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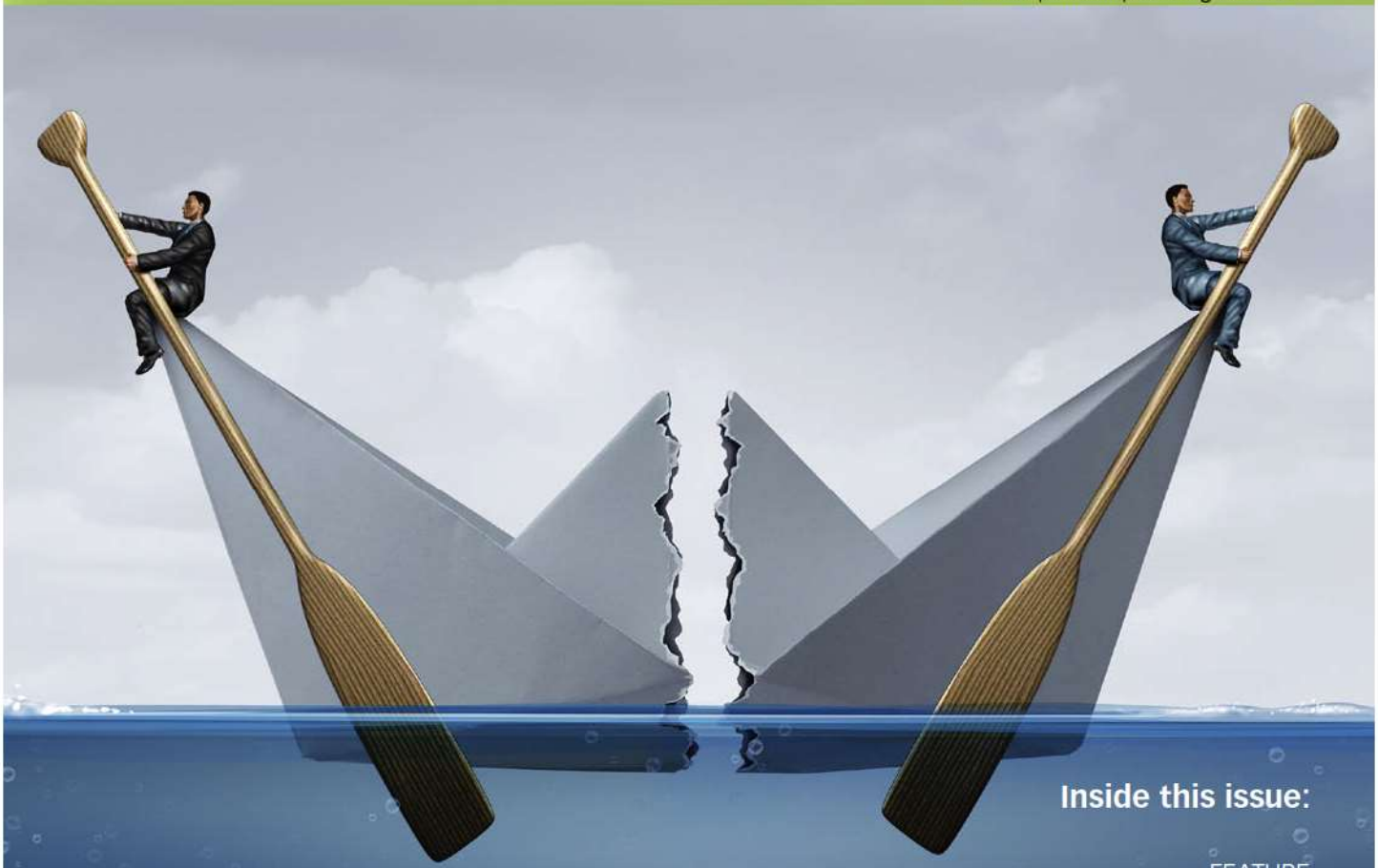

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PERSPECTIVES

WHY 'BUSINESS-FRIENDLY' AND 'NO-NONSENSE' SHOULD BE SYNONYMOUS FOR COMMERCIAL COURTS

BY **AMNA AL OWAIS AND MAHIKA HART**
> DIFC COURTS

The cost of dispute resolution has been rising worldwide, causing smart businesses to seek out the most efficient, consistent and cost-effective dispute resolution solutions available to them. For many, the solution has become arbitration, although costs are rising steadily in this area as well. Enter a new type of commercial court, proudly business-friendly and focused on using the latest tools to enhance efficiency and best serve businesses in their dispute resolution needs.

A feature of this new breed of courts is their international outlook and ability to serve business dispute companies worldwide. But why might a company in far-off China or Nigeria choose to opt-in to the jurisdiction of a court in Singapore, Dubai or New York? The answer is that these courts have become standard-bearers for business-friendly and innovative dispute resolution services, contributing to business certainty and reducing costs for businesses around the world with tools that enhance court efficiency, even for companies located some distance away.

Being business-friendly is more than simply offering an efficient process and access to top judges, however. It also means taking steps to stamp out frivolous claims and delay tactics to create certainty and finality in dispute outcomes and enforcement, and save time and money along the way.

Combating frivolous claims and delay tactics

Chief Justice Michael Hwang of the DIFC courts coined the phrase 'guerrilla tactics' to describe those who seek to "exploit the procedural rules for their own advantage, seeking to delay the hearing and (if they get any opportunity) ultimately to derail the arbitration so that it becomes abortive or ineffective".

Acknowledging the rise of guerrilla tactics in both arbitration and litigation, many courts have spearheaded measures to keep guerrilla tactics out of proceedings. These mechanisms have been immensely successful in combating frivolous claims and delays.

One such tool is that courts will appropriately grant interim measures, such as freezing or attachment orders, against the relevant defendant's assets to keep the case on track. Urgent applications for interim measures, among other things, are often heard in less than a week, giving parties little opportunity to create additional delays. In cases for the recognition and enforcement of arbitral awards, the judge may require the judgment debtor to pay security into court in an amount up to the value of the arbitral award itself as a condition of granting a stay of proceedings. These interim tools are being used more worldwide to keep cases on track.

The award of costs, especially indemnity costs, is another tool increasingly used against parties which have sought to delay a case with unmeritorious claims and motions. Many courts reserve the ability to order indemnity costs against parties that use delay tactics or otherwise add unnecessarily to the costs of litigation. Indemnity costs, along with sanctions for frivolous claims, act as real deterrents against guerrilla tactics, especially in jurisdictions where judges have made clear their intolerance for delays and their commitment to case management. Active case management is another tool increasingly used by national and commercial courts in order to keep cases progressing in a timely fashion. Active collaboration with counsel for both parties allows timetables to be set in a reasonable yet strict manner, with court officers actively liaising with parties to ensure compliance and prevent delay.

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Additionally, courts are adapting to new litigation features, such as third-party funding, by adapting rules and practices to ensure that these features cannot be used to create delays due to their unfamiliar nature. Judges are working to stay up to date on developments in litigation tools and tactics, and are thus developing and implementing new ideas to streamline the use of these new features. A prime example of this is the recent release of Practice Direction No. 2 of 2017 by the DIFC Courts, which serves to reduce delays that might be caused by the use of third-party funding in a case. The Practice Direction requires disclosure of the fact of funding at an early state in the dispute, allowing for any subsequent applications or reactions to be dealt with promptly, a strategy adopted in varying forms by a number of other courts and by several legislatures as relates to arbitration within that jurisdiction.

Enhancing certainty in outcomes and enforcement

Many courts have also implemented powerful tools to enhance the certainty of outcomes in litigation and the prompt enforcement of judgments. As specialised arbitrators have become more in demand to ensure informed decision making and reduce the necessity of expensive experts, courts are following suit. Many courts have used the creation of specialised divisions, employing specialised judges, as one method to enhance the certainty of outcomes in litigation. Divisions specialising in small claims, commercial disputes, construction and technology disputes, among others, have cropped up to provide businesses with more tailored dispute resolution services.

Anti-suit injunctions against parties that may seek to delay the proceedings by bringing concurrent

proceedings in other courts are another powerful tool to ensure certainty in outcomes and prevent duplicative and potentially conflicting judgments. While these types of injunctions are rightfully rare, they have been granted by a number of business-friendly courts to prevent delay and abuse and to ensure finality in the dispute resolution process.

Appropriate limitations on a party's right to appeal can act as another safeguard, ensuring the finality of outcomes and preventing unnecessary delay. While access to an appeal is an important right, some parties will seek to file unmeritorious appeals to prolong the case. Many courts have implemented appeal rules to ensure the proper balance between allowing meritorious appeals and filtering out unmeritorious appeals at the earliest point in time, including requiring a grant of permission to appeal by a judge and requiring the party seeking appeal to pay the costs of the application or resulting appeal should the appeal be unsuccessful.

Finally, at the enforcement stage, many business-friendly courts have worked to create certainty for businesses seeking to collect on a judgment debt. One key effort toward better worldwide enforcement has been the increasing cooperation and collaboration between courts around the world. This includes entering into guiding agreements with foreign courts to ensure speedy and efficient enforcement of orders and judgments around the world and for smooth enforcement of foreign judgments locally. Parties, thus, have greater assurance that judgments will be honoured promptly without undue risk of further challenge or investigation on the merits of the claim.

These are just some of the ways that courts are tailoring their offerings toward supporting cost-effective, efficient and final resolution of business disputes around the world. But just as there are some that will continue to look to exploit procedural rules for their own advantage, so too must court systems continue to implement new tools to prevent delay and abuse at every stage.

These no-nonsense courts will continue along their business-friendly path, adapting to the needs and demands of businesses worldwide, and for these reasons, opting-in to the jurisdiction of these business-friendly courts is a smart choice for businesses, wherever they may be located. CD

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