

DIFC COURTS CASE UPDATE

Application to Joint Judicial Committee under Decree 19
to determine a "conflict of jurisdiction" no longer results
in an automatic stay of proceedings

APPLICATION TO JOINT JUDICIAL COMMITTEE UNDER DECREE 19 TO DETERMINE A "CONFLICT OF JURISDICTION" NO LONGER RESULTS IN AN AUTOMATIC STAY OF PROCEEDINGS

Emirates NBD Bank PJSC, HSBC Bank Middle East Limited, ICICI Bank UK Plc and others v KBBO CPG Investment LLC, Mr Khaleefa Butti Bin Omair Yousif Almuhamdi and His Excellency Saeed Mohamed Butti Mohamed Algebaisi and others [2021] CFI 045/2020¹ (the **Proceedings**)

AG's Dubai Commercial Litigation Team, led by Partner Shane Jury, Managing Associate Antonia Grieve-Yates and Associate Charlotte Davis, together with Finance and Debt Restructuring Partner Robin Hickman recently acted on behalf of a Syndicate of international banks (the **Syndicate**), in successfully obtaining:

- 1 an order to lift a stay of the DIFC Proceedings which had been imposed following referral of an alleged conflict of jurisdiction to the Joint Judicial Committee (the **JJC**) established by Dubai Decree No. 19 of 2016 (the **Decree**) and which had been pending since June 2020. The lifting of the stay allows the Syndicate to pursue claims against the Defendants including KBBO CPG Investment LLC (the **Defendants**) for payment of sums in excess of US \$300 million; and
- 2 an anti-suit injunction to restrain parallel proceedings commenced by certain of the Defendants in the onshore Dubai Courts (**Dubai Courts**). These proceedings had been used by the Relevant Defendants to assert a conflict of jurisdiction before the JJC.

This is a significant and welcomed decision for parties litigating in the region as the filing of a JJC petition has historically resulted in an automatic stay of DIFC Court and Dubai Court proceedings, often for long periods of time until the petition could be determined. The decision confirms that the DIFC Courts will take a robust position and not permit the use of guerrilla tactics engaged in by certain parties commencing unfounded parallel proceedings in the onshore Dubai Courts for the sole purpose of filing a petition to the JJC in order to be obtain a stay. Indeed, the reasons for the decision of the DIFC Court described the conduct of the Relevant Defendants as an "*appalling abuse of process*".

The decision is also remarkable as the DIFC Courts granted an anti-suit injunction to restrain the parallel proceedings filed in the Dubai Courts. The granting of this relief to protect the parties' agreement on jurisdiction or alternatively to prevent conduct that is vexatious, oppressive or unconscionable is a powerful tool available to litigants in DIFC Court proceedings in order to combat the kind of guerrilla tactics referenced above.

BACKGROUND

The Proceedings in the DIFC Courts had been filed by the Syndicate pursuant to an exclusive jurisdiction clause in the relevant agreements in favour of the DIFC Courts. The Syndicate relied upon this exclusive jurisdiction clause as a basis for jurisdiction; alternatively, they relied upon the fact that certain members of the Syndicate were incorporated and/or registered in the DIFC and therefore the DIFC Courts have exclusive jurisdiction in any event.

In mid-2020, during the course of a two day hearing to determine a number of applications including the variation of Worldwide Freezing Orders (in relation to which AG also acted for the Syndicate), a number of the Defendants (the **Relevant Defendants**) informed the DIFC Court and the Syndicate for the first time that they had commenced parallel proceedings in the Dubai Courts (despite having filed an Acknowledgment of Service indicating an intention to defend the DIFC Proceedings) and had submitted an application to the JJC pursuant to the Decree for determination of an alleged conflict of jurisdiction as between the DIFC Courts and Dubai Courts. The Judge, as per Article 5 of the Decree, took the view that he was forced to stay the DIFC proceedings.

It was submitted in the Dubai Court proceedings that the provisions of the Decree meant that the Dubai Court was also required to stay its proceedings but it did not do so. The Dubai Court proceedings pressed on, and the case was eventually reserved for judgment in July 2021. In contrast, the DIFC Court Proceedings remained stayed pending a decision from the JJC.

¹ The decision of the DIFC Court of First Instance (dated 16 August 2021) is accessible at the following link: <https://www.difccourts.ae/rules-decisions/judgments-orders/court-first-instance/cfi-045-2020-1-emirates-nbd-bank-pjsc-2-hsbc-bank-middle-east-limited-3-icici-bank-limited-bahrain-limited-4-icici-bank-uk-plc-5>.

BACKGROUND TO THE DIFC COURT APPLICATIONS

The Syndicate's application to lift the stay was made following recent a recent decision of the DIFC Court of Appeal (*Lakhan v Lamia*²) which revised the DIFC Court's practice (which has been described as an "*administrative practice*") of automatically imposing a stay on proceedings upon the mere presentation of a petition to the JJC.

In *Lakhan v Lamia*, the Court of Appeal held, "*Mere application to the JJC does not trigger a stay, and the Court must be satisfied that there is a conflict of jurisdiction*"³ *finding that* "...[m]ere existence of proceedings with the same claim in both of the Courts cannot be enough for conflict of jurisdiction".⁴ The DIFC Court is not required to stay proceedings unless it is satisfied that there is – in substance rather than form – a conflict of jurisdiction.

In light of this, the Syndicate's primary argument in support of an order lifting the stay in the Proceedings was that there was no conflict of jurisdiction between the DIFC Courts and the Dubai Courts because: (1) the Dubai Courts had not ruled on the Syndicate's objection to jurisdiction; and (2) all but one of the Relevant Defendants had already accepted the jurisdiction of the DIFC Courts by filing an Acknowledgment of Service indicating an intention to defend the Syndicate's claim on the merits and had applied for orders striking out and/or for immediate judgment on the claim.

The Syndicate also applied to the DIFC Courts for an anti-suit injunction, in order to restrain all but one of the Relevant Defendants from continuing their claim in the Dubai Courts. The application was brought on two alternative grounds:

- 1 the anti-suit injunction was necessary to protect the Syndicate's right to have the dispute determined by the DIFC Courts given the exclusive jurisdiction clause in the agreements. The proceedings brought in the Dubai Courts were in breach of that clause (the **First Ground**); and
- 2 the Relevant Defendants' conduct in commencing and pursuing the claims in the Dubai Courts was vexatious, oppressive or unconscionable (the **Second Ground**).

Whilst awaiting the DIFC Courts' decision on the two applications, the Dubai Court dismissed the Dubai Courts proceedings for lack of jurisdiction. The DIFC Courts subsequently granted both applications.

THE DECISION TO LIFT THE STAY

In making the order to lift the stay, Justice Martin observed as follows: "*it is clear that the Decree only operates where there is a dispute or conflict as to jurisdiction between the Dubai Courts and the DIFC Courts because both Courts have claimed or both Courts have disclaimed jurisdiction in relation to a particular dispute*".⁵ Justice Martin ruled that as the proceedings in the Dubai Courts had been dismissed for lack of jurisdiction, it followed that there was no conflict of jurisdiction between the two Courts, and no basis for the continuation of the stay in the DIFC Courts. Justice Martin did not clarify whether something short of an express ruling to accept or reject jurisdiction could constitute a "*conflict of jurisdiction*" but clarity on this point has been provided by other recent cases (see below).

THE DECISION TO GRANT THE ANTI-SUIT APPLICATION

The respondents to this application did not contest that there was a valid exclusive jurisdiction clause and that it was sufficiently arguable that the Dubai Court proceedings were brought in breach of that clause. The focus of the respondents' submissions was on issues of comity between the DIFC Courts and the Dubai Courts.

The respondents' submissions were rejected and the application was granted. In addition to finding that the First Ground was satisfied, Justice Martin also considered the alternative Second Ground and found this had been established. In particular, there was a need to prevent "*similar conduct*" to that already undertaken by the respondents in secretly commencing the parallel proceedings and filing the JJC petition. He stated that he "*respectfully agree[d] with Justice Cooke's description [at the hearing in mid-2020] of the [respondents'] conduct as "an appalling abuse of process"*.

² *Lakhan v Lamia* [2021] DIFC CA 001 (decision dated 8 April 2021).

³ *Ibid*, para. 31.

⁴ *Ibid*, para. 33. Justice Cooke clarified in *Abraaj Investments v KMPG LG* [2021] DIFC CFI 041 (decision dated 19 June 2021), paras. 4-5, that there is no conflict of jurisdiction unless and until both the DIFC Court and the Dubai Court have either accepted and positively exercised jurisdiction or declined it. There is some controversy as to whether this correctly reflects the law or whether something less than a positive decision is sufficient to cause a "conflict of jurisdiction" within the meaning of Decree 19. That issue will ultimately need to be resolved by the DIFC Court of Appeal.

⁵ *Emirates NBD Bank PJSC and others v KBBO CPG Investment LLC* 2020 DIFC CFI 045, para. 59 (decision dated 16 August 2021).

FURTHER CLARIFICATION ON WHAT CONSTITUTES A 'CONFLICT OF JURISDICTION' FOLLOWING LAKHAN⁶

The judgment in *KBBO* is one of several recent DIFC Court judgments (all delivered by Justice Martin) which have clarified what constitutes a 'conflict of jurisdiction' for the purposes of the Decree. These decisions have been made as a consequence of applications filed to lift stays following the *Lakhan* decision.

Further guidance was provided by Justice Martin in the recent decisions in two related *Five Holding* cases.⁷ In these cases, Justice Martin held that in considering whether there is a conflict of jurisdiction requiring a stay to be imposed, the Court must determine this on the basis of "*substance rather than form*"⁸ having regard to the two objectives of the Decree being 1) to minimise the potential for inconsistent or contradictory decisions; and 2) to avoid multiplicity of proceedings. Unlike in the *KBBO* case, the Court found that a "*conflict of jurisdiction*" existed in the *Five Holding* cases.

The "*substance rather than form*" approach was again endorsed in *Lancelot and others v Leedor and others*.⁹ In deciding to lift the stay in that case, Justice Martin helpfully summarised the relevant principles to be applied when determining if a conflict of jurisdiction exists for the purposes of the Decree:

"(a) The mere commencement of proceedings relating to the same dispute in both Courts will not, of itself, give rise to a conflict of jurisdiction which enlivens the operation of the Decree;

(b) Nor will an application to the [JJC], of itself, give rise to an automatic stay of proceedings in both Courts under Article 5 of the Decree;

(c) Rather, when an application is made to a Court for a stay of proceedings pursuant to Article 5 of the Decree, after application has been made to the [JJC], it will be necessary for that Court to determine whether there is in fact a conflict of jurisdiction as between the two Courts;

(d) A conflict will arise if both Courts exercise jurisdiction over the same dispute, or both decline to exercise jurisdiction over that dispute, or if both Courts issue inconsistent or contradictory judgments;

(e) A Court will not exercise jurisdiction so as to give rise to a conflict merely by proceeding to determine an objection to its jurisdiction;

(f) Whether or not each court has exercised jurisdiction in relation to the same dispute so as to give rise to a conflict of jurisdiction which engages the jurisdiction of the [JJC] will generally depend upon the facts and circumstances of the particular case;

(g) A Court will assess whether there is a conflict of jurisdiction in any particular case as a matter of substance rather than form, having regard to the evident objectives of the Decree which are:

(i) to minimize the risk of inconsistent or contradictory judgments or decisions; and

(ii) to avoid a multiplicity of proceedings with respect to the same dispute."

SIGNIFICANCE

The JJC was set up in June 2016 to determine conflicts of jurisdiction arising between the DIFC Courts and the Dubai Courts. Unfortunately, as noted above, this procedure has historically been abused in some cases by parties concocting artificial "conflicts of jurisdiction" in order to manufacture a JJC petition and halt proceedings. The decisions in the *KBBO*, *Five Holdings Limited* and *Lancelot* cases are exceptionally welcomed by DIFC Court practitioners. They bring clarity and mark a continued shift in the DIFC Courts' attitude towards parties who abuse the JJC process in an attempt to obstruct legitimate proceedings before the DIFC Courts. The DIFC Courts have laid down a clear marker that this behaviour will not be tolerated.

The Addleshaw Goddard team was led by Partner Shane Jury and included Antonia Grieve-Yates, Charlotte Davis and Malek Kassem.

Addleshaw Goddard instructed: Tom Montagu-Smith QC and Matthew Watson of XXIV Old Buildings Chambers.

⁶ *Lakhan v Lamia* [2021] DIFC CA 001 (decision dated 8 April 2021).

⁷ (1) *Five Holding Limited* (2) *Five Hotel Jumeirah Village LLC v Orient Unb Takaful PJSC* [2021] DIFC CFI 027 and (1) *Five Holding Limited* (2) *Five Hotel FZE v Qatar Insurance Company* [2021] DIFC CFI 028 (decision in both cases dated 4 August 2021).

⁸ *Ibid*, para. 77.

⁹ (1) *Lancelot and others v Leedor and others* [2020] DIFC CFI 060 (anonymised decision dated 9 August 2021).

For further information, please contact our Dubai team below.

SHANE JURY

Partner – Commercial
Disputes
+971 5 2273 4846
S.Jury@aglaw.com



ROBIN HICKMAN

Partner – Finance & Debt
Restructuring
+971 50 465 4755
R.Hickman@aglaw.com



ANTONIA GRIEVE-YATES

Managing Associate –
Commercial Disputes
+971 52 273 4858
A.Grieve-Yates@aglaw.com



CHARLOTTE DAVIS

Associate – Commercial
Disputes
+971 5 5487 4324
C.Davis@aglaw.com



**PROBLEMS. POSSIBILITIES.
COMPLEXITY. CLARITY.
OBSTACLES. OPPORTUNITIES.
THE DIFFERENCE IS IMAGINATION.**

addleshawgoddard.com

© Addleshaw Goddard LLP. This document is for general information only and is correct as at the publication date. It is not legal advice, and Addleshaw Goddard assumes no duty of care or liability to any party in respect of its content. Addleshaw Goddard is an international legal practice carried on by Addleshaw Goddard LLP and its affiliated undertakings – please refer to the Legal Notices section of our website for country-specific regulatory information.

If you prefer not to receive promotional material from us, please email us at unsubscribe@addleshawgoddard.com. For further information, including about how we process your personal data, please consult our website www.addleshawgoddard.com or www.aglaw.com.