

# Choice of governing law and jurisdiction



**By Christopher Mills and Susie Abdel-Nabi**

We recently undertook an extensive survey analysing data from a number of regional M&A and joint venture deals in 2012 (Deal Study). The results revealed that the laws of England & Wales were used in 57 percent of M&As and 48 percent of joint ventures.

In recent years we have seen more contracting parties choose DIFC laws which are modelled closely on the principles of English common law and the DIFC Courts, which offer a conveniently located common law forum in Dubai. Our Deal Study also reviewed deals from a number of different sectors which showed that there were no sector specific preferences when it came to deciding the choice of law and jurisdiction.

The reason for the popularity of English Law is likely due to the way in which legal 'terms of art' (such as warranties, representations and indemnities) are interpreted and applied under English law. Such interpretations can be found in historic English cases (case law precedent) which have applied extensive sets of facts and thus created a relatively settled and predictable position of law. This is attractive to contracting parties as it provides certainty on the application, interpretation and consequences of breaching the terms of a contract, so we are not surprised to see such a high percentage of Middle Eastern contracting parties choosing English Law.

Choice of law can also be dependent on the domicile of the contracting parties and the facts and circumstances surrounding the commercial venture. In certain circumstances the choice of law and jurisdiction must be the laws and courts of a particular GCC country. A requirement for 'local' laws may arise in certain commercial ventures where it is a mandatory provision of law for the local courts to accept jurisdiction, who will, in turn, apply local laws. For example, in the UAE, this applies to commercial agencies, employment, real estate and contracts with government entities. Further, the UAE courts will not apply or uphold foreign choice of law in contracts relating to the possession

or ownership rights over property situated within the UAE. Other GCC member states have similar restrictions, e.g. in Qatar, pursuant to Qatar Law No. 22/2004 (the Qatari Civil Code) states that local law must be applied in real estate and employment matters. Therefore, whilst a number of GCC countries (such as the UAE) recognise the principle of freedom to contract, so an express foreign choice of law clause in a contract should ordinarily be recognised and upheld, in practice, we have seen that the local courts are reluctant to apply foreign laws for reasons such as public order or policy.

By way of further example, while UAE Federal Law No. 11/1992 (UAE Civil Procedure Code) allows parties the freedom to select the laws which govern their agreements, if certain provisions of the chosen law are contrary to Sharia law or UAE public order and morals, the chosen governing law will not be applied and UAE law will be applied instead.

In a recent court case, the Abu Dhabi Court of Appeal accepted jurisdiction to hear a dispute between GCC contracting parties in a dispute relating to a payment obligation. Despite the terms of the agreement clearly stating the parties' intended the agreement to be governed by English law and jurisdiction, the Abu Dhabi court, nonetheless, accepted jurisdiction and applied UAE law on the basis of public order, as the payment obligation had to be performed in the UAE.

Notwithstanding the freedom to contract principle, in our experience, when a UAE court accepts jurisdiction to hear a contractual dispute, it will ordinarily apply UAE law, despite any reference to foreign laws in the contract.

In summary, contracting parties should think very carefully before agreeing the choice of law and jurisdiction. The facts relating to each transaction must be considered before deciding the most

appropriate dispute resolution clause. These clauses should never be boiler plate – one size will not fit all!

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