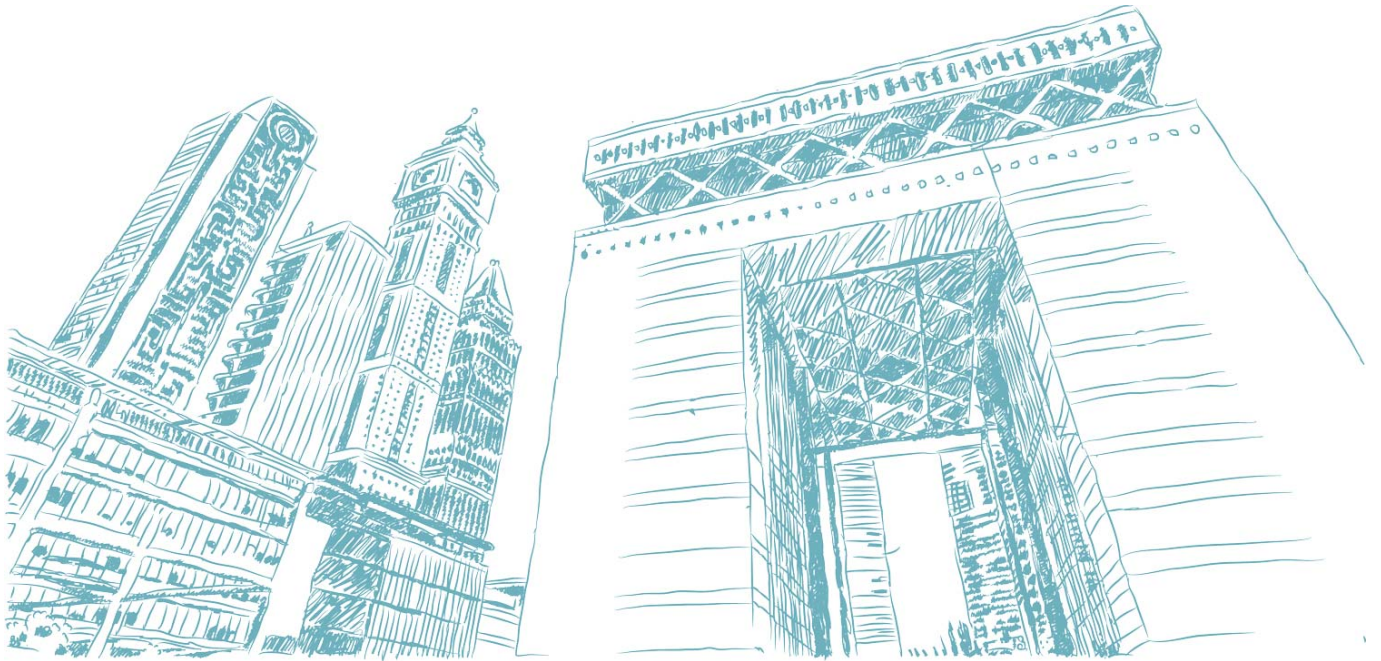


DIFC Courts Recognise Side Agreements in Injunction Proceedings for the First Time



Introduction

Al Tamimi & Company has successfully acted on behalf of three claimants to obtain interim injunctive relief from the DIFC Court of First Instance against a defendant based in the Emirate of Ajman, in a dispute arising from breaches of various agreements ('the Side Agreement', 'the Shareholders' Agreement' and the 'Lease Agreement') governing the operation of a school in the Emirate.

The DIFC Courts found it had jurisdiction to hear the application for relief in accordance with clauses in the Side Agreement and Shareholder's Agreement that opted into the DIFC's jurisdiction and amended the explicit terms of the memorandum of association ('MOA') which created the third claimant under the UAE Commercial Companies Law (Federal Law no.8 of 1984 as amended by Federal Law no.2 of 2015; the 'Commercial Companies Law').

Background

The first claimant was a businessman who owned the second claimant, a company registered in the Emirate of Ajman. The defendant was the sponsor and a nominee shareholder of the third claimant, another company registered in Ajman, which owned a school there. Under the relevant agreement, the defendant owned 51 percent of the third claimant's shareholding but held it on trust for the second claimant, and through a multi-year lease, he leased to the claimants the land and buildings on which the school was established.

The claimants complained that the defendant was interfering unjustly in the operation of the school which the parties had opened on the defendant's land. The defendant had granted the first claimant powers to manage the third claimant and the school under a power of attorney ('POA') made in accordance with the Side Agreement.

The defendant revoked the POA with the effect of freezing the third claimant's bank accounts and assets. The claimants sought urgent injunctive relief from the DIFC Courts, requesting remedies that would allow them to continue to operate the school.

The DIFC Court Injunction and Return Date

The Court granted an interim injunction on an ex-parte basis. Amongst other interim remedies ordered pending trial of the dispute, the DIFC Courts ordered the defendant to reinstate the POA, so the third claimant and the school could continue their operations, as well as to return a number of post-dated cheques that the defendant held as payment for the school's future rent of its property from him.

At the return date hearing for the injunction, the defendant argued that the interim injunction order should be set aside because the DIFC Courts did not have jurisdiction to hear the underlying claim brought by the claimants.

The defendant submitted that the MOA was a constitutional document of the third claimant which took precedence over the Side Agreement and Shareholder Agreement which, he said, had not been, and were not capable of being, validly notarised, attested and registered in accordance with the Commercial Companies Law. The dispute was, therefore, outside the jurisdiction of the DIFC Courts because the standard dispute resolution clause in the MOA meant that disputes should be decided under the jurisdiction of the Ajman Courts.

The defendant also said that the substance of the dispute related to alleged breaches of the lease agreement which was governed by the laws of the Emirate of Ajman and was subject to the exclusive jurisdiction of the Courts of Ajman. He argued that other facts of the case pointed to the Ajman Courts being the appropriate forum for the dispute: the defendant was a UAE national domiciled in Ajman; the claim related to a school located in Ajman; the material agreements were concluded, notarised and registered (where applicable) in Ajman; and the second and third claimants were registered as companies in the Emirate of Ajman and the Ajman Free Zone.

The claimants responded, arguing that the Side and Shareholders' agreements expressly gave priority to the terms of those agreements in the case of any conflict with the MOA; the default term in the MOA and Commercial Companies law would necessarily mean that disputes with companies registered in Ajman would have to be heard in Ajman, regardless of jurisdictional clauses in relevant contracts; and in accordance with the DIFC Courts' own findings in cases like *Standard Chartered Bank v IGPL* [2015] CFI 026, the DIFC Courts were courts of the UAE for the purposes of the MOA and, by implication, the Commercial Companies Law.

The claimants denied that their claim was substantially over the lease agreement: they had pleaded breaches of terms of the Side and Shareholders' agreements too. Finally, they said that the DIFC Courts did not recognise the application of the doctrine of *forum non conveniens* when other domestic courts of the UAE could have jurisdiction over the dispute (following *Investment Group Private Ltd v Standard Chartered Bank* [2015] DIFC CA 004). Even if the doctrine applied, Article 31(5) of the UAE Civil Procedure Code allows parties to opt out of the Ajman Courts' jurisdiction where gateways into other jurisdictions were available.

In his *ex tempore* judgment, the Judge, H.E. Justice Omar Al Muhairi, upheld the injunction pending trial of the defendant's jurisdiction application. He considered that the DIFC Courts had jurisdiction to make the injunction, given the structure of the agreements. He also found that the balance of convenience favoured the claimants on the facts.

Conclusion

The Court has established a helpful precedent for entertaining disputes based on exclusive jurisdiction clauses in favour of the DIFC contained within side or nominee agreements in respect of companies incorporated outside of the DIFC, notwithstanding the express terms of any articles of association. This is particularly important given the DIFC Courts' willingness to make interim orders and grant interim injunctive relief, which provide useful and flexible tools for contracting parties.

The facts that none of the parties in this case had any substantial link to the DIFC and that the defendant was based in Ajman were overridden by the clear and express DIFC jurisdiction clauses in at least two of the agreements, which were given contractual priority by the agreements.

The DIFC Courts have also demonstrated the adaptable rules of contractual interpretation used in reading and interpreting formal company documents together with nominee or side agreements.

(1) Vinod Sharma (2) Avalon Global Education Services Limited (3) Avalon Heights World Private School LLC v Sheikh Khaled Saeed Humaid Al Nuaimi [2018] CFI 022

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