Volume 4/Issue 11/ November 2026 International Journal of Modern Science and Research Technology
ISSN :2584-2706 DOI: https://doi.org/10.67317/IJMSRT26NOV052

The Battle of Jurisdiction Clauses: DIFC Courts Settle the Key Dispute between Conflicting Governing Law and Seat of Arbitration

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I. INTRODUCTION

"International Arbitration law, unlike its domestic counterpart, usually involves more than one system of law or legal rules"[1]. The choice of the "Seat" of arbitration is paramount, as it governs dispute resolution procedure and most importantly rights related to the enforcement of the arbitration award. Yet, a common drafting error keeps the conflict between a contract's governing Law and its seat of arbitration alive. The Dubai International Financial Centre (DIFC) Courts, a common law jurisdiction at the heart of the Middle East, have sought to increase legal certainty by addressing this contentious issue and aligning themselves with international best practices. This article discusses the conflict, the stance of DIFC Courts and the impact of their decision.

The Critical Conflict: Matrix Law vs. Seat of Arbitration

The Law of the seat has been defined as the "the juridical home of the arbitration, providing its procedural law and defining the courts that exercise supervisory authority over it."[2] Whilst the matrix law "governs the substantive contract"[3], the arbitration agreement, though embedded in that matrix, may be subject to a different governing law.

Courts around the world have long grappled with a fundamental question in arbitration law: when there is no express choice of law governing an arbitration agreement, which law should apply i.e. the law of the seat of arbitration or the law governing the main (matrix) contract? The answer to this question has significant implications for the validity, interpretation, and enforcement of arbitration agreements.

In England, this debate has developed through a series of landmark cases. In *Sulamérica Cia Nacional de Seguros S.A. and Others v Enesa Engenharia S.A. and Others* (2012)[4], the court held that, in the absence of an express choice, the law governing the underlying contract should also govern the arbitration agreement. This established a rebuttable presumption in favour of extending the matrix contract's law to the arbitration clause, applying a three-stage test: (1) express choice of law, (2) implied choice, and (3) the law with the closest and most real connection[5]. While this approach offered flexibility, in my view, it undermined legal predictability in England.

However, this approach was later revisited in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb*[6]. The Court of Appeal held that, in construing the contract, the court should apply the principles of the law governing the substantive contract, even if that law differs from English law[7]. On appeal to the Supreme Court, while the dissenting judges agreed with this reasoning, as they argued that coherence and practicality demand that the law governing the contract as a whole should also govern the arbitration agreement, absent explicit choice[8], the majority established that, where no choice of law governing the arbitration agreement is made, the law with which the arbitration agreement is most closely connected will generally be the **law of the seat of arbitration**, even if this differs from the law of the substantive contract[9].

The complexity of this issue has also been highlighted in other jurisdictions. The Singapore High Court observed that "it cannot be assumed that commercial parties would want the same legal system to govern both their substantive contractual obligations and the separate, often contentious, process of dispute resolution."[10] Accordingly, the Singaporean court held that, in the absence of an express choice of law, the parties should be taken to have impliedly chosen the law of the seat (lex arbitri) to govern the arbitration agreement[11]. This approach has now been codified in **Section 6A of the English Arbitration Act 2025**.

Furthermore, varied jurisdictions have considered additional factors such as the locus regit actum (the law of the place where the arbitration agreement was made), as well as internationally recognised principles of arbitration law. Some systems, such as Swiss national arbitration law, apply the validation principle, under which all potentially applicable laws are tested and the one that upholds the validity of the arbitration agreement is preferred[12].

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These examples demonstrate the tension between preserving party autonomy, respecting the separability of arbitration agreements, and ensuring enforceability, and illustrates how courts have sought to balance these considerations in practice.

DIFC Courts Intervention

In his judgement in **Oswin v Otila and Ondray**[13] H.E Justice Jeremy Cooke addressed this debate. The dispute in this case arose under a Joint-Venture contract which included conflicting clauses where the governing law was under the UAE Federal Law and the arbitration clause had DIFC as the seat of arbitration. Additionally, there were ancillary agreements, with separate jurisdiction clauses which made the matter more complex. Therefore, the court was tasked with granting interim relief for a dispute and clarifying the governing law.

Against this backdrop, the first issue raised by the Respondent, concerned the existence of multiple agreements between the parties, namely, the Operation and Management Agreement (O&M), the Memorandum of Association, and the Joint Venture Agreement (JVA). The Respondents contended that, although the Claimants had brought their claims under the JVA, their actual entitlements arose under the O&M Agreement, which had a separate arbitration clause.

Appearing for the Claimant, Mr. Khan emphasised that the Joint Venture Agreement (JVA) was the only contract which was relevant as (i) it was where the breaches arose and (ii) it as the governing instrument which defined the relationships, obligations, and governance out of which the breaches arose. By choosing the DIFC as the seat of arbitration in the JVA, Mr. Khan submitted, the parties had conferred exclusive supervisory jurisdiction upon the DIFC Courts[14].

The DIFC Courts agreed with the arguments presented by the Claimant, H.E Justice Jeremy Cooke who was hearing this matter, commented that the separability of the arbitration agreement from the underlying contract was "trite law"[15]. He held that it is the law of the seat which constitutes both the lex curiae (lex arbitri) and the law of the arbitration agreement, "absent clear indicia to the contrary"[16]. In his judgement, he clarified that where "the seat or legal place of arbitration is specified as the DIFC" there can be no doubt that the DIFC Court is to have supervisory jurisdiction[17]. He also relied on the judgement of H.E Justice Michael Black in **Narciso v Nash**[18], who held that the parties have chosen the DIFC as the seat of their arbitration which carries with it the implicit choice of the DIFC Courts as the supervisory courts[19].

Therefore, in the DIFC Courts, the law of the seat of arbitration prevailed.

Impact:

The implications of the DIFC Courts' judgment in *Oswin v Otila and Ondray* merit closer examination. In particular, two key dimensions emerge: the reinforcement of fundamental arbitration doctrines and the broader commercial consequences of the Court's reasoning. Each will be considered in turn.

Recognition of Fundamental Doctrines: Separability and Dépeçage

The DIFC courts through this judgement have recognised, in my opinion, "fundamental legal principles"[20] of modern international arbitration law such as separability and dépeçage.

Separability allows an arbitration clause to remain distinct and enforceable even if the main contract is disputed. This is crucial because arbitration agreements serve as the *procedural framework for resolving disputes*[21]; As Gary Born rightly observes, arbitration clauses become operative only when a dispute arises which shifts the focus from contractual obligations to procedural fairness and neutrality during the dispute[22], if arbitration clauses were to become one with the original contract the entire arbitration process would lose its value. By upholding separability, the DIFC Courts have strengthened legal certainty, enhanced investor confidence, and reinforced their reputation as an arbitration-friendly jurisdiction.

Dépeçage, which is a French term that means "carving up", allows different aspects of a contract to be governed by distinct legal systems. In today's globalised world, where cross-border and multi-jurisdictional supply chains involve overlapping torts, contracts, and regulatory issues, the recognition of dépeçage enables a tailored, predictable, and equitable approach.
Critics argue that these principles risk creating an "isolation fallacy,"[23] treating issues in isolation when they are inherently interconnected with the main contract. However, Redfern and Hunter, validly comment that when parties autonomously choose the law of a state, "it is a complete legal system" and not "merely a set of general principles or isolated legal rules"[24], which, in my opinion, will ensure that the right context is understood to maintain the equilibrium between parties.
Therefore, upholding the principles of separability and dépeçage, ensures legal certainty, party autonomy, procedural justice and logical coherence within arbitration.

Commercial Implications

Secondly, this ruling has positive commercial implications. The position taken by the DIFC Courts exemplifies this approach, offering a clear and straightforward default position that reduces the likelihood of disputes over the law governing arbitration agreements. From an international perspective, the DIFC Courts' approach aligns closely with global best practices, including the

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New York Convention, English Law and other common law jurisdictions where the lex arbitri governs arbitration agreements. This alignment strengthens DIFC's position as a leading arbitration hub in the Middle East promoting confidence in the jurisdiction for both regional and cross-border commercial disputes.

Practically, contract drafters are now incentivised to clearly specify the governing law of arbitration agreements if they wish it to differ from the seat, and parties can now strategically structure their agreements knowing that the choice of seat will be the governing law of the arbitration agreement.

Finally, the DIFC Courts' stance overall significantly enhances its appeal to international businesses, as it demonstrates not only a sophisticated understanding of cross-border contractual dynamics but also a forward-thinking commitment to protecting the interests of global commercial parties. Beyond DIFC, his ruling stands to exert a persuasive influence as it sets a guiding precedent for on-shore courts and other jurisdictions in the Middle East grappling with similar conflicts.

II. CONCLUSION

In *Oswin v Otila & Ondray*, the DIFC Courts have delivered a pivotal clarification: the law of that seat governs the arbitration agreement, even if the substantive contract is governed by another law, unless there is a contractual indication to the contrary. In so doing, the Courts have reinforced the principles of separability and dépeçage, bolstered confidence among investors and drafters, and advanced the competitiveness of the DIFC as a sophisticated hub for international dispute resolution. As arbitration law continues to evolve, for now it is the law of the seat that emerges victorious in the battle of jurisdiction clauses.

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