

The Implied Jurisdiction of the DIFC Court to Appoint an Arbitral Tribunal: Beware of Unintended Consequences

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But what if the parties fail to explicitly state the seat? How should the seat then be determined? In an important judgement issued last year, the DIFC Courts addressed this issue and concluded that there was “no reason why the Seat of Arbitration cannot be determined by reference to an implied choice, giving consideration to the Seat with the most connection with the Agreement, the parties, the transaction and any other relevant consideration”. The DIFC Court’s determined the seat was the DIFC, but for reasons that some might consider surprising and which demonstrate the importance of not leaving such questions open to interpretation.

This article will briefly summarise the background to the case and review the judgment of the DIFC Court of First Instance.

Background

In May 2007, Gavin Bank (“Gavin”) entered into a Store Value Card Processing Service and Marketing Agreement (“SVC Agreement”) with Gaynor Gulf (“Gaynor”), under which Gaynor was required to provide store value card services to Gavin for customers in the United Arab Emirates.

The SVC Agreement included the following clauses:

- Clause 13.2 identifies that “[t]he validity, construction and interpretation of [the SVC Agreement] and the rights and duties of the parties hereto shall be governed by the internal laws of the UAE.”
- Clause 13.3 states that the parties agree to “submit to the jurisdiction of the courts in Dubai, the UAE.”
- Clause 13.4 identifies an informal dispute resolution procedure while Clause 13.5 states that “[a]ny controversy arising out of, or relating to this [SVC] Agreement, or the breach thereof, which cannot be resolved pursuant to Section 13.4 above, shall be submitted to arbitration per the law of the United Arab Emirates.”

Gaynor is managed by and affiliated with Gaynor US, a California-based company that develops and operates technology platforms around the world. A dispute arose between Gavin and Gaynor, which led to Gaynor and Gaynor US initiating court proceedings against Gavin in California in July 2011 (“the California Proceeding I”). Subsequently, the Californian court ordered that the dispute should be submitted to arbitration.

In October 2014, Gaynor US initiated court proceedings against Gavin in the California courts to seek an order compelling arbitration regarding the claims that had been previously dismissed in the California Proceeding I ("California Proceeding II"). Gaynor joined the California Proceeding II as a claimant and requested the California courts to compel arbitration of the dispute in California.

A little over a year later, Gavin initiated proceedings in the DIFC Court of First Instance seeking an order to appoint an arbitrator, pursuant to the arbitration agreement contained in Clause 13.5 of the SVC Agreement.

Subsequently, Gavin filed a motion in California Proceeding II requesting to dismiss or alternatively stay the case in favour of the DIFC Proceeding. In September 2015, the California Court granted an order compelling arbitration in California.

The Application Before the DIFC Courts

Gaynor resisted Gavin's application to the DIFC Courts for an arbitrator. Firstly, it argued that Clause 13.5 of the SVC Agreement did not constitute a valid arbitration agreement and thus the DIFC Court of First Instance did not have jurisdiction to appoint an arbitral tribunal. Gaynor argued, amongst other things, that the arbitration agreement did not comply with the mandatory requirements under the UAE Federal Law No. 11 of 1992 ("UAE Civil Procedure Code") as it did not state the number of arbitrators, and that in failing to state the seat the agreement lacked an essential element and so could not be said to have been concluded.

Secondly, Gaynor claimed that even if Clause 13.5 of the SVC Agreement were a valid arbitration agreement, the DIFC Court of First Instance did not have jurisdiction to appoint a tribunal because the agreement did not state that the DIFC was the seat. Gaynor claimed it was irrelevant whether the contract was going to be carried out in the DIFC or not, because the arbitration clause was a separate agreement that was to be performed at the seat and not necessarily where the rest of the contract was to be performed. The question was whether the DIFC Courts had jurisdiction over the arbitration clause specifically, not the substantive agreement. The contract made reference to 'the Courts of Dubai', but this was ambiguous as it could refer to the DIFC Courts or the Dubai Courts outside of the DIFC. The California Court had already ordered that the seat was to be California. This amounted to res judicata and was binding on Gavin and the DIFC Courts.

Thirdly, Gaynor submitted that the DIFC Court should choose not to exercise its jurisdiction as Gavin's application constituted an abuse of process (even if the DIFC Court enjoyed jurisdiction over the matter), because it would duplicate the proceedings in California and possibly lead to inconsistent decisions.

Gavin argued that the DIFC Court of First Instance had jurisdiction over the claim and requested the Court to confirm its jurisdiction and to appoint an arbitrator pursuant to the Judicial Authority Law and DIFC Court Law No. 10 of 2004. Gavin argued that the arbitration agreement was valid in the UAE on the basis that the only requirement for a valid arbitration agreement in the UAE is that it should be in writing, regardless of whether UAE or DIFC law is applicable. Since the parties had agreed to subject their dispute to the laws of the UAE, this included DIFC law and the DIFC Arbitration Law provides that where a contract is governed by DIFC law the seat shall be the DIFC unless agree otherwise (Article 27). Some of the parties' dealings took place in the DIFC, including the Gaynor seeking to incorporate in the DIFC, raise capital in the DIFC and use an address in the DIFC. Finally, it was argued that the Californian Order was incorrect and was being appealed.

DIFC Court Judgment

The Court found that the parties' intentions throughout the proceedings were clear: both sought to arbitrate their dispute. However, the controversy remained over the seat of arbitration as Gaynor sought to arbitrate in California while Gavin sought to arbitrate in the DIFC.

The Court accepted that the arbitration clause itself did not clearly nominate the DIFC to be the seat, and nothing in the entire agreement referred specifically to the DIFC. In order for the Court to have jurisdiction the Court would need to be satisfied that one of the jurisdictional gateways detailed at Article 5(1) of the Judicial Authority Law was satisfied. One of these gateways is where the issue relates to an action arising out of or in relation to any incident or transaction, wholly or partly performed within the DIFC and relates to DIFC activities.

The Court did not find it sufficient that Gaynor had at one time considered incorporating in the DIFC, had tried to raise capital in the DIFC, or had stated prior to the agreement an address in the DIFC. However the Court did consider that a letter dated 4 May 2009 (two years after the agreement was entered into) provided sufficient evidence. The letter discussed arrangements for a meeting to take place the following day in the DIFC, and was sent not by Gaynor itself, but by Gaynor Pakistan, a different entity. The Court found that this was 'quite clear evidence that the transaction between the parties took place, at least in part, within the DIFC, which means that the parties transacted business in the geographical territory of the DIFC and therefore must be governed by DIFC Laws'. The fact that it was sent by a different entity was not material because the substance related to the performance of the agreement or that a contract related to the agreement came through the DIFC.

The Court then concluded that, as a result of the letter, the reference in the agreement to 'the courts in Dubai' must mean the DIFC Courts. Furthermore, this meant that any reference to the UAE was a reference to the DIFC, so that the reference to the 'arbitration law of the UAE' was a reference to the DIFC Arbitration Law.

Although no seat was explicitly stated, the Court held that the seat could be determined by reference to an implied choice, giving consideration to the seat with the most connection with the agreement, the parties, the transaction or any other relevant consideration. Since the agreement referred to Dubai, UAE law and the Dubai, UAE Courts, all of which the Court interprets to refer to the DIFC laws and courts, there was ample support to an implied seat of arbitration being DIFC.

As regards Gaynor's argument that the arbitration clause was invalid under UAE (non-DIFC) law, since the applicable law to the arbitration has been determined to be DIFC law, the fact that the clause may not have been valid under the UAE Civil Procedure Code was immaterial.

Abuse of Process

The DIFC Court of First Instance however ordered a stay on the basis that the DIFC Proceeding and California Proceeding II raised the "possibility of conflicting decisions regarding the same facts". The DIFC Court held that the appropriate course of action was to dismiss a claim in parallel actions where the subject matters are "strongly connected and hard to separate [...] as they all stem from performance of the same agreement". However since Gavin was appealing the California Order, a stay would be issued.

The DIFC Court found that it had jurisdiction over this case; therefore, the DIFC Proceeding could proceed if and when the California Court or the appointed Arbitral Tribunal overturned the jurisdiction ruling in favour of Gavin.

Conclusion

This judgment is a striking reminder of the importance of drafting a proper arbitration clause, and of recognising that unlike most countries, the UAE has a number of very different legal systems so that it is ambiguous to merely refer to the UAE or even to Dubai or Abu Dhabi (which could also refer to the Abu Dhabi Global Market). The DIFC Courts were able to assume jurisdiction on the basis of a letter sent years after the agreement was signed, which was not sent by one of the parties, and which merely referred to arranging a meeting in the DIFC. All of these issues could have been avoided with a properly drafted agreement.

It should also be noted that the Court's findings also related to the substantive law to be applied to the dispute, which may have a dramatic effect on the claim and remedies available, as the law applicable in the DIFC is in many respects significantly different to that applied in non-DIFC UAE.

By interpreting the contract so freely, the DIFC Courts have expanded their jurisdiction and reminded parties that leaving ambiguities can lead to unintended and profound consequences.