

The DIFC Court of Appeal confirms the broad scope of the jurisdiction of the DIFC Courts

The DIFC Court of Appeal has issued a seminal judgment settling many of the lingering doubts concerning the scope of the jurisdiction of the DIFC Courts. In *Standard Chartered Bank v Investment Group Private Limited*,¹ in which Clifford Chance represented Standard Chartered Bank, the DIFC Court of Appeal (CA) approved unanimously a judgment of the DIFC Court of First Instance (CFI) that held the doctrine of *forum non conveniens* does not operate to determine which court is the appropriate forum to hear and determine a case as between the courts of the UAE, which includes the DIFC Courts. The CA also took this opportunity to firmly endorse a series of DIFC Court judgments in favour of a broad interpretation of the legislation governing the scope of jurisdiction of the DIFC Courts, which clearly extends to entities with branches in the DIFC. The CA also clarified that the meaning of the words the "Dubai Courts" and the "Courts of the UAE", commonly seen in jurisdiction clauses in commercial contracts, may include the DIFC Courts.

Background

In August 2014, Standard Chartered Bank (SCB) brought a claim against Investment Group Private Limited (IGPL) before the CFI for outstanding debts under two loan agreements. IGPL challenged the jurisdiction of the DIFC Courts to hear and determine the claim. IGPL based its challenge on a common law doctrine known as *forum non conveniens* (FNC) which allows a court to decide whether to accept jurisdiction based on whether it or another court is the more appropriate forum, despite what the parties might have expressly agreed to be the forum.

Justice Sir David Steel, sitting as the CFI, rejected IGPL's challenge and ruled that FNC does not apply as between the courts of the UAE, which include the DIFC Courts.²

Initially, IGPL had also claimed that the DIFC Courts lacked jurisdiction on the basis of a proper interpretation of (1) the laws that determined the scope of the DIFC Courts' jurisdiction, and (2) the dispute resolution provisions of the relevant agreements that were the subject of the dispute. However, shortly before the hearing IGPL conceded that the DIFC Courts

had jurisdiction under the relevant laws (Jurisdiction Concession) and that the parties had not agreed to exclude the jurisdiction of the DIFC Courts (Choice of Court Concession). Therefore, the CFI only had to rule on the FNC argument.

IGPL appealed the decision of the CFI on the inapplicability of FNC. It also submitted that as IGPL had launched proceedings in the Sharjah Courts concerning the same issues as were before the DIFC Courts, the DIFC Courts should stay the case before it pending a determination of the jurisdiction of the Sharjah Courts to hear the claim filed by IGPL. IGPL based these arguments on provisions of the UAE Constitution and the Federal Civil Procedure Code.

¹ Case No CA-004-2015.

² See *DIFC Court confirms that forum non conveniens does not apply between the different courts of the UAE*, Clifford Chance LLP Briefing Note, January 2015.

In addition, IGPL sought to withdraw the Jurisdiction Concession and the Choice of Court Concession, which it had made shortly before the CFI hearing. The CA allowed the withdrawal of the Jurisdiction Concession but barred the withdrawal of the Choice of Court Concession. Notwithstanding this, the CA still provided a detailed opinion on whether the parties had agreed to opt out of the jurisdiction of the DIFC Courts. Whilst that part of the judgment is technically non-binding on the CFI, it is expected to carry significant weight.

The decision

On 19 November 2015, the CA, comprising Chief Justice Michael Hwang, H.E. Justice Omar Juma Al Muhairi, and Justice Sir Richard Field, issued a comprehensive judgment covering the wide range of arguments for and against DIFC Court jurisdiction in what appears to be an attempt to settle many of the doubts over the extent of the courts' jurisdiction. The key 'takeaways' from the judgment are as follows:

1. FNC is not applicable as a tool for determining jurisdiction between courts of the UAE, which includes the DIFC Courts. Therefore, if the CFI takes jurisdiction over a matter it will not consider whether another court in the UAE is the more appropriate forum, even if proceedings in that other court have already commenced. Under the UAE Constitution, the power to resolve any "conflict of jurisdiction" between UAE Courts (including the DIFC Courts) resides with the Union Supreme Court (USC) and therefore to apply FNC "would amount to a[n]

usurpation of the USC's constitutional function".³ Note that the DIFC Court will still apply FNC to determine whether it or a court of another state should have jurisdiction over a case as it has done before.⁴

2. The DIFC Courts have jurisdiction over claims involving Licensed DIFC Establishments, upholding what the CA called the "wide interpretation" of the DIFC Courts' enabling legislation and upholding a previous decision on the issue.⁵ In short, this means that an entity licensed by the DIFC is subject to the exclusive jurisdiction of the DIFC Courts unless the parties have agreed to opt out of that jurisdiction. In this case, SCB is a legal entity registered in the UK, is an establishment licensed by the DIFC and operates through a branch located in the DIFC. Therefore, the DIFC Courts have exclusive jurisdiction to hear and determine claims to which it, the legal entity – whether operating in or out of the DIFC – is a party. IGPL's argument that SCB's DIFC branch should be treated separately to the rest of SCB was firmly rejected.
3. Unless evidence is produced to prove otherwise, agreeing to the 'courts of Dubai' or the 'courts of the UAE' is not to be interpreted as excluding the DIFC Courts as the DIFC Courts are courts of Dubai and the UAE.
4. The above will not lead to the 'exorbitant jurisdiction' of the

DIFC Courts as FNC still works to limit DIFC Court jurisdiction if the courts of another state are the more appropriate forum, and, if the competitor forum is another court of the UAE then the provisions of the UAE Constitution intervene to refer two final and conflicting judgments on jurisdiction to the USC to determine the conflict.⁶

The implications

Defendants considering whether or not to challenge the jurisdiction of the DIFC Courts in similar cases will now need to assess carefully the merits of doing so in circumstances in which the CA has firmly endorsed the DIFC Courts' previous line of cases on the issue. That is particularly so in circumstances where (generally speaking) the losing party is obliged to pay the bulk (and sometimes all) of a winning party's costs in bringing or defending a jurisdiction challenge. Advisers should therefore be much more cautious when advising defendant clients to challenge DIFC Court jurisdiction when one party is a Licensed DIFC Establishment without clear evidence that the parties agreed to opt out of the DIFC Courts' jurisdiction.

Conversely, for claimants that have claims against Licensed DIFC Establishments, or Licensed DIFC Establishments which have claims against other parties, the road to securing the jurisdiction of the DIFC Courts has never been clearer. It is to be hoped that this judgment will reduce both the number of jurisdiction challenges before the DIFC Courts and the time and cost of those challenges which do proceed. It is good news for all users of the DIFC Courts.

³ Case No CA-004-2015, paragraph 189.

⁴ Case No CA-003-2011: *Al Khorafi and others v. Bank Sarasin-Alpen (ME) Limited and Bank Sarasin & Co. Limited*.

⁵ CA002/2011: *Corinth Pipework v Barclays Bank*.

⁶ Article 99, UAE Constitution.

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