

DIFC court jurisdiction—clarifying an ‘opt-in’ (Sunteck Lifestyles v (1) Al Tamimi and Company (2) Grand Valley General Trading)

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Arbitration analysis: What constitutes an effective ‘opt in’ to a court’s off-shore jurisdiction? Rupert Reed QC of Serle Court Chambers, who acted for the claimants in the case, considers the judgment in Sunteck Lifestyles Ltd v (1) Al Tamimi and Company Limited (2) Grand Valley General Trading LLC and explains the wider implications for litigation practitioners.

Original news

Sunteck Lifestyles Limited v (1) Al Tamimi And Company Limited (2) Grand Valley General Trading Llc [CFI 048/2017](#)

What are the practical implications of the judgment for arbitration practitioners?

The case is primarily of importance to litigation practitioners in the Dubai International Financial Centre (DIFC), Dubai, and the United Arab Emirates (UAE) in clarifying what is required in order to ‘opt in’ to the jurisdiction of the off-shore DIFC courts and in effect to ‘opt out’ of the jurisdiction of the on-shore Dubai and UAE courts.

However, to the extent that any dispute arose under a related joint venture agreement and that agreement contained provision for the London Court of International Arbitration (LCIA) in Singapore, the decision may implicitly confirm the finding in *Dhir v Waterfront Property Investment Ltd* [2009] DIFC CFI 011 (8 July 2009) that the DIFC court may not give interim relief in support of a foreign-seated arbitration in the absence of any other ‘original’ jurisdiction.

What, in brief, was the background to the judgment?

There was an underlying dispute between two joint venture parties in respect of the financing of the development of a tower in Dubai’s Downtown. The second defendant (GV) had purported to serve a ‘long stop date’ notice on the claimant (SL), requiring the first defendant (AT) as escrow agent to release to GV all SL’s shares in the joint venture company, likely to be worth AED 315m. SL disputed the validity of that notice.

The escrow agreement (EA) provided that it would be governed by ‘the law of the UAE as applied by the courts of Dubai’ and that the parties consented to ‘the jurisdiction of the courts of Dubai’.

The underlying joint venture agreement (JVA) provided that it would be governed by ‘the applicable federal laws of the UAE and the laws applicable in the Emirate of Dubai’ and that disputes would be resolved by LCIA arbitration seated in Singapore.

The judge, Justice Sir Jeremy Cooke, had already made an ex parte injunction against AT’s release of the shares. GV at the return date applied to have that injunction set aside.

What issues were before the court?

The first issue was as to whether ATM was a corporate entity with that name in the DIFC or another such entity in on-shore Dubai. The court found that because the notice provision in the EA required notice to be given to AT’s office in the DIFC, this was the DIFC entity.

The central issue was whether the DIFC court had jurisdiction. SL argued that:

- the provision in the EA for the jurisdiction of the ‘courts of Dubai’ was an effective ‘opt in’ to DIFC court jurisdiction under Article 5A(2) of the Dubai Judicial Authority Law (JAL), or
- it was not an effective ‘opt out’ of DIFC jurisdiction, and the DIFC court had ‘party’ jurisdiction under Article 5A(1)(a) of the JAL because AT was a licensed DIFC establishment

The interest in this issue arose because there was no authority as to the meaning of the requirement in Article 5A(2) of the JAL that any ‘opt in’ be made in ‘specific, clear and express provisions’ since the amendment of Article 5A of the JAL in 2011 in order to add the ‘opt in’.

What did the court decide?

The court found that the DIFC court did have jurisdiction. The judge referred to earlier authorities as having established that where the relevant words referred simply to the courts of Dubai or equivalent words, the court had to determine

whether that meant the DIFC Courts or the on-shore Dubai courts on the basis of the context, including both the contract itself and the surrounding circumstances.

All the facts of this case led to a conclusion that the reference was to the DIFC courts. In particular, AT was a DIFC entity, and so the shares would be (and were in fact) held by a DIFC entity in the DIFC. Release of the shares was envisaged by GV as involving the collection of the certificates from the office of that DIFC entity. The underlying JVA provided for LCIA arbitration in Singapore, a common law jurisdiction. The relevant partner at AT was a New Zealand qualified lawyer, and the EA was in the English language.

Accordingly, the court found an effective 'opt in' to DIFC court jurisdiction, and there was no need to consider SL's alternative case against there being any 'opt out'.

How does this decision sit in context?

Two questions arose on the judge's application of the old authorities:

- Was the burden on the claimant to establish its 'opt in'?
- What was the effect of the proviso that any 'opt in' be by 'specific, clear and express provision'?

Reversal of the reasoning in the older 'opt out' cases—including *NBC v Taaleem* [2011] DIFC CA 001, *Corinth Pipeworks v Barclays* [2011] DIFC CA 002, *Injazat v DWS* [2010] DIFC CFI 019—would have suggested that the burden should be on the claimant asserting DIFC court jurisdiction. However, the court made no such finding in this case.

As for the proviso, the judge rejected a suggestion that the need to construe the words 'courts of Dubai', in accordance with the approach taken in the older 'opt out' cases, by and of itself meant that the provision was not 'specific, clear and express'. The court must first construe the jurisdiction provision and then determine whether it satisfies the proviso. The judge emphasised that neither the proviso nor PD No 1 of 2015 required that any jurisdiction clause identify the DIFC court in such or equivalent terms.

The judge concluded his consideration of that issue by noting that:

'...[a]t the end of the day, it would be nonsensical to conclude that the parties had agreed to the jurisdiction of the DIFC courts...but that the words were not sufficiently "specific, clear or express" to amount to the agreement for the purposes of Art 5A(2) of the amended JAL, with the result that the matter would have to be determined in the onshore courts'.

Accordingly, the approach to the construction of jurisdiction clauses in the older cases dealing with 'opt outs' applies equally to the new provision dealing with 'opt ins'.

Interviewed by Jenny Rayner.

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