

Client Alert

Latham & Watkins Corporate and
Finance Departments

New Dispute Resolution Options in the DIFC Courts

Executive Summary

Prior to recent developments, the DIFC Courts were only authorized to assert jurisdiction over matters which had a direct nexus to the DIFC itself. However, a recently promulgated law issued by the Ruler of Dubai in conjunction with certain Judgments of the DIFC Court of Appeals suggest that the DIFC Courts' jurisdiction has been significantly expanded to include jurisdiction over matters which are referred to the DIFC Courts by private parties on a consensual basis, whether or not such parties are DIFC-domiciled entities, as well as jurisdiction over all matters pertaining to companies that have DIFC registered branches. Importantly, claimants no longer need to establish a direct nexus to the DIFC in order for the DIFC Courts to accept jurisdiction. As a result, clients should carefully consider whether to opt in to the jurisdiction of the DIFC Courts with respect to commercial matters that are likely to be enforced in the UAE and the GCC, even if such matters have no direct connection to the DIFC. Given that the DIFC Courts offer litigants a common law jurisdiction utilizing a body of law that is largely based on English law principles, opting for the DIFC Courts will afford most clients with an easily understandable and navigable court system to pursue potential disputes.

Overview of the DIFC Courts

The Dubai International Financial Centre (DIFC) is a financial free zone in Dubai that serves as the headquarters for many international banks, investment funds, consulting, legal and financial services firms. The DIFC contains an autonomous judicial system known as the DIFC Judicial Authority (the DIFC Courts) which is largely self-regulating and that operates independently of the courts of Dubai. The DIFC Courts were originally established and empowered through two laws enacted by the Ruler of Dubai: Dubai Law No. 12 of 2004 and DIFC Law No: 10 of 2004. The DIFC Courts were designed to offer a common law court system that is capable of providing sophisticated dispute resolution services for civil and commercial disputes. The DIFC Courts are staffed by experienced judges from both common law and civil law backgrounds and consist of a Court of First Instance and a Court of Appeals, the latter of which has appellate jurisdiction. Unlike the Dubai courts, foreign practitioners may be granted rights of audience in the DIFC Courts so long as they have been admitted to practice and remain in good standing in a foreign jurisdiction.¹

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The Expansion of DIFC Court Jurisdiction

Dubai Law No. 16 of 2011

The jurisdictional basis of the DIFC Courts was originally set forth in Dubai Law No. 12 of 2004, which has now been amended by Dubai Law No. 16 of 2011 (Law No. 16). Prior to the adoption of Law No. 16, the jurisdiction of the DIFC Courts was statutorily limited to matters which had a direct nexus with the DIFC. Such a nexus could be established, for example, if the alleged dispute in question arose out of the negotiation and execution of a contract within the DIFC and pertaining to a DIFC-based counterparty. Absent a sufficient nexus with the DIFC itself, however, the DIFC Courts would lack jurisdiction to hear a particular claim. Law No. 16 has opened the gates to wider DIFC Court jurisdiction by omitting the requirement for claimants to establish a direct nexus to the DIFC.²

As a result, Law No. 16 empowers the Court of First Instance to exercise jurisdiction over matters that are submitted to the DIFC Courts by “the agreement of the parties in writing whether before or after the dispute provided that this agreement must be according to a clear and explicit special provision.” The practical effect of this provision is to enable non-DIFC actors to opt in to the jurisdiction of the DIFC Courts, including through the inclusion of forum selection clauses in ordinary commercial contracts and finance documents, irrespective of a nexus to the DIFC. Recent cases which have been ruled on by the DIFC Court of Appeals have helped to clarify the boundaries of the DIFC’s new voluntary jurisdiction.

Relevant Case Law

In *Corinth Pipeworks SA v. Barclays Bank plc (CA)*, the plaintiff Corinth sued Barclays Bank on the basis of allegations of negligence, deceit and unlawful conspiracy stemming from the actions of an employee of a branch of the bank that was located outside of the DIFC. Barclays’ operations within the DIFC itself were conducted via an unincorporated branch office which had the status of a “Registered Office.” No complaint was made against the DIFC branch of Barclays Bank itself, and on that basis, Barclays contested the jurisdiction of the DIFC Courts. While the Court of First Instance originally accepted Barclays’ argument, holding that jurisdiction would only be properly established if the claim related to the defendant’s authorised business within the DIFC, the Court of Appeals reversed this determination and held that, by definition, the Dubai Financial Services Authority could only grant licenses to legal entities to carry out business in the DIFC. As a result, the licensed Barclays entity was not the DIFC branch of Barclays Bank—because a branch office does not have independent legal personality distinct from the legal entity which established it—but Barclays Bank plc, the foreign entity of which the DIFC branch was a part. The implications of this ruling are that the DIFC Courts may assert jurisdiction over claims made against companies that have branches registered in the DIFC. In theory, this may enable litigants to bring claims in the DIFC Courts against any bank or company that has a registered branch office in the DIFC for injuries arising anywhere in the world, even though the DIFC Courts retain the discretion to refuse jurisdiction when they deem it appropriate to do so on the basis of *forum non conveniens*—for example if material evidence and witnesses are located in a foreign jurisdiction.

The DIFC Courts further expounded on their jurisdiction in a case brought by a Kuwaiti business group against a private bank operating out of the DIFC. In *Al-Khorafi v. Sarasin* the Court of Appeals upheld the right of a litigant to bring a

claim in the DIFC Courts against an entity with a DIFC presence irrespective of the existence of a dispute resolution clause in a freely negotiated contract between the two parties which called for Swiss jurisdiction. Al-Khorafi claimed to have been the subject of “negligent investment advice” and alleged that Bank Sarasin-Alpen (ME) Limited and Bank Sarasin & Co Limited committed serious regulatory breaches by recommending an investment in products which were not authorised for distribution in or from the DIFC or Dubai. While ruling that the DIFC Courts had jurisdiction over this matter, the Court of Appeals cited the doctrine of *forum non conveniens* to decline enforcement of the Swiss forum selection clause, ruling in effect that a Swiss forum would be inappropriate in this case with respect to Sarasin, a DIFC-registered entity. In this manner, the doctrine of *forum non conveniens* was actually cited to bolster the jurisdictional argument of the DIFC Courts. Thus, in certain circumstances at least, the DIFC Courts will be prepared to assert their jurisdiction even in the face of clear foreign forum selection clauses that have been agreed to by the parties in dispute.

Enforcement Issues

A common concern which remains with respect to DIFC Court Judgements is the procedure for enforcement of those judgments outside the DIFC. Within Dubai and the UAE, legislation and procedures have been established to facilitate the enforcement of DIFC Court judgments by the courts of Dubai and the other Emirates of the UAE.

Pursuant to Law No. 16, all judgments, orders and awards issued or certified by the DIFC Courts (for example, in the instance of the certification of a DIFC-LCIA arbitration award) will be enforced by the Dubai Courts provided that the relevant procedural steps have been fulfilled. Crucially, the judge recognizing and executing the judgement at the Dubai Courts has no authority to review the merits of an order or judgement during any enforcement proceeding. The procedure established by Law No. 16 essentially facilitates the conversion of a DIFC Court Judgment into an order of the Dubai Courts. As an empirical matter, it has been reported that the Dubai Courts have to date converted and enforced several DIFC Court judgments.

Thereafter, enforcement of the judgment can also be achieved in the courts of the other Emirates of the UAE through the process of “referral”, as provided under Article 221 of the Federal Civil Procedures Law. Provided that the prescribed procedural steps are fulfilled, courts of a particular Emirate are constitutionally required to enforce the orders of the courts of other Emirates within the union.

Nevertheless, it remains an open question as to whether the courts of other GCC states will similarly enforce an order of the DIFC Courts that has been converted into a Dubai Court Judgment by virtue of Law No. 16. The GCC Convention for the Enforcement of Judgments and Judicial Notices and Delegations (the GCC Convention) is a treaty based instrument³ which should support pan-GCC enforcement and which provides that all member states shall ensure that their domestic courts enforce the final judgments of the courts of other member states.⁴ However, the GCC Convention authorizes the courts of member states to reject enforcement if the judgment in question is deemed to be contrary to the provisions of Islamic Shari’a, the provisions of a member state’s constitution or public order. It is not yet clear how widely such grounds for non-enforcement will be cited and used by GCC courts in practice. As such, the potential utility of opting into the DIFC Courts for matters that are likely to require enforcement outside of the UAE may be limited until there is more empirical evidence to support greater confidence in the likelihood of pan-GCC enforcement.

Impact and Considerations

Law No. 16 and recent case law demonstrate that the DIFC Courts have become increasingly assertive in their jurisdictional claims, particularly given the elimination from the law of the requirement to specifically establish a direct nexus with the DIFC. Such developments signal the potential emergence of a trend in favour of including the DIFC Courts as a dispute resolution forum in ordinary commercial and finance contracts by both DIFC and non-DIFC based actors. There are several potential advantages involved with opting in to the DIFC Courts:

- **Language.** The DIFC Courts offer an English language forum in a region where the vast majority of proceedings are conducted in Arabic
- **Status of Precedent.** The DIFC Courts are driven by a system of binding and recorded judicial precedent, which is not the case in the mostly civil law style courts which exist outside of the DIFC in the region
- **Choice of Law.** The DIFC Courts are likely to recognize a foreign choice of law clause, such as English or New York law. It should also be noted that much of DIFC law itself is substantively based on English law principles
- **Experienced Judges.** The DIFC Courts offer a panel of high calibre, well trained and well recognised judges who will hear the claims that are brought
- **UAE Enforcement.** DIFC Court judgments will be converted into and enforced as Dubai Court Judgments pursuant to Law No. 16.

Despite these advantages, there are also reasons to remain cautious about opting into the DIFC Courts in certain cases. In particular:

- **Existence of Prior Precedent.** The DIFC remains a relatively new jurisdiction with a limited volume of prior precedent and cases to date
- **Non-UAE Enforcement.** The enforcement regime has not been fully tested, particularly outside of the UAE in the remainder of the GCC
- **Forum Non Conveniens.** As witnessed in the Al-Khorafi case, the Court of Appeal may be willing to invoke the doctrine of forum non conveniens in potentially novel ways to assert jurisdiction. The doctrine of forum non conveniens, however, can just as easily be used to decline jurisdiction and it remains to be seen how robustly and regularly the DIFC Courts will employ it

Law No. 16 and recent cases decided by the DIFC Courts have had the practical effect of introducing a new dispute resolution option for clients. In particular with respect to cases that are likely to require enforcement within the UAE, clients should carefully consider the inclusion of forum selection clauses opting in to the DIFC Courts for their commercial and financial contracts. In addition, in the event that a dispute has already arisen, such as in the event of a restructuring, clients should consider the benefits of mutually agreeing with their adversaries to submit to the jurisdiction of the DIFC Courts irrespective of the choice of forum originally identified in the relevant contracts. The utility of opting in to the DIFC Courts for judgments that are likely to be enforced outside of the UAE, however, remains to be proven and is currently speculative. In short, there is reason to believe that opting in to DIFC Court jurisdiction presents a practical solution to the vexatious problem of choosing a local forum to resolve certain regional disputes.

Endnotes

- ¹ The procedural law of the DIFC Courts is based on several sources including, amongst others, the English Civil Procedures Rules and the IBA Rules.
 - ² The grounds upon which the Court of First Instance exercises exclusive jurisdiction remain unchanged by Law No. 16, and include cases involving: (i) the Dubai International Financial Centre itself, any of its associated regulatory bodies, or any licensed institutions, (ii) contracts made or to be executed in the DIFC, and (iii) incidents or transactions which occur in the DIFC and which are related to its activities. Exclusive jurisdiction therefore remains closely tied to the notion of a direct nexus with the DIFC.
 - ³ The Riyadh Arab Agreement for Judicial Cooperation (the Riyadh Convention), which has twenty signatory states in the Middle East and North Africa, including the UAE, also governs reciprocal enforcement of judgments.
 - ⁴ The member states of the GCC Convention are the UAE, Bahrain, Qatar, Kuwait, the Kingdom of Saudi Arabia and the Sultanate of Oman.
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