

Contracting Out of the Court's Jurisdiction in the UAE

Hassan Arab - Partner, Regional Head of Dispute Resolution - Litigation / Arbitration
h.arab@tamimi.com - Dubai International Financial Centre

July - August 2014

The UAE consists of seven Emirates. Each Emirate has its own courts, but they can be divided into those Emirates which have their own court systems (Abu Dhabi, Dubai and Ras Al Khaimah) and those that have local courts which are part of the Federal Court system (the other Emirates of Sharjah, Fujairah, Umm al-Quwain, and Ajman), and which are therefore referred to as 'Federal Courts'. Abu Dhabi is unique in that it has both local and Federal Courts, although the Federal Courts are used in limited circumstances.

The jurisdiction of these courts is set out in two legal instruments: the UAE Constitution, and the UAE Civil Procedure Law. In commercial matters it can often be the case that the party claiming has a choice as to which Emirate to file the case. This article considers when and how this choice can be exercised.

Sources of Jurisdiction - The Constitution

The Constitution of the United Arab Emirates provides the legal and political framework for the operation of the United Arab Emirates as a federation of seven emirates.

The UAE Constitution permits each Emirate to have its own legislative body and judicial authority (see Articles 94 - 109). The Emirates of Sharjah, Fujairah, Umm al-Quwain, and Ajman remain part of the Federal judiciary authority, but the Emirates of Abu Dhabi, Dubai and Ras Al Khaimah have set up their own judicial authorities. This means that essentially there are four judicial authorities in the UAE: Abu Dhabi, Dubai and Ras Al Khaimah and the Federal judicial authority covering Sharjah, Fujairah, Umm al-Quwain, and Ajman. Abu Dhabi also contains Federal Courts but these are only used in limited circumstances.

The Constitution explains that there are some disputes that must be heard at a Federal level (by the Federal (also known as 'Union') Supreme Court) and not at a local Emirate level. These are detailed at Articles 99 and 102 of the Constitution. Examples include disputes between the Emirates themselves regarding their jurisdiction, disputes concerning the interpretation of the Constitution, and criminal matters that relate to the security of the state. All of other matters can be dealt with by the local Emirate courts.

Article 105 of the Constitution allows that it is possible, by federal law, for all or part of a local Emirate court's jurisdiction to be referred to the Federal Courts. However it would not be possible for a local Emirate court to take jurisdiction away from the Federal Court.

Sources of Jurisdiction - Civil Procedure Law

Section 3 of the UAE Civil Procedure Law defines the jurisdiction of the local UAE courts. The main provision for commercial disputes is Article 31(3) which sets out four circumstances in which a court may have jurisdiction:

'In commercial matters jurisdiction shall be vested in

1. the court in whose area the defendant has his domicile or
2. the court in whose area the agreement was made or
3. was performed in whole or in part or
4. in the court in whose area the contract should have been performed.'

This means that for commercial matters it may be the case that the Claimant will have a choice as to which court to bring a claim. If the defendant is domiciled in Ajman but the agreement was made in Dubai, the Claimant may bring the claim either in Ajman or Dubai.

Contracting Out

A significant amount of confusion arises from Article 31(5) of the Civil Procedure Law. This provision states that save in certain situations detailed in articles 32 and 34-39 (such as property issues, insurance claims, inheritance matters), it is possible for parties to agree on the jurisdiction of a specified court, in which case that court will have jurisdiction or the court where the defendant is based.

To the casual observer Article 31(5) may suggest that parties can choose any Emirate court for their dispute. In truth however, the position is more limited because of how this article interacts with article 104 of the Constitution and that fact that some Emirates have their own judicial authorities:

1. Article 104 of the Constitution states that local courts have jurisdiction 'in all judicial matters not assigned to the Federal Courts under the Constitution'.
2. This jurisdiction is, being defined in the Constitution, a matter of public policy, and cannot be transferred or excluded by the agreement of the parties.
3. Therefore if a local court does not have jurisdiction under Article 31(3), it is not possible for the parties to confer jurisdiction on the court as it would be taking the jurisdiction away from one of the courts.
4. The exception is with the courts that form part of the Federal judicial authority (i.e. Sharjah, Fujairah, Umm al-Quwain, and Ajman). Since these courts are all part of the same judicial authority, parties can decide which of these courts to use.

These issues can be illustrated by way of the following examples:

Example 1:

Company A sells 100 bricks to Company B. Both companies are in Sharjah and the agreement is performed in Sharjah. Any agreement that the court of Dubai has jurisdiction over any dispute would be void because the parties cannot confer jurisdiction on the Dubai courts (a separate judicial authority) where it otherwise would not have any jurisdiction.

Example 2:

Company A sells 100 bricks to Company B. Both companies are in Sharjah and the agreement is performed in Sharjah. Any agreement that the court of Ajman has jurisdiction over any dispute would be acceptable because although Ajman would not otherwise have jurisdiction, it is part of the same judicial authority as Sharjah (i.e. the Federal judicial authority).

Example 3:

Company A sells 100 bricks to Company B. Both companies are in Sharjah but the agreement is performed in Dubai. Any agreement that the court of Dubai has jurisdiction over any dispute would be acceptable because Dubai already has jurisdiction under Article 31(3) of the Civil Procedure Law.

Example 4:

Company A sells 100 bricks to Company B. Both companies are in Dubai but the agreement is performed in Ras Al Khaimah. Any agreement that the court of Sharjah has jurisdiction over any dispute would be void

because the parties cannot confer jurisdiction on the Sharjah courts (a separate judicial authority) where it otherwise would not have any jurisdiction.

Case Law

The basic principles discussed above have been repeatedly stressed by all local courts in the UAE.

In Federal Supreme Court Appeal No.137 of Judicial Year 11 (21 January 1990), the Federal Supreme Court considered the separate judicial authority in Dubai and explained that

“Pursuant to Article 104 of the Constitution, the Emirate of Dubai has retained judicial authority over its local courts which are accordingly competent to hear cases within the territory of the Emirate of Dubai and their decisions would not be subject to any form of challenge before the Federal Courts. The allocation of competence on court cases between the federal courts and local courts in Dubai is an issue of functional state jurisdiction that defines the competence of the various judicial bodies of the UAE and as such is related to public policy.”

Equally in Dubai Court of Cassation Civil Appeal No. 48 Of 2004 (24 October 2004), the Dubai Court of Cassation found that:

“This Court has consistently held that the Dubai Courts represent a judicial system that is independent from the federal judicial system in the UAE and that the jurisdiction of the Dubai Courts extends to all disputes in the Emirate other than federal disputes of the special nature described in Article 102 of the Constitution. Such courts must abide by the limitations imposed on their jurisdiction and may not actively or passively transgress those limitations. They may not give up their jurisdiction or oust the jurisdiction of another national court. Such jurisdiction, being constitutionally conferred, is a rule of public policy and parties cannot contractually agree to depart from it.”

For similar reasons, in Dubai Court of Cassation Property Appeal No.58-2009 (14 March 2010), the Dubai Court of Cassation stressed that ‘an agreement between the parties to apply the laws of the Emirate of Dubai does not by itself confer jurisdiction upon its courts’. The court’s jurisdiction was conferred by the constitution and could not be conferred or ousted by the agreement of the parties.

By way of a final example, in Abu Dhabi Court of Cassation Commercial Appeal No.1057/3/2009 (25 November 2009), the Abu Dhabi Court of Cassation stated that:

“The Dubai Courts’ position as a judicial authority that is independent from the federal judicial system entails that their jurisdiction extends to all disputes in the Emirate other than federal disputes described in Article 102 of the Constitution. Such jurisdiction is positively or negatively related to public policy and may not be considered as international or local jurisdiction nor may any agreement be made to the contrary. It is further settled that the boundaries of each Emirate represent the scope of venue jurisdiction of the local judicial authorities. Each court must therefore abide by its own jurisdiction which it may not transgress, actively or passively.”

The DIFC Courts

The DIFC Courts are courts of Dubai but have a specially defined jurisdiction to deal with civil and commercial disputes relating to the Dubai International Financial Centre. The Courts’ jurisdiction is not defined in the UAE Civil Procedure Law, but is set out primarily in Dubai Law 12 of 2004.

In 2011 the jurisdiction of the DIFC Courts was widened so that claims with no connection with the DIFC could be heard by the DIFC Courts if both parties agreed in writing to submit to the Courts’ jurisdiction. The question then arises as to whether this amendment is consistent with what was explained above.. This is an important issue which will be discussed in a forthcoming Law Update article.

Conclusion

Parties doing business in the UAE need to be aware of how effective any jurisdiction clause they place in their contract may be. This can only be determined by a thorough analysis of the particular agreement, and a robust understanding of how the various jurisdictions and judicial authorities in the UAE inter-relate. Essentially, in relation to commercial matters parties can only select a particular local court if that court would have jurisdiction under the Civil Procedure Law in any event.