ORDR-2457871122-1310

Claim No. CFI 098/2021

THE DUBAI INTERNATIONAL FINACIAL CENTRE

IN THE COURT OF FIRST INSTANCE

BETWEEN

AL BUHAIRA NATIONAL INSURANCE COMPANY

Claimant

and

HORIZON ENERGY LLC

Defendant

AL BUHAIRA INTERNATIONAL SHIPPING INC

Proposed Second Defendant

ORDER WITH REASONS OF H.E. DEPUTY CHIEF JUSTICE ALI AL MADHANI

UPON the Claimant's ("C") Application No. CFI-098-2021/3 dated 29 August 2022 seeking an anti-suit injunction order (the "Anti-Suit Injunction Application")

AND UPON the C's Application No. CFI-098-2021/4 dated 31 August 2022 seeking the joinder of the (proposed) Second Defendant ("D2") to these proceedings (the "Joinder Application")

AND UPON hearing Counsel for the Claimant and Counsel for the First Defendant ("D1") on 20 September 2022 (the "Hearing")

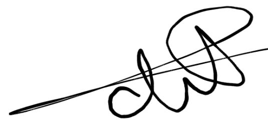
AND UPON D2 consenting to the Joinder Application at the Hearing

IT IS HEREBY ORDERED THAT:

1. The Anti-Suit Injunction Application is dismissed.

2. The Joinder Application is granted.

3. Costs of the Anti-Suit Injunction Application is awarded to D1 and D2, on the standard basis and to be assessed by a Registrar if not agreed.



Issued by:
Delvin Sumo
Assistant Registrar
Date of issue: 9 November 2022
At: 9am

SCHEDULE OF REASONS

Introduction

1. This is the Claimant's ("C") application for an order restraining the Defendants (D1 and D2) from continuing proceedings before the Sharjah Court of First Instance (the "Sharjah Proceedings") and/or for an order that they discontinue their claims there (the "Application").

Background

2. C is the insurer under a Hull and Machinery Policy and a War Risks Policy (the "Policies") pursuant to which C insured D1 *"&/or subsidiary &/or affiliated companies &/or other interests as may be named for their respective rights and interests*" against the risks identified in the Policies for the period from 10 June 2018 to 9 June 2019.

3. A number of vessels were insured under the Policies, one of which was the motor vessel "BETA" (the "Vessel") which had an insured value of USD 70,000,000. D2 is a subsidiary of D1 and the owner of the Vessel and is identified as such in each of the Policies.

4. The Policies contain a choice of law and jurisdiction clause (the "Law and Jurisdiction Clause") which provides:

   > "This Contract shall be governed by and construed in accordance with the English Law and each Party Agrees to submit to the exclusive jurisdiction of the courts of the United Arab Emirates. The arbitration agreement shall also be subject to the law and jurisdiction of the United Arab Emirates."

   It is common ground between the parties that the Policies were not subject to any arbitration agreement, and so the second sentence of the Law and Jurisdiction Clause is obsolete.

5. In about December 2019, it was discovered that the Vessel was missing. On 18 November 2020, D1 notified C that the Vessel had disappeared. On 25 October 2021, D1 gave C formal notice of a claim for its loss.

6. On 7 November 2021, D1 and D2 filed a complaint with the Insurance Authority (the "IA Complaint"), constituted under Federal Law No. 6 of 2007 (the "Insurance Law"). It is common ground between the parties that, in order to make a claim against an insurer in the UAE, an insured is required by Article 110 of the Insurance Law to make the

complaint to the Insurance Authority, which will then be referred to a committee of the Insurance Authority for decision.

7. By letter dated 10 November 2021, C's solicitors wrote to D1 notifying it of C's decision to avoid the Policies.

8. On the same day, C issued proceedings in this court (the "DIFC Proceedings"), seeking declarations that the Policies were avoided ab initio and that C was not liable under the Policies by reason of their avoidance or alternatively that D1's claims did not fall to be covered under the Policies.

9. On 13 December 2021, D1 filed an Acknowledgement of Service and indicated that it intended to challenge the jurisdiction of the DIFC Courts.

10. Its application challenging the Court's jurisdiction was filed on 27 December 2021 (the "Jurisdiction Application"). D1 sought a declaration that the DIFC Court did not have jurisdiction or, in the alternative, an order striking out the claim on grounds that the proceedings constituted an abuse of process in circumstances where, D1 stated in the application notice:

> "(a) [D1] had commenced and filed proceedings before the onshore [Insurance Authority] before [C] filed this Claim on 11 November 2021; (b) those proceedings therefore constitute lis alibi pendens; and (c) [C] has filed this Claim in order to frustrate the [Insurance Authority] proceedings as well as any steps taken by [D1] to enforce in the Sharjah Courts any award made by the [Insurance Authority committee] in its favour. (14) Issuing the Claim in such circumstances and with such a purpose constitutes an abuse of the Court's process and ought to be struck out."

11. The Jurisdiction Application was dismissed by Justice Roger Giles on 27 April 2022 (the "Jurisdiction Order"). The judge found that the DIFC Courts had jurisdiction virtue of the Law and Jurisdiction Clause:

> "12. In short, the agreements in the Policies on the jurisdiction of the courts of the United Arab Emirates … in their ordinary meaning confer jurisdiction on the DIFC Courts, as courts of the UAE, and are specific, clear and express provisions in that respect, unless there is reason from their text or the surrounding circumstances to give them a different construction…
>
> 26. In my view, reason has not been shown to depart from the ordinary and natural meaning of the conferring of jurisdiction on "the Courts of the United Arab Emirates" as including the DIFC Courts."

The judge also held that there was no abuse of process. The Insurance Authority did not constitute a judicial body whose proceedings were a *lis pendens*:

> "48. … Complaint to the Authority and the decision of a committee may be a mandatory first step where an insured disputes the full or partial rejection of a claim or raises some other dispute, but not where the insurer brings proceedings. The dispute resolution process is not an integral part of the judicial system. It is an administrative process of partial application, with the committees reporting to the Authority (the Decision, Article 1), and by cl 4 of Article 110 its result may be challenged in a court. There is a clear distinction between the Authority by its committees and the courts, and the committee's decision is not in the workings of the judicial system but something which may be challenged in that system. I do not think the doctrine [of lis alibi pendens] is attracted."

12. D1 filed an Appeal Notice against the Jurisdiction Order on 18 May 2022 (the "Permission to Appeal Application").

13. On 13 June 2022, the Insurance Authority committee (the "Committee") dismissed the complaint made by D1 and D2 (the "IA Decision") on grounds, it held, that it had no jurisdiction over the dispute because the parties had chosen "*English law as an applicable law in case of dispute between the parties*" and that the Policies contained an arbitration clause. Where a dispute falls within an arbitration agreement, a complaint is expressly excluded from the Committee's jurisdiction by Article 5 of Decree No. 33 of 2019 of the Board of Directors of the Insurance Authority. It is not clear why the Committee concluded that there was an arbitration clause. The Committee also considered that the DIFC Court, which it was aware was already hearing C's claim, had jurisdiction over the dispute.

14. Pursuant to Article 101(4) of the Insurance Law, a committee's decision may be challenged within 30 days of its notification "*before the competent court of first instance*." On 7 July 2022, D1 and D2 commenced the Sharjah Proceedings before the Sharjah Court seeking an order that the IA Decision be set aside and the matter referred back to the Insurance Authority or, in the alternative, an indemnity under the Policies in respect of the loss of the Vessel.

15. While C objects to the Sharjah Proceedings in their entirety, some aspects of D1 and D2's case in Sharjah have received particular criticism from C and have been the subject of argument in the Application. The following citations from D1 and D2's Statement of Case sufficiently capture those aspects:

    a. "The courts of the United Arab Emirates mean the federal and local courts in the United Arab Emirates and does not include free zone courts such as the DIFC Courts" ([41]);

    b. "… the Honourable Court will find that the Insurance Dispute Settlement and Resolution Committee is considered a judicial authority" ([53]); and

c. "The issue of establishing a foreign law is a critical one as it is about application before the national judge of a foreign law issued by the legislator of a foreign country, knowing that the duty of the national court is to determine the dispute referred to it by applying the national law" ([55]).

16. Returning to the DIFC Court, the Permission to Appeal Application was refused by Chief Justice Zaki Azmi on 5 August 2022.

On 9 August 2022, C submitted a response to D1 and D1's claim in the Sharjah Proceedings and, on 22 August 2022, D1 and D2 submitted a reply to that response.

On 29 August 2022, D1 filed a renewed application in the DIFC Court for permission to appeal the Jurisdiction Order.

17. On the same day, C issued this Anti-Suit Injunction Application and on 31 August it issued the Joinder Application for an order that D2 be joined as a defendant to these proceedings.

18. On 6 September 2022 there was an urgent hearing. C requested an anti-suit injunction on an interim basis. That request was dismissed. No reasons were given for that decision. Those reasons are rendered redundant by these reasons.

19. At the Hearing, D2 subsequently consented to be joined as a party to these proceedings and so the Joinder Application became redundant.

The Anti-Suit Injunction Application

20. The DIFC Court's power to issue injunctions is derived from Article 32 of DIFC Law No. 10 of 2004 being the DIFC Court Law (see: *Brookfield Multiplex Constructions LLC v DIFC Investments LLC & or* [2016] CFI 020 (28 July 2016) at [37]).

21. In common law, a court may grant an anti-suit injunction either to enforce a contractual right not to be sued in the foreign forum or to intervene against the unconscionable pursuit of proceedings in the foreign court even though it has jurisdiction (*Turner v Grovit* [2002] 1 W.L.R. 107). The parties agree that the Law and Jurisdiction Clause is a non-exclusive jurisdiction clause and the Application has been made and opposed under the second ground from *Turner*.

22. There will be unconscionable conduct if the pursuit of proceedings in the other jurisdiction is "*oppressive or vexatious or … interferes with the due process of the*

court" (*South Carolina Insurance Co v Assurantie Maatschappij de Zeven Provincien NV* [1987] A.C. 24 at 41D).

23. When deciding whether to grant the anti-suit injunction, the court must take account "*not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff if he is not allowed to do so. So, the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him*" (*Societe Nationale Industrielle Aerospatiale (SNIA) v Lee Kui Jak* [1987] AC 557 at 896G).

24. In *The Abidin Daver* [1984] AC 398 at 411 to 412, it was said that the burden is on the party pursuing proceedings in the foreign jurisdiction to adduce *"cogent evidence that there is some personal or juridical advantage that would be available to him only in [that jurisdiction] that is of such importance that it would cause injustice to him to deprive him of it.*" A similar point was made in *Star Reefers Pool Inc v JFC Group Ltd* [2012] EWCA Civ 14 at [36]: "*It is hard to see that a party can be said to be acting unconscionably when it seeks a legitimate juridical advantage in a foreign court…"* C relies on these decisions.

25. However, in *Deutsche Bank v Highlander* [2010] 1 WLR 1023, a decision more recent than *The Abidin* but older than *Star Reefers*, it was stated at [50] that even where the court cannot see a legitimate personal or juridical advantage to the claimant in the foreign proceedings:

> "it does not automatically follow that an anti-suit injunction should be granted. For that would be to overlook the important restraining influence of considerations of comity … An anti-suit injunction always requires caution because by definition it involves interference with the process or potential process of a foreign court. An injunction to enforce an exclusive jurisdiction clause governed by English law is not regarded as a breach of comity, because it merely requires a party to honour his contract. In other case, the principle of comity requires the court to recognise that, in deciding questions of weight to be attached to different factors, different judges operating under different legal systems with different legal policies may legitimately arrive at different answers, without occasioning a breach of customary international law or manifest injustice, and that in such circumstances it is not for an English court to arrogate to itself the decision how a foreign court should determine the matter. The stronger the connection of the foreign court with the parties and the subject matter of the dispute, the stronger the argument against intervention."

And the importance of comity was also emphasised in *Star Reefers* at [40]: "*The judge however took no account of … considerations [of comity]. That is an error in the exercise of his discretion, having found the conditions for the exercise of his power made good.*"

26. The English courts have not laid down any hard and fast rules about what amounts to vexatious or oppressive conduct and have indicated that this will depend on the circumstances of the particular case (*Societe Aerospatiale* per Lord Goff at 398-F-G). A "typical case" of vexatious conduct is where a defendant issues foreign proceedings after having submitted to the court's jurisdiction, through participating in its proceedings, in an attempt to extricate himself from them (see: *Star Reefers* at [37]).

The parties' cases

27. In summary, C's case is that D1 and D2's conduct in bringing and continuing the Sharjah Proceedings is oppressive and vexatious, justifying the imposition of an injunction to prevent them from continuing to pursue those proceedings. D1 and D2's case is that the Application is "utterly misconceived." C makes the Application on three grounds. I will discuss them in turn, dealing with other issues which have arisen between the parties in inconvenient places throughout them.

Ground 1

28. C says that it is plain that D1 is taking steps in these proceedings designed to delay their progress in order that it be able to submit to the Sharjah Court that no decision on the merits has been made by the DIFC Court or that matters are pending. C says that the same steps, which I will outline now, reveal that D1 has no intention of abiding by the rulings of this Court.

29. The steps are these. On 27 December 2021, D1 filed an application contesting the Court's jurisdiction to try the claim. Following Giles J's dismissal of that application, D1 sought permission, on 18 May 2022, to appeal his decision. Permission was not granted. Then on 29 August 2022, D1 renewed its application for permission to appeal Giles J's order. It was after D1 first sought permission to appeal but before permission was denied that D1 and D2 commenced the Sharjah Proceedings.

30. D1 and D2's response to C's characterisation of the steps D1 has taken is that Giles J ruled only that the DIFC Court has non-exclusive jurisdiction. He did not rule that the Sharjah Court does not have jurisdiction. And regarding D1's applications for permission to appeal, D1 and D2 submit that they cannot be a basis for concluding that the Sharjah Proceedings are vexatious and abusive. It amounts to a complaint, they submit, that it is an abuse of process for an unsuccessful party to seek permission to appeal. The rules of the DIFC Court permit a party both to seek permission to appeal from a single judge and then to renew the application to the Court of Appeal. If the

Court of Appeal considers that the appeal has no merit it will refuse permission or grant permission and dismiss the appeal. None of this is an abuse of process, D1 and D2 argue; it is an example of due process in operation.

31. Dealing with the point about D1's applications for permission to appeal the Jurisdiction Order, I agree with D1 and D2's arguments. The steps D1 has taken are available to it pursuant to the Rules of the DIFC Courts ("RDC") rr. 12.1, 44.5 and 44.9. Where there is no merit in an application for permission to appeal, the normal consequence of that will be the refusal of permission and an adverse costs order. Where the circumstances justify it, costs may be ordered on the indemnity basis. And where there are compelling reasons for doing so, the Court of Appeal may strike out an appeal notice or set aside or impose conditions on permission to appeal pursuant to RDC rr. 44.94 and 44.95. Moreover, if a party wishes to challenge a decision of the Court, he cannot do so without consuming his rights to do so. So, a party has the right to challenge decisions but a respondent has sufficient protection against bad challenges which will not go on indefinitely in any event.

32. Moving onto the issue of whether D1 has abided or intends to abide by the rulings of this Court, in my view while Giles J ruled that the DIFC Court has jurisdiction to try C's claim it is significant that he expressly acknowledged that the parties will as a consequence of that decision "*need to fight on two fronts*" ([51]). While the learned judge was then commenting on the DIFC Proceedings and the IA Complaint, these being the "*two fronts*", I see no reason to conclude that Giles J regarded it tolerable that the parties would fight on the two fronts he referred to but inherently intolerable that they might fight on another combination of fronts, for example if any decision of the Committee was challenged outside of the DIFC in another court of the UAE, much less that his order prohibited proceedings in any other court in the UAE.

33. The learned judge regarded that each of the courts of the UAE—whether "*onshore*" or "*offshore*"— was a "*competent court of first instance*" for the purposes of challenging a decision of the Insurance Authority under the Insurance Law: see the Jurisdiction Order at [21]. If he regarded that any such challenge in the future was required to be made in the DIFC Court on the basis that DIFC proceedings were already on foot, I expect he would have said so. Nor do I see a basis for concluding that the effect of the Jurisdiction Order is that D1 was prohibited from pursuing its substantive claim in another court of the UAE. This is not to say that D1 and D2's pursuit of the Sharjah Proceedings is not vexatious or oppressive, but only that, in my judgment, D1 and D2

did not commence and do not continue the Sharjah Proceedings in breach of the Jurisdiction Order which is the question I am addressing under Ground 1.

34. Even if C is correct in its assessment of the steps D1 has taken in these proceedings, I do not think it follows that the Sharjah Proceedings are necessarily oppressive or vexatious. If D1 seeks to delay the progress of these proceedings or has no intention of abiding by this court's rulings, in my view that would all be reprehensible and potentially oppressive and vexatious conduct in or related to these proceedings. But the test that I have been asked to apply is whether the proceedings in the Sharjah Court are oppressive or vexatious. Unconscionable conduct in one set of proceedings is not necessarily incompatible, in my judgment, with proper conduct in another and it is the conduct in or underpinning the Sharjah Proceedings which I understand to be decisive. The question for me to address is whether C should be protected from unconscionable conduct somewhere else, not whether unconscionable conduct here justifies restraining D1 and D2 somewhere else. To the extent that there is any reprehensible conduct in the DIFC Proceedings, that conduct can be sanctioned within them by the DIFC Court.

35. For the foregoing reasons, I do not think that an anti-suit injunction constraining D1 and D2 from continuing the Sharjah Proceedings would be justified on Ground 1.

<u>Ground 2</u>

36. C says that D1 and D2 seek to relitigate two issues in the Sharjah Proceedings: first, whether the DIFC Courts have jurisdiction and, second, whether an Insurance Authority committee is a judicial tribunal. Giles J's Jurisdiction Order of course determined that the DIFC Court does have jurisdiction to try this claim and that "*there is a clear distinction between the [Insurance] Authority by its committees and the courts, and the committee's decision is not in the workings of the judicial system but something which may be challenged in that system*" ([48]). C adds that if D1 and D2 wish to challenge the IA Decision they can and should do so in the DIFC Court in tandem with these proceedings.

37. D1 and D2 say in response that all the DIFC Court has decided, subject to D1's proposed appeal, is that it itself has jurisdiction to hear C's claim for a declaration that it is not liable to D1. It has not made any ruling that the Insurance Authority has no jurisdiction to decide D1 and D2's claim, which is the primary question the Sharjah Court is being asked to decide. And to the extent that the Sharjah Court does address

issues which have been or will be decided by the DIFC Court, that is the consequence of the parties' agreement, by agreeing to a non-exclusive jurisdiction clause, to the risk of parallel proceedings. D1 and D2 rely on *Deutsche Bank* and *Airbus Industrie v Patel* [1999] 1 AC 119. In the former decision, the Court of Appeal stated at [107] that "*Duplication of litigation through parallel proceedings is undesirable, but it is an inherent risk where the parties use a non-exclusive jurisdiction clause*." In *Airbus*, the House of Lords stated at p. 132 to 133 that "*parallel proceedings in different jurisdictions are not of themselves regarded as unacceptable*."

38. In oral submissions at the Hearing, C conceded that proceedings are not inherently vexatious or oppressive because they are parallel proceedings. What is important is the conduct of the relevant party in commencing or continuing the parallel proceedings. In *Airbus*, the Court stated at page 637: "*The focus is … on the character of the defendant's conduct, as befits an equitable remedy such as an injunction*."

39. C contended that the following sequence of events demonstrates oppressive or vexatious conduct on the part of D1 and D2 in commencing the Sharjah Proceedings. The DIFC Court found that it had jurisdiction by virtue of the Law and Jurisdiction Clause. At that time, there were no other judicial proceedings on foot. When the Insurance Authority made its decision, D1 had several options open to it. First, it could ignore the IA Decision and participate in the DIFC Proceedings. Second, it could make a challenge against the decision in the Sharjah Court -as it went on to do -or in another non-DIFC court of the UAE. Third, D1 could challenge the IA Decision in the DIFC Court in tandem with C's claim. C argues that D1 and D2 should have challenged the IA Decision in the DIFC Court and that by making the challenge in the Sharjah Court, D1 and D2 made a conscious decision to multiply proceedings. Moreover, rather than ask the Sharjah Court only to set aside the IA Decision and remit the matter back to the Insurance Authority, D1 and D2 sought to relitigate issues decided in these proceedings for no other reason, C contended, than to create a conflict of judgments between the DIFC and the Sharjah courts.

40. D1 and D2's position on the question of the sequence in which proceedings were issued is that although the Sharjah Proceedings were commenced after the DIFC Proceedings were already on foot, they were commenced as part of the mandatory dispute resolution process laid down by the Insurance Law which D1 initiated on 7 November 2022, that is, prior to the commencement of the DIFC Proceedings. It was C, therefore, who commenced a parallel claim, and it would be a "*strong step*" for a court to restrain D1 and D2 from pursuing their claim in Sharjah in such circumstances.

D1 and D2 rely on *Star Reefers Pool Inc v JFC Group Ltd* [2012] EWCA Civ 14 where Rix LJ said at [29]:

> "I do not think that Mr Kimmins was able to show us a case in which a respondent, first in the field in a foreign jurisdiction (and here in its own domicile) was injuncted for his unconscionable conduct in the absence of his agreement to litigate or arbitrate in England. I do not say that it may not happen or have happened, only that it may be a strong thing to do and that an example of it happening has not come readily to hand."

41. Ground 2 contains several interrelated issues which I will nevertheless deal with separately, namely (i) the question of the importance of the sequence in which proceedings were commenced; (ii) the question of whether D1 and D2 are attempting to relitigate issues in the Sharjah Proceedings; and (iii) the proper categorisation of D1 and D2's conduct in commencing the Sharjah Proceedings. It is convenient to deal with three other issues not yet outlined which arose in argument and which are in different ways connected to the first three, namely: (iv) the question whether D1 has submitted to the jurisdiction of the DIFC Courts and, if so, whether that supports the Application; (v) the question whether D1 and D2 have demonstrated or need to demonstrate any juridical advantage afforded to them by the Sharjah Proceedings; and (vi) whether D1 and D2 are pursuing the Sharjah Proceedings in order to avoid the application of English law.

(i) The sequence in which proceedings were issued

42. The parties are in agreement that the question of the sequence in which proceedings were issued is an important one. They disagree, however, on which party it was to first bring proceedings and which party, accordingly, commenced parallel proceedings. As noted above, C says that it was first in the field and that D1 and D2's commencement of parallel proceedings combines with other factors to render the Sharjah Proceedings vexatious and oppressive. D1 and D2, on the other hand, say that, even if the IA Complaint was not a judicial proceeding, they were first in the field to pursue a claim and that, relying on *Star Reefers Pool*, it would be a "*strong step*" to injunct them from continuing the Sharjah Proceedings which is part of the Insurance Authority complaint procedure.

43. To comment on the proposition derived from *Star Reefers*, I respectfully disagree that it should or might be a "*strong thing*" to injunct a party who was first to commence proceedings on that basis alone. I adopt the view taken by Toulson LJ in *Deutsche Bank AG* at [118]:

> "I would attach little significance to the fact that the Texas action was begun before the English action, both for the reason given by Bingham LJ in EI Du Pont de Nemours v Agnew [1987] 2 Lloyd's Rep 585 when considering an application to stay an English action in favour of an Illinois action commenced a month later (where he expressed the view that the outcome should not be affected by what was little more than an accident of timing), and also because the natural consequence of treating it as an important factor would be to encourage parties to rush to fire the first shot."
> (emphases added)

44. The present case provides a good example, in my judgment, of why it is appropriate to attach little significance to the sequence in which proceedings are commenced as a standalone consideration. If an insured party is obliged by UAE law to refer a complaint to the Insurance Authority, an insurer is effectively given total freedom, where the insurer and insured have agreed to a non-exclusive jurisdiction clause, to commence a claim in the forum most advantageous to it while the insured remains confined to the Insurance Authority at the first stage and thereafter confined to the insured's choice of court, in the event of a challenge to the committee's decision, at the second stage. As counsel for D1 and D2 put it at the Hearing, an insurer would always be able to effectively convert a non-exclusive jurisdiction clause into an exclusive jurisdiction clause by simply commencing proceedings in a court falling within the jurisdiction clause, and then argue abuse of process if the insured commences proceedings elsewhere, notwithstanding that the second court falls within the clause also.

45. I agree with D1 and D2 but think the same argument goes against D1 and D2's case on timing also. An insurer will usually be responsive to an insured's claim and have little interest in issuing proceedings unless the insured has made or at least may make or has intimated a claim, and it seems to me that the value of a non-exclusive jurisdiction clause would be similarly undermined if an insurer was required to confine itself to defending a complaint to the Insurance Authority at the first stage and if a successful party in that process was required to confine itself to the unsuccessful party's choice of court in which a challenge to the decision is made at the second stage.

46. I think a better approach is to assess whether the relevant non-exclusive jurisdiction clause prohibits parallel proceedings. If it does not, then I do not see why significant weight should be given to the sequence in which proceedings are issued, particularly as it is only undesirable but not unacceptable that there be parallel proceedings, as they authorities make clear. Unless two sets of proceedings are issued simultaneously, will not every instance of parallel proceedings have a "first" and "second" in the field?

In my view, the parallel proceedings should be vexatious or oppressive for some other reason than that they are parallel.

47. And likewise, the first proceedings should, in my view, be other than vexatious or oppressive for some other reason than that they were first. In some cases, the party first in the field may have commenced proceedings prematurely and in bad faith while the other party delayed firing a shot because he adopted a constructive position. In my view, the first party's conduct should not be rewarded and the second party's penalised in such a circumstance by giving weight to the fact that the first party's proceedings preceded the second party's. And if the Court took the position that it was a "*strong thing*" to injunct the party first in the field on that basis alone or that it was somehow reprehensible that the second party commenced parallel proceedings, I suspect that there would be less and less of parties like the second party in this example, as parties catch on that it is probably naïve to be constructive rather than as quickly as possible sue.

48. For these reasons, I attach little weight to the question of timing.

(ii) Issues common to the DIFC Proceedings and the Sharjah Proceedings

49. In my view, to the extent that there is overlap between the issues in the Sharjah Proceedings and the DIFC Proceedings, on the one hand this is to be expected where there are parallel proceedings and on the other it is for each court to decide how to deal with that issue. Each court may, taking its own approach, arrive legitimately at different conclusions or each court may adopt approaches which are in harmony with each other. In the first case, I do not think that there would be a basis for this court interfering with the process of the Sharjah Court and, in the second case, no issue would arise in any event; in both cases, therefore, I think the mere fact that there may be issues common to both proceedings is not in and of itself sufficient to find vexatious and oppressive conduct and to grant an anti-suit injunction.

50. Moreover, while the DIFC Court may have decided that it does have jurisdiction under the Law and Jurisdiction Clause and that proceedings before an Insurance Authority committee are not judicial proceedings, on my reading of D1 and D2's Statement of Claim in the Sharjah Proceedings these issues appear to feature as part of D1 and D2's challenge of the IA Decision, not as part of an indirect challenge to the Jurisdiction Order.

51. For example, D1 and D2's arguments that the DIFC Court does not have jurisdiction appear under the heading "*Misapplication of law and misinterpretation of the explicit terms of the policy concerning the exclusive jurisdiction of the courts of the United Arab Emirates.*" The first paragraph under that heading, [37], makes clear that it is the Committee's finding that is being challenged: "*The Appealed Decision [i.e. the IA Decision] states: 'The respondent submitted … that Dubai International Centre Courts have jurisdiction to consider the dispute … this pleading is proper'*." In the following paragraph, D1 and D2 stated: "*This position is flawed for misinterpretation of the policy.*" And D1 and D2's arguments that the proceedings before Insurance Authority committees are judicial proceedings appear under the heading "*Application of the English Law*." D1 and D2's case in this section is that the parties' choice of English law was not a basis for the Committee's conclusion that it did not have jurisdiction to decide the complaint. D1 and D2 referred to a case in which the Dubai Court sent a complaint back to the Insurance Authority which had rejected the complaint on the basis of a clause opting into the jurisdiction of the English courts and electing English law. The English translation of the Statement of Claim is not entirely clear, but D1 and D2 appear to comment that a dispute where the parties have a clause opting into the jurisdiction of the UAE courts is more worthy of being sent back to the Insurance Authority than the case cited, not least, I understand, because a committee is a judicial authority subordinate and therefore akin to a court in which any appeal would be heard (see: [52] to [54] of the Statement of Claim). D1 and D2 then went on to argue that the Committee should have approached the question English law as a court of the UAE would have approached it.

52. It has not been argued by C that D1 and D2 are not entitled to challenge the IA Decision or any parts thereof. Instead, C says that D1 and D2 should make any challenge against the IA Decision to the DIFC Court in tandem with these proceedings. No objection has been made therefore to D1 and D2 challenging an aspect of the IA Decision on the basis that doing so would be tantamount to reopening an issue already decided by the DIFC Court. And I see no basis for concluding that D1 and D2 have raised the two issues in the Sharjah Proceedings for a purpose other than challenging the IA Decision, much less that their conduct is vexatious or oppressive for having done so.

53. In any event, it seems to me that D1 and D2's case in the Sharjah Proceedings is no more than consistent with D1's case in the DIFC Proceedings. And in circumstances where D1 has not exhausted its right to challenge the Jurisdiction Decision, and where

it is currently challenging that decision, I do not think that there is anything particularly untoward about it submitting to the Sharjah Court that, as it maintains here, the DIFC Court does not have jurisdiction under the Law and Jurisdiction Clause and that the Insurance Authority complaint proceedings were judicial proceedings.

(iii) D1 and D2's conduct in commencing the Sharjah Proceedings

54. Is D1 and D2's conduct as outlined above oppressive and vexatious? I place the conduct into two categories, namely (i) conduct which resulted in the Sharjah Proceedings being commenced; and (ii) conduct which resulted in D1 and D2's case in the Sharjah Court taking the form it did and in particular resulted in the inclusion of issues which had already been decided by this Court. I have dealt with the second category under the previous heading. I will deal with the first category now.

55. If the existence of parallel proceedings is not of itself unacceptable then I do not see why D1 and D2 should be criticised for bringing into existence parallel proceedings. Whenever a party decides to initiate parallel proceedings there is a conscious decision to multiply proceedings, but that conscious decision must not, in my judgment, be unacceptable also if the proposition for which *Deutsche Bank* and *Airbus Industrie* are authorities is to have effect.

56. I do think, however, there is merit to C's point that, when the Committee issued the IA Decision, amongst D1 and D2's options was to ignore the IA Decision. It could be argued, for example, that D1 and D2's claim in the Sharjah Proceedings for the IA Decision to be overruled and for the matter to be remitted back to a newly constituted Insurance Authority committee constitutes a breach of the Law and Jurisdiction Clause. By that clause, the parties agreed to "*submit to the exclusive jurisdiction of the courts of the United Arab Emirates*" (emphasis added). Giles J of course found that committees of the Insurance Authority are not courts (see the Jurisdiction Order at [48]). While it may be that D1 and D2 had no option under UAE law but to commence an action before the Insurance Authority, the right to challenge the committee's decision was only that -a right -and one which was arguable overridden by the Law and Jurisdiction Clause. C's point was made in reply and was not the subject of full argument. I am therefore unable to do anything more than acknowledge there may have been something to it.

(iv) The question of submission to the jurisdiction of the DIFC Courts

57. D1 and D2 -who I think were the first to raise the consideration of submission—submit that D1 has not submitted to the jurisdiction of the DIFC Court. This was recognised by Giles J, they submit, in [4] of the Jurisdiction Order where he noted that no point was taken by C that D1 was both denying the jurisdiction of the court and asking the court to exercise its jurisdiction to strike out the claim as an abuse of process. D1 and D2, therefore, do not fall within the common category of unconscionability where a party first submits to the jurisdiction of a court before trying to extricate itself from that submission.

58. C argued in response to this submission that Giles J's statement only applied to D1's conduct until the making of it. If D1 or D2 invoked the Court's jurisdiction after the Jurisdiction Order was made, that would be a fresh potential submission. And such an invocation has indeed occurred, C argues. For example, in D1's renewed grounds of appeal, it has submitted as follows:

> "28. In the premises, the Judge was wrong to conclude that:
>
> 28.1. the ongoing proceedings that had been issued by [D1] before the onshore Insurance Authority did not constitute *lis alibi pendens*; and
>
> 28.2. the issuing of the Claim by [C] when those were already on foot and proceeding to determination when the process in the onshore UAE was mandatory and a pre-requisite to litigation in the onshore, civil law, courts was not an abuse of process.
>
> 29. *Rather, the Judge should have concluded that the Claim was an abuse of process and proceeded to strike it out pursuant to RDC r.4.16(2)."* (emphasis added)

59. I agree with C's reading of the Jurisdiction Order. However, even if D1 has submitted to the jurisdiction of this Court, I do not think that that submission would be the type referred to in *Star Reefers*. The unconscionability referred to in that decision occurs when the foreign claimant first submits to the jurisdiction of the court and afterwards seeks to extricate himself from that submission. It has always been D1's case that the DIFC Court does not have jurisdiction and it has always been clear that it upholds its jurisdiction challenge. And D1's invocation of the Court's jurisdiction has been made in the alternative and on a basis which is closely akin to its case that the Court does not have jurisdiction.

60. Moreover, if submission has occurred, in my view that submission would take effect in respect of C's claims in these proceedings, but unless it can be said that D1 was required to challenge the IA Decision or to plead what became its alternative case i.e. its substantive claim in the Sharjah Proceedings in the DIFC Court, there is no reason

to conclude that D1 is conducting itself in the Sharjah Proceedings inconsistently with any submission in these proceedings.

(v) The question of juridical advantage and comity

61. C says that D1 and D2 have adduced no evidence that even-handed justice would not be done to them in the DIFC Courts and that the absence of juridical advantage available to them in the Sharjah Proceedings is evidence that those proceedings are pursued vexatiously and oppressively.

62. D1 and D2's primary response to this line of argument is that the test for an anti-suit injunction does not include the question whether the claimant in the foreign proceedings has a juridical advantage. The correct position, they argue, is that the foreign proceedings should be allowed to continue unless they can be shown by the applicant to be vexatious and oppressive. Moreover, considerations of judicial comity mean that the court is reluctant to impose its own view on another court even where no advantage has been established.

63. As a secondary position, D1 and D2 enumerated, in written and oral submissions, the following justifications for pursuing their claim in the Sharjah Court. First, D1 and D2 are contractually entitled to commence proceedings in Sharjah. Second, D1 was under a tight timetable to challenge the IA Decision. Third, D1 and D2 could not file their claim in the DIFC Courts without thereby waiving their objections to the jurisdiction of the DIFC Court. Fourth, proceedings in the Sharjah Court would be less expensive. Fifth, proceedings before the Insurance Authority would be quicker.

64. C argues that these advantages are not juridical advantages. In respect of the second justification in particular, C says that D1 and D2 could have sought a stay of the Sharjah Proceedings and that they did not need to call into question the jurisdiction of the DIFC Court or add merits to the claim in Sharjah. In respect of the fourth justification, C pointed out that, unlike in the DIFC Court, in the Sharjah Court there is no cost recovery.

65. I understand that that "juridical advantage" is a factor usually considered as part of a *forum non conveniens* analysis. That doctrine does not apply amongst the courts of the UAE. It is not clear, therefore, whether the propositions from the English authorities which C relies on are instructive without qualification or indeed instructive at all in the present case. In my view, it is sufficient that D1 and D2 were contractually entitled to pursue a claim in the Sharjah Court, that they maintain their objection to the jurisdiction

of the DIFC Court and that the Court should be cautious about interfering with the process of another court to decline injuncting D1 and D2 on the basis of considerations of juridical advantage and comity.

(vi) The law which will determine the dispute

66. C contends that the only possible reason for D1 and D2 pursuing the Sharjah Proceedings, other than their rejection that the DIFC Court has the jurisdiction, is that they wish to have their dispute determined under UAE Law, contrary to the parties' agreed choice of law in the Law and Jurisdiction Clause. The consequences of this are two-fold, C submits. First, it renders the Sharjah Proceedings an abuse of the process of the Sharjah Court. Second, if the Sharjah Proceedings were to be allowed to continue, C would be deprived of a "*personal or juridical advantage*" which is only available to it in the DIFC Courts i.e. the application of English law.

67. D1 and D2 say that they have never contended in the Sharjah Proceedings that UAE law should govern their claim, and they have made this clear in a memorandum submitted to the Sharjah Court on 15 September 2022 that the parties agreed that the Policies were governed by English law:

> "The Plaintiffs shall rely upon the terms and conditions of the Policies to their full effect and agree the Policies include an English law governing law clause. The Plaintiffs don't disagree that the governing law of the Policies is English Law. The Plaintiffs reserve their right to challenge any evidence submitted by the Defendant as to its interpretation of English law, as the Plaintiffs are entitled to do."

68. I am satisfied that it is not unlikely that a UAE onshore court will not apply the English law clause as the governing law of the Policies. But if that were to happen, in my view this is a risk which C took by agreeing to a jurisdiction clause which provided for the jurisdiction of the courts of the UAE. With that said, English law can be applied by the onshore courts of the UAE and I am satisfied by D1 and D2's recent submission to the Sharjah Court that they will not object to the application of English law other than as to its interpretation which they must be entitled to do and so I am unable to find vexatious or oppressive conduct on the part of D1 and D2 on this question.

Ground 3

69. C says that, in the Sharjah Proceedings, D1 and D2 seek to have the self-same issues determined as are to be determined in these proceedings. In particular, D1 and D2 seek in their alternative case an indemnity under the Policies in the amount of USD 70 million and contend that C's policy defences are not well made.

70. C says that, by pursuing the alternative case in the Sharjah Proceedings, D1 and D2 have given rise a serious risk of inconsistent decisions. There was no such risk created when C issued these proceedings while those before the Committee were on foot because, C contends, any decision of an Insurance Authority committee is subject to challenge in the UAE Courts, which includes, as Giles J held, the DIFC Courts: see the Jurisdiction Order at [21] and [51]. By contrast, there is a risk of inconsistent decisions as between the Sharjah Court and this Court because both are "*formal courts of similar status.*" For that reason, the Sharjah Proceedings are "*fundamentally different in nature*" to the Insurance Authority complaint procedure.

71. D1 and D2's primary position in their written submissions was that there is no risk of inconsistent decisions between the Sharjah Court and the DIFC Court because the issues before each court are different. In the Sharjah Proceedings, D1 is primarily asking the Sharjah Court to overrule the Committee's decision that it has no jurisdiction and to remit the complaint for reconsideration by a differently constituted Committee. In the DIFC Proceedings, the DIFC Court has held that it has jurisdiction in respect of C's claim that it is not liable under the insurance policies.

72. In oral submissions it was conceded that, in respect of D1 and D2's alternative case in the Sharjah Proceedings, there is a risk of inconsistent decisions. D1 and D2 contend, however, that to the extent that the Sharjah Court does address the same issues which have been or will be decided by the DIFC Court, that is the consequence of the parties' agreement to a non-exclusive jurisdiction clause to which, as we have seen, the risk of parallel proceedings is inherent. D1 and D2 submit that if the DIFC and Sharjah courts ultimately deliver conflicting judgments on the merits of D1's claim under the Policies, that is a conflict which will fall to be resolved by the Union Supreme Court (the "USC").

73. In reply, C relied on *Emirates NBD PJSC & Ors v KBBO CPG Investment LLC & Ors* [2020] CFI 045 (9 August 2021), where Justice Wayne Martin issued an anti-suit injunction in respect of Dubai Court proceedings. Counsel for C said at the hearing that this decision presupposes that an intervention may be made in respect of UAE proceedings before one gets to the point of conflicting judgments.

74. I respectfully take the view that *Emirates NBD* does not rebut D1 and D2's response to the conflicting judgments point. In *Emirates NBD* it was sufficiently arguable that the DIFC Court had exclusive jurisdiction to resolve the dispute: see [78] to [80]. The anti-suit injunction was issued to protect a substantive legal or equitable right to have the

dispute resolved by the DIFC Court in the exercise of its exclusive jurisdiction, and so the situation in *Emirates NBD* was comparable, in my judgment, to one where parties have agreed to the exclusive jurisdiction of a forum and an injunction is granted in order to enforce the contractual right not to be sued in another forum. While the application was brought on the alternative ground that the commencement or pursuit of proceedings in another Court would be vexatious, oppressive or unconscionable, that ground became "*somewhat academic*" on the basis that the first ground was made out: see [80].

75. The judge nevertheless went on to find that "*the conduct of the Hadef Defendants in commencing the proceedings in the Dubai Courts in the manner in which they did confers jurisdiction upon this Court to restrain them from similar conduct by way of an anti-suit injunction. In short, I respectfully agree with Justice Cooke's description of that conduct as 'an appalling abuse of process'*" ([80]). However -and this is the crucial point, in my view -in *Emirates NBD*, Martin J granted the injunction in circumstances where "*the Dubai Courts have upheld the objection to jurisdiction and dismissed the Hadef Defendants' claims … there is no prospect of inconsistent judgments, because the Dubai Courts have declined jurisdiction*" ([84] and emphasis added).

76. It is important to note that the supposed risk of inconsistent judgments was a factor raised by the respondents in opposition to the application for an anti-suit injunction. They argued that the applicants' delay in bringing the application weighed against granting the injunction in circumstances where the delay, it was argued, had allowed proceedings in the other court to continue which created a risk of inconsistent judgments and caused costs to be wasted. While in this Anti-Suit Injunction Application it is the applicant who relies on the risk of inconsistent judgments as a factor weighing in favour of granting an anti-suit in injunction, still, I think that of the circumstances in which an anti-suit injunction might be granted for which *Emirates NBD* is authority, the prevention of the risk of inconsistent judgments cannot be one. For this reason, I do not think that *Emirates NBD* supports a proposition to the effect that an anti-suit injunction can or should be granted in order to prevent the coming into existence of conflicting judgments which the USC would have jurisdiction to resolve.

77. In my judgment, where conflicting judgments will, if given, fall within the jurisdiction of the USC- which is to say, where any conflict will ultimately be resolvable- I think the DIFC Court should be especially slow to interfere with the process of another UAE court in an attempt to prevent that conflict from occurring in the first place. The position is different where the courts hearing claims are not ultimately reconciled under a single

authority. But here the DIFC Courts and the Sharjah Courts converge in the USC and the parties in both proceedings can therefore count on a single conclusion to their dispute, even if the route to get there will be undesirable.

78. For these reasons, I do not think that an anti-suit injunction is justified under Ground 3.

Conclusion on the Application

79. For the foregoing reasons, the Anti-Suit Injunction Application is dismissed.

Costs

80. I said at the Hearing that I would invite further submissions from the parties on costs. Having reconsidered the matter, I hope it will be uncontroversial that I apply the general rule and award D1 and D2 their costs of the Application, on the standard basis, to be assessed, if not agreed.