



Claim No: CFI 012/2012

**THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS**

**In the name of His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Ruler of Dubai**

**IN THE COURT OF FIRST INSTANCE  
BEFORE H.E. JUSTICE ALI AL MADHANI**

**Between**

**ALLIANZ RISK TRANSFER AG DUBAI BRANCH**

Claimant

and

**AL AIN AHLIA INSURANCE COMPANY PJSC**

Defendant

Hearing: **12 November 2012**

Counsel: Timothy Jenns (on behalf of Clyde and Co) for the Claimant

Kaashif Basit (KBH Kaanuun) for the Defendant

Judgment: **24 April 2013**

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**JUDGMENT OF H.E. JUSTICE ALI AL MADHANI**

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1. CFI 012/2012 – Allianz Risk Transfer AG Dubai Branch v. Al Ain Ahlia Insurance Company PJSC

### **Background:**

#### **The Claimant's Claim**

2. On 13 March 2012 the Claimant, Allianz Risk Transfer AG Dubai Branch, submitted a Part 7 claim with the DIFC Courts against the Defendant, Al Ain Ahlia Insurance Company PJSC. The claim concerned a contract of reinsurance entered into between the Claimant and the Defendant for damage to property and business interruption cover, which had been placed by Jordanian reinsurance brokers, in respect of which the Claimant's DIFC branch had accepted a 10 % share of the facultative reinsurance placement, as evidenced by a reinsurance slip policy dated 9 June 2010 (the "**Reinsurance Policy**"). The Reinsurance Policy contained neither a jurisdiction clause, nor an express choice of law clause.

#### **The Defendant's Challenge to the Jurisdiction of the DIFC Courts**

3. On 10 May 2012 the Defendant submitted an application for a Court order that the DIFC Courts do not have jurisdiction to hear this claim, on the grounds that the Defendant is an Abu Dhabi domiciled entity that is subject to the provisions of Federal Law 11 of 1992 (Concerning Civil Procedures) and had already lodged a petition (the "**Constitutional Petition**") to the Union Supreme Court (the "**USC**") of the UAE which has exclusive jurisdiction to hear claims arising out of a conflict of jurisdiction.
4. It was asserted by the Defendant that there was a clear conflict of jurisdiction between the DIFC Courts and the Abu Dhabi Courts. A claim was filed by the Defendant in the Abu Dhabi Courts on 06 September 2012. In accordance with Article 99/8 of the Constitution of the United Arab Emirates, the USC has exclusive competence in ruling over conflicts of jurisdiction between judicial authorities of two Emirates. Accordingly, the Defendant had filed a petition under case reference no. 07/2012 (Constitutional) with the USC requesting the said Court to decide over the asserted conflict of jurisdiction between the Civil Court of Abu Dhabi and the DIFC Courts.



## **The Defendant's Application for a Stay of the Proceedings before the DIFC Courts**

5. On 13 September 2012 the Defendant submitted an application to the DIFC Courts for a Court Order that the determination of this case be stayed pending a determination of the USC in Constitutional Petition no. 7/2012; and/or alternatively that it be ordered that:
  - (a) The DIFC Courts have no jurisdiction to try this claim against the Defendant;
  - (b) The Claimant's Claim against the Defendant be dismissed for lack of jurisdiction and the Claim Form dated 13 March 2012 be set aside.
  
6. In its application, the Defendant maintained that a more appropriate jurisdiction for the claim was that of the Courts of Abu Dhabi. They further relied on the fact that a Constitutional Petition had been filed with the USC for determination of the jurisdiction as between the DIFC Courts and the Abu Dhabi Courts to hear this claim.

## **The Hearing of the Defendant's Application on 12 November 2012**

### **The Defendant's Position**

7. On 12 November 2012 the Defendant filed its skeleton argument for the hearing of its application. It put forward its primary position as being that the proper forum for the determination of the dispute at hand was the Abu Dhabi Courts. Its secondary position was that conflicts of jurisdiction between the judicial authorities of two Emirates in the UAE were to be determined by the USC, and that as a consequence the DIFC Court proceedings should be stayed, with or without a final determination on the question of jurisdiction until the USC had ruled on the matter. The Defendant further argued that the burden of proof was on the Claimant to show to this Court's satisfaction that the Claimant, as the DIFC branch of a foreign company, could bring this claim under Dubai Law No. 12 of 2004 ("Law No. 12"), as amended by Dubai Law No. 16 of 2011 ("Law No. 16"). Notwithstanding, the Defendant maintained that even if the Claimant managed to cross that threshold, the Defendant's primary application must succeed for two reasons: Firstly, parallel proceedings on the same subject matter in the DIFC Courts (which is a Dubai Court) and Abu Dhabi Courts comprise an inter-Emirate jurisdictional conflict, which pursuant to Article 99 of the Constitution of the UAE was a matter of exclusive jurisdiction for the USC to determine. Secondly, jurisdiction under Law No. 12 was nonetheless subject to the doctrine of forum non conveniens ("FNC"), which they contended had been accepted by DIFC Courts' case law.



8. Furthermore, as regards the doctrine of FNC, the Defendant asserted that in circumstances in which a negative declaration was being sought in one forum (in the instant case the DIFC Courts) and a positive remedy in another forum (the Abu Dhabi Courts), that would be a factor in favour of the latter forum, in this case the Abu Dhabi Courts. It followed that the burden of proof was on the Claimant to show that the chosen forum (in this case the DIFC Courts) was the most convenient forum, which in the Defendant's opinion the Claimant had failed to do. The DIFC was not the principal place of business of the Claimant, since it was merely a branch of a company whose principal place of business was in Switzerland. The Abu Dhabi Courts were more appropriate, not least because significant points of Egyptian law were in issue which the Abu Dhabi Courts were best placed to consider. This would also reduce or remove the need for expert evidence on foreign law.
9. In sum, the Reinsurance Policy had been placed by brokers situated in Jordan, which meant that the Claimant had been offering its services outside of the DIFC in Jordan to primary insurers situated in Abu Dhabi in respect of an insured party domiciled in the UAE and property located in Egypt. In such circumstances, the Claimant must have anticipated that the DIFC would not be the suitable forum.
10. If this Court were not to stay the proceedings in question, pending the delivery of the USC's ruling, it ran the risk that it would assume jurisdiction in a case where the USC found that it ought not to, creating the unacceptable and confusing situation in which there were conflicting judgments of this Court and the USC. The Claimant had accepted that at some point the USC would need to determine any jurisdictional conflict between the DIFC Courts and the Abu Dhabi Courts. This, in itself, was a powerful argument in favour of a stay of the DIFC Court proceedings where there was no evidence of a stay application or intention to seek a stay by the Claimant in the Abu Dhabi Court proceedings. There was a real risk that the Abu Dhabi Courts would give a conflicting judgment in the claim. Moreover, to allow both sets of proceedings to continue would cause the parties to incur the costs of parallel proceedings.



## The Claimant's Position

11. The Claimant had been advised that the DIFC Courts had exclusive jurisdiction to determine this dispute and that therefore any question of FNC did not arise in the circumstances of this case. The DIFC Courts were plainly the appropriate forum in which to determine the dispute as: (a) the Claimant was a branch of a foreign company based in the DIFC and licensed to carry out (re)insurance business within it; (b) the Reinsurance Policy had been concluded in the DIFC and (c) the Claimant had been advised that, in the absence of an express governing law clause in the Reinsurance Policy, DIFC Law provided that *"If the parties do not specify the governing law of the contract, the contract shall be governed by the law of the DIFC"* (see Article 10 of the DIFC Law No. 10 of 2005 (Law Relating to the Application of DIFC Laws)). Therefore, the Reinsurance Policy should be governed by DIFC Law. Moreover, the principal place of performance of the Reinsurance Policy, namely, payment, was in the DIFC. The fact that the losses had occurred in Egypt was irrelevant to determining the DIFC Courts' jurisdiction over a dispute under the Reinsurance Policy.
12. The Abu Dhabi Courts would only hear a claim in Arabic, with all documentation submitted in Arabic, whereas the language of the DIFC Courts was English. This is a most relevant consideration as the language of the Reinsurance Policy and all related documents are in English. Having technical and legal documents translated into Arabic ran the risk of translation errors and inconsistencies altering the meaning and intention of the original words and could be quite an expensive exercise. On the basis that DIFC law applied to the Reinsurance Policy, translations of Egyptian law would not be required. Furthermore, the Claimant had been advised that witness evidence was generally not admissible in civil proceedings in the Abu Dhabi Courts. Consequently, if heard in the Abu Dhabi Courts, the Claimant's claim would likely be determined purely on the basis of written submissions filed on its behalf and by reference to documents submitted without any witness evidence.
13. The Claimant also submitted the expert legal opinion of Dr Makkawi on relevant matters of UAE law. Dr Makkawi asserted that Article 37 of the Civil Procedures Law was only intended to organise the relationship between the insured and the insurer in an insurance contract and did not apply to reinsurance policies, where the contracting parties have a wider freedom to decide which law and which jurisdiction would govern



the two insurance companies' relationships. He was of the opinion that the USC was most likely to conclude that the DIFC Courts and not the Abu Dhabi Courts had jurisdiction over the dispute. In any event, since the present proceedings had been brought in the DIFC and under DIFC law, the provisions of the Federal Civil Procedures Law ("FCPL") were irrelevant to the rules of jurisdiction to be applied by the DIFC Courts in determining whether or not they should retain and exercise jurisdiction as the governing law was DIFC law.

14. In sum, the Claimant maintained that the DIFC Courts had exclusive jurisdiction to determine this matter and that there was no other clearly or distinctly more appropriate forum to determine this dispute. Accordingly, the Claimant requested that the Defendant's application be dismissed in its entirety.

#### **The Claimant's Representative's Letter to the Registry of 23 January 2013**

15. On 23 January 2013 the Claimant's representatives wrote to the DIFC Courts' Registry, bringing their attention to the USC's decision of 16 January 2013, in which the Defendant's Constitutional Petition of 10 May 2012 had been dismissed. An Arabic language copy of the Certificate which had been issued by the USC on 22 January 2013 confirming its decision was attached. It was argued on behalf of the Claimant that while the USC's full written judgment was not yet available to the parties, the USC's rejection of the Defendant's Petition significantly undermined the Defendant's case as advanced in its application heard before this Court on 12 November 2012.

#### **Reasoning**

16. The Defendant in its challenge to the DIFC Courts' jurisdiction application applies for the following relief:
  - a) Primarily, a stay of the proceedings pending the determination of the Union Supreme Court in the Constitutional Petition;
  - b) Alternatively;
    - (i) A finding that this court has no jurisdiction to try this claim, the claim should therefore be dismissed and the claim form set aside;
    - (ii) That the service against the Defendant be set aside
    - (iii) The costs of the application



17. In order to deal with and determine the Defendant's application efficiently, the Court will take the issues central to this application and discuss both parties' arguments in specific detail in the order that if the determinations in relation to the first issue favour the Defendant's position, then there will be no need to go through to the following issue, as it would be determinative of the application or the claim entirely.

The order of issues is as follows:

- (a) The issue of the service of the Claim Form;
- (b) The issue of a stay of proceedings pending a determination of the Union Supreme Court in regards of jurisdiction;
- (c) The issue of whether the DIFC Court has jurisdiction;
- (d) The issue of Forum Non Conveniens.

**(a) The issue of the service of the Claim Form**

18. The Defendant in the context of this issue argues that the Claimant did not follow the proper procedures provided under Rules 9.52, 9.53 and 9.55 of the Rules of the DIFC Courts ("RDC") in serving the Claim Form and had not put forward any evidence that they had done so. The Defendant insists that service should be set aside at paragraph 58 of its Defendant's Skeleton Arguments, stating that:

*"The Claimant's evidence is that service was effected through Abu Dhabi Courts on 29 March 2012 and the only documents exhibited in support of that contention are in Arabic. There is no evidence in the Claimant's three witness statements filed in this application that service was effected by a method permitted by Abu Dhabi law and service should be set aside for that reason alone."*

19. The Claimant, on the other hand, submits that they have effected service through the Abu Dhabi Courts and gives reference to documents [HB tab 6, pages 119-121], and that the Defendant had then acknowledged that service by submitting to the Court its Acknowledgement of Service [HB tab 4].

20. It is clear from the evidence submitted by the Claimant [HB tab 6, pages 119-121] that there was service on the Defendant in the Abu Dhabi Courts and I, being a native Arabic speaker, was able to identify that and confirm it. I also do not see that it was necessary for the Defendant to ask the Claimant to submit an English translation of the documents which they received, and acted upon, at the time by submitting an Acknowledgment of Service to this Court. The Court therefore considers that to be an unfair and



unreasonable ground upon which to set aside the Claim Form just because the Defendant wishes to see official documents served on them in another jurisdiction translated for them in these proceedings, serving no merit beyond a desperate effort to make the proceedings appear more complicated than what they truly are. Furthermore, the Defendant did not raise any issue concerning service at the time of submitting, or even while submitting, its Acknowledgement of Service.

21. With reference to the Overriding Objective, specifically that provided at Rule 1.5 (4) of the RDC, the Court accordingly relies on the official service documents issued by the Abu Dhabi Court in Arabic, and the acknowledgement of service in this case as evidence that service was effected properly, in accordance with the RDC, and therefore finds no fair ground on which to set aside the claim form.

**(b) The issue of a stay of proceedings pending a determination of the Union Supreme Court in regards of jurisdiction**

22. In its application, the Defendant did not clearly argue that the DIFC Court had no jurisdiction to determine this case. Instead, it requested that the Claimant establish before this court that they are a party under the definition of Article 5.1 of Law No. 12 (amended by Law No. 16), which would bring the dispute under the jurisdiction of this Court. The Defendant states in paragraph 41 of its Skeleton Arguments:

*"The burden of proof is on the Claimant to show to this Court's satisfaction that the Claimant, as the DIFC branch of a foreign company, can bring this claim under Law No. 12."*

23. Then the Defendant further claimed that the Abu Dhabi Courts have jurisdiction to deal with this claim, as the Defendant is domiciled in Abu Dhabi, by relying on two jurisdictional references in the FCPL. The first is that Article 31 of the FCPL provides an independent basis for jurisdiction to be with the Abu Dhabi Courts where it states:

*"Jurisdiction shall be vested in the court within whose area the Defendant has his domicile unless the law provides otherwise and if the Defendant has no domicile in the State, jurisdiction shall be vested in the court in whose area he has his place of residence or his place of business"*



Secondly, Article 37 of the FCPL provides:

*"In disputes relating to the claims for the value of insurance jurisdiction shall be vested in the court in whose area the beneficiary has his domicile or the insured property is located".*

24. Notwithstanding, the Defendant insists that even if the Claimant manages to cross the threshold of establishing that the DIFC Courts have jurisdiction to deal with the case, this would lead to a situation in which parallel proceedings on the same subject matter in the DIFC Courts (which is a Dubai Court) and the Abu Dhabi Courts would comprise an inter-Emirate jurisdictional conflict, which pursuant to Article 99 of the Constitution of the UAE is a matter of exclusive jurisdiction for the USC to determine. The Defendant argues, in particular, that Article 99 (9) of the Constitution provides the Union Supreme Courts with jurisdiction to determine *"conflicts of jurisdiction between the judicial authority in one Emirate and the local judicial authority in another Emirate. The rules relating thereof shall be regulated by a Union Law"*.

25. According to the Defendant, that is further supported by Constitutional Amendment No. 1 of 2004, Article 21 of which states:

*"...the Union shall have exclusive jurisdiction in the following matter - ... the order and the manner of establishing Financial Free Zones and the boundaries within which they are exempted from having to apply rules and regulations of the Union."*

26. On the other hand, the Claimant argued firstly that no conflict of jurisdiction yet existed; and secondly that the Defendant's petition for a determination on jurisdiction before the USC was premature for two reasons:

- (a) the Defendant had not yet issued proceedings before the Abu Dhabi Courts; and
- (b) neither the DIFC Courts nor the Abu Dhabi Courts had made any decision in regards of jurisdiction. They referred in this connection to Dr. Makkawi's evidence as an independent legal expert in UAE law, and therefore there was no ground upon which to stay the proceedings.

27. This Court has no doubt that the USC has (according to Article 99.9 of the Constitution and Article 33 (9) and (10) of the USC Law No. 10/1973) jurisdiction to determine a conflict of jurisdiction between the judicial authority in one Emirate and the local judicial authority in another Emirate, as in this case between the DIFC Court (a Dubai Court)



and the Courts of Abu Dhabi, the question to be answered is only at what stage the USC Court shall intervene and determine the conflict.

28. Even though the rules of the Constitution and USC Law No. 10/1973 are silent about the timing of when the conflict can be brought before the USC, the Union Supreme Court with the authority to interpret the Constitution and its Laws given to it by the Constitution formulated a principle derived from the case no. [10/28 Jurisdictional Conflict. Hearing 5/5/2002], where it was held:

"اختصاص المحكمة الاتحادية العليا بالفصل في تنازع اختصاص بين حكيمين انتهائين - اقتضارة على تنازع الاختصاص بين القضاء الاتحادي والهيئات القضائية في الامارات او بين هيئة قضائية في امارة وهيئة قضائية في امارة اخرى"

This principle states that the USC shall exercise its jurisdiction to determine the conflict of jurisdiction between two final judgments of a federal and local judicial authority or between two local judicial authorities in the UAE.

29. It is clear to the Court that before taking a purported jurisdictional conflict to the USC for its consideration, there would first have to be two conflicting judgments over a jurisdictional matter issued by two different Courts in the Emirates. Secondly and more importantly, those two conflicting judgments should be final. In other words, the USC's jurisdiction would start after two UAE Courts had issued two judgments creating a positive (both claiming jurisdiction) or negative (both declining jurisdiction) conflict of jurisdiction which cannot be said to happen unless and until each Court has made a final decision in that regard. In that event, those two judgments will be questioned before the USC but not the parties' submissions or arguments before final Judgment has been delivered by the conflicting Courts.

30. Applying that to the Defendant's application to stay the proceedings pending a determination of the USC's jurisdiction, it can be seen that as to the timing, development and progression of the cases with the assumption that there might be jurisdiction for an Abu Dhabi Court to deal with the substantial case between parties, to take the conflict before the Union Supreme Court is premature (as the Claimant rightly describes it). Therefore the Court takes the view that the grounds put forward by the Defendant for this Court to use its power to stay the proceedings are not realistic or even helpful. The Court rejects the application for an order to stay the proceedings, and shall continue to



deal with the alternative relief sought by the Defendant in their application in the following paragraphs below.

31. As regards the argument of the Defendant that to allow both proceedings to continue would mean the parties incurring the costs of parallel proceedings, I agree with the Defendant's position and add to it that there will also be the cost of the petition before the USC after the parties have obtained two final judgments. Though it is not an ideal way to resolve jurisdictional conflicts, we are not in a position to review the legal system in the UAE or to suggest a better way of dealing with such a matter.
32. However, I will refer to this as a risk both parties have brought onto themselves when failing to agree on a jurisdiction clause in their sophisticated contract, or even to reach an agreement at any stage after the dispute had arisen knowing full well the legal system in place in the UAE.

**(c) The issue of whether the DIFC Courts have jurisdiction**

33. Although the Defendant did not expressly contend in their submissions that the DIFC Courts have no jurisdiction at all to hear this case and, they instead put it this way: "the Defendant's primary position is that the proper forum for the determination of this dispute is the Abu Dhabi Court," paragraph 12 of the Defendant's Skeleton Argument, and then paragraph 18 requested the Claimant to satisfy the Court by establishing that the Claimant as a DIFC branch of a foreign company can bring the claim under the jurisdiction of this Court according to the rules. Even if the Claimant manages to do so, the doctrine of FNC must favour the Abu Dhabi Courts on the grounds that are to be discussed in the last part of this judgment, but first and foremost it is necessary to find out whether the DIFC Courts have the jurisdiction to deal with this matter or not.
34. The jurisdiction of the DIFC Courts is primarily determined by Article 5 of Dubai Law No. 12 which in fact was amended by Law No. 16 that came into force on 31 October 2011. Sub-paragraphs (A)(1)(a) and (b) of Article 5 of Law No. 12 state:
- (a) Civil or commercial claims and actions to which the DIFC or any DIFC Body, DIFC Establishment or Licensed DIFC Establishment is a party;
  - (b) Civil 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 or will be



performed or is supposed to be performed within DIFC pursuant to express or implied terms stipulated in the contract;"

35. Article 2 of Law No. 12 defines "DIFC Establishments" as "any entity or enterprise established, licensed, registered or authorised to carry on business or conduct any activity within the DIFC pursuant to DIFC Laws, including Licensed DIFC Establishments". The Article also defines "Licensed DIFC Establishments" 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".

36. This Court agrees with both the Defendant and the Claimant that in *Khorafi & Ors v Bank Sarasin-Alpen & Ors* CA003/2011, the DIFC Court of Appeal held that matters of procedure and jurisdiction must be determined by reference to Law No. 12 only, as amended by Law No. 16.

37. In *Corinth Pipeworks SA v Barclays Bank Plc* CA002/2011, it was held that;

*"(81) The definitions of "DIFC Establishments" and Licensed DIFC Establishments" now read, respectively:*

*"Any entity or enterprise established, licensed, registered or authorised to carry on business or conduct any activity within the DIFC pursuant to DIFC Laws, including Licensed DIFC Establishments.*

*"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."*

It was also held that;

*(83) "...access to the jurisdiction of the Court of First Instance through the gateway provided by paragraph (a) of Article 5(A)(1) of the Original Law as amended by Law No 16 of 2011 is not so restricted. Whatever may have been the position before the issue of Law No 16 of 2011 — and I should not be taken as indicating any disagreement with the view expressed by the Chief Justice in his judgment on this Appeal — the position following the issue of that Law seems to me free from doubt. Access through the gateway provided by paragraph (a) of Article 5(A)(1) is available in the case of civil or commercial claims and actions to which a Licensed DIFC Establishment is a party. Once it is shown that the party by or against whom the civil or commercial claim is brought is an entity or enterprise licensed, registered or authorised by the DFSA to provide financial services or to conduct any other activities in accordance with the DIFC Laws, the requirement under paragraph (a) is met. The jurisdiction exists ad hominem: there is no further "transaction-*



*based" requirement, comparable to those imposed under paragraphs (b) and (c) of Article 5(A)(1)."*

38. Applying the above to the facts of this case, it can be seen from the trade licence of the Claimant that Allianz Risk Transfer AG is registered as a foreign recognised company (Dubai Branch), as is evident on page 16 of the Application Bundle. Therefore, they are a DIFC Establishment bringing a civil or commercial action against another party within the meaning of Article 5 (A) (1) (a), the requirement in the *Khorafi & Ors v Bank Sarasin-Alpen (ME) Ltd & anor* and meeting the definition of "DIFC Establishment" as in *Corinth Pipeworks SA v Barclays Bank Plc*.
39. Furthermore, the Claimant submitted that the contract between the parties had been signed in the DIFC. The Defendant did not contest this, which means that the gateway (b) of Article 5 is met too.
40. Finally, no written opt-out agreement in any form has been put forward by the Defendant to litigate outside the exclusive jurisdiction of the DIFC Courts.
41. For all that has been said above, this case which has been brought by the Claimant (a DIFC Establishment) falls under the jurisdiction of the DIFC Courts as provided under Article 5 of Dubai Law No. 12, amended by Law No. 16. The Court shall next discuss the alternative proposition of the Defendant, namely that the Abu Dhabi Court is a preferable court to deal with this case, according to the doctrine of FNC.

**(d) The issue of Forum Non Conveniens**

42. This part of the judgment deals with the second alternative position of the Defendant that jurisdiction under Law No. 12 is nonetheless subject to the doctrine of FNC, which is supported by DIFC case law. The Defendant argues that even if the Claimant managed to establish the jurisdictional link with the DIFC Courts, the Claimant must notwithstanding establish that the chosen forum (in this case, the DIFC Courts) is the most convenient forum, and it has failed to do so.



43. The Defendant made reference to the decision of the English House of Lords in *Spilada Maritime v Cansulex* [1987] 1 Lloyd's Report 1, where the Court held that a judge may decline to take a case where there is another jurisdiction that is more suitable for the parties. Many factors can be considered to determine the "natural forum," including the availability of witnesses, the applicable law of the matter, the parties' residence or place of business, and the possibility for the plaintiff to obtain justice in the foreign jurisdiction. If a party makes out a claim for a natural forum the opposing side may rebut the claim by showing that justice requires the matter to be heard in the "domestic court", otherwise justice would not be done.
44. The Defendant submits that the following factors stand to make the Abu Dhabi Courts more convenient to hear this matter than the DIFC Courts:
- (a) The DIFC is not the principal place of business of the Claimant, since it is merely a branch of a company whose principal place of business is in Switzerland;
  - (b) One factor in the determination of the suitable forum is which law applies (on which point see below);
  - (c) There can be no doubt that the Claimant is forum shopping. The Abu Dhabi Courts are available to hear the claim, and there is no evidence to suggest that substantial justice cannot be done there;
  - (d) The relevance of the connections with Egypt and Egyptian (or UAE) law is that a difficult point of interpretation is in issue under that system of law and the Abu Dhabi Courts are not only more experienced but more appropriate to determine it. This will also reduce or remove the need for expert evidence on foreign law.
45. The Claimant, on the other hand, argues that the link with the DIFC Courts has been established, and as parties have not opted-out from their jurisdiction in writing or any other form, the only basis upon which the DIFC Courts could decline to exercise jurisdiction would be FNC. However, the Defendant did not through its application seek to stay the proceedings in favour of the Abu Dhabi Courts, and that argument cannot apply to the USC as it is not the competent Court in the context of the FNC doctrine.
46. The Claimant further submitted that in the event that this Court accepted the view that the Defendant is, following on from its application, entitled to a stay in favour of the Abu Dhabi Courts (which has been denied), then the application of FNC must favour their forum (the DIFC Courts). The Claimant supported its argument with reference to a range of factors that bolstered the view that the DIFC Courts are the most convenient forum in contrast with the Abu Dhabi Courts if the latter Court is accepted as an existing forum by this Court at the outset.



47. Taking into account the Application, the Skeleton Argument and the oral submissions (before the Court) of the Defendant, the Court takes the view that the Defendant did raise the issue that the proceedings should be stayed in favour of the Abu Dhabi Courts as an alternative relief in the event that this Court was minded not to stay in favour of a petition before the USC.
48. It is quite obvious from what both parties argued that they have considered the test of appropriateness between the DIFC Courts on the one hand, and the Abu Dhabi Courts on the other. Each party in furtherance of its arguments put forward and advanced many factors to persuade this Court of the view that the forum they had suggested was either the most natural or the most appropriate forum. However, none of them raised the question or challenge of whether the doctrine of FNC is applicable if the two fora in question are courts in one country or state such as the United Arab Emirates in this case.
49. There is no way to say that FNC is not applicable or that it is not considered to be a legal principle that the Court might refer to in the case of potential conflicts of jurisdiction such as this one. The DIFC Courts in fact applied it in the case of *Khorafi & others v. Bank Sarasin-Alpen (ME) Limited & anor (CA 3/2011)*, and referred to it in the case of *Corinth Pipeworks SA v Barclays Bank Plc* at both Court of First Instance and Court of Appeal levels, as the Chief Justice Michael Hwang stated:

*"I leave open the question of the applicability of forum non conveniens in a case which is prima facie within the jurisdiction of both the Dubai Civil Courts as well as the DIFC Courts by virtue of Article 5(A)(1) as neither party has, before this Court, addressed us as to whether that doctrine should apply to the facts and circumstances of the present case."*

50. In my opinion, the question raised by the Chief Justice in regards of the application of the FNC doctrine between the DIFC Courts and Dubai Courts is similar to that between the DIFC Courts and any other Court in the UAE. I also believe that the answer to this question is not in fact that simple.
51. As concerns the doctrine of FNC as in the case of *Spiliada Maritime v. Cansulex Ltd*, the English House of Lords held that a judge may decline to take a case where there is



another jurisdiction that is more suitable for the parties. Lord Goff, the Judge in that case, stated that:

"In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right and there is the further advantage that, on a subject where comity is of importance, it appears that there will be a broad consensus among major common law jurisdictions. I may add that, in any case, the connection of the defendant with the English forum is a fragile one (for example, if he is served with proceedings during a short visit to this country), it should be all the easier for him to prove that there is another clearly more appropriate forum for the trial overseas."

52. In the above case, the Judge (Lord Goff) stipulated that the English Court may only order a stay of the proceedings if the Defendant shows that there is another available court with competent jurisdiction. Lord Goff then proceeded to address the balance and factors of appropriateness before considering the justice and fairness of the decision to grant or to reject the stay.
53. It is clear that in *Spiliada Maritime v Canulex Ltd* and in so many other precedents, the English Courts will not exercise jurisdiction if the Defendant has contested their jurisdiction and can establish that there is another forum elsewhere which is available and more appropriate than England for the determination of the case. The other proposed forum or court would have to be a foreign court, in other words the court of another country or state.
54. In fact, *Spiliada Maritime v Canulex Ltd* introduced the FNC doctrine for international disputes where the Claimant often has a choice between two or more countries in which to bring an action against the Defendant, and where those countries have different systems of law and procedures which govern jurisdiction, therefore allowing for either double proceedings or conflicting decisions that might lead to injustice in one way or another. The basic rationale in applying the doctrine to cases which feature a conflict between international jurisdictions is that the equitable discretion given to a judge to grant or to reject a stay of the proceedings might be the only way to avoid conflict of



forums, or injustice between national courts in one country, in another country or state, in the absence of binding international law (or policy) organising and regulating the issue of jurisdiction between different nations, and to protect parties' interest in getting a fair trial in the most appropriate jurisdiction (forum).

55. At the international level, the assumption of jurisdiction is ordinarily within the sound judicial discretion of the national trial court, and its ruling will not be disturbed by the findings of any higher authority beyond that country. The doctrine even developed and spread in many other countries, but still has been referred to predominantly in the context of competing jurisdiction between competent international courts, rather than local or national courts.
56. However, that is not the case where the whole conflict is between forums in one country within a legal framework that governs and regulates the issue of jurisdiction, or even when there is a higher authority powered to make a decision over the conflict which is binding on the trial courts, or the different forum that is subject to its absolute authority.
57. Even though the situation in the UAE seems complicated to some extent because of its nature as a federal system with federal and local Emirate Courts, and furthermore the existence of the DIFC to share with the Dubai Courts their original local jurisdiction in civil and commercial cases, the jurisdiction between all UAE courts is clearly defined at both Federal and local levels. The FCPL and its later amendment provide statutory guidance as to how jurisdiction between the Emirates (Federal and local) Courts is to be determined. Inside each single Emirate of the Union, such as the Emirate of Dubai, the jurisdiction between its local courts is also clearly defined. For example Law No. 12 which was amended by Law No. 16 establishes the fine line jurisdictional borders between the Dubai Courts and the DIFC Courts. The jurisdiction between Dubai Courts and the Rental Tribunal (or Committee) is also clearly defined by Dubai law.
58. It is not only that, but in the case of any conflict over jurisdiction at both local level (inside one Emirate) or at a federal level (between federal and local, or two local courts in two different Emirates) the USC is vested with the power to make binding rulings over the conflict and to allocate what would be the appropriate court to deal with the substantial



claim under Article 99 of the Constitution of the UAE and Article 33 (9) and (10) of the Law established the USC in 1973.

59. Our main consideration here will be to examine those rules which make general policy and govern the trial court in the exercise of its discretion when deciding cases. No doubt is raised as to the effectiveness of the Constitution, the federal and local laws.
60. Having said that, there are in the UAE federal constitutional and statutory provisions preventing the widespread application of the doctrine of FNC in both Emirate and federal courts. In my view, that is enough to argue that trial courts should have no discretion to refuse to hear cases under the FNC as it has been dealt with through the general policy which is reflected in the jurisdictional provisions in the aforementioned laws.
61. The DIFC Courts are a common law court. However, since they are subject to the Constitutional and Federal laws which are of a regulatory nature that does not set them apart from the rest of the UAE Courts. Therefore, the only way to apply the FNC doctrine is in circumstances in which the competent forum is outside the jurisdiction of the USC.
62. Another difficulty arises if one is to assume that the DIFC Courts apply the FNC doctrine and relinquish jurisdiction in favour of another UAE Court, such as a Dubai Court or an Abu Dhabi Court. The rest of the UAE Courts do not recognise by definition or apply the FNC doctrine, which means that the local court in its usual application might still decline to deal with the said case just because there is a jurisdictional link with the other court, which might even be the court which just relinquished the exercise over its jurisdiction.
63. For the above-cited reasons, this Court decides to seize jurisdiction and need not discuss the possibility of the Abu Dhabi Courts being available and competent and discuss therefore the factors that make it more appropriate than the DIFC Courts, as that shall be the task of the USC, as it has been required to do by the parties.
64. In conclusion, in my opinion, the doctrine of FNC was introduced to give Judges the discretion to stay proceedings in favour of another foreign competent court to enhance justice at the international level. It is not applicable at a national level (inside one country) where the parameters of jurisdiction between the local courts are clearly defined



and, more importantly, where there is a higher authority responsible to decide over jurisdictional conflicts. If the FNC doctrine is said to be applicable at national level, there would need to be clarity (through clear policy) and authority to determine the most appropriate court.

65. Thus, having decided that the DIFC Court is a jurisdictional gateway to deal with the case brought by the Claimant, and having decided that there are no grounds to stay the proceedings in favour of the petition before the USC as it is still premature as two final judgments have not yet been rendered; and finally having decided that the FNC doctrine is not helpful for the Defendant to stay the proceedings in favour of the Abu Dhabi Courts as the most appropriate forum, the entire application is consequently dismissed and the Defendant is to pay the costs of this application to be assessed by the Registrar if not agreed.
66. Finally, I have considered the Defendant's application for an order that should this Court decide to seize jurisdiction, and not order a stay of proceedings as sought by the Defendant, the DIFC Court proceedings should only continue on the basis that the Claimant be at sole risk of the costs of the DIFC Court proceedings irrespective of success, in the event that the USC ultimately rules in favour of the Defendant on jurisdiction. I believe that liability for costs should lie on both sides.
67. The risk lies on both sides, and the Claimant is now aware of that as seen to by the Defendant. The most important question is, in my opinion, (as the Defendant did not further develop this point and gave no clear legal references in support of its position) who should make the determination in regards of final costs in the event that the USC makes the final ruling on jurisdiction if so required.
68. Each court usually makes costs orders according to the strength of the parties' submissions before it, but I shall leave this question open until the instant proceedings have come to an end and each party has sought to make a related application before the appropriate court.

Issued by  
**H.E. Justice Ali Al Madhani**  
Date: 30 April 2013

