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Choice of Forum in Contracts with Saudi Arabian Counterparties: An Analysis of the DIFC Common Law Courts from a Saudi Arabian Perspective

AMGAD HUSEIN* & JONATHAN BURNS**

Overview

As the largest exporter of oil in the world and one of the wealthiest countries in the Middle East, doing business in Saudi Arabia is attractive to many companies and investors throughout the world.¹ Indeed, Saudi Arabian leaders and policymakers have worked hard to create a climate in Saudi Arabia that strikes a balance between the interests of Saudi Arabian citizens, who seek to obtain high-paying jobs and training in advanced industries, and foreign companies and investors, who seek to obtain lucrative rewards from doing business in the Kingdom.²

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1. See *About Saudi Arabia: Oil*, ROYAL EMBASSY SAUDI ARABIA (July 11, 2015), <https://www.saudiembassy.net/about/country-information/energy/oil.aspx>.

2. See, e.g., Glenn Carey & Mourad Haroutunian, *Saudi Arabia Imposes Quotas to Boost Local Hiring*, BLOOMBERG BUS. (June 29, 2011), <http://www.bloomberg.com/bw/magazine/saudi-arabia-imposes-quotas-to-boost-local-hiring-06302011.html>.

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One manner in which Saudi Arabian leaders and policymakers endeavor to satisfy the interests of Saudi Arabian citizens includes, for example, enforcement of legal restrictions requiring foreign businesses and investors who seek to operate in certain sectors of the market to engage local Saudi Arabian nationals as agents and business partners.³ Even so, many foreign businesses and investors voluntarily choose to partner with local Saudi Arabian counterparties to take advantage of their local presence, contacts, and general knowledge of and history in the Saudi Arabian market.

Without knowledge or background in Saudi Arabian law, legal counsel for foreign businesses and investors are often apprehensive when advising their clients who seek to do business in Saudi Arabia. A cursory review of the Saudi Arabian legal regime on the internet, in books, or in the news will quickly inform counsel that Saudi Arabian law is founded on Islamic law (*Shari'a*) and, due to an overall unfamiliarity with this legal background, legal counsel frequently seek to employ non-Saudi Arabian choice of law and forum in their clients' contracts with Saudi Arabian counterparties.⁴

In this regard, the Dubai International Financial Centre (DIFC) has in recent times become increasingly attractive to foreign businesses and investors in general as a familiar, pro-business setting in a regional environment that is often perceived as backward, chaotic, xenophobic, and anti-business.⁵

Particularly for the legal counsel of such clients, who are paid to be pessimistic and plan for the worst, dispute resolution options at the DIFC, which may be conducted under various legal systems—such as English common law—and in various languages at the option of the parties, can often appear attractive and put legal counsel at ease that any dispute involving his/her client will be subject to a familiar, tried, and tested system of law. Recently, one such option became available to the global business world via the DIFC Common Law Courts (the DIFC Courts), a system of binding litigation pursuant to English common law within the DIFC complex in Dubai.⁶

This article seeks to provide a brief overview of the DIFC Courts system and a comparative analysis to the commercial courts system in Saudi Arabia, as well as an examination of the suitability of designating the DIFC Courts as the choice of forum in dispute resolution clauses in contracts with Saudi Arabian counterparties.

I. Commercial Litigation in Saudi Arabia

Commercial litigation in Saudi Arabia is presided over by the Saudi Arabian court system, which applies rules of substance and process according to Saudi Arabian law.

3. See, e.g., The Commercial Agencies Law, enacted by Royal Decree no. M/11, 20/2/1382H. (July, 22, 1962), art. 1 ("Non-Saudi persons, whether natural or legal, shall not act as commercial agents in the Kingdom of Saudi Arabia.").

4. See generally Julio C. Colon, *Choice of Law and Islamic Finance*, 46 TEX. INT'L L. J. 411 (2010).

5. See generally Muhammad Waqas, *Foreign Investors Flock to UAE*, ARABIAN GAZETTE (July 2, 2013), <http://www.arabiangazette.com/foreign-investors-flock-uae-20130702/>.

6. See Anahita Ferasat, et. al., *Middle East and North Africa*, 46 INT'L LAW. 601, 624 (2012) ("The DIFC Courts are English language civil and commercial courts that follow common law, rather than civil law, procedures.").

A. COURTS, JURISDICTION, AND APPLICABLE LAW

1. *The Saudi Arabian Courts System*

The Saudi Arabian courts system is complex and generally in a state of constant uncertainty. For example, the Law of the Judiciary and the Board of Grievances (the Judiciary Law) sought to establish several different court branches, each with its own specified area of jurisdiction.⁷ But, the extent to which this new structure has been implemented is not always clear. In practice, the *Shari'a* courts, the courts of general jurisdiction, hear all claims that are not subject to the jurisdiction of an existing specialized court.⁸ For example, the Labor Courts have jurisdiction to oversee disputes specifically related to labor and employment concerns, the Board of Grievances has jurisdiction to resolve disputes between traders or involving the Saudi Arabian government, and any dispute involving a bank can be submitted to the Committee for the Settlement of Banking Disputes, a quasi-judicial body that operates under the auspices of the Saudi Arabian Monetary Agency.

2. *Applicable Law*

The *Shari'a* (Islamic law) is the paramount source of law in Saudi Arabia.⁹ While codified regulations in the form of royal decrees, ministerial orders, agency circulars, and the like have the effect of creating binding law, all such codifications are ultimately subject to the uncoded provisions of the *Shari'a* as applied in Saudi Arabia according to the Hanbali school (*fiqh*) of Islamic jurisprudence.¹⁰

In general, all Saudi Arabian judicial tribunals are bound to apply the *Shari'a* to resolve disputes brought before them.¹¹ While Saudi Arabian judges generally consider freedom of contract as an inviolate principle of the *Shari'a*, a choice of law clause to the exclusion of Saudi Arabian law will generally not be enforced to the extent that it conflicts with the judge's interpretation of the *Shari'a*.¹² But, the Saudi Arabian judiciary generally gives effect to choice of forum clauses to the exclusion of Saudi Arabian courts (e.g., a clause that designates the DIFC Courts as the choice of forum for a dispute) and will eschew jurisdiction and compel the parties to submit their dispute to the contractually agreed forum.

7. See The Judiciary Law, enacted by Royal Decree no. M/78,19/9/1428H. (Oct. 1, 2007).

8. See The Legal Procedures Law of Procedure Before Shari'a Courts, enacted by Royal Decree no. M/20, 20 Jumada I, 1421 (Aug. 19, 2000), art. 31-32 [hereinafter The Law of Procedure before Shari'a Courts] ("[T]he General [Shari'a] Courts shall have jurisdiction to consider all cases, issues, final evidence and equivalents beyond the jurisdiction of other courts, the notary public, and the Board of Grievances.").

9. See The Basic Law of Governance, enacted by Royal Decree no. A/90, 27/8/1412H., corr. (Jan. 3, 1992), Art. 1 ("[The] constitution [of the Kingdom of Saudi Arabia] is Almighty God's Book, the Holy Qur'an, and the Sunnah (traditions) of the Prophet (PBUH).").

10. See The Law of Procedure before Shari'a Courts, *supra* note 8, at art. 1 ("Courts shall apply to cases before them provisions of the *Shari'a*, in accordance with the Qur'an and Sunnah of the Prophet (PBUH), and laws promulgated by the State that do not conflict with the Qur'an and Sunnah.").

11. *Id.*

12. See *id.*

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B. PROCESS OF LITIGATION IN SAUDI ARABIA

The process of litigation in Saudi Arabia is unique and is more influenced by the continental European civil law tradition rather than the British common law tradition. That is, Saudi Arabian courts in general seek to provide a fair and amicable settlement for all parties to a dispute and do not engage in an adversarial process with clear winners and losers as in the common law tradition. This tradition of fairness and amicability is evident in the elements that make up the process of litigation in Saudi Arabia.

1. *Judges and Juries*

Saudi Arabian courts are presided over by a single judge or judges and trial by jury is wholly unavailable. All matters of procedure, admissibility of evidence, and the like are subject to the sole discretion of the judge(s) overseeing the dispute. In general, courts are closed to everyone except for the relevant parties to a dispute and their legal counsel; disputes are resolved behind closed doors. This is generally reflective of an overall principle of utmost respect for privacy which is evident in Saudi Arabian society, which has also been criticized for its lack of transparency.¹³ But, judges do have discretion to permit select outsiders and/or the public at large to access their courtrooms.

2. *Precedent and Stare Decisis*

The Saudi Arabian judiciary does not apply a system of precedent or *stare decisis*. Further, similar to the overall principle of the privacy of the courtroom, judicial dockets and opinions are not published or made available to the public.¹⁴ Thus, past judicial decisions form neither binding nor persuasive precedent for subsequent judicial proceedings.¹⁵

3. *Discovery and Evidence*

There is no formal or informal system of discovery that is practiced or enforced amongst the legal community in Saudi Arabia and, thus, discovery disputes are generally rare. The Legal Procedures Law provides that “[f]acts intended for verification during proceedings must be relevant, material to the case, and admissible.”¹⁶ In practice, judges have wide discretion to question parties and request that they submit honest and truthful evidence to the court. Otherwise, they have wide discretion to issue orders for the disclosure of information as they see fit.

13. See, e.g., John Balouziyeh & Amgad Husein, *The Legal Framework for Privacy and Data Protection in Saudi Arabia*, 41 INT’L L. NEWS (2012), http://www.americanbar.org/publications/international_law_news/2012/fall/legal_framework_privacy_data_protection_saudi_arabia.html.

14. See Michael J. T. McMillen, *Collateral Security and Finance Structures for Sharia-Compliant Project Finance: Four Case Studies*, 24 MIDDLE E. EXECUTIVE REP. 7 (2001) (“Previous decisions of Saudi Arabian courts and other adjudicative authorities are not considered to establish binding precedents for the decision of later cases, and the principle of stare decisis is not accepted.”).

15. *Id.*

16. The Law of Procedure before Shari’a Courts, *supra* note 8, at art. 97.

4. *Timeframe*

On average, litigation of a commercial dispute before the Saudi Arabian courts can last anywhere from one year to three years or more depending on several unpredictable and varying factors including, for example, the amount in controversy. Further, enforcement of a judgment against a judgment debtor in Saudi Arabia can require one additional year for the enforcement proceedings to complete.

5. *Legal Counsel*

The practice of law in Saudi Arabia is open to both Saudi Arabian and non-Saudi Arabian citizens. But a non-Saudi Arabian citizen in the practice of law holds the status of a “Legal Consultant” and is not permitted to hold a practitioner’s license issued by the Saudi Arabian bar.¹⁷ While Legal Consultants are fully permitted to provide legal advice, they are not permitted to sign pleadings or represent clients before Saudi Arabian courts, only duly licensed Saudi Arabian nationals are permitted to do so.¹⁸

6. *Language of Proceedings*

All proceedings before Saudi Arabian courts are conducted in the Arabic language. Any documentary evidence that comes before a Saudi Arabian court must ultimately be provided in Arabic translated by a duly licensed translator. Further, any live testimony from a witness who does not speak Arabic would have to be communicated to the judge(s) through a translator.

II. The DIFC, the DIFC Courts, and Enforceability of DIFC Court Judgments in Saudi Arabia

The DIFC complex and the DIFC Courts in Dubai offer an environment that can be considered substantially opposite to the business and legal environment that prevails in Saudi Arabia. However, where one is involved in a dispute with a Saudi Arabian counterparty, the benefit of the DIFC may lose its appeal.

A. THE DIFC—GENERALLY

The United Arab Emirates (UAE) authorized the Emirate of Dubai in 2004 to establish the DIFC as a free zone to serve as an international hub for major business dealings.¹⁹ The founders envisioned the DIFC as a bridge between the East and the West, where everyone could come together from all over the world to engage in business transactions.²⁰

17. See Khaled Benjelayel & Nima Mersadi Tabari, *How to Qualify as a Lawyer in Saudi Arabia*, INT’L BAR ASS’N, http://www.ibanet.org/PPID/Constituent/Student_Committee/qualify_lawyer_SaudiArabia.aspx (last visited July 7, 2015).

18. See *id.*

19. See The Law of Dubai International Financial Centre, No. (9) for the year 2004.

20. See *id.*, at art. 4.

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The UAE established the DIFC almost as a piece of sovereign soil within the country, in that the DIFC is permitted to adopt and refine its own legal system (limited primarily to matters of commercial law).²¹

DIFC law is based on international best practices and many of these laws are derived from English law (and in some cases, where the law does not specifically provide for a matter, English law will be referred to in order to fill in the gaps).²²

There are three subparts to or “branches” of the DIFC:

- (a) the “administrative” or “housekeeping” branch that keeps the DIFC running;
- (b) the “legislative” branch that oversees the commercial rules, based on English common law, which are expected to be adhered to by businesses negotiating and concluding transactions at the DIFC (and tweaks those rules as necessary); and
- (c) the “judicial branch,” or the DIFC Courts, which provide for the binding resolution of any disputes that may arise between parties conducting business together at the DIFC or otherwise submitting to the jurisdiction of the DIFC Courts.²³

Further, the DIFC and the London Court of International Arbitration (the LCIA) entered into a joint venture to create the DIFC LCIA Arbitration Centre as an additional body within the DIFC complex in Dubai in 2008.²⁴ But this body’s jurisdiction is not limited solely to the DIFC complex; a DIFC LCIA arbitral tribunal can be convened in any forum designated by the parties to a dispute.²⁵

B. THE DIFC COURTS—A BRIEF EXPLANATION OF THE PROCESS

The DIFC Courts system is not alternative dispute resolution. Rather, because the DIFC Courts are a creature of Dubai law and therefore part of the Dubai court structure, they should be considered as equal to the local courts of the Emirate of Dubai. But, this is currently a controversial and relatively untested assertion in practice.

The English legal tradition is evident in nearly all aspects of the DIFC Courts system. Procedural rules are based on the English Admiralty and Commercial Courts Guide as well as the Civil Procedure Rules (with some limited nuances). The small number of judges who sit on the benches of the DIFC Courts largely hail from common law jurisdictions, such as England and Singapore.

In sum, the DIFC Courts system operates as common law bench trials in that there is an adversarial process, the judge(s) do not get involved in the arguments except to the extent absolutely necessary for procedural purposes, the judgments are based on precedent, and common law rules of evidence and procedure are applied. Additionally, all proceedings, filings, and communications are conducted wholly in English.

21. See Damien P. Horigan, *The New Adventures of the Common Law*, 1 PACE INT’L L. REV. ONLINE COMPANION 1, 7-9 (2009).

22. See *id.* at 8-13.

23. The “judicial branch” of the DIFC will presumably be replaced by a new body called the Disputes Resolution Authority (the DRA) by virtue of Dubai Law No. 7 of 2014. The DRA will, in turn, oversee both the DIFC Courts and a new Arbitration Institute. As yet, no further developments in this regard have occurred, but it is believed that the role of the Arbitration Institute under the DRA will be filled by the DIFC LCIA Arbitration Centre.

24. See generally Horigan, *supra* note 21.

25. *Id.*

1. *Expansion of DIFC Courts' Jurisdiction*

In 2011, the Emirate of Dubai granted the DIFC Courts additional jurisdiction to hear and decide any commercial dispute whatsoever, so long as all parties consent.²⁶ Previously, DIFC litigation could only be pursued if there was a DIFC nexus, either through one of the parties being DIFC-based or where the subject matter of the dispute had a real connection with the DIFC. Now, parties located outside the UAE contemplating a transaction that is not connected to the DIFC can choose to engage in dispute resolution before the DIFC Courts.

Thus, with the grant of expanded jurisdiction, and a system of common law justice, the UAE generally—and Dubai and the DIFC specifically—have made clear an intent to attract parties all over the world to come to the DIFC Courts for binding settlement of disputes.

But while the process may seem attractive to foreign parties who are more comfortable with common law rather than the *Shari'a*, international lawyers hesitate to advise clients to consent to dispute resolution before the DIFC Courts due to uncertainty relating to the enforcement of a ruling therefrom.

2. *Status of DIFC Court Judgments*

a. Generally

When the Emirate of Dubai expanded the jurisdiction of the DIFC Courts in 2011, there was initially a degree of uncertainty pertaining to the status of the DIFC Courts in relation to the “onshore” courts within the UAE. But, the express terms of Dubai Law No. 16 essentially placed judgments of the DIFC Courts on par with judgments of the local Dubai governmental courts for purposes of both international enforcement and intra-UAE enforcement under the UAE’s federal civil code.²⁷

Thus, as a governmental body of sorts, and by virtue of Dubai Law No. 16 of 2011, the DIFC Courts should be considered equal to the local Dubai official courts for purposes of international recognition. Rulings issued by DIFC Courts should receive the recognition of traditional comity, as well as the protection of any international agreements, treaties, or conventions to which the UAE is signatory.

b. Status of DIFC Court Judgments in Saudi Arabia

In that regard, Saudi Arabia and the UAE are both signatories to the Riyadh Arab Agreement for Judicial Cooperation (1983) (the RAAJC)²⁸ and the Gulf Cooperation Council Convention (1996) (the GCCC).²⁹ The RAAJC and GCCC agreements provide for, *inter alia*, reciprocal recognition of judicial orders, supposedly without any review of

26. Law No. (16) of 2011 Amending Certain Provisions of Law No. (12) of 2004 Concerning Dubai International Financial Centre Courts, art. 5.

27. *Id.* at art. 7.

28. League of Arab States, Riyadh Arab Agreement for Judicial Cooperation, Apr. 6, 1983, art. 25(b), *English translation available at* <http://www.refworld.org/docid/3ae6b38d8.html> [hereinafter RAAJC] (stating that “each contracting party shall recognize the judgments made by the courts of any other contracting party in civil cases” and that such orders have “the force of res judicata.”).

29. Gulf Cooperation Council Convention for the Execution of Judgments, Delegations, and Judicial Notifications, *opened for signature* Sept. 22, 1995, art. 1(A) [hereinafter GCCC] (stating that “each GCC country

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the substantive merits of the judgment or the underlying facts, subject to certain reservations (see Part 4).

In addition, both Saudi Arabia and the UAE are signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). The New York Convention provides for the mutual recognition of foreign arbitral awards among the courts of the states signatory thereto.³⁰ But because the DIFC Courts should be considered as judicial courts rather than arbitral bodies, the New York Convention should be inapplicable to the enforcement of DIFC Court judgments in Saudi Arabia. In practice, Saudi Arabian judges may not be readily aware of the status of the DIFC Courts within the Dubai official judiciary system. Even so, the RAAJC and the GCCC provide for the mutual recognition of foreign arbitral awards in addition to mutual recognition of foreign judgments.³¹

C. ENFORCEMENT OF DIFC COURT JUDGMENTS IN SAUDI ARABIA

Notwithstanding the RAAJC, the GCCC, and/or the New York Convention, enforcement of any DIFC Court judgment in Saudi Arabia against a Saudi Arabian counterparty is ultimately subject to Saudi Arabia's domestic Enforcement Law.³²

The Enforcement Law requires that all foreign awards, judgments, or orders be submitted to the Enforcement Department, which has jurisdiction to enforce foreign judgments in Saudi Arabia. Thereafter, an enforcement judge will be assigned, who shall enforce the foreign award, judgment or order upon satisfaction of the following elements:³³

1. *Reciprocity*

The jurisdiction in which the foreign judgment, order, or arbitral award was issued must reciprocally enforce the judgments, orders, and arbitral awards issued in Saudi Arabia. For enforcement of a judgment rendered by the DIFC Courts, this element is established via the execution of the RAAJC, the GCCC, and (as applicable) the New York Convention by both Saudi Arabia and the UAE.

2. *Jurisdiction*

The Saudi Arabian courts must not have jurisdiction to consider the dispute in which the judgment or award was issued, and the foreign court or tribunal who issued the judgment or award must have had jurisdiction to consider the dispute pursuant to the rules of international jurisdiction provided for in the foreign forum's domestic regulations.

This element is most easily satisfied with a choice of forum clause to the exclusion of the Saudi Arabian courts, such as a clause expressly submitting dispute resolution under a contract to the jurisdiction of the DIFC Courts.

shall execute the final judgments issued by the courts of any member state in civil, commercial, and administrative cases.”).

30. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. III, June 10, 1958, 330 U.N.T.S. 38 [hereinafter *The New York Convention*].

31. RAAJC, *supra* note 28, at art. 37; GCCC, *supra* note 29, at art. 12.

32. Execution Regulation, Royal Decree No. M/53, 13 *Sha'ban* 1433 A.H. (Mar. 7, 2012).

33. *Id.* at art. 11.

3. *Proper Summons and Adequate Representation*

The parties to the claim in which the foreign judgment or award was issued must have been summoned, adequately represented, and able to defend themselves against the claim.

4. *Finality*

The judgment or award issued by the foreign court or tribunal must be final prior to its submission to the Enforcement Department.

5. *Consistency*

The judgment or award must not be inconsistent with any judgment or order issued in the same subject area by a competent judicial authority in Saudi Arabia.

6. *Public Order / Public Policy*

The foreign judgment or award must be consistent with the law and public policy of Saudi Arabia *as interpreted and applied in Saudi Arabia*.

III. Practical Considerations for Foreign Businesses and Investors Seeking to Do Business with Saudi Arabian Counterparties

To Western trained and qualified legal counsel, the prospect of litigating a dispute before the Saudi Arabian courts can seem daunting and unpleasant. Indeed, legal counsel trained in a Western legal tradition are often uncomfortable with a legal system that is not based on binding or persuasive precedent and, thus, can appear as arbitrary justice at times. Further, legal counsel who received their training in open societies, where casebooks and dockets often reveal the identities of all parties involved in a dispute and contain every last grisly and explicit detail, are often uncomfortable with a legal system that holds privacy and security in such high regard that judicial decisions are not even available for public analysis or review.

In addition, legal counsel trained in a Western tradition may not feel comfortable with the Saudi Arabian trial system, which does not allow for much room in shaping facts and advocating for a client in front of a sympathetic or hostile jury. Indeed, Saudi Arabian courts deciding commercial disputes are generally more characteristic of bureaucratic bodies that simply receive documentary evidence, rather than courts that hear impassioned pleas and competing fact patterns. Depending on the complexity of the dispute and/or the amount in controversy, a third party expert will generally be assigned to provide an expert opinion on the liability of the parties to a dispute, which largely receives substantial deference by the judge.

Further, legal counsel from developed countries with efficient and responsive judiciaries are often uncomfortable with the potentially substantial length of time that may be involved when pursuing litigation in Saudi Arabia. And, legal counsel with minimal knowledge of or training in Islamic law may be apprehensive about submitting a dispute to resolution under Saudi Arabia's uncoded, and often criticized, interpretation of the *Shari'a*.

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Thus, litigation of a dispute under English common law, in an adversarial forum, and with the use of the English language may make the DIFC Courts an appealing choice of forum for the legal counsel of foreign businesses and investors executing contracts with Saudi Arabian counterparties. But, foreign businesses and investors and their legal counsel should consider the following when contemplating designation of the DIFC Courts as the choice of forum in their contracts with Saudi Arabian counterparties, or otherwise when litigation before the DIFC Courts is foreseen.

A. UNCERTAINTY OF DIFC COURT SYSTEM'S PROCESS

The DIFC Courts have only been operational since 2004.³⁴ But, they have only been operational on an *international level* (rather than a DIFC-only level) since 2011. Thus, the DIFC Courts have not had a significant amount of time to prove their efficacy, especially in regard to disputes without any DIFC nexus.

In addition, over ninety-five percent of disputes filed in the DIFC Courts system settle before actually reaching trial.³⁵ Some litigants may see this as an advantage, and DIFC Court personnel credit the fast settlement of disputes with the business-friendly structure of the organization, which aims to bring disputants to an amicable settlement as early as possible in order to avoid the costs of trial.

But, while some people would agree that this is a favorable reason to agree to a DIFC Courts choice of forum clause, the lack of experience of the organization in actually trying cases means that the process is still unpredictable. Since the inception of the DIFC Courts in 2004, only about 600 disputes have been formally adjudicated.³⁶

B. UNCERTAINTY OF ENFORCEMENT OF A DIFC COURT JUDGMENT IN SAUDI ARABIA

While litigating a dispute in the DIFC Courts under English common law, in an adversarial forum, using the English language may seem more preferable to litigating a dispute before the courts of Saudi Arabia, any judgment obtained from the DIFC Courts must ultimately satisfy the elements of the Enforcement Law in order for it to be enforceable against a Saudi Arabian counterparty in Saudi Arabia.

1. *Wide Discretion of Enforcement Judges*

The enforcement judge generally has wide discretion to analyze and reopen foreign judgments and arbitral awards to the extent that he deems necessary to ensure congruence with Saudi Arabian law and policy. At times, the enforcement of a foreign judgment could very well require a total re-litigation of the dispute. In this regard, enforcement of a common law judgment obtained from a DIFC Court may face resistance, specifically in

34. Sir Anthony Evans, Chief Justice, *Dispute Resolution in the DIFC*, Address at the Dubai Society of Construction Lawyers (Oct. 1, 2008), <http://difccourts.ae/dispute-resolution-in-the-difc-2/>.

35. Jayanth K. Krishnan & Priya Purohit, *A Common Law Court in an Uncommon Environment: The DIFC Judiciary and Global Commercial Dispute Resolution*, AM. REV. INT'L ARB. (forthcoming 2015) (manuscript 6) (on file with journal).

36. *Id.*

light of Parts (e) (Consistency) and (f) (Public Policy) of Article 11 of the Enforcement Law.

2. *Example of Specific Considerations for Saudi Arabian Enforcement Purposes*

A saying goes that “money is the universal constant of all cultures” and, thus, the substantive law in relation to contracts and commerce usually does not vary greatly amongst the three main global legal traditions (British common law, continental European civil law, and Islamic law). But, two principles that distinguish Islamic law from Western legal traditions are the prohibition of *riba* (interest) and *gharar* (excessive uncertainty) in any transaction involving the exchange of wealth.

(a) *Riba*

The term *riba* translates as “interest,” but conceptually refers to the broader theory of “unjust enrichment.” A fundamental principle of Islamic law is that a person should be rewarded for the effort s/he expends in an amount exactly proportional to that effort.

(b) *Gharar*

The term *gharar* translates as excessive uncertainty and is derived from the prohibition of gambling and games of chance under Islamic law. An important note is that mere uncertainty is not forbidden in commercial matters under Islamic law, but *excessive* uncertainty is. The distinction between mere uncertainty and excessive uncertainty is often subjective, though established sources of Islamic law do provide limited guidance.

While the enforcement judge could potentially refuse to enforce a DIFC Court judgment in Saudi Arabia on any number of grounds, the total or partial non-enforcement of most foreign judgments usually occurs due to a taint of *riba* and/or *gharar* in the foreign judgment or in the underlying transaction on which the foreign judgment is based.

In the context of foreign judgments issued under English law to resolve contractual disputes, the taint of *riba* and *gharar* can at times be found in judgments that are based on penalty and liquidated damages clauses in contracts, as well as judgments containing judgment interest, awards of punitive damages, and the like.

Generally, freedom of contract is highly respected in Islamic law and, thus, Saudi Arabian judges seek to uphold pre-determined penalty and liquidated damages provisions that were duly agreed to by the contracting parties. But because no one has the ability to predict the future, pre-determined penalty and liquidated damages clauses could be considered to be tainted with excessive uncertainty. Further, to the extent that a penalty or liquidated damages clause unreasonably fails to compensate the harmed party precisely according to his or her actual damages, it may be seen as tainted with *riba*.

In the same way, if sums awarded pursuant to a foreign judgment include amounts in excess of the prevailing party's actual damages, such as judgment interest, punitive damages, and the like, this would likely be seen as unjust enrichment (*riba*) by a Saudi Arabian judge.

As mentioned, the enforcement judge generally has wide discretion to re-open and re-analyze foreign judgments that are brought before him for enforcement in Saudi Arabia

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and enforce the judgment as he sees fit. Thus, should a DIFC Court judgment be based on or tainted with any element of *riba* or *gharar*, the enforcement judge in Saudi Arabia may either sever any unlawful elements from the judgment or, alternatively, refuse to enforce the judgment altogether.

This is just one example of how a Saudi Arabian enforcement judge may analyze a judgment rendered by the DIFC Courts. It is possible that the enforcement judge may find other aspects of a judgment rendered by the DIFC Courts to be unenforceable against a Saudi Arabian counterparty in Saudi Arabia due to the nature and process of the DIFC Courts system and its dissimilarity to the Saudi Arabian legal system.

IV. Conclusion

Ultimately, the choice of forum designated in a contract with a Saudi Arabian counterparty is a decision that is subject to the negotiation of the parties. But, businesses and investors are generally optimistic clients who tend to focus on the prospects of making money, rather than thoughts of dispute resolution and the consequences of choice of forum clauses. Thus, legal counsel for such clients must take the lead in engaging in a meaningful examination and cost-benefit analysis regarding choice of forum and provide advice in accordance with the best interests of their clients.

While litigation before the DIFC Courts may appear as an optimal choice for Western-trained and qualified legal counsel, the disadvantages to such litigation must be considered in light of potential difficulties that may arise when seeking to enforce a DIFC Court judgment in favor of a client against a Saudi Arabian counterparty in Saudi Arabia.