

## DIFC Courts – Sovereign Immunity & Opt-In Jurisdiction

In two recent decisions, the DIFC Court has provided welcome guidance on the concept of sovereign immunity and how parties can opt-in to the DIFC Court's jurisdiction. This article outlines the key takeaways from the two decisions and some practical considerations for parties.

### SOVEREIGN IMMUNITY

The recent judgment of the DIFC Court of First Instance in *FAL Oil Company v Sharjah Electricity and Water Authority* has provided welcome guidance on the concept of sovereign immunity in the DIFC Courts.

The judgment arose out of FAL Oil Company's ("FAL") application to the DIFC Court for the recognition and ratification of a Sharjah Court judgement ordering the Sharjah Electricity and Water Company ("SEWA") to pay FAL an amount over 1 billion AED. SEWA opposed FAL's application on various grounds, including that SEWA is entitled to claim sovereign immunity.

The DIFC Court rejected SEWA's claim that it ought to be afforded immunity and considered the following key questions in the process:

- *Do the general principles of sovereign immunity apply in the DIFC Courts?*

The DIFC Court held that the general principles of sovereign immunity at common law and set out in Dicey Morris & Collins forms part of the procedural law of the DIFC Courts, including in relation to the recognition of judgments of other courts.

- *Are the Emirates immune to any action or proceedings in the courts of all other Emirates?*

The DIFC Court examined the UAE Constitution and noted that Article 99 of the Constitution confers jurisdiction on the Union Supreme Court to resolve disputes between any Emirates or conflicts of jurisdiction between judicial authorities in different Emirates. The UAE Constitution does not contemplate a general principle of inter-Emirate immunity. Rather, the UAE Constitution envisages that only the Union Supreme Court has jurisdiction to resolve claims relating to inter-Emirate immunity on a case by case basis.

- *Is SEWA entitled to the immunity to which Sharjah is entitled?*

The DIFC Court also went on to hold that even if the Emirate of Sharjah could claim immunity before the DIFC Court, that immunity does not extend to an entity like SEWA. In line with English law principles, the Court found

#### Key issues

##### *Sovereign Immunity*

- There is no general principle of inter-Emirate sovereign immunity in the UAE Constitution
- Where the state created a separate entity for commercial purposes there is a strong presumption that it should be viewed as separate from the state and not entitled to sovereign immunity.

##### *DIFC Court jurisdiction*

- The words "*the courts of Dubai*" in a jurisdiction clause could include the DIFC Courts.
- If parties intend to exclude the DIFC Courts jurisdiction they should expressly do so in the jurisdiction clause.

that where the state created a separate entity for commercial or industrial purposes, with its own management and budget, there is a strong presumption that it should be viewed as a separate entity. This presumption may be displaced if no effective separate existence can be established between the entity and the state.

Some of the factors that were determinative in the Court's judgment that SEWA was separate from the Emirate of Sharjah were:

- SEWA is a legal entity constituted by Decree in the Emirate of Sharjah and has a separate legal personality to Sharjah;
- The decree establishing SEWA expressly noted that only SEWA and not its chairman (appointed by the Ruler) were accountable to third parties for any of SEWA's actions/omissions;
- Both SEWA and Sharjah had previously argued before the Sharjah Courts that they were independent from each other.

Moreover, the DIFC Court also held that even if SEWA were able to claim immunity, it would not be able to do so in relation to FAL's application because the Sharjah Court's judgment arose from a series of transactions of a commercial character.

#### *A conduit for enforcing UAE Court judgments?*

SEWA also argued that the DIFC Court should refuse recognition of the Sharjah Court judgment because Fal would not be able to execute the DIFC Court judgment (recognising the Sharjah Court Judgment) against SEWA's assets in onshore Dubai due to certain statutory provisions that would apply in the Dubai Courts. The DIFC Court however rejected this argument noting that it is for the onshore Dubai Courts to decide whether to execute the Sharjah Court judgment through the conduit route of the DIFC Courts. It remains to be seen if the Dubai Courts enforce the DIFC Court judgment in this case.

The Fal judgment has provided clarity on the DIFC Courts' approach to the issue of sovereign immunity and may encourage parties to opt-in to the DIFC Courts' jurisdiction, particularly in contracts with government linked entities.

### **Opt-in to the DIFC Courts' jurisdiction**

In another recent judgment<sup>1</sup>, the DIFC Court of Appeal confirmed that the terms "*the courts of Dubai*" in a jurisdiction clause amounted to a valid opt-in to the DIFC Courts' jurisdiction under Article 5 (A) (2) of the Judicial Authority Law.

Credit Suisse (Switzerland) Limited claimed against four individual guarantors (with no DIFC connection) under a personal guarantee agreement. The personal guarantee had initially been entered into with Credit Suisse AG, which was a DIFC entity, but the agreement was subsequently assigned to Credit Suisse (Switzerland) Limited (a non- DIFC entity).

The DIFC Court held that the fact that Credit Suisse AG was a DIFC Establishment at the time the guarantee was signed indicated strongly that the mutual intention of the parties was that the DIFC Courts were to be included within the meaning of the term "*Courts of Dubai*". The fact that the guarantee was subsequently assigned to a non-DIFC Credit Suisse entity did not impact this interpretation. The DIFC Court's decision follows a series of cases which

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<sup>1</sup> *Ashok Kumar Goel & anor v. Credit Suisse (Switzerland) Limited CA 002/2021 dated 26 April 2021.*

upheld this proposition including the landmark judgment in *IGPL v. Standard Chartered Bank* where Clifford Chance represented the bank. However, as a warning, the DIFC Court noted that the construction of terms like "*courts of Dubai*" and the "*courts of the Emirate*" will ultimately depend on the factual context.

The case is another reminder that if parties intend to exclude or include the DIFC Courts' jurisdiction, they should expressly state so in their dispute resolution clause to avoid ambiguity.

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