JURISDICTION

James Weale, Serle Court

NON-ELECTIVE JURISDICTION

The DIFC Court's jurisdictional gateways are contained in Article 5(A)(1) of the Judicial Authority Law (Dubai Law 12 of 2004) ('the JAL').

Similar provisions appear in the DIFC Court Law (DIFC Law 10 of 2004), Article 19. Following amendments to the JAL in 2011, which were not reflected in the Court Law, there is a mismatch in the language between the two sets of provisions. To the extent that there is any discrepancy, the JAL takes precedence: *Dhir v. Waterfront Properties* [2009] DIFC CFI 011 at [61], considering discrepancies between the original texts of the JAL and DIFC Court Law. More recently, in a somewhat different context, the Court of Appeal said in *Sky News Arabia FZ-LLC v. Kassab Media FZ LLC* [2016] DIFC CA 010 (12 July 2017) that the DIFC Court's jurisdiction is 'solely governed by the Judicial Authority Law' [119].

The language of the non-elective jurisdictional gateways contained in Article 5(A)(1) of the JAL has always been ripe for argument as to their scope. Recent cases have confirmed the broad approach to construction which has been adopted to those provisions, consistent with the trend towards an expansive jurisdiction for the DIFC Courts.

In *Al Khorafi v. Bank Sarasin-Alpen (ME) Ltd* [2011] DIFC CA 003 (5 January 2012), the Court of Appeal said at [58]:

In construing Article 5(A) it is necessary to keep very clearly in mind that the ultimate and dominant text is in Arabic and that this court is using a translation to arrive at the true meaning and intent of that Arabic text. In this correction it is to be remembered that Arabic may not lend itself to as precise a facility of expression of legal phraseology as English. Thus translation may result in what appears to be a very precise expression in English but which too narrowly defines the meaning of the original Arabic text. That is why it is important when construing DIFC legislation such as Law 16 not by a literalist construction of the English to lose sight of the legislative purpose underlying the text.

Article 5(A)(1)(a): DIFC entities

Article 5(A)(1)(a) confers ‘party’ jurisdiction over:

Civil or commercial claims and actions to which the DIFC or any DIFC Body, DIFC Establishment or Licensed DIFC Establishment is a party.

Article 2 defines ‘DIFC Establishment’ to include ‘any entity or enterprise established ... to carry on business or conduct any activity within the DIFC pursuant to DIFC Laws’, including ‘Licenced DIFC Establishments’. They are in turn defined as: ‘Any entity or enterprise licensed, registered or authorised by the Dubai Financial Services Authority to provide financial services, or conduct any other activities in accordance with the DIFC Laws.’

The Court of Appeal in *Corinth Pipeworks SA v. Barclays Bank plc* [2011] DIFC CA 002 (22 January 2012) held that the result of these provisions was that the DIFC Court will have exclusive jurisdiction over any claim brought against an entity with a branch in the DIFC, even if the activity the subject of the claim was not related to the DIFC branch.

In *Barclays Bank plc v. Afras Ltd* [2013] DIFC CFI 008 (11 August 2013), the Court confirmed that the same analysis applies to claims made by such an establishment: [5], [10].

The boundaries of the gateway were further expanded in *Tavira Securities Limited v. Re Point Ventures FZCO & Ors* [2017] DIFC CFI 026 (17 December 2017). Justice Sir Richard Field concluded that Article 5A(1)(a) was engaged even where the relevant events occurred *before* the claimant had obtained the status of a DIFC establishment. The Court made clear that it would not be possible for a claimant to engage in extreme forum shopping by establishing a branch solely for the purpose of bringing the claim [42] and that in appropriate cases it would be open to the defendant to invoke the doctrine of *forum non conveniens* [41].

By contrast with the liberal approach adopted by the higher courts, there are a number of recent Small Claims Tribunal (SCT) cases which appear to have gone against the flow. In *Imtiyal v. Ingaborg & Ors* [2018] DIFC SCT 254 (30 October 2018), the Claimant was a former employee of a Cayman company within a group of companies of which the second and third Defendants formed part. Both were registered in the DIFC. SCT Judge Maha Al Mehairi acknowledged that whilst the DIFC Courts ‘may generally’ have jurisdiction over DIFC entities, on the facts of the case there was not a

‘sufficient link’ to the DIFC. It is submitted that the case is best viewed as one in which the Claimants failed to establish an arguable claim as against the relevant DIFC entities, rather than as restricting the scope of the jurisdictional gateways.

Articles 5(A)(1)(b)–(c): contracts, transactions and incidents within the DIFC

Article 5(A)(1)(b) of the JAL confers exclusive ‘subject-matter’ jurisdiction over:

Civil or commercial claims and actions arising out of or relating to a contract or promised contract, whether partly or wholly concluded, finalised or performed within DIFC or will be performed or is supposed to be performed within DIFC pursuant to express or implied terms stipulated in the contract.

Article 5(A)(1)(c) confers subject-matter jurisdiction over:

Civil or commercial claims and actions arising out of or relating to any incident or transaction which has been wholly or partly performed within DIFC and is related to DIFC activities.

In *Al Khorafi v. Bank Sarasin-Alpen (ME) Ltd* [2011] DIFC CA 003 (5 January 2012), the Court of Appeal said at [60]:

The purpose of Article 5(A)(1)(b) is to bring within the exclusive jurisdiction of the DIFC Courts claims arising out of or relating to a contract or to the negotiation for a contract where the connecting factor is that the contract or intended contract had been wholly entered into or partly entered into in the sense of negotiated or had been wholly or partly agreed upon or wholly or partly performed by conduct or an event which had taken place within the DIFC. The essence of the provision is that the court is given jurisdiction where there has been relevant activity with regard to the contract or related to it within the DIFC.

As to gateway (c), the Court of Appeal said at [63]–[65]:

The claim or action has to arise out of or relate to either an incident or a transaction. The meaning to be accorded to ‘incident’, as under Law 12, Article 5(A)(1)(b), comprehends any of the essential elements of conduct or the incidence of loss or damage necessary to give rise to a cause of action in tort or for breach of statutory duty. The meaning to be accorded to ‘transaction’ is any commercial relationship between the Claimant and defendant giving rise to mutual rights and obligations, including, but not limited to, a contractual relationship. Whereas it is meaningful to speak of a ‘transaction’ as being ‘performed’ in a particular place, that is not so of an ‘incident’.

Accordingly, the words should be understood as referring to an incident which has occurred within the DIFC.

The requirement that the transaction or incident shall be ‘related to DIFC activities’ simply means that such incident or transaction should have been in furtherance of or as a result of a particular commercial activity carried on in the DIFC.

With regard to ‘incidents’, the relevant acts or omissions said to give rise to tortious liability must take place in the DIFC.

The potential breadth of these gateways is apparent from a number of cases. In *Gavin v. Gaynor* [2015] DIFC CFI 017 (3 April 2016), the Court determined that it had jurisdiction on the basis of a letter which referred to a meeting in the DIFC to discuss a possible addendum to the contract in dispute. The contract itself appears not to have been concluded in the DIFC and was said to be ‘silent’ about where it was to be performed. The letter post-dated the relevant contract and the proposed addendum was never pursued. Nevertheless, the Court concluded that a single meeting in respect of the contract was sufficient to satisfy Article 5(A)(1)(c). The Court rejected the Claimant’s alternative argument that a mere proposal by the Defendant (which had not been implemented) to incorporate in the DIFC was sufficient to render it a DIFC establishment pursuant to Article 5(A)(1)(a).

In *National Bank of Kuwait S.A.K.P v. SBM Bank (Mauritius) Ltd and Ors* (referred to in the judgment of the Joint Judicial Committee (JJC) in Cassation No. 5 of 2018), the DIFC Court of First Instance had concluded that it had jurisdiction against the Defendant bank solely on the basis that the Claimant – after the dispute had arisen – had directed that payment was to be made into a nominated bank account based in the DIFC. The Claimant thus relied on the broader wording which was introduced by the amendments to the JAL. On that basis, the Court concluded that the contract was to be (or supposed to be) performed in the DIFC. Whilst there is no reported judgment of the DIFC Court’s decision, that conclusion was upheld by the JJC.

In *Commercial Bank of Dubai PSC v. M/S Totor Restaurant and Lounge LLC* [2017] DIFC CFI 047 (23 January 2019), H.E. Justice Ali Al Madhani concluded that a guarantee agreement executed outside of the DIFC fell within the scope of Article 5(A)(1)(b). The judge identified five features of the guarantee agreement which rendered it inextricably connected to the underlying agreement which was both concluded and to be performed in the DIFC. However, the overall conclusion was that, for the purposes of this gateway, it is sufficient that there is a ‘close connection’ between the agreement sued upon

and an agreement which falls squarely within Article 5(A)(1)(b). The limits of this liberal ‘close connection’ approach will no doubt be explored in future cases.

It appears relatively clear that the DIFC Court will have jurisdiction over a dispute relating to a contract which was actually concluded in the DIFC, in the sense of having been signed or otherwise agreed by persons physically in the DIFC. This appears from the words of Article 5(A)(1)(b) itself (‘a contract ... whether partly or wholly concluded ... within DIFC’) and was confirmed in *Allianz Risk Transfer AG Dubai Branch v. Al Ain Ahlia Insurance Company PJSC* [2012] DIFC CFI 012 (30 April 2013) at [39]. Considering the original text of the JAL, the Court of Appeal in *National Bonds Corporation PJSC v. Taaleem PJSC & Ors* [2011] DIFC CA 001 (5 May 2011), decided at [57] that the relevant transaction had been ‘concluded in the DIFC’ because one of the contracts comprising the overall transaction had been executed in offices in the DIFC.

As against the above, SCT Judge Maha Al Mehairi concluded in *Idan v. Ilaria* [2018] DIFC SCT 223 (9 July 2018) that a meeting and signing of a contract in the ‘DIFC alone does not place this case within the ambit of Article 5(A)(1)(b)’. In that case, the Court did not have jurisdiction because the claim was principally concerned with a Saudi company. It is submitted that the above conclusion is clearly inconsistent with the terms of the JAL and previous decisions of the Court. The decision could only be justified on *forum non conveniens* principles. In *Ishtar Advocates v. Iniko* [2018] DIFC SCT 197 (8 July 2018), the same judge concluded that it was not sufficient, for the purposes of Article 5(A)(1)(b), that an ‘initial advisory meeting’ took place in the DIFC.

Article 5(A)(1)(e)

Article 5(A)(1)(e) confers jurisdiction over claims ‘over which the Courts have jurisdiction in accordance with DIFC Laws and DIFC Regulations’. This has proven to be one of the most significant sources of jurisdiction for the DIFC Courts, giving rise to the Court’s jurisdiction over claims against ‘necessary and proper parties’ to existing claims and also to the Court’s jurisdiction to enforce foreign judgments and arbitration awards.

Jurisdiction over a ‘necessary or proper party’

Under English procedural law, the English Court may have jurisdiction over a claim against a necessary and proper party to existing proceedings: paragraph 3.1(3) of Practice Direction 6B of the English CPR.

This jurisdiction is conspicuously absent from the JAL, Article 5(A)(1). Left unplugged, this could represent a significant lacuna in the DIFC's jurisdictional regime. Where the subject matter of a dispute involves a complex chain of transactions or several corporate layers, a claim could be stifled or split across jurisdictions if one or more parties in the chain or the corporate structure could not be joined as parties and therefore bound by the Court's order following a trial. The absence of such a jurisdiction could also preclude a claimant from pursuing a claim against two persons who are jointly and severally liable under the same transaction (or fraud) and likewise a claim for a contribution as between two co-defendants.

The Court of Appeal found a solution to this issue in *Nest Investments Holding Lebanon S.A.L. & others v. Deloitte and Touch (M.E.) & Joseph El Fadl* [2018] DIFC CA 011 (13 March 2019). The Claimant sought to bring proceedings against a partner of the first Defendant auditors. Whilst the auditors themselves (DTME) were a DIFC Establishment, the partner had no relevant connection to the DIFC and the claim against him did not fall within any of the jurisdictional gateways in Article 5(A).

At first instance [2016] DIFC CFI 027 (24 August 2017), Justice Roger Giles confirmed (by reference to *Al Khorafi v. Bank Sarasin-Alpen (ME) Ltd* [2011] DIFC CA 003 (5 January 2012)) that one or more jurisdictional gateways had to be satisfied in respect of each Defendant [13]. He rejected the contention that jurisdiction could be derived from the substantive provisions of the DIFC Law (in that case, Article 13 of the Law of Obligations) in conjunction with Article 5(A)(1)(e): 'the source of a right to sue is not itself a source of jurisdiction; jurisdiction in accordance with a DIFC Law or Regulation must be found independently' [23]. The question of whether or not the Claimant could rely upon RDC 20.7 as a free-standing basis for jurisdiction was adjourned to a further hearing. However, in a further judgment dated 12 February 2018, Justice Roger Giles dismissed that application.

The latter decision, however, was overturned by the Court of Appeal [2018] DIFC CA 011 (13 March 2019). The Court concluded that the Rules of the DIFC Court constituted a DIFC Regulation for the purposes of Article 5(A)(1)(e). The Court considered that a contrary conclusion would result in RDC 20.7 being 'robbed of most its force' [52]. Moreover, the Court was clearly influenced by the policy considerations set out above [54]. The Chief Justice expressed some 'anxiety' over the consequences, but was persuaded by Justice Sir Jeremy Cooke's conclusion.

Although not referred to in *Nest Investments*, the existence of a necessary and proper party jurisdiction was recognised in the earlier decision of Justice Al Sawalehi in *Orion Holdings Overseas Limited (in liquidation) and Ors v. Privatbank IHAG* [2015] DIFC CFI 033 (8 April 2018). In that case, the Court determined that a claim against a Swiss bank should proceed on the basis that it was a necessary and proper party to a claim involving a transaction to which it was a party. The conflict between *Orion Holdings* and the first instance judgment in *Nest Investments* was recognised by Justice Sir Jeremy Cooke in *KBC Aldini v. Baazov* [2017] DIFC CFI 002 (14 October 2018) [41].

The conclusion is also consistent with the decision of the Dubai World Tribunal (DWT) in *Alize 1996 v. DP World UAE Regions FZE* (DWT-001-2017) (15 January 2018). In that claim, the owners of a vessel sought to establish a limitation fund in respect of a shipping collision in Jebel Ali Container Port and so limit their total liability for the incident pursuant to treaty. In resisting the order sought, the Defendants argued that the DWT could not have jurisdiction over claims against the fund brought by non-Dubai World third parties against the Claimant. The DWT's primary jurisdiction is over claims by or against entities within the Dubai World Group. However, relying in part on similar policy considerations to those referred to above and referring to the equivalent joinder provisions of the Rules of the DWT, the Tribunal found that the DWT could have jurisdiction over claims between the Claimant and non-Dubai World entities who could be joined to the proceedings for that purpose.

Contempt of court

Article 5(A)(1)(e) also confers onto the Court jurisdiction to make orders for contempt of court: per Justice Sir Richard Field in *VIH Dubai Palm Jumeirah Ltd (Cayman Islands) v. Assas Opco Ltd and Ors* [2017] ARB 005 (25 December 2018). The Court held that, for the purposes of gateway (e), the Court must be satisfied that there is a 'sufficiently clear conferral of jurisdiction' by the relevant provision. That requirement was satisfied by Article 43 of the Court Law which expressly provides that 'The DIFC Court has jurisdiction ... to deal with matters relating to contempt'.

Enforcement of arbitration awards

Article 5(A)(1)(e) has also been established as the source of the Court's jurisdiction to enforce arbitration awards where no other jurisdiction gateway exists. This is discussed below in Section 2 – Conduit Enforcement.

SUBMISSION

The DIFC Court's jurisdiction is exclusively statutory: *Akhmedova v. Akhmedov* [2018] DIFC CA 003 (19 June 2018) at [20]. In *Hardt v. Damac (DIFC) Company Ltd* [2009] DIFC CFI 036 (31 March 2010), considering the original wording of the JAL, Justice Sir Anthony Colman found that submission to the DIFC Court by, for example, defending on the merits or by operation of RDC 12.5 could not confer on the Court jurisdiction which it did not otherwise have: [35]–[37]. See also *NBC v. (1) Taaleem (2) Deyaar Development* [2011] CA 001 (5 May 2011) [31]; *Robinson Club GMBH v. Zabeel Investments LLC* [2013] DIFC CFI 016 (25 November 2013) [17]; and *Investment Group Private Ltd v. Standard Chartered Bank* [2015] CA 004 (19 November 2015) [54]–[67]. Submission could operate only as a waiver of objections that a party might have to the exercise of the Court's jurisdiction, for example, as a result of an exclusive jurisdiction agreement in favour of another forum. The JAL has since been amended to confer jurisdiction by agreement between the parties: Article 5(A)(2) of the JAL. However, the position appears to remain that submission cannot create jurisdiction unless the acts relied on satisfy the requirement in Article 5(A)(2) for a jurisdiction agreement or otherwise meet the requirements of one of the other gateways to jurisdiction.

JURISDICTION – THE CPC DOES NOT APPLY TO THE DIFC COURTS

In a number of cases, parties have argued that the issue of whether the DIFC or Dubai Courts should have jurisdiction over a claim should be decided by reference to the jurisdiction provisions of the Dubai Civil Procedures Code (CPC). In *IGPL v. Standard Chartered Bank* [2015] DIFC CA 004 (19 November 2015), the Court of Appeal confirmed the decision of Justice Ali Al Madhani in *(1) Fiske (2) Firmin v. Firuzeb* (5 January 2015) [2014] DIFC ARB 001 (5 January 2014) and its own conclusion in *Meydan Group LLC v. Banyan Tree Corporate PTE Ltd* [2014] DIFC CA 005 (3 November 2014) that the CPC does not apply to the DIFC Courts at all [82]–[99]. This conclusion rests on the legislative framework of the DIFC Court.

Article 121 of the UAE Constitution, as amended, gave the Union legislative jurisdiction to establish financial free zones and exempt them from federal law. Federal Law No. 8 of 2004 allowed the establishment of financial free zones in any Emirate by Federal Decree, disapplying Federal civil and commercial law in those zones and permitted the relevant Emirate to issue laws for them. Federal Decree No. 35 of 2004 established the DIFC in Dubai as a Federal financial

free zone. Thereafter, the JAL and DIFC Law laid down the rules regarding the jurisdiction of the DIFC Courts. The Constitution therefore authorised the disapplication of UAE law in the DIFC and the introduction of fresh laws to take their place.

The fact that the CPC provisions on jurisdiction concerned a matter of public order did not mean that the different rules on jurisdiction in the JAL and DIFC Law in any way offended the public order of the UAE. Indeed, the exemption of the financial free zones from the CPC in civil and commercial matters was consistent with public order: it had been identified and sanctioned in the relevant constitutional and federal provisions as an important part of the UAE's economic policy [94]–[99].

The reasoning and conclusion in *IGPL* were reaffirmed by the Court of Appeal in *Sky News Arabia FZ-LLC v. Kassab Media FZ (LLC)* [2016] DIFC CA 010 (12 July 2017) at [119]. Subsequently, in *VIH Dubai Palm Jumeirah Ltd (Cayman Islands) v. Assas Opco Ltd and Ors* [2017] DIFC ARB 005 (25 December 2018), Justice Sir Richard Field confirmed, by reference to *IGPL*, that the 'whole of the CPC has been disapplied in the DIFC'. See also *Barclays Bank v. EGFL* [2016] DIFC CFI 036 (20 April 2017) at [38].

In a number of cases, judges sitting in the SCT have declined jurisdiction by applying provisions of the CPC: see *Halvar v. Hana* [2016] DIFC SCT 210 (22 January 2017) at [18]–[20] and *Hackett v. Hania* [2017] DIFC SCT 034 (29 March 2017) at [13]–[18]. In light of earlier authority which made clear that the CPC does *not* apply to the DIFC Courts, it can be safely concluded that these decisions are wrong.

ESTABLISHING THE GATEWAY – STANDARD OF PROOF

A claimant is required to establish that it has a good arguable case that one of the jurisdiction gateways is satisfied: *Al Khorafi & Ors v. Bank Sarasin-Alpen (ME) Ltd & Anor* [2011] DIFC CA 003 (5 January 2012).

In *Akhmedova v. Akhmedov* [2018] DIFC CA 003 (19 June 2018), the Court of Appeal noted that this reflected the fact that an interlocutory hearing is not normally the appropriate forum for determining disputed issues of fact. However, where the issue of jurisdiction depended solely on a point of law or the construction of a legal instrument, it would be appropriate for the Court to determine that issue at the jurisdiction stage [18].

In England, the ‘good arguable case’ test for jurisdiction has been the subject of recent judicial discussion in the cases of *Brownlie v. Four Seasons Holdings Inc* [2018] 1 WLR 192; *Goldman Sachs International v. Novo Banco SA* [2018] 1 WLR 3683; and *Kaefer Aislamientos SA de CV v. AMS Drilling Mexico SA de CV and Ors* [2019] 1 WLR 3514.

The English Supreme Court established a three-stage test as follows:

- (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it.

These authorities have not yet been considered by the DIFC Courts. However, it is suggested that it is likely that the Court would follow them or, at least, have regard to them, in future cases.

THE RELEVANCE OF THE MERITS OF THE CLAIM

Under the common law and Brussels I Regulation regimes applying to issues of jurisdiction in the *English* Courts, a Claimant is required to show not only a good arguable case that the claim comes within the relevant gateway, but also a serious issue to be tried on the *merits* of the claim. In some cases (e.g. where the existence of a contract is disputed) the merits and the satisfaction of the gateway may be one and the same.

There is no *express* statutory provision in DIFC Law requiring a Claimant to satisfy any merits threshold as to the strength of its claim in order to engage the jurisdiction of the DIFC Courts. There was previously some suggestion in the authorities that the DIFC Court might nevertheless impose a merits threshold when deciding whether it had jurisdiction.

In *Hardt v. Damac (DIFC) Company Ltd* [2009] DIFC CFI 036 (31 March 2010), Justice Sir Anthony Colman had refused jurisdiction because the Claimant had named a Centre Establishment as a defendant but had failed to make any ‘coherent allegation’ against that party [60].

In *Bank Sarasin v. Al Khorafi* [2011] DIFC CA 011 (12 January 2012), the Defendant had argued that the claim lacked sufficient substance to exercise jurisdiction. Appearing to accept that the issue could be relevant, the Court of Appeal found that there was sufficient substance to exercise jurisdiction, provided one of the jurisdiction gateways was engaged [74].

In *Al-Mojil v. Protiviti Member Firm (Middle East) Ltd* [2015] DIFC CFI 020 (3 January 2016), the Defendant argued that the Claimant had not advanced an arguable claim on the basis of which jurisdiction could be established. At first instance, the Judge appeared to accept that such a merits' threshold applied but found that the claim was arguable [28].

The judge's decision in *Al-Mojil* was upheld on appeal [2016] DIFC CA 003 (23 August 2016). However, in *obiter* remarks, the Court of Appeal made clear that, at least in circumstances where the Court 'undoubtedly has jurisdiction' under one of the Article 5(A) gateways, it was not open to a Claimant to dispute jurisdiction on the basis that the claim is not reasonably arguable [72]–[74].

The Court warned that a defendant who adopted such an approach would be at 'real risk' of being deemed to have submitted to the jurisdiction. On the facts, it was held that the Defendant had not submitted on the basis that its application made clear that it was limited to disputing the Court's jurisdiction and did not seek any substantive relief on the claim.

With respect to the Court, the reasoning that submission might arise is open to question. The Judge relied on Goff LJ's reasoning in *Astro Exito Navegacion SA v. W T Hsu* [1984] 1 Lloyd's Rep 266. In that case, the English Court of Appeal had found that a combined application to strike out parts of the claim and for a stay on *forum non conveniens* grounds amounted to submission to the jurisdiction. However, that case was decided at a time when an application on *forum non conveniens* grounds was not considered to be an application disputing jurisdiction. As a result, the Defendant had taken steps in the proceedings (the application to strike out) without contesting jurisdiction, resulting in submission. It is therefore doubtful that the case can properly be regarded as authority for the proposition that a position taken in an application disputing jurisdiction could itself amount to submission.

JURISDICTION – *FORUM NON CONVENIENS*

A Defendant to a claim over which the DIFC Court has jurisdiction may be entitled to apply for a stay on *forum non conveniens* grounds: *Corinth Pipeworks SA v. Barclays Bank plc* [2011] DIFC CA 002 (22 January 2012) at [67]. This was necessary to limit a potentially exorbitant jurisdiction, particularly under gateway (a) which could otherwise give the DIFC Court jurisdiction over any claims brought by or against any DIFC Establishment regardless of the subject matter. In principle, an entity with a branch in the DIFC may bring any claim against any party in the DIFC Courts.

FNC doctrine does not apply where competing jurisdiction is in the UAE

The Court of Appeal in *Corinth* expressly left open the question of whether the doctrine of *forum non conveniens* (FNC) would apply where the alternative forum was the *Dubai* Courts [69]. That question was answered in the negative by H.E. Justice Ali Al Madhani in *Allianz v. Al Ain Insurance Company PJSC* [2012] DIFC CFI 012 (30 April 2013). The FNC doctrine does not apply where the competing jurisdiction is in the UAE.

The decision was followed by H.E. Justice Omar Al Muhairi in *Banyan Tree Corporate Pte Ltd v. Meydan Group* [2013] DIFC ARB 003 (27 May 2014). It was subsequently endorsed by the Court of Appeal in *IGPL v. Standard Chartered Bank* [2015] DIFC CA 004 (19 November 2015).

In his judgment, Justice Michael Hwang SC found that this conclusion was justified because (at that time) the power to decide which of several UAE courts was most appropriate to hear disputes rested exclusively with the Union Supreme Court under Article 99 of the UAE Constitution and Article 33 of the Supreme Court Establishment Law No. 10 of 1973 [181]–[191].

At first instance, Justice Sir David Steel had found that the FNC doctrine should not apply to resolve competing claims to jurisdiction by courts of *the same state* and that it was not appropriate for a court within the UAE to apply the FNC doctrine when other civil law courts of the UAE would *not* apply that doctrine. CJ Michael Hwang SC did not accept that argument and observed that it was not unusual for common law jurisdictions to apply the FNC doctrine in declining jurisdiction in favour of civil law jurisdictions [176]. Although the Chief Justice's judgment is drafted as if it is the judgment of the whole Court, in fact the other judges expressed agreement with the judgment of Justice Sir David Steel. It remains to be seen whether anything will turn on this in future cases.

The position has yet to be tested in the JJC. However, it is submitted that the JJC is likely to conclude that FNC has no application as between the DIFC and onshore Dubai for the reasons set out by the majority in *IGPL*.

DIFC Courts apply the two-stage *Spiliada* test

The application of the FNC doctrine where the rival jurisdiction is *outside* the UAE was considered by the Court of Appeal in *Protiviti Member Firm (Middle East) Limited v. Al Mojil* [2016] DIFC CA 003 (23 August 2016). The Court concluded that the broader principles (favouring international comity) which had developed under English law were better suited to the DIFC than the more restrictive doctrines which had been developed in Australia and the United States [32]–[33]. The Court thus confirmed that the two-stage test propounded by Lord Goff in *The Spiliada* [1987] AC 480 applied in the DIFC.

First, the Defendant must show that there is another available forum which is clearly or distinctly more appropriate than the DIFC. That question is considered by reference both to legal and practical issues. The exercise will generally involve identifying the natural forum for the claim and taking into account other factors which might affect the question, such as the applicable law, the language of the parties and the documents and the location of witnesses.

If the Defendant is able to satisfy the first test, the burden then switches to the Claimant to show that the interests of justice nonetheless require trial in the DIFC Courts. This may be the case if, for example, proceedings in a foreign jurisdiction would be subject to very substantial delay.

The above framework may apply even where the Court is not exercising an exorbitant jurisdiction, for example, where the defendant is domiciled in the DIFC (*Protiviti* at [35]).

Notwithstanding the emphasis in *Protiviti* on a broad approach to FNC so as to promote international comity, the trend in the case law suggests that the Court is adopting a more restrictive approach which may, in practice, not differ much from the Australian regime. Thus, the Court has expressly found the DIFC to be the *forum conveniens* and/or foreign courts to be the *forum non conveniens* in a number of recent cases even where there appeared to be strong connecting factors to the foreign courts.

Recent examples of application of FNC doctrine

In *Al-Mojil v. Protiviti Member Firm (Middle East) Ltd* [2015] DIFC CFI 020 (3 January 2016) itself, the Claimants claimed damages for losses said to have been caused by a report prepared by a DIFC-licensed entity for the Capital Markets Authority of Saudi Arabia. The report followed the suspension in trading of shares in a KSA company and concerned the management of the company in the period leading up to the suspension. Justice Omar Al Muhairi found that even if the KSA Courts had jurisdiction, he would have found that the DIFC was the more convenient forum because: (i) the Defendant was licensed in the DIFC and had no presence or licence in the KSA; (ii) the Claimants resided in the UAE and were subject to a travel ban in the KSA; (iii) the report, most of the documents and the evidence of most witnesses were likely to be in English; and (iv) there was no reason to suggest that the DIFC Court could not decide issues of KSA law [31]–[35]. The Court of Appeal refused to interfere with this decision. In particular, the Court of Appeal was not persuaded that, in substance, the dispute concerned the management of a KSA company, making it more appropriate for the KSA Courts to adjudicate.

In *IGPL*, the majority of the Court of Appeal agreed with the findings made *obiter* by Justice Sir David Steel that, *if* the FNC doctrine had applied to allocate jurisdiction as between the DIFC and Sharjah Courts in the banking dispute in that case, the relevant circumstances would not have pointed to the Sharjah Courts as being a distinctly more appropriate forum because: (i) only the DIFC Courts fell within the scope of the jurisdiction clauses in *all* of the relevant finance and security documents; (ii) all of the relevant agreements were in English and one was governed by English law; and (iii) there was no difference in physical convenience as Dubai and Sharjah are adjacent Emirates.

In *Tavira Securities Ltd v. Re Point Ventures* [2017] CFI 026 (17 December 2017), jurisdiction was founded solely on the basis that one of the parties had become a DIFC establishment *after* the events giving rise to the claim (see above). The Defendant's fall-back argument was that the Court should decline jurisdiction based on FNC grounds in circumstances where any contract between the parties was subject to an exclusive English jurisdiction clause, governed by English law and England was the place of the underlying performance of the contract. That argument was rejected. The Court concluded that it was not open to a party to seek to enforce an exclusive jurisdiction clause whilst at the same time disputing the existence of the contract, including the jurisdiction agreement contained within it. Moreover,

the question of whether the Court should enforce a contractual jurisdiction clause was distinct from the question of whether the jurisdiction chosen by the parties was in fact clearly or distinctly more appropriate. If a jurisdiction agreement is not to be enforced, it will have only 'slight relevance' to the FNC analysis [52]. In circumstances where: (i) the DIFC Court is familiar with English law; (ii) the language of the DIFC Court is predominantly English; (iii) most of the witnesses were based in Dubai; (iv) a judgment of the English Court would be more difficult to enforce in the likely enforcement jurisdiction (Dubai), the defendant failed to satisfy the first stage of the *Spiliada* test.

In *KBC Aldini Capital Limited v. Baazov* [2017] DIFC CFI 002 (24 September 2018), the sole basis for jurisdiction was that the Claimant was a DIFC establishment. Various causes of action, ranging from conspiracy to defamation, were alleged by the Claimant as a result of its having been named as an intending equity investor in a quoted Canadian company. The first defendant sought a stay on the grounds that the relevant duties arose as a matter of Canadian and US financial regulatory law and all relevant witnesses were based in Canada and the United States. The Court concluded that it was 'tolerably plain' that the issues relating to liability centred on events in Canada and the United States and expert evidence of foreign law would be required [31]. However, the witnesses and issues relating to alleged reputational damage were connected to the Middle East. The tipping factor appears to have been that the trial was going to proceed in any event against the second and third Defendants, which had not challenged the jurisdiction of the DIFC Courts and, therefore, a stay against the first Defendant was liable to result in multiple proceedings relating to a similar subject matter [38]–[40].

In considering the FNC doctrine, the DIFC Court appears to have focused on the practical consequences of a trial in the DIFC. In England, such cases have often turned on whether, in light of the subject matter of the case, it would be inappropriate for the English Court to adjudicate: see, for example, the comments of Jonathan Sumption QC (as he was) in *Ceskoslovenska v. Nomura* [2002] All ER (D) 157 [12].

Consideration on appeal of decisions on the FNC doctrine

In *Protiviti* on appeal [2016] DIFC CA 003 (23 August 2016), the Court of Appeal emphasised that a determination on a plea of FNC by a first instance judge involves an evaluation of different factors in which an appeal court should be slow to interfere. In the context of an appeal, it must be shown that the judge manifestly applied the wrong test, failed to take into account

relevant factors which he was obliged to have regard to, wrongly took into account irrelevant factors, or reached a conclusion that was plainly wrong [46].

JURISDICTION – OPTING IN

Construction of ‘Dubai Courts’, ‘UAE Courts’ and like words to include DIFC Courts

Following the amendment of the JAL in 2011, Article 5(A)(2) gave the DIFC Courts jurisdiction where the parties have expressly ‘opted in’ by written agreement ‘provided that such agreement is made pursuant to specific, clear and express provisions’. Debate in the authorities has largely turned on the meaning of words such as ‘Dubai Courts’ or ‘the Courts of Dubai’ in jurisdiction agreements. On the one hand, such phrases literally include reference to both the DIFC and non-DIFC Courts in Dubai. On the other, a party agreeing to the ‘Dubai Courts’ may be entirely unaware even of the existence of the DIFC Courts.

In *IGPL v. Standard Chartered Bank* [2015] DIFC CA 004 (19 November 2015), the Court of Appeal found that, while it is always a matter of construction of the particular agreement in its context, references to the ‘Dubai Courts’ and the ‘Courts of the UAE’ should normally be broadly construed to include both the DIFC and non-DIFC Courts of Dubai, so that the Claimant had been entitled to elect to bring its claims in the DIFC Courts [123]–[154]. The position is different where the point of construction arises in an arbitration agreement as there can be only one juridical seat. However, there is no reason in principle why parties cannot agree to the jurisdiction of both the DIFC and non-DIFC Courts.

The Court noted the recognition of Justice Sir John Chadwick in *Taaleem PJSC v. NBC & Deyaar* [2010] DIFC CFI 014 (21 November 2010) that the DIFC Courts were an integral part of the judicial system of Dubai and were Dubai Courts. The Court limited to its particular facts the conflicting decision in *Hardt v. DAMAC (DIFC) Company Ltd* [2009] DIFC CFI 036 (31 March 2010) that ‘Courts of Dubai’ meant the non-DIFC Courts of Dubai.

The ‘Dubai Courts’ or ‘Courts of Dubai’ could be read inclusively to refer to both the DIFC and non-DIFC Courts and confer jurisdiction on more than one forum. The words ‘Dubai Courts’ ‘must include all the courts and judicial committees formed within the territory of Dubai and established by the

Emirate's legislation, regardless of whether these courts exercise separate jurisdiction' [138].

The same approach was taken to 'the Courts of the UAE'. The phrase included all courts located in the UAE: [143]–[144].

Where a jurisdiction agreement could be read broadly to confer jurisdiction on more than one forum, it was for the Claimant to elect to sue in the court of its choice coming within the relevant wording [145].

Although *IGPL* was not referred to in the judgment, Justice Sir Jeremy Cooke reached a similar conclusion in *Sunteck Lifestyles Limited v. Al Tamimi and Co Ltd* [2017] DIFC CFI 048 (15 November 2017). A clause referring to 'the courts of the Emirate of Dubai', when construed against the factual background, were sufficient to confer jurisdiction onto the DIFC Courts [24].

However, where a clause makes no reference to a geographic area which the DIFC could fall within it will not be sufficient. In *EBI SA France v. Lal Mahal DMCC* [2016] DIFC CFI 024 (14 November 2016), the relevant clause provided for disputes to be resolved in France or any other country 'where jurisdiction may exist or be established'. That was not sufficient to confer jurisdiction [17].

Restrictive construction of reference to 'UAE Courts', 'Dubai Courts' and like words

Notwithstanding the conclusion and reasoning of the Court of Appeal in *IGPL*, some subsequent judgments, in particular in the SCT, have adopted a more restrictive approach.

In *Harold PJSC v. Hava* [2017] DIFC SCT 127 (22 June 2017), the Court concluded that a loan agreement which provided for the 'jurisdiction of the civil courts of the UAE' was not sufficient to confer jurisdiction on the DIFC Courts [18]–[20]. In *Ishtar Advocates & Legal Consultants v. Iniko* [2018] DIFC SCT 197 (8 July 2018), the Court concluded that a jurisdiction clause which made reference to the 'Courts of the UAE' or 'Dubai Courts' was not sufficient to opt-in to the jurisdiction of the DIFC Courts [33].

These decisions were followed by a judgment of H.E. Justice Ali Al Madhani in *Commercial Bank of Dubai PSC v. Ms/S Totor Restaurant and Lounge LLC* [2017] DIFC CFI 047 (23 January 2019). Whilst the decision on this issue was *obiter* because the Court determined it had jurisdiction on other grounds,

it concluded (without mentioning *IGPL*) that a reference to the ‘United Arab Emirates courts’ was not sufficiently clear to confer jurisdiction on the DIFC Courts because it ‘could refer to either DIFC or non-DIFC courts’ [41]. These decisions are difficult to reconcile with *IGPL*. It remains to be seen whether they are aberrations or form part of a trend in favour of a narrower approach.

Erroneous decisions that Article 32 of the CPC prevails over opt-in

A series of recent decisions of the SCT have suggested that parties may not be able to opt into the DIFC Courts in respect of disputes concerning real property in non-DIFC Dubai. In *Haloke v. Halil PJSC* [2017] DIFC SCT 049 (11 April 2017), a jurisdiction clause conferred jurisdiction on the ‘Courts of Dubai’ rather than the DIFC Courts. The Court distinguished *IGPL* on the basis that it was not concerned with real property based outside the DIFC. However, the Court appeared to conclude that, even if a jurisdiction clause had been expressly in favour of the DIFC Court, it would still not be effective to opt into the DIFC Court’s jurisdiction because the relevant property was in Dubai. Moreover, this conclusion applied regardless of whether the action was an action *in rem* or *in personam* [26]–[29]. However, the Court’s reasoning was based on an application of Article 32 of the CPC, which confers jurisdiction on the Courts in whose area the relevant real property is located. A similar conclusion was reached by the SCT in both *Halvar v. Hana* [2016] DIFC SCT 210 (22 January 2017) [20] and *Hackett v. Hania* [2017] DIFC SCT 034 (29 March 2017) [13]–[18]. In light of earlier authority which made clear that the CPC does *not* apply to the DIFC Courts, these decisions are best viewed as wrong.

It may be that the fact that the substantive dispute concerns non-DIFC property will be an important factor in the construction of the clause. There is no absolute rule that a clause in favour of ‘the Courts of Dubai’ confers jurisdiction on the DIFC Courts. It is always a matter of construction and the subject matter of the contract and the nature of the disputes likely to emerge from it may well have a bearing on that process.

Willingness of Courts to consider related agreements separately

Where related agreements contain inconsistent clauses in respect of jurisdiction, each agreement must be considered separately where possible (*Natixis S.A. Fast Telecom General Trading LLC* [2016] DIFC CFI 047 (15 January 2018, amended on 15 May 2018) at [13]).

No specific formality required of an opt-in

There is no specific formality required in order to comply with Article 5(A)(2). In *Sky News Arabia FZ-LLC v. Kassab Media FZ (LLC)* [2016] DIFC CA 010 (12 July 2017), the Court of Appeal emphasised that the relevant clause need not be included in the underlying contract, but that it would be sufficient for the parties to reach a simple agreement on jurisdiction through correspondence. However, merely issuing an invoice containing an opt-in clause which is not expressly or implicitly agreed to is not sufficient: *Ichro FZE v. Iesha* [2018] SCT 041 (5 February 2018).

The requirement that the agreement be ‘specific, clear and express’ was found to add little to the process of construction. Per Justice Sir Jeremy Cooke in *Sunteck Lifestyles Limited v. Al Tamimi and Co Ltd* [2017] DIFC CFI 048 (15 November 2017) at [24]: ‘If the parties have agreed to the jurisdiction of the DIFC Courts, on the proper construction of a jurisdiction clause, the agreement is, *ex hypothesi*, sufficiently specific, clear and express.’ The requirement may, however, produce a fine distinction between an opt-in that is *implicit* in the express wording of the agreement and one that is *implied* by reason of its being necessary or obvious, but in the latter case *not* express.

The Court has sought to assist parties opting in by providing in PD 1/2015 a model jurisdiction clause which will be taken by the Registry as being at least *prima facie* in compliance with the requirements of Article 5(A)(2) of Dubai Law No. 12 (i.e. a valid agreement to submit to DIFC jurisdiction).

Opting into the supervisory jurisdiction of the DIFC Courts

Parties can similarly opt into the *supervisory* jurisdiction of the DIFC Courts by agreeing to arbitration and choosing the DIFC as the seat. Strictly, the Court’s jurisdiction in relation to arbitration arises under Article 5(A)(1)(e) of the JAL, combined with the relevant provisions of the DIFC Arbitration Law. However, the authorities dealing with the construction of jurisdiction agreements are relevant in this context.

The analogy cannot be pressed too far, however. Whereas the ambiguities arising from agreement to the ‘Courts of Dubai’ may be solved by finding that both Courts have jurisdiction, that answer is not available where the parties choose ‘Dubai’ as the seat. As pointed out by Justice Hwang SC in *Dhir v. Waterfront Properties* [2009] DIFC CFI 011 (8 July 2009) and endorsed by the Court of Appeal in *IGPL v. Standard Chartered Bank* [2015] DIFC CA 004 (19 November 2015) at [136], an arbitration can have only one juridical seat.

When construing the choice of ‘Dubai’ as the seat, the term can mean only one of the DIFC or non-DIFC Dubai Courts.

In *Dhir*, Justice Hwang SC remarked that ‘the moral of this case is that, if parties want the DIFC Arbitration Law to apply and the DIFC Courts to have jurisdiction over an arbitration, they should expressly select the DIFC as the seat in their arbitration agreement’ [90]. Despite that, in some cases, the DIFC Courts have shown themselves willing to interpret the choice of ‘Dubai’ as the seat of an arbitration as a reference to the DIFC.

In *Brookfield Multiplex v. DIFC Investments* [2016] DIFC CFI 020, Justice Sir Jeremy Cooke reached the tentative view that an agreement to arbitration ‘in the Emirate of Dubai’ was likely to be an agreement to DIFC as the seat of the arbitration even though the DIFC had not existed at the time when the arbitration agreement had been made [46]–[47]. He did not need to decide the point, however.

The point did need to be decided by Justice Sir Jeremy Cooke in *Hayri International LLC v. Hazim Telecom Private Ltd* [2016] DIFC ARB 010. The parties had agreed to arbitration under the ‘Rules of the Arbitration of the DIFC’ and had selected the seat as ‘Dubai’. The Defendant had brought proceedings in Pakistan. The Claimant applied to the DIFC Court for an anti-suit injunction. The Court found that the rules being referred to were most likely the DIFC-LCIA Rules, while the seat was most likely intended to be the DIFC. As a result, the Court had supervisory jurisdiction and was able to issue an anti-suit injunction in support of the arbitration.

In *Vannin Capital PCC plc v. Al Khorafi & Ors* [2014] DIFC CFI 036 (18 February 2015), H.E. Justice Omar Al Muhairi rejected a jurisdiction challenge to an application by a third-party litigation funder for an interim order that monies recovered in the funded litigation be paid into Court. The relevant funding agreement contained an arbitration clause requiring the arbitration of any disputes in the DIFC-LCIA Arbitration Centre. The Court found that it had competent jurisdiction to hear the application for interim relief in support of the intended arbitral claim in circumstances where the DIFC Court was the supervisory court for DIFC-LCIA arbitrations and has jurisdiction to issue interim measures under Article 15 of the Arbitration Law (and Article 5(A)(1)(e) of the JAL) [18]–[25].

Choice of DIFC law

Whilst the judicial trend is to construe opt-in clauses broadly so as to confer jurisdiction on the DIFC Court, the position is less clear in relation to choices of DIFC law as the governing law. As with arbitration, it is not possible for two systems of law to apply: *National Bonds Corporation PJSC v. Taaleem PJSC & Ors* [2011] DIFC CA 001 (5 May 2011) at [38]. However, on a number of occasions, the DIFC Courts have found that reference to Dubai or UAE law was properly construed as a reference to DIFC law.

In *Taaleem*, the relevant contract was governed by ‘the laws of Dubai, UAE’. This was found to be a reference to DIFC law, principally because the function of the agreement was to regulate the relationship between beneficiaries under a trust, a concept unknown to non-DIFC Dubai law: see [46].

In *Gavin v. Gaynor* [2015] DIFC CFI 017 (3 April 2016), the opt-in clause provided for disputes to be ‘submitted to arbitration per the law of the United Arab Emirates’. The CFI construed that clause as referring to ‘UAE Laws applicable within the DIFC’. However, in *Sky News Arabia FZ-LLC v. Kassab Media FZ (LLC)* [2016] DIFC CA 010 (12 July 2017), the Court of Appeal held that the *ratio* of *Gaynor* was confined to determining the applicable *arbitration* law and procedure, rather than the applicable law of the contract. Further, the Court remitted to the trial judge the question of the governing law, based upon a clause which referred to the laws of the UAE ‘as applicable in the Emirate of Abu Dhabi’ [125]–[126]. The factual background is therefore likely to be of significant importance in determining how a governing law clause is to be construed.

Relevance of opt-in to enforceability outside DIFC of DIFC Court judgment

Parties deciding whether to opt into the DIFC Courts have historically been concerned to understand their prospects of enforcing that judgment elsewhere.

Enforcing a final DIFC judgment *onshore* in Dubai is generally seen as being straightforward under Article 7 of the JAL, requiring certain procedural steps and the submission of the judgment to the Execution Judge of Dubai.

The enforcement of a DIFC judgment *outside* Dubai will depend on whether the enforcing court accepts that the DIFC Courts are constitutionally courts of the UAE. A great deal of progress has been made on this issue by the

conclusion of Memoranda of Guidance with numerous other courts for the mutual enforcement of judgments.

Despite this, the DIFC Courts' Enforcement Guide 2018 continues to accept that '[i]n practice, ... some foreign courts may be slow to recognize the DIFC Courts as part of Dubai's judicial system' and accordingly '... it may be prudent to obtain a fast-track enforcement order from the Dubai Courts before then going on to seek enforcement further afield' [78].

What is clear, however, is that enforcement in other jurisdictions is likely to be significantly easier where the parties have 'opted in' to the DIFC Courts jurisdiction. That is because under nearly all treaty arrangements for mutual enforcement and at common law, it is a condition of enforcement that the originating court had jurisdiction by the relevant treaty gateways and/or under the law of the enforcing state. Agreement to the jurisdiction of the DIFC Courts is highly likely to satisfy that requirement.

The DIFC Courts are busier than ever. Empirical evidence suggests that jurisdiction and arbitration clauses in favour of the DIFC have dramatically increased in commercial contracts concluded within the Middle East and Asia, even where the contracting parties are based outside of the DIFC.

JURISDICTION – OPTING OUT

Implicit statutory right of parties to opt out of DIFC Court jurisdiction

In its original version, the JAL by what was then Article 5(A)(2) provided expressly for parties whose dispute would otherwise fall within the jurisdiction of the DIFC Courts to agree to submit their disputes to another Court. That provision was removed by the amendments in 2011. In its place, Article 5(A)(3) now reads:

The Court of First Instance may hear and determine any civil or commercial claims or actions falling within its jurisdiction if the parties agree in writing to submit to the jurisdiction of another court over the claim or action but such court dismisses such claim or action for lack of jurisdiction.

In *Al Khorafi v. Bank Sarasin-Alpen (ME) Ltd* [2011] DIFC CA 003 (5 January 2012) at [89]–[93], the Court of Appeal confirmed that this implicitly conferred on parties a right to opt *out* of DIFC Court jurisdiction.

The most significant issue in practice is commonly whether the party contending for the opt-out has discharged its burden of showing, as a matter of contractual construction, that the parties intended to opt out.

Implicit requirement that opt-out be specific, clear and express

In *Commercial Bank of Dubai PSC v. M/S Totor Restaurant and Lounge LLC* [2017] DIFC CFI 047 (23 January 2019), H.E. Justice Ali Al Madhani confirmed that the requirements of specificity and clarity in respect of opt-in clauses applied with equal force to opt-out clauses [40]. A non-exclusive jurisdiction clause in favour of another jurisdiction was not sufficient to constitute a ‘specific, clear and express’ opt-out clause: *Standard Chartered Bank v. Fal Oil Company Limited* (11 June 2018) [2016] DIFC CFI 018 [42]–[43].

Discretion of Court *not* to give effect to opt-out

The Court retains a discretion to refuse to enforce a jurisdiction agreement in favour of another Court. In *Al Khorafi v. Bank Sarasin-Alpen (ME) Ltd* [2011] DIFC CA 003 (5 January 2012), the Court of Appeal applied the English law approach set out in *Donoghue v. Armco* [2002] 1 Lloyd’s Rep 425, which is intended to prevent the fragmentation of litigation across a number of jurisdictions. The Court should give effect to a foreign jurisdiction agreement unless there is ‘strong cause’ not to do so.

In *Al Khorafi*, overturning the decision below of Hwang CJ, the Court of Appeal found ‘strong cause’ against enforcing an exclusive Swiss jurisdiction clause because claims against one of the two Defendants were governed by the clause, but claims against the other Defendant were not. There was therefore a risk of fragmentation of the claims between the DIFC and Switzerland and resulting ‘serious procedural dislocation’: [115]–[119].

Neither the application of Swiss law, nor the location of witnesses weighed heavily in the analysis [119].

The reasoning in *Al Khorafi* was applied in *Orion Holdings Overseas Limited (in liquidation) and Ors v. Mohammed Abu Al Haj* [2015] DIFC CFI 033 (8 February 2018). In that case, the Court overrode a jurisdiction clause in a pledge agreement concluded between the Claimants and the third Defendant, a Swiss Bank. The fact that there was likely to be a trial raising identical issues against the first and second Defendants in the DIFC, and the consequent risk of procedural dislocation, was determinative [13]–[14].

Defendant cannot rely on opt-out in agreement it denies ever having made

In *Tavira Securities Limited v. Re Point Ventures FZCO & Ors* [2017] DIFC CFI 026 (17 December 2017), the Defendants denied that they had entered into any contract with the Claimant at all. However, they nevertheless sought to rely on an exclusive jurisdiction agreement in favour of the English Courts contained in the Claimant's standard terms of business. Justice Sir Richard Field found that it was not open to them to do so. The position would no doubt be different if the Defendants' position had been that the contract had been concluded but had been terminated or avoided. Absent some vitiating factor affecting the jurisdiction agreement itself, it would be likely to survive the termination of the matrix contract.

DIFC Courts can stay proceedings in support of foreign arbitration agreement

There had been significant concern, not least from the DIFC Court itself, that it did not have jurisdiction to stay DIFC Court proceedings brought in breach of a 'foreign' *arbitration clause*. In *Injazat v. DWS* [2010] DIFC CFI 019 (6 March 2012), the Court accepted that the requirement to grant a stay in support of an arbitration agreement under Article 13(1) of the DIFC Arbitration Law was *expressly* limited under Article 7 to arbitrations seated in the DIFC, so that it could not be construed consistently with Article II of the New York Convention. The Court did not feel that it could rely on its residual jurisdiction, given the clarity of statutory provision in Articles 7 and 13 of the DIFC Arbitration Law [37]–[38].

That concern has been allayed by the later decision of the Court in *International Electromechanical Services v. Al Fattan Engineering LLC* [2012] DIFC CFI 004 (14 October 2012). In that case, the Court found that it *did* have an inherent jurisdiction to stay proceedings brought in breach of a foreign arbitration agreement. That was because: (i) the RDC, by 12.7(4) and 4.9 conferred a power on the Court of its own initiative to impose a stay [98]; (ii) the inherent jurisdiction possessed by the DIFC Court as a superior court of record was recognised in RDC 4.1 [99]–[100]; and (iii) the Court could refer, pursuant to Article 8(2) of DIFC Law No. 3 of 2004 and to RDC 2.10 to the applicable English law, which was to the effect that the Court could exercise its inherent jurisdiction, even in respect of matters expressly regulated by statute or rules, in order to maintain its authority and to prevent the obstruction or abuse of its process [101]. It found that Article 7 was in fact silent on whether the mandatory stay in Article 13 applied to non-DIFC

seated arbitration agreements and, more particularly, on whether the Court should have a *discretion* to stay pursuant to its inherent jurisdiction [110]–[112]. To the Court’s list of reasons might now be added; (iv) that the terms of the New York Convention have direct effect in DIFC law: see *Pearl Petroleum v. The Kurdistan Regional Government of Iraq* [2017] DIFC ARB 003 (20 August 2017), considering the application of the Riyadh Convention [55].

SOVEREIGN IMMUNITY

In *Pearl Petroleum Company Limited & Others v. The Kurdistan Regional Government of Iraq* [2017] DIFC ARB 003 (20 August 2017), the Defendant (KRG) sought to resist the enforcement of two LCIA arbitration awards totalling USD 2 billion against it in the DIFC. The arbitrations related to a contract under which KRG expressly waived ‘any claim to immunity for itself and its assets’. Notwithstanding that waiver, KRG contended that any questions relating to the applicability and scope of sovereign immunity fell within the scope of Article 120 of the UAE Constitution on the basis that they concerned foreign affairs and questions of public policy and therefore had to be resolved by the UAE Supreme Court. The Defendant’s position was therefore that (1) the Court lacked jurisdiction over the Defendant on grounds of sovereign immunity but that (2) the Court in fact had no jurisdiction to determine the sovereign immunity issue itself.

KRG’s argument was rejected in a robust judgment of Justice Sir Jeremy Cooke. The Judge concluded that KRG’s concession that sovereign immunity was a question of procedural law was itself sufficient to enable the Court to determine that issue.

On the true construction of the contract, the Court held that any claim to sovereign immunity had been waived. On that basis, the Court did not have to consider whether KRG was recognised by the UAE as a state and/or the recognition or scope of the doctrine of sovereign immunity under the laws of the UAE or DIFC. The Court did not need to decide whether a sovereign immunity defence could succeed in the absence of a waiver [64]. That issue therefore remains live for consideration in future. However, the Court noted that ‘at first blush’, statements by the Dubai Court of Cassation in *Central Bank of Sudan v. Africa Alpha Capital 1 Co Ltd* (Appeal No. 480/2012 Commercial) militated against any such applicable rule of law outside the specific terms of international treaties.

JURISDICTION – ANTI-SUIT INJUNCTIONS

Despite its stated view that Article 5(A)(1) of the Dubai JAL effects a mandatory allocation of jurisdiction as between the DIFC and (non-DIFC) Dubai Courts, the Court has been reluctant to grant anti-suit injunctions against parties pursuing claims in the Dubai Courts.

In *Taaleem v. National Bonds Corporation* [2010] DIFC CFI 014 (21 October 2010), Justice Sir John Chadwick refused to grant an anti-suit injunction restraining proceedings in the Dubai Courts, in circumstances where he had recently decided that the DIFC Court had exclusive jurisdiction over the claim.

That decision was followed in the related claim of *Ziad Azzam v. Deyaar Development PJSC* [2015] DIFC CFI 024 (9 December 2015). The DIFC Courts had recently adjudicated and dismissed Deyaar's counterclaim against Taaleem in *Taaleem v. NBC & Deyaar* [2010] DIFC CFI 014 (19 February 2014). Deyaar then sought to advance essentially the same claim against Taaleem's Chief Executive in the Dubai Courts. H.E. Justice Omar Al Muhairi refused to restrain Deyaar from pursuing those proceedings.

Justice Sir Jeremy Cooke expressed greater willingness to take that course in *Brookfield Multiplex v. DIFC Investments* [2016] DIFC CFI 020 (28 July 2016). In that case, the claimant applied for an anti-suit injunction to restrain proceedings in the Dubai Courts in alleged breach of an arbitration agreement. On the facts, Justice Sir Jeremy Cooke concluded that the purpose of the proceedings in Dubai was to obtain evidence which was consistent with the arbitration agreement. However, the Court expressly confirmed the existence of its jurisdiction and left open the possibility that, in a suitable case, the DIFC Court would be willing to exercise its jurisdiction to restrain claims before the Dubai Courts [38]–[40] and [49]. The Court, however, stressed that it would only be in an 'unusual and exceptional' case in which it would order injunctive relief in support of non-DIFC arbitration proceedings.

Brookfield concerned the enforcement of the negative pledge in an arbitration agreement not to sue the counterparty in Courts. However, the power to grant an anti-suit injunction is not limited to cases where there is a contractual right not to be sued.

In *Federal Express International Inc v. Abdul Latif Jameel Transportation Company* [2018] DIFC CFI 038 (15 July 2018), the Claimant sought to restrain an application in the US District Court for discovery under section 1728 of Title

28 of the United States Civil Code. Applying the conventional English law approach to such applications, the Court confirmed that, where an anti-suit injunction was based on non-contractual grounds, the Applicant must show that the foreign proceedings were vexatious and oppressive. The Court emphasised that this was a 'high standard' and went beyond the general *American Cyanamid* principles. This reasoning is consistent with the applicable test under English law, which requires an Applicant to establish its entitlement to relief to a 'high degree of probability'.

Similarly, in *ED&F Man Capital Markets MENA Ltd v. Hussain* [2018] DIFC CFI 015 (31 October 2018), H.E. Justice Omar Al Muhairi refused to grant an injunction restraining proceedings in Illinois. The burden on the Claimant was to show that the foreign proceedings were vexatious or oppressive [46].

There is only one reported case in which the DIFC Courts have to date granted an anti-suit injunction. In *Hayri International LLC v. Hazim Telecon Private Ltd* [2016] DIFC ARB 010 (9 March 2017), Justice Sir Jeremy Cooke granted an anti-suit injunction restraining the Defendant from pursuing proceedings otherwise than in DIFC arbitration. In the course of argument, the Judge indicated that there was nothing at all unusual about granting an anti-suit injunction to enforce a contractual right not to be sued. The case was approached on an entirely conventional English law analysis. The scope of the injunction does, however, warrant some comment. By its terms, the injunction restrained all court and arbitration proceedings, besides DIFC arbitration, wherever they might be. The Court appears not to have been concerned about the fact that, in principle, that included any proceedings in non-DIFC Dubai arbitration or in the non-DIFC Dubai Courts. This is likely because the injunction was primarily directed at restraining proceedings brought by the Defendant in Pakistan. At that stage, no party had intimated that there might be proceedings in non-DIFC Dubai.

JURISDICTION – INTERIM REMEDIES IN SUPPORT OF FOREIGN PROCEEDINGS

In some recent decisions, the DIFC Courts have indicated that they may have free-standing jurisdiction to grant interim remedies in support of non-DIFC arbitration and court proceedings. No reasoned judgments are available. However, in some cases, the reasoning appears from the Order itself.

In *SEC v. Wintercap SA* [2019] DIFC CFI 003 (4 March 2019), the SEC obtained a freezing order in aid of an interim order granted by the US District Court. H.E. Justice Shamlan al Sawalehi found that the DIFC Court had jurisdiction under Art 5(A)(1)(e) by reason of Article 32(b) of the DIFC Court Law and RDC Rules 25.1(6) and (7) and RDC 25.24. Article 32(b) of the Court Law (together with Article 22) sets out the Court's general power to grant injunctions. Rules 25.1(6) and (7) set out the Court's powers to grant interim freezing and disclosure orders. RDC 25.24 expressly envisages that interim orders may be sought in support of proceedings outside the DIFC.

Previous decisions had tended to indicate that the Court might not have such powers. In *Dhir v. Waterfront Properties* [2009] DIFC CFI 011 (8 July 2009), Deputy Chief Justice Hwang stated that the provisions of the DIFC Arbitration Law only conferred jurisdiction to grant interim measures in support of DIFC-seated arbitrations: at [74]–[78]. That decision did not however consider whether the Court Law or Court Rules might confer such jurisdiction and powers. In *CMOC Sale and Marketing Ltd v. Persons Unknown* [2017] DIFC CFI 052 (5 December 2017), Deputy Chief Justice Steel refused to grant an injunction in support of foreign proceedings, finding *inter alia* that the Court Rules could not independently create jurisdiction where none otherwise existed. That reasoning now appears to be *per incuriam*, following the Court of Appeal's decision in *Nest Investments Holding Lebanon S.A.L. & others v. Deloitte and Touch (M.E.) & Joseph El Fadl* [2018] DIFC CA 011 (13 March 2019). In addition to *Wintercap*, the editors are aware of at least one other case, *IMMS Ltd v. Bankmed SAL (DIFC Branch)* [2019] DIFC CFI 079 (25 November 2019) (oral judgment of Justice Sir Richard Field, transcribed); [2019] DIFC CA 013 (16 December 2019) (brief oral decision with reasons to follow), in which the Court at first instance and on appeal recognised its free-standing jurisdiction under the Rules to grant interim remedies in support of non-DIFC litigation.

The result may now be that the DIFC Courts will grant interim remedies in support of non-DIFC litigation and arbitration in appropriate case. If so, that is to be welcomed. The policy case in favour of such a jurisdiction is overwhelming and in line with the approach of other major international dispute resolution centres.