

GOEL & ORS V CREDIT SUISSE (SWITZERLAND) LTD:

DIFC JURISDICTION CLAUSES CONSIDERED

A Case Note from the 2TG Commercial Dispute Resolution Team

Summer 2021

Introduction

1. On 26th April 2021, the Court of Appeal of the Dubai International Financial Centre (the "DIFC") handed down judgment in *Goel & Ors v Credit Suisse (Switzerland) Limited* [2021] DIFC CA 002, upholding the decision of Justice Wayne Martin to dismiss the Appellant's application for a declaration that the DIFC Courts do not have jurisdiction in proceedings brought against them by the Respondent.
2. This case is significant to all DIFC Court practitioners as it is the first time the Court of Appeal has considered whether a party had chosen to "opt in" to the jurisdiction under Article 5(A)(2) of the Judicial Authority Law, Dubai Law No. 12 of 2004 (the "JAL") as amended by Dubai Law No. 16 of 2011.



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The Facts

3. In May 2016, the Appellants entered into an agreement with Credit Suisse AG (a Swiss company which was also a "DIFC Establishment" under Article 2 of the JAL), guaranteeing the performance of various borrowers (the "Guarantee Agreement").
4. In September 2016, the Appellants and Credit Suisse AG, entered into a further agreement substituting the Respondent (a Swiss company which was not a DIFC Establishment), for Credit Suisse AG (the "Transfer Agreement").

5. The Guarantee Agreement included a governing law clause applying the “laws of the Emirate of Dubai and the applicable Federal Laws of the United Arab Emirates” (Clause 16) and a jurisdiction clause (Clause 17) as follows:

17. Enforcement

17.1 The Guarantor hereby agrees, for the benefit of the Lender, that the Courts of Dubai shall have jurisdiction over all disputes arising under this Guarantee.

17.2 Notwithstanding clause 17.1, the Lender shall be entitled to initiate legal proceedings before any other competent court.

6. The Transfer Agreement likewise applied the laws of the Emirate Dubai and provided that it shall be subject to the same jurisdiction clause as the Guarantee Agreement (Clause 7).
7. In August 2020, the Appellant applied *ex parte* for a worldwide freezing order against each of the Respondents (the “WFO”), pending its intended claim against them arising out of the Guarantee and Transfer Agreement. The application was initially refused on grounds of jurisdiction but was subsequently granted on 13th September 2020 after the Court of Appeal ruled¹ that the Judge at first instance should have held that there was a good arguable case that the Court had jurisdiction.

8. After the Respondents received notice of the WFO they applied to the Court for a declaration that it lacked jurisdiction and for dismissal of proceedings on that basis. At first instance, Justice Martin dismissed the Appellants’ application, finding that the Court did have jurisdiction to determine the proceedings.

The “Opt In” provision of the JAL

9. Article 5 of the JAL sets out the jurisdiction of the DIFC Court of First Instance (the “CFI”). The Appellant did not argue for the applicability of any of the five jurisdictional “gateways” contained within Article 5(A)(1)² but rather for the applicability of 5(A)(2) which allows for parties to “opt in” to the jurisdiction of the DIFC where the Article 5(A)(1) gateways do not apply. Article 5(A)(2) provides as follows:

“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.”

10. Article 5(A)(2), prior to its amendment by Dubai Law No. 16 of 2011, was an “opt out” provision permitting parties to agree to “submit to the jurisdiction of any other court” notwithstanding that certain Article 5(A)(1) gateways (as they then were) were satisfied.

¹ [2020] DIFC CA 008

² However, it is relevant (as will be discussed) that under Article 5(A)(1)(a), the CFI has “exclusive jurisdiction to hear and determine... Civil or commercial claims and actions to which... any DIFC Establishment... is a party.”

The Issues

11. The Court of Appeal considered that there were two issues to be determined under the appeal:

11.1. The correct construction of Clause 17 in the Credit Agreement read with the Transfer Agreement; and

11.2. If Clause 17 confers jurisdiction on the DIFC Court, whether it is effective to enliven the jurisdiction of the CFI pursuant to Article 5(A)(2).

The Decision

Issue 1: The construction of the Credit Agreement's jurisdiction clause

12. As a preliminary point, the Court of Appeal was applying UAE Law (pursuant to Clause 16 of the Credit Agreement) when determining the proper construction of the jurisdiction clause. In this regard, the summary of the relevant law by Justice Martin was cited by the Court of Appeal without disapproval:³

12.1. The relevant provisions of the UAE Civil Code are Articles 258 and 265 which set out, in broad terms, the approach to contractual construction under UAE Law.

12.2. The approach to contractual interpretation under UAE Law is

generally the same as the common law. As previously stated in the Court of Appeal decision of *Investment Group Private Limited v Standard Chartered Bank* [2015] DIFC CA 004: "... 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."⁴

13. The Court of Appeal held that by Clause 17 (and, specifically, its reference to the "courts of Dubai") the parties had agreed that the CFI should "continue to be a repository of jurisdiction over their disputes."⁵ In making this finding, the Court of Appeal observed the following:

13.1. Prior cases⁶ all point to a default position in which the CFI is included in the terminology the "courts of Dubai" along with the onshore courts.⁷ Its ordinary meaning, "absent context and purposes pointing in a different direction" refers to all of the courts of Dubai.⁸

13.2. As Credit Suisse AG was a DIFC Establishment, the CFI had exclusive jurisdiction in relation to disputes arising under the Credit Agreement prior to the

³ At [37 – 40]

⁴ At [125]

⁵ At [96]

⁶ The Court of Appeal reviewed the cases of *Taaleem PJSC v National Bonds Corporation PJSC and Anor* [2010] DIFC CFI 014, *Investment Group Private Limited v Standard Chartered Bank* [2015] DIFC CA 004 and *Sunteck Lifestyles Ltd v Al*

Tamimi and Company Limited & Anor [2017] DIFC CFI 048. In these three cases, jurisdiction was challenged (unsuccessfully) on the basis that the parties had chosen to "opt out" of the jurisdiction by virtue of jurisdiction clauses materially similar to the instant case.

⁷ At [91]

⁸ At [89]

Transfer Agreement.⁹ There is nothing to suggest that the parties had chosen to have “opted out” of the jurisdiction of the DIFC by the use of the phrase the “courts of Dubai” given the default position on its construction described above.¹⁰

13.3. The construction of Clause 17 did not change upon the execution of the Transfer Agreement particularly as Clause 7 expressly states that it will be subject to the same jurisdiction clause as the Credit Agreement.¹¹

13.4. The parties’ choice of UAE Law as the governing law did not affect the proper construction of Clause 17. The choice of governing law “is not determinative of the choice of jurisdiction”.¹²

Issue 2: the applicability of Article 5(A)(2), JAL

14. In respect of the second issue, the Court of Appeal held that the wording of Clause 17 was sufficient to enliven the jurisdiction conferred by Article 5(A)(2):

14.1. The primary argument made against this conclusion was that the words “Courts of Dubai” are not “specific, clear and express” as required by Article 5(A)(2). However, the Court of Appeal considered that “it would be a triumph of form over substance”¹³ to hold that

Article 5(A)(2) had not been satisfied once it had been accepted, as a matter of construction, that the parties had intended to agree that the CFI should have jurisdiction over their disputes.

14.2. The Court of Appeal also rejected the Appellants’ argument concerning the effect of the Protocol of Jurisdiction between DIFC Courts and Dubai Courts (the “Protocol”), signed into force on 7 December 2009 for the purpose of avoiding jurisdictional disputes between the DIFC and onshore courts. The Appellants argued that by virtue of the Protocol, there should be no case in which the courts differ as to which has jurisdiction (a potential situation where the phrase “courts of Dubai”, by itself, refers to both the DIFC and the onshore courts). However the Court of Appeal held that the Protocol cannot determine the correct interpretation of Article 5(A)(2).

Discussion

15. This decision follows a line of prior authority holding that terms such as the “courts of Dubai”, without more, include reference to the CFI. The significance of this case is that it is the first to determine that such a phrase (which, as the Court of Appeal noted, can refer to either the DIFC or the onshore courts) is sufficient to enliven the jurisdiction of Article 5(A)(2) which

⁹ The Court noted that in these circumstances, even though Credit Suisse AG was no longer a party to the agreement, an argument could be made that jurisdiction was therefore established on the basis of the DIFC Court Law, DIFC Law No 10 of 2004, clause 19(1)(b) which provides jurisdiction over disputes arising out of contracts concluded by a DIFC establishment. No finding was made either way as no submissions were made on the point (at [22]).

¹⁰ At [92]

¹¹ At [93]

¹² At [99]

¹³ At [95-96]

expressly requires a “specific, clear and express” agreement. In so doing, the Court of Appeal has indicated that the primary (or perhaps even determinative) question when considering whether parties to an agreement have “opted in” under Article 5(A)(2) remains that of contractual construction in accordance with the relevant agreement’s governing law. Indeed, it could be argued that if the question of the parties intentions is determinative, the requirement that the agreement be “specific, clear and express” adds little to the considerations already inherent in the contractual construction process (save for ruling out an implied agreement).

16. Consistent with this, the Court of Appeal emphasised that the proper construction of terms such as “courts of Dubai” will be dependent upon context and that the history of the transactions in issue in the case were “central to the constructional conclusion.”¹⁴ This begs the question as to whether the Court of Appeal’s conclusions would have differed had Credit Suisse AG not been a DIFC Establishment (such that Article 5(A)(1)(a) could not have conferred jurisdiction in respect of disputes prior to the Transfer Agreement). In any event, as the Court of Appeal noted, while (as this case demonstrates) Article 5(A)(2) does not require express reference *in terms* to the “DIFC Courts”, parties wishing to satisfy its requirements would be well advised to make such a reference so as to remove the potential for uncertainty.

Conclusion

17. This decision provides welcome clarification as to the scope of Article 5(A)(2) of the JAL. It establishes the primacy of the question of contractual construction when determining whether Article 5(A)(2) has been satisfied. More specifically, it confirms that jurisdiction agreements which, on their face, refer to both the DIFC and the onshore courts, can be sufficient to satisfy the Article’s requirements.
18. As the Court of Appeal warned however, where construction is determinative, each case will turn on its facts. Accordingly, parties would be well advised to be as specific as possible when seeking to enter into jurisdiction agreements in favour of the DIFC Courts.

Disclaimer

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¹⁴ At [100]

ABOUT THE AUTHOR



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James has a diverse commercial practice and has gained particular experience in cases concerning contract interpretation and shareholder disputes. He has worked on a number of cases before the DIFC Courts, including:

- Acting (led by Timothy Killen) in a multi-million dollar DIFC Courts cross-border fraud claim concerning alleged breach of fiduciary duties, trust and contract.
- Assisting with a high value DIFC Courts claim concerning the proper shareholding of a Dubai company.

Other commercial cases of note include:

- *Al Jaber & Ors v Salfiti & Ors* [2021] – acting (led by Olivier Kalfon and Zac Sammour) for the First, Third and Fifth Defendants in a multi-million pound cross-border fraud claim involving claims for breach of directors' duties, knowing receipt, dishonest assistance, breach of trust and conspiracy by unlawful means.
- *O'Toole v Demarca Gaming Limited* [2020] – acting as sole counsel for the defendant in a successful jurisdiction challenge to a breach of contract claim against a Maltese casino.
- *Liberty Partnership Ltd v Tancred* [2020] – acting as sole counsel for the defendant in a longstanding dispute concerning alleged breaches of a share purchase agreement.
- *Riddel v Laffey* [2020] – acting as sole counsel in a restitution and breach of trust claim against a waste processing company.
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