

Opting Out Of The Exclusive Jurisdiction Of The DIFC Courts

In the absence of an express choice of the DIFC Courts' jurisdiction, Article 5A(1) of the Judicial Authority Law sets out the following five jurisdictional gateways which confer exclusive jurisdiction on the DIFC Courts to hear and determine:

- (a) civil or commercial claims and actions to which the DIFC or any DIFC Body, DIFC Establishment or Licensed DIFC Establishment is a party;
- (b) civil or commercial claims and actions arising out of or relating to a contract or promised contract, whether partly or wholly concluded, finalized or performed within the DIFC or that will be performed or is supposed to be performed within the DIFC pursuant to express or implied terms stipulated in the contract;
- (c) 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;
- (d) appeals against decisions or procedures made by DIFC Bodies where DIFC Laws and DIFC Regulations permit such appeals; and
- (e) any claim or action over which the DIFC Courts have jurisdiction in accordance with DIFC Laws and DIFC Regulations.

Contracting parties falling within one or more of the jurisdictional gateways cited above may however wish to opt out of the jurisdiction of the DIFC Courts in favour of the local (non-DIFC) Dubai Courts, which they are entitled to do pursuant to Article 13(1) of DIFC Law No. 10 of 2005 as amended (the Law relating to the application of DIFC Laws). Article 13(1) provides that a "submission to the courts of a jurisdiction in a contract shall be effective". Such parties must exercise particular care when drafting a suitable jurisdiction clause giving effect to their intention to opt out in favour of the local (non-DIFC) Dubai Courts. This is because the DIFC Courts have determined that they will ordinarily exercise jurisdiction over contracts that fall within the jurisdictional gateways but contain jurisdiction clauses that are vague to the extent that they do not clearly identify which of the courts of Dubai the parties agree shall have jurisdiction to hear disputes arising under or in relation to their contract.

In such cases the DIFC Courts will examine whether the background circumstances of a contract lead to the conclusion that the parties intended to submit to the DIFC Courts' jurisdiction. Factors relevant to such a judicial conclusion include having contracting parties: (a) entering into their contract within the DIFC and subjecting it to DIFC Law; (b) located in the DIFC; (c) providing services under their contract from the DIFC; and (d) with an English-language contract and related documentation.

These factors were expressly identified in *Injazat Capital Limited and Injazat Technology Fund B.S.C. v Denton Wilde Sapte & Co.* (CFI 019/2010) earlier this year. In its judgment the DIFC Court determined that a reference to the "exclusive jurisdiction of the Dubai courts" in the terms of engagement of a DIFC-based law firm gave the DIFC Courts jurisdiction on the grounds that the DIFC Courts are also courts of Dubai. The Defendant law firm had argued that the phrase "exclusive jurisdiction of the Dubai courts" was a valid opt out of the DIFC Courts' jurisdiction exclusively in favour of the local (non-DIFC) Dubai Courts.

In *Injazat*, the DIFC Court acknowledged that a distinction can be drawn between the Dubai Courts as established under Dubai Law No. 3 of 1992 and the DIFC Courts established under the Judicial Authority Law. However, the DIFC Courts looked to what the parties had intended by their reference to the "Dubai courts" and decided that the burden was on the DIFC-based law firm to establish that its terms constituted

an agreement to opt out of the DIFC Courts' jurisdiction. As the law firm is a DIFC entity it did not meet this burden.

This issue only arises where at least one of the contracting parties is a DIFC entity or one or more of the other jurisdictional gateways conferring exclusive jurisdiction on the DIFC Courts is engaged and the disagreement is whether the applicable jurisdiction clause can be taken to constitute an "opt out" of the DIFC Courts' jurisdiction, thereby conferring jurisdiction on the local (non-DIFC) Dubai Courts.

Where none of the jurisdictional gateways conferring exclusive jurisdiction on the DIFC Courts are engaged and the parties have not expressly opted into the jurisdiction of the DIFC Courts, the usual jurisdiction provisions in a contract should suffice. However, in order to eliminate any remaining risk of being involuntarily drawn into the net of the DIFC Courts, a jurisdiction clause should still make it clear that a reference to the "Dubai Courts" is to the local (non-DIFC) Dubai Courts and not to the DIFC Courts. Therefore, where a party or transaction with any link to the DIFC intends to contract out of the DIFC Courts' jurisdiction and refer disputes to the local (non-DIFC) Dubai Courts, the jurisdiction clause should make it clear that all disputes are to be referred to the Dubai Courts as established under Dubai Law No. 3 of 1992.