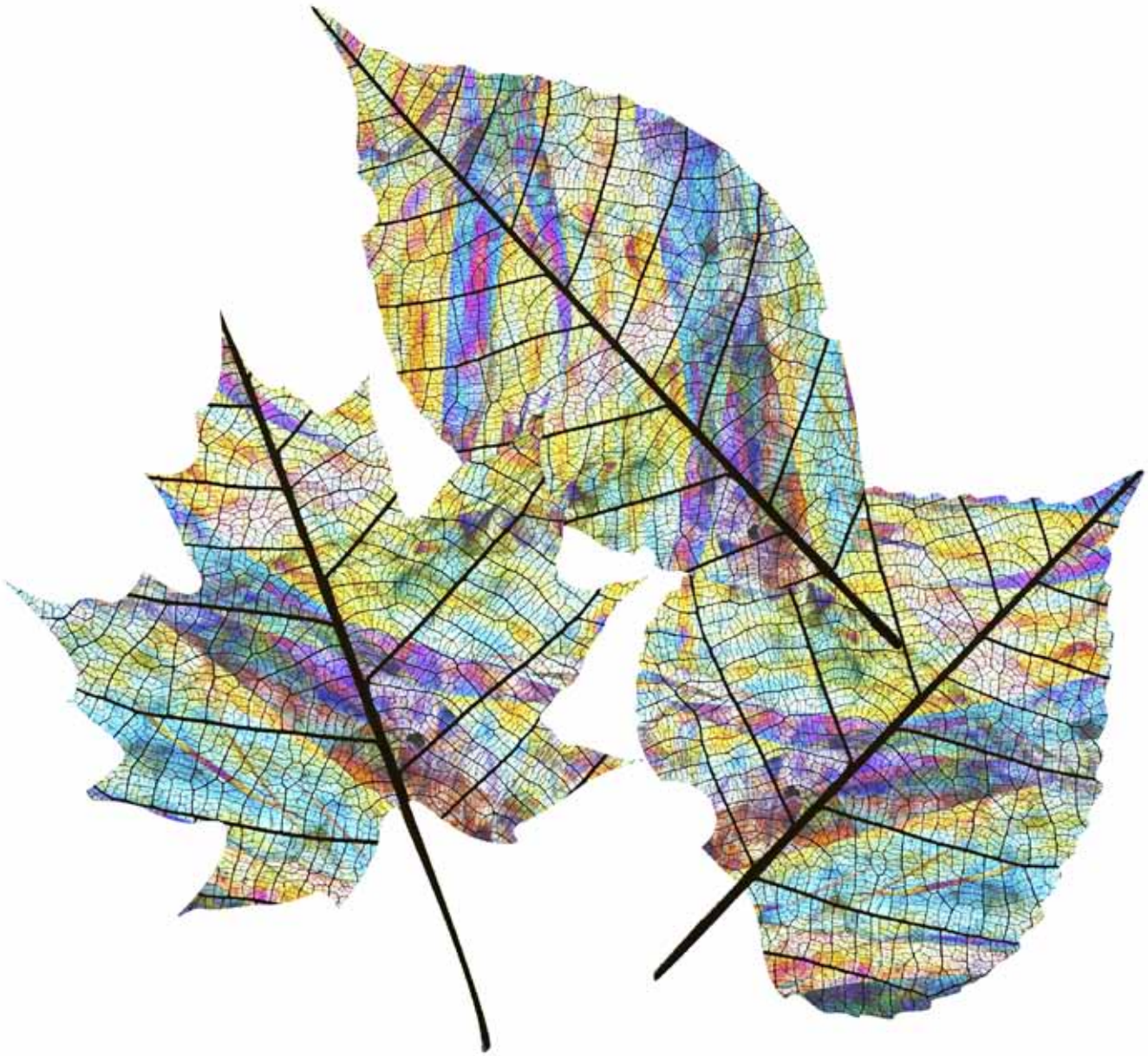
Global Litigation Survey

A survey of 161 jurisdictions, produced by the Allen & Overy Global Law Intelligence Unit and carried out by Allen & Overy's Litigation Department, together with global relationship firms



New and expanded edition

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There is no question that the rise in legal risks occasioned by litigation has been quite startling and a cause for dismay. Adverse litigation can lead to unexpected and large losses, penalties for senior managers and sometimes disqualifications, as well as high costs.

In order to help readers quickly and easily assess risks and opportunities associated with litigating in a given jurisdiction, the results of the survey are presented using simple colour-coded charts and maps. Ten key indicators of the litigation process have been selected and are evaluated in each jurisdiction by the assignment of a colour rating (ranging from blue through green and yellow to red), which best captures the position in that jurisdiction. Each of the colour ratings is accompanied by brief notes and additional data explaining the selection country by country, but the broad position in all the jurisdictions can always be seen and compared at a glance. This innovative technique of rating legal issues – allowing complex legal data to be synthesized and distilled – has been devised by Philip Wood CBE QC of our Global Law Intelligence Unit and is intended to enable surveys of this kind to be conducted swiftly and at a fraction of the cost generally involved.

The new and expanded edition of the survey, to be published shortly, will include contributions from an additional 25 jurisdictions, including Bahrain, Bangladesh, Cayman Islands, Cuba, Jamaica, Lebanon, Macau, Malawi, Paraguay, Rwanda and Senegal. Existing entries and analysis have also been extensively updated. The result is an evaluation of the essentials of litigation in 161 jurisdictions, a truly global survey which, as far as we know, remains the only one of its kind.

The pages that follow give a snapshot of the survey.

If you would like to receive a copy of the new edition of the Allen & Overy Global Litigation Survey, please contact Sarah Garvey at sarah.garvey@allenovery.com

Each jurisdiction is measured against ten key indicators.

Key indicators

We have selected the following ten legal indicators relevant to commercial parties who are deciding whether to litigate or facing litigation in a particular forum.

1. **Governing law:** Our courts will generally apply a foreign law as the governing law of a contract if it is expressly chosen by the parties to decide the rights and obligations under the contract, subject only to local public policy and mandatory rules and even if there is no connection between the choice of law and the contract or the parties.
2. **Jurisdiction – parties choose your courts:** Our courts will generally assume jurisdiction over a contract and dispute if the contract states that the parties have agreed that our courts should have jurisdiction (a choice of court or jurisdiction agreement), but neither the parties nor the dispute have any connection with our jurisdiction.
3. **Jurisdiction – parties choose a foreign court:** If a clause in a contract states that a foreign court is to have exclusive jurisdiction over a contract, our courts will almost always decline jurisdiction even though they would have had jurisdiction in the absence of the clause.
4. **State (or sovereign) immunity:** Our courts will normally give effect to a written waiver in a contract of state immunity from jurisdiction and enforcement over the local assets of a foreign state, including pre-judgment freezes on assets.
5. **Pre-judgment arrests or freezing orders:** Our courts will normally grant an order prior to judgment to prevent a defendant from dissipating its assets.
6. **Disclosure or discovery of documents in litigation:** In a contractual dispute, compulsory disclosure/discovery is very limited.
7. **Class actions:** Class actions or collective actions, whereby all members of the class are bound by a judgment, are not usually possible in our jurisdiction.
8. **Enforcement of foreign judgments:** Our courts will enforce a foreign judgment for a fixed sum of money.
9. **Costs:** The losing party typically has to pay most of the litigation costs of the winning party in the case of a dispute on a commercial contract.
10. **Standards of the courts – high value disputes:** Our courts are generally efficient and reliable in the case of high value commercial disputes involving cross-border parties and issues (including, for example, large bank loans to corporations (secured or unsecured), bond issues, derivative contracts, sale and purchase of companies, takeovers, joint ventures, high value supply contracts and large insolvencies and restructurings).

For each key indicator, survey respondents assign the colour rating that best captures the position in their jurisdiction.

Question 1 *Governing law*

Key indicator: Our courts will generally apply a foreign law as the governing law of a contract if it is expressly chosen by the parties to decide the rights and obligations under the contract, subject only to local public policy and mandatory rules and even if there is no connection between the choice of law and the contract or the parties.

Guidelines

BLUE

The governing law usually governs most aspects of the contract such as validity, interpretation, performance and breach, although it may not govern the status, powers and authorities of the parties (which are normally determined by the place of incorporation) or determine the law relating to security interests, property, trusts, insolvency, court procedure or evidence. Mandatory rules are generally normal economic or regulatory rules, and public policy is restricted to basic morality. The result is a wide respect for the chosen foreign law and upholding party autonomy. There may be special rules (for example, in relation to contracts of carriage, consumer contracts, insurance contracts and employment contracts).

GREEN

Our courts will often not apply a chosen foreign governing law unless there is a connection between the foreign law and the parties or the contract. Alternatively, there may be restrictions on our courts applying a chosen foreign law; for example, the mandatory and public policy overriding rules are quite broad in their application.

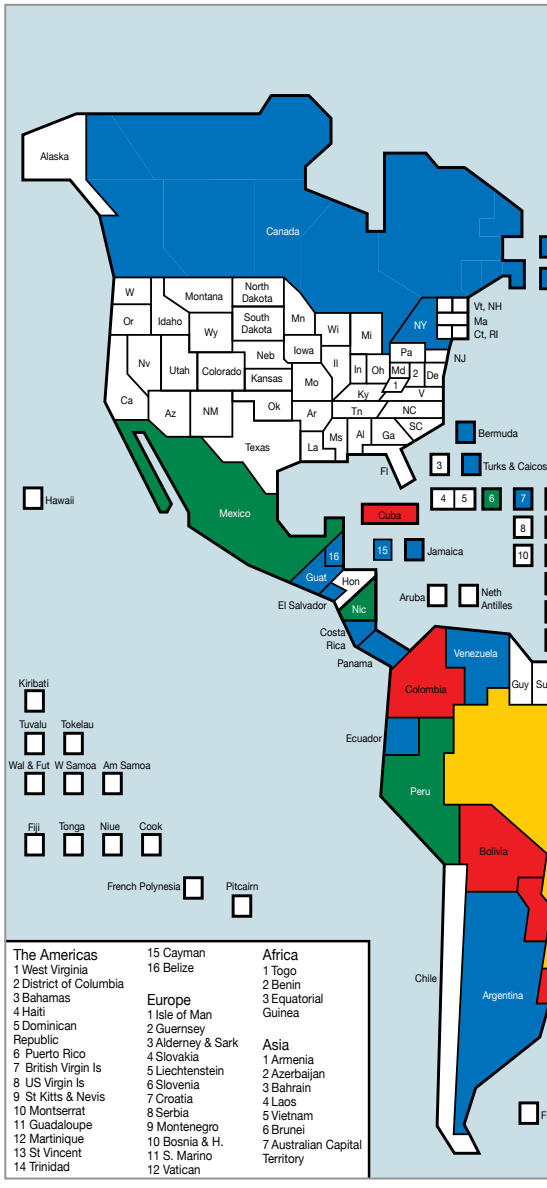
YELLOW

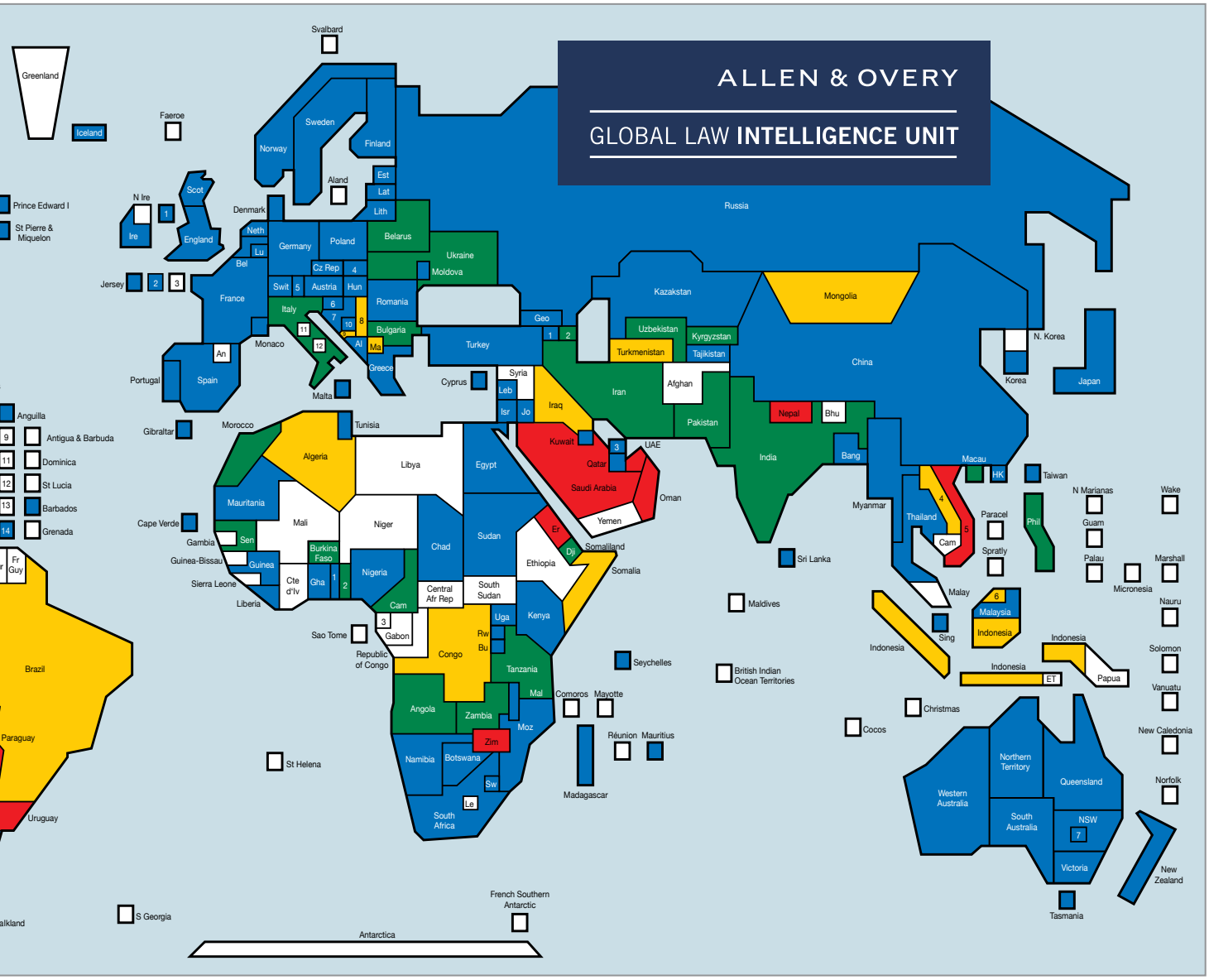
Our courts are slow to apply a chosen foreign governing law. There must be very significant connections between the foreign law and the parties or the contract. In addition, the foreign governing law is overridden by local views about public policy and also by local mandatory rules. The public policy and mandatory rules are very wide in scope and substantially restrict the foreign law. The result is that local law often prevails over the chosen foreign law.

RED

Our courts will not generally apply a chosen foreign governing law.

CAN'T SAY/NOT APPLICABLE





Colour-coded maps display the results for each key indicator.

The results are analysed in greater depth.

Governing law – analysis

Where commercial parties have chosen a particular law as the governing law of their contract, the question whether that choice will be upheld by the courts in any relevant jurisdiction is a critical one. At the most fundamental level, if the law chosen is not upheld by a particular court, the parties may find that their contractual rights and obligations are significantly different in nature and scope to the rights and obligations that they thought they had assumed when the contract was entered into. But it is not just at this level that governing law can have an impact on commercial parties. There are a host of other reasons why parties may have chosen a particular law to govern their contract, many of which will also have been relevant to their assessment of the risk of doing the deal, including the following:

- Identifying a law that is commercial, stable and predictable.
- Insulating the contract from legal changes in a counterparty's country (for example, local legislation imposing a moratorium on foreign obligations, reduction of the interest rate by legislation or exchange controls).
- Avoiding the need for a detailed investigation into an unfamiliar system of law.
- Coinciding the governing law with the choice of enforcing jurisdiction (ie the courts chosen to hear any dispute under the contract) or, where there is no choice of jurisdiction for disputes, establishing the jurisdiction of particular courts (in some jurisdictions a choice of local law to govern a contract may be sufficient to confer jurisdiction on the local courts).
- Being able to use lawyers who have special experience in the type of contract concerned.
- Language or other non-legal preferences, such as market acceptability, familiarity and convenience, and/or relative cost.

If a choice of law is not upheld by the relevant courts, therefore, this may fundamentally change the risks faced by parties in circumstances where those parties will generally not be in a position to renegotiate commercial terms.

It is therefore reassuring (although perhaps unsurprising) that the responses to our survey indicate that in **two thirds of the jurisdictions surveyed, the local courts will generally uphold a choice of foreign law** to govern a contract, subject only to limited exceptions. Indeed, it appears that there are only seven jurisdictions (Colombia, Oman, Saudi Arabia, UAE, Uruguay, Vietnam and Zimbabwe) in which reports suggest the local courts will not generally uphold a choice of foreign law at all.

It also seems that among the jurisdictions in which a choice of law is generally upheld, there is a high degree of consensus as to the limited grounds on which the local courts might in fact refuse to apply the chosen law. So, for example, in many of these jurisdictions the local courts may apply **mandatory rules of local law** notwithstanding a choice of foreign law to govern the contract, or may refuse to apply aspects of the chosen law on **public policy** grounds. However, when one looks at the survey responses in more detail it is clear that these grounds are construed more broadly in some jurisdictions than in others. For example, in Jordan the notion of public policy appears to be wide enough to encompass all mandatory rules in applicable Jordanian laws or legislation. As such, any provision of a contract which contradicts a mandatory Jordanian law will be contrary to public policy and null and void. In Kuwait, mandatory rules and public policy rules are also reported to be construed widely (so, for example, public policy rules would include matters prescribed by Islam). In Bulgaria the courts are described as generally very cautious when applying foreign laws and sometimes tend to exaggerate the application of public policy rules. Conversely, in England and Wales and the Netherlands, for example, the public policy exception is applied very rarely, so there is even divergence between EU Member States on this question (notwithstanding the fact that choice of law rules have been broadly harmonised across the EU, as to which see further below).

Further, whilst the survey responses do present a broadly positive picture for commercial parties on governing law, the fact that exceptions apply in every jurisdiction means that if parties have chosen a foreign law in order to insulate themselves from the application of a particular

law, this **insulation may not always be complete**. One particular point to note in this context is that in many jurisdictions, the local courts may have regard to the overriding mandatory rules of the law of the place of performance of a contract in certain circumstances (so it is not just the law of jurisdiction in which the courts are located that can potentially undermine the choice of a foreign governing law).

The various grounds on which a choice of law may not be upheld by the courts (in particular by EU Member State courts) has been the subject of particular focus in the last year or two in light of events in the **Eurozone**. Parties have sought to determine whether their contracts may be affected by any changes to local law in a vulnerable Member State (such as the imposition of reorganisation measures in respect of local credit institutions, as happened in Cyprus) or in a Member State exiting the EU, notwithstanding the fact that those contracts are expressed to be governed by a different law. Some of these grounds are also often focused on by parties involved in major infrastructure and energy projects in emerging markets jurisdictions, where the risk that the law of the place of performance may be applied notwithstanding a choice of a foreign law to govern the contract can be significant given that the law in those jurisdictions can differ greatly from the law commonly chosen by parties to govern commercial contracts and also given that there is often less scope to move the place of performance.

Some more general themes also emerge from the survey. For example:

- Geographically (and notwithstanding the points mentioned above), the most consistent picture appears to be among the EU Member States, with responses from 26 Member States confirming that local courts will generally uphold a choice of foreign law to govern a contract (though note the divergence on some points of detail). This is unsurprising since, as noted above, all EU Member States other than Denmark apply the same regime for determining contractual governing law (Regulation (EC) No 593/2008 of 17 June 2008, known as **Rome I**). For a summary of the provisions of Rome I, see Annex A on page 344 below.
- The region where there is least consistency in this area appears to be Africa, where a number of responses suggested that local courts may be slow to apply the chosen law.
- Among the jurisdictions whose courts will not often uphold a choice of law, the absence of a sufficient connection between the foreign law and the parties or the contract is a key reason given for the refusal to apply the parties' choice.
- In Russia and China, the question whether a foreign law can be chosen to govern a contract depends on whether there is a foreign "element" to the contract; for example, whether a party is foreign or there is a foreign element in the subject matter of the contract.
- In some jurisdictions the local courts have little experience of applying foreign law (for example, as reported in Kyrgyzstan, Mongolia, Montenegro, Turkmenistan and Uzbekistan) and/or may apply local law in circumstances where they are unfamiliar with provisions of the chosen law (for example, in Laos).
- In almost all jurisdictions, there are special rules that apply to particular types of contract or particular issues, such as employment, consumer or insurance contracts, questions of capacity and authority, exchange contracts and insolvency.

There is nothing that commercial parties can do in the governing law clauses of their contracts to make their choice of law absolutely watertight. However, including an express *jurisdiction* clause (a clause in which the parties agree on the courts in which any dispute under the agreement will be heard) and identifying the courts of a jurisdiction where the grounds on which a governing law clause will not be upheld are narrow and clearly delineated may go some way to reducing the risks. A discussion of the enforceability of jurisdiction clauses follows in the next section.

A chart of results shows the colour rating assigned by each contributing jurisdiction for all of the key indicators, giving the reader an instant overview of the results globally.

	1. Governing law Choice of foreign law effective?	**2. Jurisdiction: home court** Choice of home court effective?	**3. Jurisdiction: foreign court** Choice of foreign court respected?	**4. State (or sovereign) immunity** State immunity waiver effective?	**5. Pre-judgment** Pre-judgment arrests or freezing orders normally granted?
Iran					
Iraq					
Ireland					
Isle of Man					
Israel					
Italy					
Jamaica					
Japan					
Jersey					
Jordan					
Kazakhstan					
Kenya					
Lebanon					
South Korea					
Kuwait					
Kyrgyzstan					
Laos					
Latvia					
Liberia					
Liechtenstein					
Lithuania					
Luxembourg					
Macau					
Macedonia					
Madagascar					
Malawi					
Malaysia					
Malta					
Mauritania					
Mauritius					
Mexico					
Moldova					
Monaco					
Mongolia					

6. Disclosure Disclosure/ discovery very limited?	**7. Class actions** Class actions not usually allowed?	**8. Enforcement of foreign judgments** Foreign judgments enforced?	**9. Costs** Losing party typically pays most of the costs?	**10. Standards of the courts** Courts usually reliable for high value commercial disputes?	
					Iran
					Iraq
					Ireland
					Isle of Man
					Israel
					Italy
					Jamaica
					Japan
					Jersey
					Jordan
					Kazakhstan
					Kenya
					Lebanon
					South Korea
					Kuwait
					Kyrgyzstan
					Laos
					Latvia
					Liberia
					Liechtenstein
					Lithuania
					Luxembourg
					Macau
					Macedonia
					Madagascar
					Malawi
					Malaysia
					Malta
					Mauritania
					Mauritius
					Mexico
					Moldova
					Monaco
					Mongolia

Finally, a results and commentary section presents the colour ratings and additional commentary provided by each survey respondent alphabetically by jurisdiction.

Cuba

1. Governing law

2. Jurisdiction: parties choose your courts

Cuban law is very specific in this sense. At least one of the parties must be Cuban or assets must be located in Cuban territory.

3. Jurisdiction: parties choose a foreign court

The Cuban court's jurisdiction cannot be declined when one of the parties in dispute is Cuban or the dispute relates to assets located in Cuba. There is an exception for disputes that, pursuant to international agreements to which Cuba is signatory or agreements between the parties, are to be resolved by the arbitration court.

4. State (or sovereign) immunity

5. Pre-judgment arrests or freezing orders

6. Disclosure or discovery of documents in litigation

7. Class actions

8. Enforcement of foreign judgments

9. Costs

Litigation costs are very often assumed by each party.

10. Standards of the courts: high value disputes

As a general note to the responses above, disputes involving joint ventures with foreign companies, branches of foreign companies and high value commercial disputes are generally under the jurisdiction of the arbitration court. The arbitration court is more relaxed and has its own procedure. For many years in Cuba, there have been two different commercial relationships: one between Cuban companies (most of which are owned by the government) and also between Cuban and foreign companies. Over the years the Cuban court has mostly heard domestic disputes between Cuban companies but currently also sees litigation between Cuban and foreign companies.

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Dubai International Financial Centre (DIFC)

1. Governing law

2. Jurisdiction: parties choose your courts

There is a residual uncertainty where the parties have submitted to the jurisdiction of the DIFC courts but where the UAE Civil Procedure Law allocates jurisdiction to a particular UAE state court. This has not yet been tested.

3. Jurisdiction: parties choose a foreign court

The approach would be similar to the English courts.

4. State (or sovereign) immunity

The approach would be similar to the English courts, but this has not yet been tested.

5. Pre-judgment arrests or freezing orders

The approach would be similar to the English courts. The colour rating is likely to be green, although there is no case law making explicit the requirement that the courts must have jurisdiction in the main action.

6. Disclosure or discovery of documents in litigation

The approach would be similar to the English courts.

7. Class actions

The DIFC Court Rules do make provision for Group Litigation Orders to be made. As far as we are aware, however, this has not yet been tested in practice.

8. Enforcement of foreign judgments

The colour rating is likely to be green or blue but it is not clear if reciprocity is required in the DIFC as it is in the English courts. This has not yet been tested.

9. Costs

10. Standards of the courts: high value disputes

Indonesia

1. Governing law

In general, the Indonesian courts would uphold the choice of foreign law. However, in practice the courts have from time to time applied the laws of the Republic of Indonesia, notwithstanding the choice of law provisions in the relevant documents.

2. Jurisdiction: parties choose your courts

In general, Indonesian courts would accept jurisdiction over any dispute if it is chosen by the parties. However, if neither the parties nor the disputes have any connection with the jurisdiction of the Indonesian courts and one of the parties challenges the jurisdiction of the Indonesian courts (including on the basis of the *forum non conveniens* doctrine), it is likely that the Indonesian court will refuse to entertain the dispute.

3. Jurisdiction: parties choose a foreign court

The appointment of a foreign court as an exclusive forum for dispute resolution does not override the jurisdiction of Indonesian courts to try the dispute and in practice we are aware that Indonesian courts have taken jurisdiction based on the argument that by law a court has the authority to decide the case if either party is domiciled in Indonesia or the disputed asset is located in Indonesia.

4. State (or sovereign) immunity

Indonesian law acknowledges the principle of state immunity based on international conventions. However, if there is any commercial dispute on a matter in which the foreign state acts in its private capacity that is not related to such immunity (for example, real estate), the Indonesian courts may take jurisdiction and allow certain aspects of enforcement on a case-by-case basis.

5. Pre-judgment arrests or freezing orders

In general, the Indonesian civil procedural code does allow an interim order to prevent the dissipation of assets prior to the granting of a final judgment of a dispute under its jurisdiction.

6. Disclosure or discovery of documents in litigation

Unlike when they adjudicate a criminal dispute, in a civil/commercial dispute Indonesian courts take a passive position. It is up to the parties to present sufficient evidence to prove any of their claims/arguments against the other parties.

7. Class actions

Class action claims are not uncommon in Indonesia and have been acknowledged, among other types of claim under consumer protection law and environmental law, although for other areas of law they are still rare or not well established. Any potential claimants to the dispute have to opt out (rather than opt in).

8. Enforcement of foreign judgments

Indonesian courts will not enforce a foreign court judgment. Such foreign court judgments can only be used as evidence if the competent Indonesian court considers this appropriate based on its own discretion.

9. Costs

The losing party will only be obliged to pay court fees as part of the litigation costs. Although by law litigation costs could be requested as part of the compensation (which could consist of costs, interest and damages) payable by the losing party to the winning party, it is a well-established precedent that Indonesian courts will not grant any request from the winning party to obtain compensation for any litigation costs (including attorneys' fees), other than the court fees.

10. Standards of the courts: high value disputes

It is generally acknowledged that Indonesian courts are not very efficient and are quite unreliable in high value or complex commercial disputes involving a complicated structure and multi-jurisdictional laws/entities. We are aware that several courts in big cities like Jakarta have several career and *ad hoc* judges who are well trained and experienced in handling complex commercial disputes, but these judges are a minority in the pool of Indonesian judges. In addition, judges in courts which are located in rural areas (where some of the disputed assets may be located so that the case falls within the jurisdiction of such courts), might have no exposure/experience at all to even medium-sized commercial disputes and therefore the risk factor in respect of inefficiency and of unreliability is even higher.

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