

Client Alert

International Disputes

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UAE Courts recognise the “Without Prejudice” principle with wide reaching implications across the Middle East

INTRODUCTION

The application of the “without prejudice” (“**WP**”) principle varies in jurisdictions across the Middle East, with civil law jurisdictions such as the Kingdom of Saudi Arabia (“**KSA**”) and onshore United Arab Emirates (“**UAE**”) traditionally not recognising the principle, in contrast to common law jurisdictions such as the Dubai International Financial Centre (“**DIFC**”) and the Abu Dhabi Global Market (“**ADGM**”). However, the onshore UAE courts have recently taken an important step in recognising the protection of WP communications following a ruling by the Dubai Court of Cassation (which upheld a ruling by the Dubai Court of Appeal). This development is welcomed as it is expected to encourage more open settlement discussions by providing parties with greater confidence that their settlement efforts will not negatively impact them in onshore proceedings.

WHAT IS THE WP PRINCIPLE?

The WP principle is a common law concept found in jurisdictions such as England & Wales. It is designed to encourage settlement between parties and facilitate efficient resolution of disputes. The principle typically prevents oral or written statements which are made in a genuine attempt to resolve a dispute from being admissible in court proceedings.

Communications which are made as part of a genuine effort to resolve a dispute should be marked “without prejudice”. However, the inclusion or omission of the “without prejudice” label is not always decisive – whether the substance of the communication evidences a genuine attempt to settle matters more.

The courts of England & Wales have recognised a number of exceptions to the WP principle. WP communications have, for instance, been deemed admissible:

- To determine if the communications led to a binding settlement agreement.
- To demonstrate misrepresentation, fraud, or undue influence.
- To establish whether a statement created an estoppel.
- As evidence of perjury, blackmail, or other “unambiguous impropriety”.
- To justify delay or “apparent acquiescence”.
- To assess the reasonableness of a settlement.
- On the matter of costs of where there are “without prejudice save as to costs” offers.

APPLICATION IN THE UAE

Onshore UAE

Until recently, onshore UAE courts did not recognise the WP principle. As a result, settlement communications were generally admissible in court, discouraging parties from engaging in transparent settlement discussions or creating written records of their negotiations, out of concern that these could later be used against them in litigation.

However, there has been a significant shift in favour of protecting WP communications following the recent landmark judgment by the Dubai Court of Cassation in Case No. 486/2024, which upheld an earlier ruling by the Dubai Court of Appeal in Case No. 31/2024.

The case concerned a cryptocurrency transaction in Dubai, where the claimant alleged the respondent failed to transfer the amount of cryptocurrency that the parties had agreed. The Dubai Court of First Instance ruled in favour of the claimant, but awarded an amount which was lower than the amount claimed. The claimant appealed, arguing that the Court of First Instance had overlooked WhatsApp messages in which the respondent allegedly admitted to owing the higher amount. Both the Court of Appeal and the Court of Cassation upheld the decision to exclude these messages, ruling that they were part of amicable settlement negotiations and, as such, protected by the WP principle, making them inadmissible as evidence.

The case represents a notable change in the treatment of settlement communications in the onshore UAE courts. However, since the courts do not follow a system of binding precedent, it remains unclear whether the WP principle will be consistently protected under onshore UAE law.

DIFC

The DIFC courts, which operate within a common law framework, formally and consistently recognise the WP principle. The Rules of the DIFC Courts (“**RDC**”) provide that settlement offers under Part 32 of the RDC will be treated as “without prejudice except as to costs”. The rules specifically state that the fact that such an offer has been made “*must not be communicated to the trial Judge... until the case has been decided*”.

Further, the DIFC’s Code of Conduct prohibits practitioners from disclosing the details of any settlement offers or negotiations to the DIFC courts prior to judgment, regardless of whether these have expressly been stated to be “without prejudice”. Such communications may only be disclosed if they are expressly marked or identified as being sent on an open basis. Under the DIFC’s Code of Conduct, as with English law, labeling a communication “without prejudice” does not guarantee it privileged status. Privilege applies only if the communication can reasonably be regarded as a settlement offer or part of the negotiation process.

ADGM

The ADGM Courts similarly recognises the WP principle. The ADGM Court Procedure Rules (“**ADGM CPR**”) provide that a settlement offer under Part 18 of the ADGM CPR will be treated as “without prejudice save as to costs” and that the (i) fact such an offer has been made, and (ii) the terms of such an offer, “*must not be communicated to the trial Judge until the case has been decided*”. Unlike the RDC, there are exceptions to this prohibition on disclosure, where:

- “(a) the defence of tender before claim has been raised;
- (b) the proceedings have been stayed following the acceptance of a Part 18 offer;
- (c) the offeror and offeree agree in writing that it should not apply; or
- (d) although the case has not been decided in full, any part of, or issue in, the case has been decided and the offer related only to the parts or issues that have been decided.”

Where (d) applies, the trial judge may also be informed of the existence of Part 18 offers other than those relating to decided parts or issues. However, the terms of such offers must not be disclosed unless any of (a) to (c) above apply.

Further, when requesting a stay to allow for settlement of a case, a party may inform the Court or trial judge of the existence of a Part 18 offer but must not reveal the offer's terms or the identities of the offeror and offeree.

WP communications in mediation are also protected. In accordance with Practice Direction 13, all communications made during court annexed mediations (i.e. mediations conducted in accordance with the Practice Direction), including information disclosed, views expressed and oral or written statements are made on a “*strictly ‘without prejudice’ basis*” and “*shall not be used in any proceedings before any court or other body*”.

APPLICATION IN THE KSA

The KSA Commercial Court Law and Implementing Regulations encourage reconciliation and mediation, and in some cases, require it before filing certain claims. While KSA law has traditionally not recognised the WP principle, the Procedural Manuals for the Law of Evidence provide that declarations made, or documents submitted during conciliation and mediation proceedings cannot be invoked. There are a few exceptions, namely: (i) when evidence and documents are available independently of conciliation and mediation, (ii) when evidence or documents are required to implement the reconciliation or settlement, or (iii) when the parties involved in conciliation and mediation mutually agree otherwise. The Law of Evidence and its Procedural Manuals came into force relatively recently, and there is uncertainty about how the courts will interpret and apply this provision.

Further, the KSA's Draft Mediation Law issued for public consultation in 2023 notes that “*mediation procedures, hearings, data, information and documents related to or submitted to them are confidential, and may not be disclosed*”. There are exceptions to this, such as disclosure necessary to enforce a settlement agreement or disclosure required by law. However, the Draft Mediation Law has not been implemented, and it remains uncertain when, or if, it will be adopted. Parties should therefore carefully consider what they disclose during any mediation or settlement process.

KEY TAKEAWAYS

WP communications are protected under the laws of the DIFC and ADGM. While the Dubai Court of Cassation has acknowledged the WP principle, it remains to be seen whether the WP principle will be consistently applied by the onshore UAE courts. KSA law has introduced protections for statements and documents made during conciliation

and mediation proceedings. However, it is yet to be determined how extensively the courts will uphold these protections.

In light of this, parties involved in potential or existing disputes should remind themselves of the governing law of their contracts to assess whether WP communications are likely to be protected. While marking settlement communications as “without prejudice” is advisable, it is important to remember that this may not protect the contents of the communications.

Additionally, since the level of protection for settlement communications varies significantly across jurisdictions, parties may consider selecting more 'settlement-friendly' jurisdictions which uphold the WP principle when negotiating governing law and dispute resolution clauses in their contracts.

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