

Syndicates Beware—DIFC Court Reaffirms Expansive Approach to Jurisdiction

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DIFC Court jurisdiction – Judicial Authority Law – Syndicated agreements

Introduction

In a decision that will be of particular interest for insurers and lenders entering into syndicated agreements, the Dubai International Financial Centre ("DIFC") Court of First Instance recently found that it had jurisdiction to hear a claim brought by four reinsurers (the "Claimants") for a declaration of nonliability, despite the fact that none of the parties to the claim were DIFC entities.¹ Jurisdiction existed because Zurich Insurance Co (DIFC Branch) ("Zurich DIFC"), a fifth reinsurer which had already conceded liability and was thus not a party to the proceedings, was a Licensed DIFC Establishment² and had executed and performed the relevant reinsurance contracts in the DIFC. The case is a useful reminder that the DIFC Courts will generally take an expansive approach to jurisdiction, and parties that have no connection with the DIFC can find themselves unintentionally before the DIFC Courts. Recommendations on how best to avoid this are set out below.

Background

1. The defendant, a Qatari insurance company (QIC) with a branch in onshore Dubai, had insured United Arab Bank (UAB) against criminal acts of its employees. QIC obtained reinsurance from a number of reinsurers, including the Claimants.
2. One of UAB's employees misappropriated customer funds and was found criminally liable. UAB paid AED 38 million to the customer as compensation, and claimed an indemnity for QIC under its insurance policy. QIC in turn claimed indemnity from its reinsurers.
3. Some reinsurers, including Zurich DIFC, accepted liability. The Claimants, however, contested liability, and sought a declaration from the DIFC Courts that they were not liable under the reinsurance contracts. QIC in response applied for a declaration that the DIFC Courts had no jurisdiction to hear the claim.

Contact Information

If you have any queries regarding the above, or disputes more broadly, the experienced team at Akin Gump is on hand to assist:

Graham Lovett

Partner

glovett@akingump.com

Dubai

+971 4.317.3040

Michael Stewart

Associate

stewartm@akingump.com

Dubai

+971 4.317.3044

The Reinsurance Contracts

4. The reinsurance was structured in five 'layers' (a primary layer and four excess layers), each with a different amount of insured liability. The reinsurers then subscribed for a percentage of the insured liability for a given layer. Importantly, each layer of insurance comprised of a single contract. Members of a reinsurance syndicate in respect of a layer were all parties to the same contract and did not have individual contracts with QIC.
5. The Claimants were subscribers to four of the contract layers. Zurich DIFC was also a subscriber to those four layers and thus a party to each of the four relevant contracts (the "Reinsurance Contracts").
6. The Reinsurance Contracts were in essentially identical terms, and said as follows regarding governing law and jurisdiction: "This contract...is in all respects to be construed in accordance with and governed by United Arab Emirates law only...[and] any dispute(s) arising out of or in connection with this contract are subject to the exclusive jurisdiction of the United Arab Emirates Courts" (the "Jurisdiction Clause").

Findings of the Court

7. The primary finding of the Court was that it had jurisdiction in respect of the claim under Article 5(A)(1)(b) of the JAL, which grants the DIFC Court of First Instance exclusive jurisdiction to hear and determine "[c]ivil 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...**" (emphasis added).
8. Zurich DIFC was party to the four Reinsurance Contracts. This was sufficient for the contracts to have been partly concluded in the DIFC and thus the jurisdiction gateway in Article 5(A)(1)(b) of the JAL applied. Interestingly, there was no direct evidence that the execution of the Reinsurance Contracts had occurred in the DIFC, with the Court content to find that "it is implicit in the status of Zurich DIFC as a Licensed DIFC Establishment that, when it signed...it did so in the DIFC". To this end, the Court emphasised that Zurich DIFC is only licensed to carry out insurance business in the DIFC.
9. Additionally, one of the Claimant reinsurers, Talbot Underwriting Limited ("Talbot"), had been represented in all negotiations by its DIFC subsidiary ("Talbot MENA") pursuant to a binding authority, and Talbot MENA had signed the two reinsurance contracts to which Talbot subscribed for and on behalf of Talbot. Like Zurich DIFC, Talbot MENA was at the relevant time a Licensed DIFC Establishment, and thus execution by Talbot MENA of the two reinsurance contracts was inferred to have occurred in the DIFC (again without any direct evidence). The Court found this was a further basis for jurisdiction in respect of those two reinsurance contracts.
10. The Court also noted that the reinsurance contracts, in addition to being partially concluded in the DIFC, were (or would be) partially performed in the DIFC, as the payment of premiums and claims were made to Zurich DIFC and Talbot MENA. This was another basis on which Article 5(A)(1)(b) of the JAL was satisfied.
11. Part performance in the DIFC was also enough to satisfy the gateway in Article 5(A)(1)(c) of the JAL, which gives the DIFC Court of First Instance exclusive jurisdiction in respect of civil and commercial claims "relating to any incident or transaction which has been wholly or partly performed within the DIFC and is

related to DIFC activities”. The Court found that Zurich DIFC and Talbot MENA were conducting ‘DIFC activities’ within the meaning of the definition set out in *Al Khorafi*.³

12. QIC had argued the following points in opposition to a finding of jurisdiction:
 - a. Zurich DIFC and Talbot MENA were not parties to the proceedings and thus not a valid source of jurisdiction under the JAL.
 - b. QIC had made arrangements for the reinsurance through a broker, and had no knowledge of where and with which reinsurers the contracts would be concluded.
 - c. The Court should take a holistic view of the matter, which recognised that neither Zurich DIFC nor Talbot MENA were parties to the proceedings and the link to the DIFC was tenuous at best.
 - d. The participation of each reinsurer at each layer was a separate contract, such that the participation by Zurich DIFC (or Talbot) could not ground jurisdiction in respect of the Claimants’ separate contracts.
13. Each of these contentions were firmly rejected: (a) to (c) because they ignored the clear terms of Article 5(A)(1)(b) of the JAL, and (d) because the reinsurance layers were very clearly structured as overarching contracts with individual subscribers, and that is how the parties had acted when alterations to the subscriptions were made.
14. The Court further noted in obiter that, even if it had been persuaded by QIC’s separate contracts argument, it would still have found it had jurisdiction in respect of the full claim. This was because, even if each subscription by a reinsurer was a separate contract, the two Talbot contracts would have satisfied the terms of Article 5(A)(1)(b) as they were concluded and part performed in the DIFC through their agent, Talbot MENA. This provided a jurisdictional ‘hook’ under the JAL in respect of one of the reinsurers. The claims of the remaining Claimant reinsurers could then be permitted to join the proceedings brought by Talbot pursuant to RDC 20.7, as it was desirable to determine the liability of the various reinsurers in one place.⁴ Pursuant to *Nest Investment* (and subsequent cases) the DIFC Court Rules are DIFC Regulations.⁵ RDC 20.7 read in conjunction with Article 5(A)(1)(e)⁶ of the JAL is therefore a freestanding basis of jurisdiction in respect of joined parties. The DIFC Court would therefore have had jurisdiction in respect of all the joined reinsurers.
15. The Claimant reinsurers had also relied on Article 5(A)(2) of the JAL⁷ as a source of jurisdiction, arguing that the Jurisdiction Clause, which conferred jurisdiction on the Courts of the United Arab Emirates, should properly be read as opting in to the jurisdiction of the DIFC Courts. The Court said that, in light of its finding on jurisdiction under Article 5(A)(1) of the JAL, there was no need to consider Article 5(A)(2) as the point was not decisive. However, the Court noted that it was an “uphill battle” for QIC to argue that the Jurisdiction Clause did not confer jurisdiction on the DIFC Courts, given it is well established that reference to the Courts of Dubai or the Courts of the United Arab Emirates in jurisdiction clauses will generally be taken include the DIFC Courts (which are both UAE Courts and Dubai Courts), unless on a proper construction, and in light of all the surrounding circumstances, the clause only conferred jurisdiction on a specific court or courts outside the DIFC.⁸

16. Curiously, it seems QIC did not argue (at least not squarely) that the Jurisdiction Clause **opted-out** of the jurisdiction of the DIFC Courts. As such, the obiter discussion regarding the Jurisdiction Clause was focused on whether the Claimants' submission was correct (i.e. whether the Jurisdiction Clause was an **opt-in** to DIFC Court jurisdiction under Article 5(A)(2)). This meant that the proper construction of the Jurisdiction Clause was not a decisive issue, as jurisdiction already existed under Article 5(A)(1) of the JAL. The expert evidence that QIC had sought to belatedly adduce on the construction of the Jurisdiction Clause was therefore refused, as it was contrary to the overriding objective to consider expert evidence on a non-decisive issue.
17. The better approach would have been for QIC to positively submit that the Jurisdiction Clause was an unequivocal opt-out of DIFC Court jurisdiction in favour of the on-shore courts (although as the Court noted, this would have been a difficult argument given the terms of the Jurisdiction Clause and the established case law in the DIFC Courts). The benefit of this approach is that the Court would have had to at least determine the issue, because the position in the DIFC Courts is that a clear opt-out of DIFC Court jurisdiction by the parties will be upheld, even if one or more of the exclusive jurisdiction gateways are satisfied in Article 5(A)(1) (although the Court does retain a discretion to retain the claim even where there is an opt-out of DIFC Court jurisdiction in limited circumstances).⁹
18. Overall, the decision of Justice Lord Angus Glennie, is the latest iteration of a clear trend in the DIFC Courts towards an expansive jurisdiction and a broad interpretation of the JAL. Whilst a first instance decision and thus not binding precedent, it was a carefully reasoned judgment and is likely to be followed in the future, not least because of the eminence of the Judge.

Lessons for Commercial Parties

19. There are several points of interest in the case for commercial parties, particularly those entering into syndicated facility or insurance agreements:
 - a. The DIFC Court can take jurisdiction even if none of the parties to a claim are connected to the DIFC, and even where the subject matter of the deal is outside the DIFC. This can occur, for instance, where a member of a contractual syndicate signs the contract in the DIFC, even though that party is not later involved in the case before the DIFC Court.
 - b. If desired, the best way of preventing the DIFC Court seizing jurisdiction is to draft a "specific, clear and express" opt-out agreement, which confers jurisdiction on a particular court outside the DIFC. As noted above, these clauses will generally be upheld by the DIFC Court, even if the DIFC Court would otherwise have jurisdiction.
 - c. Be wary of using DIFC entities as agents if you want to prevent the DIFC Courts seizing jurisdiction. Even if the actual party to a contract is not a DIFC entity, if it acts through an agent in the negotiation, conclusion or performance of the contract which is a DIFC entity, the DIFC Court may take jurisdiction in respect of disputes arising out of or relating to the contract.
 - d. Make sure you know your counter-parties as ignorance is no excuse. It is irrelevant to the jurisdiction of the DIFC Court whether a party is aware that its

counter-party is connected to the DIFC. This is important for insurance and facility agreements that are arranged through brokers or third parties.

¹ Order with Reasons of Justice Lord Angus Glennie dated 29 August 2022 in CFI 003/2022: (1) *American International Group UK Limited (as transferee of AIG Europe Limited)*, (2) *Markel Syndicate Management Limited*, (3) *Talbot Underwriting Limited*, (4) *Berkshire Hathaway International Insurance Ltd v Qatar Insurance Co. (branch of a foreign company)*.

² The Judicial Authority Law (law no. 12 of 2004) (JAL) defines Licensed DIFC Establishment 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".

³ (1) *Mr Rafed Abdel Mohsen Bader Al Khorafi* (2) *Mrs Amrah Ali Abdel Latif Al Hamad* (3) *Mrs Alia Mohamed Sulaiman Al Rifai v (1) Bank Sarasin-Alpen (ME) Limited* (2) *Bank Sarasin & Co. Ltd* [2011] DIFC CA 003 (5 January 2012) at [64]: "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".

⁴ RDC 20.7 provides: "The Court may order a person to be added as a new party if: (1) it is desirable to add the new party so that the Court can resolve all the matters in dispute in the proceedings; or (2) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the Court can resolve that issue".

⁵ *Nest Investment Holding Lebanon S.A.L. v Deloitte & Touche (M.E.)* [2018] DIFC CA 011; Order with Reasons of Justice Wayne Martin dated 3 November 2021 in CFI-041-2021: *Abraaj Investment Management Limited (in official liquidation) & Anor v KPMG Lower Gulf Limited & Ors*.

⁶ Article 5(A)(1)(e) of the JAL provides: "The Court of First Instance shall have exclusive jurisdiction to hear and determine...Any claim or action over which the Courts have jurisdiction in accordance with DIFC Laws and DIFC Regulations".

⁷ Article 5(A)(2) of the JAL provides: "The Court of First Instance may hear and determine any civil or commercial claims or actions where the parties agree in writing to file such claim or action with it whether before or after the dispute arises, provided that such agreement is made pursuant to specific, clear and express provisions".

⁸ *Investment Group Private Limited v Standard Chartered Bank* [2015] DIFC CA 004 at paragraphs [142]-[143]; *Credit Suisse (Switzerland) Ltd v Goel* [2018] DIFC CFI 066; *Laabika and Labhdi v Ladu and Lakesh* [2021] DIFC CA 008 at paragraphs [41]-[42]; and *Al Buhaira National Insurance Co v Horizon Energy LLC* [2021] DIFC CFI 098 at paragraph [12]

⁹ (1) *Mr Rafed Abdel Mohsen Bader Al Khorafi* (2) *Mrs Amrah Ali Abdel Latif Al Hamad* (3) *Mrs Alia Mohamed Sulaiman Al Rifai v (1) Bank Sarasin-Alpen (ME) Limited* (2) *Bank Sarasin & Co. Ltd* [2011] DIFC CA 003 (5 January 2012) at paragraphs [89] to [119]; and Order with Reasons of Justice Wayne Martin dated 3 November 2021 in CFI-041-2021: *Abraaj Investment Management Limited (in official liquidation) & Anor v KPMG Lower Gulf Limited & Ors* at paragraphs [143], [151] to [180]. See also Article 13 of DIFC Law No.10 of 2005 regarding the Application of Laws in the DIFC, which states that "[a] submission to the courts of a jurisdiction in a contract shall be effective".

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