

AGREEMENTS TO RESOLVE DISPUTES IN THE "COURTS OF DUBAI" OR "DUBAI COURTS" MAY BE AN OPT-IN TO DIFC COURT JURISDICTION

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Dubai Litigation and Dispute Resolution Alert

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A recent decision of the DIFC Court of Appeal in *Goel and others*¹ has confirmed that a reference to the “Courts of Dubai” or “Dubai courts” may be sufficient to constitute a “specific, clear and express” agreement to opt in to the jurisdiction of the DIFC Courts pursuant Article 5(A)(2) of the Judicial Authority Law (JAL).²

By way of background, Credit Suisse (Switzerland) Limited commenced proceedings in the DIFC Courts to enforce guarantees provided by four individuals (the Guarantors). The underlying guarantee agreements had been entered into with Credit Suisse AG, a “DIFC Establishment” within the meaning of the JAL (the Guarantee Agreements). However, Credit Suisse AG and each of the Guarantors subsequently entered into guarantee transfer agreements, substituting Credit Suisse (Switzerland) Limited (a non-DIFC Establishment), for Credit Suisse AG, as the party to whom the Guarantors owed their obligations (Guarantee Transfer Agreements).

The applicable governing law was the laws of the Emirate of Dubai and the applicable Federal Laws of the United Arab Emirates (UAE). The parties agreed, pursuant to Clause 17.1 of the Guarantee Agreements, “*the Courts of Dubai shall have jurisdiction over all disputes arising under this Guarantee.*”

THE DECISION OF THE DIFC COURT OF FIRST INSTANCE

Credit Suisse (Switzerland) Limited applied to the DIFC Court of First Instance for a worldwide freezing order (WFO). The application was heard on an ex parte basis and dismissed due to lack of jurisdiction. Credit Suisse (Switzerland) Limited appealed ex parte to the DIFC Court of Appeal. The Court of Appeal found that the Judge at first instance should have held that there was a good arguable case that the Court had jurisdiction and, on that basis, should have made the WFO, leaving it open to the Guarantors to challenge the jurisdiction of the Court after having been served with the order.

Following receipt of notice of the WFO, the Guarantors challenged the Court's jurisdiction and applied for a declaration that the Court lacked jurisdiction to entertain the claim for a WFO. The application was heard by Justice Martin.

There was no dispute that, as Credit Suisse (Switzerland) Limited is not a DIFC Establishment, the DIFC Courts did not have jurisdiction by virtue of Article 5(A)(1) of the JAL. The issue was whether the parties had opted in to the jurisdiction of the DIFC Courts pursuant to Article 5(A)(2) of the JAL, which requires “specific, clear and express provisions”. This required the Court to interpret the parties' agreement under UAE law (the governing law of the contracts) to ascertain the mutual intention of the parties.

Justice Martin relied upon three prior decisions, in *Sunteck*,³ *Taaleem*,⁴ and *IGPL*⁵ to support the general proposition that “the test to be applied was the ordinary and natural meaning of the words of the jurisdiction agreement as they would have been mutually understood by the parties having regard to the background circumstances and the nature of the agreement and the context in which the words are used”. If the Court concludes that, as a matter of construction of their agreement, the parties did intend to confer jurisdiction upon the DIFC Courts to hear and determine a dispute of the kind that has arisen, those words will satisfy the requirement imposed by Article 5(A)(2) of the JAL for “specific, clear and express provisions.”

Justice Martin further noted that these prior cases confirm that:

- It is not necessary for a jurisdiction agreement to specifically refer to the “DIFC courts” or some variant of that expression to engage the gateway to jurisdiction in Article 5(A)(2) of the JAL;
- The phrases “courts of Dubai” or “Dubai courts” in their natural and ordinary meaning encompass all the courts established within the Emirate of Dubai, and therefore include both the DIFC Courts and the non-DIFC courts; and
- If one of the parties is, at the time that the agreement is signed, a DIFC Establishment, such that the parties would be taken to have known and understood that the DIFC courts would, by virtue of that fact, have exclusive jurisdiction within Dubai to determine disputes arising under that agreement, clear and express words would be required before it would be concluded that it was the mutual intention of the parties to exclude that jurisdiction.

Notwithstanding that *IGPL* involved an argument that the parties had agreed to “opt out” of the jurisdiction of the DIFC Courts, where the issue in this case was whether the parties had agreed to “opt in” to the jurisdiction of the DIFC Courts, Justice Martin held that the judgment in *IGPL* was particularly relevant given that: (a) the relevant agreements are governed by the applicable laws of the UAE; (b) the phraseology used in the jurisdiction agreements is substantially identical; and (c) at the time the jurisdiction agreements were entered into, one of the parties was a DIFC entity. He therefore considered that the Court was bound to apply the reasoning in *IGPL* to conclude that Clause 17.1 of each of the Guarantee Agreements embodied the mutual intention of the parties, at the time that the guarantees were signed, to confer jurisdiction upon all the courts of Dubai, including the DIFC Courts.

In reaching this conclusion, the fact that Credit Suisse AG was a DIFC Establishment at the time each Guarantee Agreement was signed was considered to be a factor that points very strongly towards the conclusion that it was the mutual intention of the parties that the DIFC Courts were to be included within the meaning of the expression “courts of Dubai.” According to *IGPL*, in such circumstances, a very clear and express indication of a mutual intention to exclude the jurisdiction of the DIFC Courts would have to be found, which was not present in this case.

It is also worth noting the weight placed by the Court on the fact that the Guarantee Agreements are governed by the laws of Dubai and applicable UAE federal laws, and not by DIFC law. Justice Martin stated that, while the adoption of the laws of the DIFC as the substantive law of the agreement provides a strong indication that the parties would have intended the DIFC Courts have jurisdiction, the converse proposition does not carry as much weight. That is because it is commonplace for the “opt in” jurisdiction of the DIFC Courts to involve the resolution of disputes governed by substantive laws other than the laws of the DIFC.

THE DIFC COURT OF APPEAL DECISION

The Guarantors appealed against the Court's conclusion that it had jurisdiction to hear and determine the substantive claims against the Guarantors including the request for a WFO.

The appeal was unsuccessful. The Court of Appeal confirmed that the parties' jurisdiction clause amounted to a valid agreement to opt in to the DIFC Courts' jurisdiction under Article 5(A)(2) of the JAL.

In dismissing the Guarantors' appeal, the Court of Appeal confirmed that, when the term “the courts of Dubai” is used in a contract, its ordinary meaning, absent context and purposes pointing in a different direction, refers to all of the courts of Dubai, including the DIFC Courts and onshore Dubai courts. The Court of Appeal further confirmed that it was appropriate to consider the intention of the parties when the Guarantee Agreements were originally executed with a DIFC Establishment, and noted that such construction did not change because of the transfer of the Guarantors' obligations to a non-DIFC Establishment under the Guarantee Transfer Agreements. The term “courts of Dubai” should still be taken to refer, as it did from the outset, to the DIFC Courts and to the other Dubai courts.

The Court then turned to the question of whether the use of the term “the courts of Dubai” is sufficiently clear for the purposes of the gateway to jurisdiction under Article 5(A)(2) of the JAL. The Court held that if, as a matter of contractual construction, the parties had intended to agree that the DIFC Courts would have jurisdiction over their disputes, it would be a “triumph of form over substance” to hold that they failed because they did not use the term “DIFC Courts.” Accordingly, the Court of Appeal held that the parties' agreement was sufficiently “specific, clear and express” to opt in to the jurisdiction of the DIFC Court.

COMMENT

Although this case reaffirms the DIFC Court's broad approach to jurisdiction, as the Court of Appeal emphasised in its closing remarks, the construction of terms such as “courts of Dubai” will depend upon their particular context, and, in this case, the history of the transaction in issue was central to the constructional conclusion.

This case once again highlights the importance of clear and precise drafting. If parties intend to include or exclude the jurisdiction of the DIFC Court, express language should be used to avoid any ambiguity and reduce the risk of disputes over jurisdiction.

FOOTNOTES

¹ (1) Ashok Kumar Goel (2) Sudhir Goyel (3) Manan Goel (4) Prerit Goel v Credit Suisse (Switzerland) Limited [2021] DIFC CA 002

² Law No. 12 of 2004 in respect of the Judicial Authority of the Dubai International Financial Centre, as amended

³ Sunteck Lifestyles Ltd v (1) Al Tamimi and Company Limited and (2) Grand Valley General Trading LLC [2017] DIFC CFI 048

⁴ Taaleem PJSC v (1) National Bonds Corporation PJSC and (2) Deyaar Development PJSC [2010] DIFC CFI 014

⁵ Investment Group Private Limited v Standard Chartered Bank [2015] DIFC CA 004

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