

Effectiveness of Arbitration and Jurisdiction clauses in the courts of Dubai

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Well this question might be asked by international commercial parties like the renowned rock band Eagles which prepares to land and perform in Dubai next month. To what extent will the Courts (and Tribunals) of Dubai recognise and uphold long standing and internationally recognised legal custom and practice to permit parties to commercial transactions to elect the law and the forum to govern and regulate their relationship?

Itself but one of the seven United Arab Emirates under the UAE Constitution, the Emirate of Dubai retains its own legislature and judicial systems discrete from the Federal authorities such that the Courts of Dubai apply UAE Federal law, where applicable, and/or local laws and regulations enacted by the Ruler of Dubai. In the event of conflict between Federal and local law, Federal law prevails. Recognised within the UAE's constitutional framework as an economic freezone and separate jurisdiction in the Emirate of Dubai, the Dubai International Financial Centre ("the DIFC") dis-applies Federal commercial and civil laws and substitutes laws especially enacted by the Ruler apply in the DIFC in order to attract and service international financial business to Dubai. The laws establishing the DIFC Courts are designed to ensure the highest international standards of legal procedure, which in turn creates a legal and judicial environment conducive to international trade, finance and investment and to provide the certainty, transparency and efficiency expected by the global institutions operating in the Middle East. Albeit a Court of Dubai, the DIFC Court is a self contained two tiered judicial system with exclusive jurisdiction to determine specified DIFC related civil and commercial cases . Otherwise, the Dubai Court of Cassation is the final court of appeal for all non-DIFC related civil and commercial actions in Dubai.

In previous editions of Law Update we have discussed decisions of the UAE Courts exercising jurisdiction notwithstanding attempts by the parties to "contract out" of the national courts by agreeing to submit exclusively to the courts of another jurisdiction and to choose a different law to govern their commercial relationship. The courts of the UAE, including those in Dubai applying Federal civil and commercial law, have historically avoided and ignored any such agreements as a matter of public policy and retained jurisdiction as conferred by Articles 20 and 21 of Federal Law No. 11 of 1992 ["the Civil Procedure Law" or CPL]. Upon seizing proceedings within its jurisdiction, the national courts will routinely apply UAE law regardless of any other chosen by the parties. The CPL, inter alia, provides that national courts hear proceedings against foreigners even if they maintain no domicile or residence in the UAE but have chosen UAE jurisdiction or if the proceedings concern property in the UAE, relate to inheritance or the estate of a UAE national; or if the proceedings involve an obligation that was made, performed or supposed to be performed in the UAE, a contract to be attested in the UAE, an event occurring in the UAE or bankruptcy declared by a UAE court.

Thus, broadly speaking, parties should be aware that there is no real check out of the UAE/Dubai courts' exercise of international jurisdiction, unless they avail themselves the only exit gate permitted by the CPL and execute a valid arbitration agreement. Consequently, the vast majority of construction, development and trade contracts in Dubai, including real estate transactions include an arbitration clause.

Although the CPL does not mandate a stay of court proceedings brought in breach of an arbitration agreement, there is developing practice (in the Dubai courts at least) that substantive claims will be dismissed routinely for want of jurisdiction provided that the defendant adduces evidence of a signed contract containing an arbitration clause prior to taking any step in the litigation. Although the practice is sometimes variable, the courts seem more content to presume the existence and validity of an

arbitration agreement evidenced in writing and not otherwise intervene or continue contrary to an ostensible arbitration clause; there is a tendency to defer consideration of any existentialist debates first to the arbitrators and then to the courts to review in the event of subsequent applications to annul an arbitral award under Article 216 of the CPL. Perhaps anticipating reform of Federal arbitration laws and adopting an increasingly pro-arbitration stance in complex commercial matters, the Dubai courts are applying the provisions of the CPL somewhat more progressively than before.

Dubai World Special Tribunal – a Court of Dubai by any other name

Established by Decree in 2009 to handle various matters pertaining to the restructuring and settlement of the financial position of Dubai World and its subsidiaries in accordance with the decreed insolvency code, the Dubai World Special Tribunal (“the DWST”) instead substitutes the jurisdiction of the Dubai courts with its own exclusive jurisdiction to hear and decide any proceedings commenced against Dubai World, any of its subsidiaries or any person relating to the settlement of the financial obligations of Dubai World and/or any of its subsidiaries. The appointed members of the DWST are the senior international judges of the DIFC Courts.

The judgments of the DWST are final, irrevocable and not subject to any appeal. All judgments may be executed and enforced by a competent court in the Emirate of Dubai. Whereas most disputes before the DWST invoke UAE Law as applied in the wider Emirate of Dubai, the procedural rules adopted by the DWST are those of the DIFC Court, in turn modelled on the common law procedures of the Commercial Court in England.

Whereas there is no checking out of the DWST in to an alternative litigation forum, DWST Practice Direction No. 1 of 2010 affirms the policy and procedure of the Dubai courts to respect and enforce arbitration agreements made between Dubai World entities and their contractors. Indeed, the DWST considers itself entitled to exercise robustly its power to enforce such arbitration agreements including pro-active supervision of (to some perceived as intervention in) extant arbitral proceedings.

Other decisions of the DWST however suggest a signal reluctance to stay proceedings brought before it, if there is raised any doubt about the existence or validity of an arbitration agreement. For example, in *Alangari v Limitless LLC*, absent the Claimant’s signature upon a comprehensive Sale & Purchase Agreement containing an arbitration clause and finding no other affirmatory conduct sufficient to prove that the Claimant had accepted the arbitration clause, the Defendant’s jurisdiction challenge to the DWST was rejected. More surprisingly, in *Farhat v International City LLC & Nakheel PJSC*, the DWST relieved a claimant from the usual consequences of his signature upon a similar sale and purchase agreement containing an arbitration clause, which he claimed not to have read or understood. Upon finding no arbitration agreement concluded between the parties, the DWST avoided the need to address the issue of its obligation to refer the matter to arbitration regardless of whether a “dispute” falling within the ambit of the arbitration clause had been first identified.

Thus, arguably, the local Dubai courts are manifesting a more pro-arbitration or, rather, a less interventionist attitude than their DIFC brethren sitting as members of the DWST.

The DIFC Court – a Court of Dubai

Consistent with the DIFC’s international mandate and free from the constraints of the CPL, jurisdiction and arbitration clauses have always been recognised under DIFC law and by the DIFC Court – they are to be construed according to their terms like any other term of contract. See Article 13 of DIFC Law No.10 of 2005 (“DIFC Application of Laws”) which appears to mandate that: (1) “A submission to the courts of a jurisdiction in a contract shall be effective”; and (2) “A submission to arbitration in a contract shall be effective”.

These provisions are reinforced by Article 13 of the DIFC Arbitration Law of 2008 which similarly mandates a stay of proceedings brought in breach of an arbitration agreement.

Two recent decisions of the DIFC Court of Appeal confirmed, at least in principle, the DIFC's recognition and effectiveness of contracting parties' choice of law, choice of court jurisdiction and/or arbitration agreements. However, whether in reality contracting parties will be permitted to check out of and actually leave DIFC Court jurisdiction remains debatable.

In *Al Khorafi & Ors v Bank Sarasin & Co Ltd*, the DIFC Court rejected the Appellants/Claimants' contention that, there no longer being any reference in the New Law equivalent to former Article 5(A)(2) of the original Judicial Authority Law, it was no longer permissible for parties to "opt out" of the DIFC Court's exclusive jurisdiction, i.e. for parties to choose or contract to submit their disputes to be heard in other fora. It is clear that the draftsman of the New Law had no intention to depart from these established principles or to repeal existing DIFC law. Article 5(A)(3) of the Judicial Authority Law as amended by the New Law unarguably contemplates the situation where there has been made an effective agreement in writing to submit to the jurisdiction of another court.

However, in that case the Court having found that the jurisdiction clause constituted valid and binding agreements to refer all disputes between the Claimants and the Second Defendant (a Swiss Bank) to the Swiss Courts and also having determined that Switzerland was the natural forum for such Swiss law claims, it was therefore very surprising that the DIFC Court did not apply DIFC law to stay or dismiss the proceedings and give effect to the jurisdiction agreements accordingly. Instead, the Court decided to apply English law which, the Court also appears to have decided, thereby affords the DIFC Court discretion to refuse to enforce such agreements "on balance" due to "exceptional circumstances".

There being no general jurisdiction of the English Courts or of the DIFC Courts to re-write the terms of a commercial contract, which is otherwise valid and enforceable, international litigants will expect courts to stay proceedings in aid of the parties' choice of forum unless the claimant makes a very convincing case (demonstrating real injustice, not just administrative inconvenience) for being allowed breach his contract, specifically, the jurisdiction agreement. In fact, English authorities in recent years demonstrate fidelity to agreements choosing foreign courts and there is a presumption in favour of a stay of proceedings issued in breach of said agreements.

Whilst there is a public interest in avoiding the potential for competing or parallel judgments, there is also a strong public interest in having cases disposed of by the "natural forum" being the court best placed to apply its own laws in respect of its own nationals. Moreover, notwithstanding a public interest in having all interested parties before the court at once and bound to a single adjudication, decisions of the English Courts trend in favour of the private interest of the defendant in holding the claimant to his bargain.

Corinth Pipeworks SA v Barclays Bank plc might offer some comfort to the international banking and finance community who look to the DIFC Courts to afford commercial certainty and to ensure parties are held to their contractual obligations. Hwang CJ opined that "it is entirely within the control of banks and other enterprises" to choose not to subject their disputes to DIFC jurisdiction by "either trad[ing] through separate corporate vehicles in the DIFC and the wider Emirate or (even more simply) includ[ing] jurisdiction clauses in their contracts choosing where they allocate jurisdiction over any disputes." In other words perhaps, you can check out any time you like...

But no doubt many in the international business community will hope there lingers no echo in the DIFC of the Eagles' night man who was nevertheless programmed to receive and would never let them leave.

Footnotes :

1 - Dubai Law No 16 of 2011 ("the New Law") amending certain provisions of Dubai Law No. 12 of 2004 establishing the Judicial Authority of the DIFC and the jurisdiction of the DIFC Courts.

2- March 2011 and February 2012 editions

3- CPL Article 84 - challenges to jurisdiction must be made promptly and prior to any step in the court action, failing which the parties are deemed to have submitted to the court's jurisdiction and waived their

right to arbitrate. However, regardless of their arbitration agreement, parties remain free to apply to the court for such interlocutory attachment or preservative measures as the CPL affords

4- A practice reinforced by Dubai Court of Cassation Case No. 73/2010 which confirmed the validity of an award albeit predicated on an unsigned arbitration clause included within terms and conditions referred to and expressly incorporated in the main contract.

5- DWT/0019/2011 Al Mazaya Real Estate FZ LCC v Limitless LLC - Judgment of Sir Anthony Evans dated 9 May 2011

6- DWT/0029/2010 - Judgment of Sir Anthony Evans dated 23 March 2011

7- DWT 0018/2011 - Judgment of Sir John Chadwick dated 21 December 2011

8- Article 8 of this Law provides that "the existence, validity, effect, interpretation and performance of a contract, or any term thereof, including any requirements as to formality, shall be determined by the law which governs it". Article 9 also provides that "an express choice of a governing law in a contract shall be effective against all persons affected thereby".

9- Article 13. Arbitration agreement and substantive claim before a Court

(1) If an action is brought before the DIFC Court in a matter which is the subject of an Arbitration Agreement, the DIFC Court shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, dismiss or stay such action unless it finds that the Arbitration Agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this Article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the DIFC Court.

10- DIFC CA 003/2011 dated 5 Jan 2012.

11- DIFC CA 002/2011 dated 22 Jan 2012

12- Ibid para 68(a).