

caseBrief



Asymmetric jurisdiction agreements; DIFC Courts give guidance

By Aleefa Ahmed | 25 May 2023

Asymmetric jurisdiction clauses (or unilateral option clauses as they are also sometimes described) confer on one contracting party the option to bring proceedings in a court or forum of its choosing, while restricting the counterparty's ability to bring claims to a single jurisdiction. Such clauses could provide, for example, that the party who enjoys the benefit of the provision may unilaterally opt for either arbitration or court litigation to bring a claim, or that its claims may be brought in any court of competent jurisdiction of its choice.

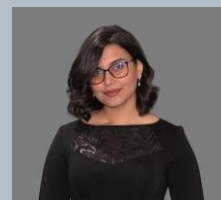
Asymmetrical clauses are commonly found in financing transactions (primarily for the benefit of lenders) and give lenders the discretion to initiate action in whichever jurisdiction best serves their interests. However, such clauses have to be carefully drafted and can be subject to challenge (particularly those that include asymmetrical options to arbitrate). Such clauses have in the past been held to be unenforceable in certain jurisdictions (e.g., France, Russia), usually on the grounds that they violate public policy.

Background

The DIFC Courts, in *Lara Basem Musa Khoury v Mashreq Bank Psc* [2022] DIFC CA 007 dealt with the question of whether Ms. Khoury could bring a claim against the Bank before the DIFC Court where the right to do so under their agreement was conferred only on the Bank. The relevant provision reads as follows:

"This Agreement shall be governed by, and be construed in accordance with, the laws of the Dubai International Financial Centre ('DIFC'). The [Claimant] agrees, for the benefit of the Bank, that any legal action or proceedings arising out of or in connection with this Agreement against it or any of its assets may be brought in the relevant courts of the DIFC".

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“The [Claimant] irrevocably and unconditionally submits to the jurisdiction of the relevant courts of the DIFC. The submission to such Jurisdiction shall not (and shall not be construed so as to) limit the right of the Bank to take proceedings against the [Claimant] in the courts of any other competent jurisdiction...”

It was Ms. Khoury’s contention that, in the absence of a provision dealing with claims that the customer may have against the bank, the forgoing clause should be interpreted such that she was entitled to bring proceedings against the Bank in the DIFC Courts. The Bank argued that the clause gave only the Bank the unilateral right to bring claims against Ms. Khoury in the DIFC Courts, and that the same right was not reciprocally available to Ms. Khoury.

The DIFC Court of First Instance ruled that Ms. Khoury had agreed that claims could be brought against her in the DIFC Courts, but that the Bank had made no such reciprocal agreement. As a result, Ms. Khoury would only be able to sue the Bank in the Courts of Dubai, where the Bank was registered and incorporated. Ms. Khoury appealed the ruling to the Court of Appeal.

The Appeal

The DIFC Court of Appeal, while noting that the asymmetry of the clause “*makes for a degree of disquiet, serving to reflect the imbalance between the comparative market power of banks as contrasted with their customers*”, went on to dismiss Ms. Khoury’s appeal. The Court rejected Ms. Khoury’s argument that the clause was an ‘opt-in’ clause that conferred jurisdiction on the DIFC Courts by virtue of Article 5(A)2¹ of the Judicial Authority Law because the agreement lacked a clear and specific provision by which Ms. Khoury could bring her claim before the DIFC Courts, holding that the clause was only for the *benefit* of the Bank.

The Court of Appeal specifically commented that asymmetrical clauses “*are familiar as a matter of international banking practice and, in part at least, serve a legitimate commercial purpose*” while citing with approval the English Court decision in *AG v Pauline Shipping Ltd* [2017] EWHC 161 (Comm), which noted that “[a]symmetric jurisdiction agreements are a long-established and practical feature of international financial documentation...”

Comment

Even though the Bank ultimately succeeded, the extensive debate in the *Khoury* case demonstrates that asymmetrical dispute resolution clauses can lend themselves to challenge and must be carefully drafted. It is to be noted that the *Khoury* case turned on the interpretation of the clause, rather than the enforceability of a unilateral option clause as a matter of principle. Ms. Khoury does not appear to have argued that an asymmetrical clause was repugnant *per se*. Nevertheless, it is clear that this case represents an affirmative acceptance of asymmetric dispute resolution contracts and the validity of such clauses by the Courts of the DIFC. The Courts of the ADGM had also previously adopted the common law approach and affirmed such clauses.²

It should be noted that, while the two common law courts in the UAE appear to have affirmatively accepted the enforceability of asymmetrical dispute resolution clauses, the position as to their enforceability in the UAE federal courts (or courts of Dubai outside of the DIFC) is far from certain. The civil law courts in the UAE will likely not be as open to enforcing such provisions, and could invoke principles of public policy, requirements of good faith and balance of rights such that a party seeking enforcement would have a higher threshold to meet. The enforcement of unilateral option clauses that confer on one party the exclusive right to opt for arbitration could be particularly problematic, given that the UAE Courts have consistently held that arbitration is an exceptional form of dispute resolution and that, in order to divest the Court from its ordinary jurisdiction,

¹Article 5(A)2 “The Court of First Instance may hear and determine any civil or commercial claims or actions where the parties agree in writing to file such claim or action with it whether before or after the dispute arises, provided that such agreement is made pursuant to specific, clear and express provisions.”

² *A3 v B3* [2019] ADGM CFI 0004

there must exist a clear and unambiguous agreement evidencing the joint intention of the contracting parties to resolve their disputes by arbitration. Whether a unilateral option clause would satisfy such requirement remains to be seen. ■

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