it, e.g. by agreeing that a specific dispute, or by making any disputes arising from a contract, should be subject to a court's jurisdiction. Note that parties may usually agree that any disputes which otherwise may satisfy the party or subject matter gateways be removed from a court's jurisdiction too; and
4. laws and rules may bring a form of dispute within a court's jurisdiction, e.g. any dispute involving financial service regulations applicable within the jurisdiction. This gateway usually overlaps with one or more of the other gateways.

The question of jurisdiction is not only one for formal litigation processes, but may also affect: (a) whether parties can access formal court-annexed mediation or other alternative dispute resolution processes; and (b) whether and how a court may provide support for any arbitral processes. Families are therefore advised to consider, with their trusted advisors, whether to opt into the jurisdiction of one of the common

law courts, preferably by way of an express term to that effect on the family business' foundational or constitutional documents (such as its corporate memorandum and articles of association).

## **Alternative dispute resolution facilitated by the common law courts**

It is proportionate for families to select and engage a dispute resolution process appropriate to the dispute at hand. Many family disputes may start with a small disagreement that may possibly escalate into a larger one over time. The common law courts generally provide access to a tiered dispute resolution processes and they place alternative dispute resolution ('ADR') at the front of their offerings.

For example, the QFC Court Regulations expressly mandate ADR in a rule that comes at the start of the applicable court rules: 'the Court will encourage the parties, whenever it is appropriate to do so, to resolve their disputes by resorting to arbitration or mediation or any other method of alternative dispute resolution' (Article 5). Part 27 of the Rules of the DIFC Courts expressly notes the benefits of settling disputes by means of ADR, which:

1. significantly helps parties to save costs;
2. saves parties the delay of litigation in reaching finality in their disputes;
3. enables parties to achieve settlement of their disputes while preserving their existing commercial relationships and market reputation;
4. provides parties with a wider range of solutions than those offered by litigation; and
5. is likely to make a substantial contribution to the more efficient use of judicial resources.

The common law courts can facilitate family mediation in one of two ways. The first follows from the courts' own rules: once litigation has started, the courts may switch the litigation onto an ADR track at any point. In the DIFC Courts, for instance, parties may apply, at any stage in the proceedings, for directions for ADR. The judge may adjourn a case for a specified period of time for ADR, including extending the time for compliance by any party of any order of the Court, and the judge may even order the parties to engage in ADR (including orders as to costs).

Second, before litigation has commenced, the disputing parties can agree to host a mediation process or other form of ADR such as conciliation or expert determination in the court facilities, which are usually of very high quality (including main meeting rooms and individual party rooms for break-out sessions). Holding ADR in the courts has a number of benefits: it is a neutral ground, away from the public forums of a hotel or conference centre, and competitively priced.

By way of an example of the common law courts' ADR capabilities – in the ADGM Courts, parties may voluntarily refer their dispute to the Court-annexed mediation service prior to or after the commencement of proceedings, as well as by an order of the Court. The Court Registry will appoint a mediator within seven days of any referral; he or she is obliged by the relevant practice direction to facilitate discussions between parties, assist them in identifying underlying issues, clarify priorities and explore areas of compromise and generate options in an attempt to resolve the dispute. Further rules govern the Court's assistance in the mediation, and the processes of hearings, settlement and costs.

## **Arbitration**

Mediation is usually a voluntary process that does not require findings of fact by an umpire. An escalation

in family business dispute resolution may take the parties to arbitration, if they agree. The benefits of arbitration are well known. They include flexibility over the pace of the process, a choice of arbitrator (allowing the choice of a technical subject matter expert rather than a law), a high degree of privacy, and the rendering of a binding award that is highly portable through the New York Convention, allowing enforcement in jurisdictions around the world where the award debtor has assets. All of these aspects may be beneficial to family businesses in dispute. The common law courts provide additional advantages. Firstly, the common law courts may also act as the legal or curial seat of an arbitration. The common law courts have a range of tools which can be deployed in support of arbitral proceedings, some of which the non-common law courts of the UAE and Qatar lack. These include remedies such as injunctive relief and substantial orders as to costs. Second, arbitrations can take place under either institutional or ad hoc rules, and the common law courts have experience of all forms of arbitration. Each of the common law jurisdictions has its own arbitral centres and rules (such as the LCIA in the DIFC) but parties are generally free to choose any rules they so wish, and that choice will be respected by the common law courts provided they accord with principles of natural justice.

## Litigation

In the context of almost every family business dispute, litigation remains the 'nuclear option'. The compulsory nature of litigation may force a recalcitrant, unwilling or uncooperative family member to engage with the process, given the ultimate sanctions of costs orders, damning judgments and orders available to the public, and contempt of court applications that may lead to fines or even imprisonment. Litigation does not require the cooperation of the defendant or their good faith in proceedings. The process provides procedural certainty and fixed rules of evidence without any selection process for the judge (unlike arbitration and mediation). There is much less scope for challenging jurisdiction. However, litigation can be: inflexible; unnecessarily adversarial in a way that drives family members further apart without accounting for the non-legal side of the dispute, such as emotional relations between the parties; very costly (although unlike in the civil law courts, the common law courts allow the recovery of the bulk of a winning party's incurred legal costs); and there is a greater right to appeal.

## Conclusion

Lots of options are available to families in commercial disputes who wish to access the common law courts of the GCC. Family businesses and their professional advisors should consider accessing the DIFC, ADGM and QFC dispute resolution offerings now, before any disputes arise, so that exclusive jurisdictions can be selected and stepped, incremental dispute resolution clauses drafted and agreed. It is far easier to plan how to deal with potential disputes in advance, rather than deciding how to do so once a dispute has crystallised, when each party will use the choice of dispute resolution to its advantage and no agreement on process is guaranteed.

*Al Tamimi & Company's [Litigation](#), [International Litigation](#) and [Arbitration teams](#) regularly advise on [family business](#) disputes. For further information, please contact [Rita Jaballah \(r.jaballah@tamimi.com\)](mailto:r.jaballah@tamimi.com), [Peter Wood \(p.wood@tamimi.com\)](mailto:p.wood@tamimi.com) or [Peter Smith \(p.smith@tamimi.com\)](mailto:p.smith@tamimi.com).*