Claim No: CFI-027-2016

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 JUSTICE ROGER GILES

BETWEEN

(1) NEST INVESTMENTS HOLDING LEBANON S.A.L.

(2) JORDANIAN EXPATRIATES INVESTMENT HOLDING COMPANY

(3) QATAR GENERAL INSURANCE AND REINSURANCE COMPANY P.J.S.C.

(4) GHAZI KAMEL ABDUL RAHMAN ABU NAHL

(5) JAMAL KAMEL ABDUL RAHMAN ABU NAHL

(6) TRUST COMPASS INSURANCE S.A.L.

(7) TRUST INTERNATIONAL INSURANCE COMPANY (CYPRUS) LIMITED

(8) HIS EXCELLENCY SHEIKH NASSER BIN ALI BIN SAUD AL THANI

(9) FADI GHAZI ABU NAHL

(10) HAMAD GHAZI ABU NAHL

(11) KAMEL GHAZI ABU NAHL

Claimants

and

(1) DELOITTE & TOUCHE (M.E.)

(2) JOSEPH EL FADL

Defendants

Hearing: **1 August 2017**

Counsel: Jonathan Fisher QC (Onoma FZE) for the Claimants

Anneliese Day QC (Clifford Chance LLP) for the Defendants

Judgment: **25 August 2017**

JUDGMENT

ORDER

UPON hearing Counsel for the Claimants and Counsel for the Defendants at a hearing on 1 August 2017

AND UPON reading the submissions and evidence filed and recorded on the Court file

IT IS HEREBY ORDERED THAT:

1.Declare that the Court has no jurisdiction to hear and determine the claim against the Second Defendant.

2. The Claim Form and Particulars of Claim shall so far as they make, detail and/or particularise the claim against the Second Defendant be set aside, but without prejudice to any application the Claimants may make pursuant to RDC 20.7 for an order that the Second Defendant be added as a party.

3. Costs reserved.

Issued by:

Natasha Bakirci

Assistant Registrar

Date of Issue: 24 August 2017

At: 4pm

JUDGMENT

Introduction

1. This is an application by the Second Defendant for a declaration that the Court has no jurisdiction to hear and determine the claim against him, alternatively a declaration that it should not exercise its jurisdiction, and relief giving effect to the declaration.

2. For the reasons which follow, in my opinion the Court does not have jurisdiction over the claim against the Second Defendant; but were it to have jurisdiction, it should not decline to exercise that jurisdiction.

The parties

3. The Claimants are shareholders in Lebanese Canadian Bank SAL ("LCB"), a company based in Beirut formerly conducting a banking business. LCB is now in liquidation. The Claimants acquired their shares in 2006-7.

4. The First Defendant, Deloitte & Touche (ME) ("DTME"), is a general partnership registered in accordance with the laws of Cyprus. It is an accounting firm, operating through branches in a number of countries in the Middle East including in Dubai, and is a Registered Auditor in the DIFC.

5. The Second Defendant, Joseph El Fadl ("Mr Fadl") is a partner in DTME. He is also the Managing Partner of Deloitte & Touche ("DTL"), a civil company registered in Lebanon and carrying on an accounting business in that country.

The proceedings

6. The claims in the proceedings are for breaches of duties as auditor. The Particulars of Claim are lengthy, and for present purposes a brief description of the claims is sufficient.

7. The claims against DTME and Mr Fadl are in relation to audits of the financial statements of LCB for the financial years ending 31 December 2006, 2007, 2008 and 2009, performed by DTL under letters of engagement with LCB. Mr Fadl was the responsible Managing Partner. The claim in relation to the audits of a subsidiary of LCB, Tabadul Company for Shares and Bonds LLC, may be passed over, as that claim is only against DTME.

8. The Claimants allege that in breach of their duties as auditor of LCB for the years above, the Defendants failed to report the true financial position of the companies or to disclose various illicit activities, including but not limited to money laundering and terrorist financing; and that had they properly fulfilled their duties the illicit activities would have been corrected and LCB would not have gone into liquidation. They allege that the breaches of duties caused them collective loss in the order of USD128 million.

9. Although the audits were performed by DTL, the Claimants allege that DTL was in truth an extension of DTME, that they were both part of a single economic unit with DTL a branch of DTME, whereby DTME is liable for the acts and omissions of DTL and of Mr Fadl as a partner in DTME. They also claim against Mr Fadl as personally liable.

10. The causes of action in the Particulars of Claim are in deceit, for negligence and for compensation under the Regulatory Law, DIFC Law No 1 of 2004; more specifically -

(a) contravention of Article 31 of the Law of Obligations, DIFC Law No 5 of 2005, in deliberately ignoring reasonable suspicion of money laundering and terrorist financing or recklessness in the audit opinions in that respect;

(b) owing a duty of care to the shareholders and contravention of Article 18 of the Law of Obligations, in falling below the standards of a competent auditor and failing "to apply professional scepticism and objectivity"; and

(c) liability to compensate for breach or dishonest conduct in connection with duties imposed under regulatory Rules, pursuant to Article 94 (2) of the Regulatory Law.

The Application

11. Jurisdiction is conferred on this Court by Article 5 (A) of the judicial authority law, Law No 12 of 2004, so far as relevant to this application providing in sub-article (1) -

"(1) The Court of First Instance shall have exclusive jurisdiction to hear and determine:

(a) Civil or commercial claims or actions to which the DIFC or any DIFC Body, DIFC Establishment or Licensed DIFC Establishment is a party;

(b) .

(e) Any claim or action over which the Courts have jurisdiction in accordance with DIFC Laws and

> > > > DIFC Regulations."

12. DTME is a DIFC Establishment within Article 5 (A) (1) (a), and does not challenge the jurisdiction to hear and determine the claim against it. DTME has applied to strike out the claim against it. The application is to be heard later this year.

13. The Claimants did not submit that there is (present) jurisdiction to hear and determine the claim against Mr Fadl under Article 5 (A) (1) (a) because he is another party to an action to which DTME is a party. Correctly so, since "claim [s] or action [s]" in Article 5 (A) (1) addresses the particular Defendant (see Al Khorafi v Bank Sarasin-Alpen (ME) Ltd [2011] DIFCCA 3 at [82]).

14. In the Particulars of Claim the Claimants asserted jurisdiction as against Mr Fadl on the ground that the claim against him is a claim within Article 5 (A) (1) (e) of the Judicial Authority Law, because he was "an Authorised Individual carrying out a licensed function under the supervision of the DFSA". This was effectively abandoned in the Claimants' skeleton argument, and expressly at the hearing of the application.

15. In its place, the Claimants submitted that there is jurisdiction under Article 5 (A) (1) (e) -

(a) as to the causes of action in deceit and for negligence, by force of Article 13(1) of the Law of Obligations; and

(b) as to compensation under the Regulatory Law, by force of Article 86(4) of that Law.

The paragraphs of Article 5 (A) (1) are often referred to as gateways, and I will refer to these as the gateways issues and to the para (e) gateways.

16. The abandonment of Authorised Individual and the new grounds for jurisdiction required amendment to the Particulars of Claim, and draft amendments were produced. The submissions addressed the proposed amendments.

17. In addition, in their skeleton argument the Claimants submitted that there is jurisdiction because Mr Fadl is "a necessary and proper party" to the claim against DTME. This was put as a ground for present jurisdiction.> When it was unpacked, it was something different.> The contention was that the Court could order under RDC 20.7 that Mr Fadl be added as a new party in the alternative circumstances there set out.> That Rule provides, under the heading "Addition and Substitution of Parties" (and not in terms of necessary and proper party) -

"20.7 The Court may order a person to be added as a new party if:

(1)> it is desirable to add the new party so that the Court can resolve all the matters in dispute in the proceedings; or

(2)> there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the Court can resolve that issue".

18. Submissions were received on satisfaction of one or other of the circumstances, and on whether the Rule permitted addition of a party where there would not otherwise be jurisdiction to hear and determine the claim against that party pursuant to Article 5 (A) of the Judicial Authority Law. However, reliance on the Rule for present jurisdiction was misplaced.> It came to be accepted that the possibility of an order under the Rule did not mean present jurisdiction, and that the Rule could not be invoked when Mr Fadl was already a party (albeit with a challenge to jurisdiction).> Further, prospective decision of an application for joinder was inappropriate, not only because it would be hypothetical but also because success in DTME's application to strike out the claim against it would mean that there was nothing to which Mr Fadl could be added.

19. The application thus turned on the gateway issues. Depending on the outcome, a subsequent application for an order under RDC 20.7 might be made.

The Gateway Issues

(a) Deceit and negligence

20. Article 13 of the Law of Obligations provides -

"13 (1) A claimant has the right to sue any number of persons whom he considers to be jointly or severally liable in respect of any liability to him under this Law, subject to any rules of the Court limiting this right.

(2)> Persons who are jointly liable, or severally liable in respect of the same loss, are liable for the whole loss.

(3)> Persons who are severally liable in respect of different loss are each liable only for the loss that each has caused."

21. The Claimants submitted that, as a partner in DTME, Mr Fadl is jointly and severally liable with DTME; that Article 13 (1) gives them the right to sue him for DTME's liability in deceit and for negligence; and that this satisfies the para (e) gateway. They said also that any limitation of the right was only by rules of Court, and so that the existence Article 5 (A) could not confine the right.

22. The submission was not in the Claimants' skeleton argument, and first appeared in oral submissions. The addition to the submission suggests jurisdiction by force of Article 13 (1) independently of satisfaction of the para (e) gateway, and as the argument was put in oral submissions it was rather confused by the addition (and also rather mingled with the "necessary and proper" argument).> It matters not: the argument is untenable.

23. For the argument that the para (e) gateway is satisfied, it must be said that Article 13 (1) gives a right to sue over which there is jurisdiction in accordance with a DIFC Law or Regulation. The source of a right to sue is not itself a source of jurisdiction; jurisdiction in accordance with a DIFC Law or Regulation must be found independently.> Article 13 reflects the established joint and several liability of partners, but Article 13 (1) says nothing about the jurisdiction of the Court (or any court) to entertain the Claimants' suit.> Likewise, it does not provide jurisdiction independently of satisfaction of the gateway.> It is not correct that, either as a freestanding conferral of jurisdiction outside Article (5) (A) (1) of

the Judicial Authority Law or as a source of jurisdiction in accordance with a DIFC Law, it founds jurisdiction for the causes of action in deceit and for negligence against Mr Fadl.

(b) Compensation under the Regulatory Law

24. Article 86 (4) of the Regulatory Law provides -

> "(4) If a partner (or a person purporting to act as a partner) is knowingly concerned in a contravention of the Law or Rules or other legislation administered by the DFSA committed by a partnership or by all or some of its constituent partners, he as well as the partnership or its constituent partners as the case may be commits a contravention and is liable to be proceeded against and dealt with accordingly."

25. The Claimants submitted that Mr Fadl was a partner in DTME knowingly concerned in its contravention of the Rules; that he was "liable to be proceeded against and dealt with"; that proceeding against and dealing with him included applying to the Court for damages or compensation under Article 94 (2); and that there was thereby jurisdiction in accordance with the Regulatory Law.

26. It is doubtful that the proposed amendments to the Particulars of Claim sufficiently pleaded liability as a partner knowingly concerned in DTME's contravention of the Rules. Be that as it may, Article 86 (4) does not pick up an application for damages or compensation under Article 94 (2).

27. By the last-mentioned Article, an application may be made to the Court by a person who has suffered loss or damage "caused as a result of conduct described in Article 94 (1)". The conduct there described is -

> "(a) intentionally, recklessly or negligently commits a breach of duty, requirement, prohibition, obligation or responsibility imposed under the Law or Rules or other legislation administered by the DFSA; or
>
> (b) commits fraud or other dishonest conduct in connection with a matter arising under such Law, Rules or Legislation".

28. The conduct is not described in terms of contravention, let alone of being knowingly concerned in another's contravention. The Article provides, as its heading indicates, for civil proceedings. The provision picking up contraventions is Article 90, providing for a catalogue of sanctions (including fines, restitution, compensation and accounting for profits) against a person who has committed a contravention. The sanctions are administered by the DFSA, not by the Court (or any court). Being involved in a contravention as referred to in Article 86(4) does not enliven the Article 94 (2) jurisdiction in the Court.

29. Mr Fadl also submitted that the Claimants failed on this gateway issue because the contravention of the Rules by DTME on which the Claimants relied did not give rise to a right of action, and in any event could not be made out. It is not necessary to go into this submission, or into whether it was more properly a strike-out submission rather than a jurisdiction submission.

30. It may be noted, however, that if DTME's application to strike out the claim against it is successful, it would seem that any jurisdiction as against Mr Fadl through Article 13(1) of the Law of Obligations or Article 86 (4) of the Regulatory Law would fall away. It is difficult to see how there could then be joint liability or involvement in a contravention. This was not mentioned in the application, and does not arise.

Conclusion as to jurisdiction

31. In my opinion, neither argument for jurisdiction to hear and determine the claim against Mr Fadl should be upheld. The Court does not have jurisdiction, and a declaration and other relief should be made and granted accordingly.

Exercise of jurisdiction

32. In case I am wrong in the above, I should consider whether the Court should not exercise jurisdiction if there be jurisdiction to hear and determine the claim against Mr Fadl. I should do so first, because it may be of assistance in the event of an appeal and secondly, because the question of an exclusive jurisdiction provision may arise if an application under RDC 20.7 is made: the matter was fully argued, and its resolution may assist in any such application.

33. Mr Fadl contended that the exercise of jurisdiction should be declined because the Claimants were bound by exclusive jurisdiction provisions in favour of the courts of Lebanon. The Claimants contested this, and contended that in any event the exercise of jurisdiction should not be declined.

The exclusive jurisdiction provisions

34. Mr Fadl relied on two provisions in the alternative, one in the Articles of Association of LCB and the other in the audit engagement letters. It was common ground that the application and effect of these provisions were governed by Lebanese law.

35. I had the benefit of experts' reports concerning Lebanese law of Mr Chakib Cortbaoui (instructed on behalf of Mr Fadl) and Dr Phillipe Boustany (instructed on behalf of the Claimants). Mr Cortbaoui is a practising lawyer qualified in Lebanon, a former President of the Beirut Bar Association and a former Minister of Justice of Lebanon. Dr Boustany is an academic and practising attorney specialising in Lebanese and French law.

36. Mr Fadl submitted that Mr Cortbaoui's opinions should prevail over those of Dr Boustany for superiority of practising experience, but I do not think that Dr Boustany's opinion should be discounted for that reason. The experts did not give oral evidence, and the differences between them were not explored in cross examination. The Claimants suggested that I should order a determination of separate issues in which this could be done, but the parties chose to bring this application upon the bare reports and I do not think that, upon a suggestion first made in submission in reply at the hearing, that should be done. So far as necessary, I must decide between and upon the opinions of the experts (which in truth went beyond informing the court upon Lebanese law and included opinions on substantive issues) upon a rational assessment of their persuasiveness.

37. The experts interrelated the two provisions on which Mr Fadl relied, and it is convenient to describe them both before going to the application and effect of each.

(a) The Articles of LCB

38. Article 15 provides that the ownership of a share -

> ".automatically implies the complete, total, definitive and unconditional acceptance of the Company's Articles of Association and resolutions duly taken by the General Meeting or the Board of Directors".

39. Article 87, within Chapter Ten of the Articles headed "Disputes", provides (in the English version) -

> "87 Any disputes arising throughout the company's duration or liquidation whether between the Shareholders and the Company or the Board Members and the Auditors or the Shareholders themselves, regarding the activities of the Company or their direct or indirect consequences, shall fall within the jurisdiction of the Court located in the area of the Company's Head Office."

40. Article 88 provides for election of domicile within the Head Office jurisdiction by a shareholder party to a dispute. The Head Office of LCB is in Beirut.

41. The Articles of LCB were in Arabic and English. By Article 93, in the event of "divergence or ambiguity in [their] interpretation. the Arabic text shall prevail". Dr Boustany provided a different translation of Article 87 from the Arabic version, to which I will refer.

(b) The engagement letters

42. The engagement letters on which Mr Fadl relied relevant to the LCB audits were dated 18 November 2008 (for the audit of the financial statements of LCB for the year ending 31 December 2008) and 30 October 2009 (2009). It appears that there were like letters for earlier years, and as later mentioned Mr Fadl's submissions referred also to a letter for the 2010 audit. Each was a letter in English from DTL to LCB, signed on behalf of LCB by way of acceptance.

43. Each engagement letter included -

> "GOVERNING LAW
>
> This agreement shall be governed by and construed in accordance with the laws of Lebanon and the parties irrevocably submit to the exclusive jurisdiction of the Lebanese Courts, where applicable, to settle any disputes, which may arise out of or in connection with this agreement."

44. In relation to these engagement letters, Mr Fadl referred also to a resolution at an Annual General Assembly meeting of LCB concerning the engagement of DTL. The minutes of a meeting of 9 June 2008 record as the Seventh Decision -

> "The General Assembly decided to confirm the appointment of Deloitte & Touche as auditors of the Bank for three years according to the provisions of Article /186/ of the Money and Credit Code starting from the year 2007 until the date of the convening of the General Assembly, which would look into accounts of the fiscal year ended 31/12/2009. The terms of the contract are to be specified, taking into consideration the recommendations of the competent committee and / or committees and / or the recommendations of the Board of Directors, as necessary."

45. I note that Mr Fadl's submissions referred also to an engagement letter dated 31 December 2010 and a resolution at an Annual General Assembly meeting of 26 May 2010. Both concerned the 2010 or later audits; the Claimants do not sue in relation to LCB audits after 2009. In any event regard to the earlier letters, or to the letter of 31 December 2010 and the resolution of 26 May 2010, would not affect what follows.

Exclusive jurisdiction under Article 87

46. Mr Cortbaoui considered that Article 87 was enforceable by Mr Fadl against the Claimants, and that the jurisdiction agreement was upon the exclusive jurisdiction of the Lebanese courts. Dr Boustany considered that the Article is "not valid" at all, did not apply, and was not enforceable by Mr Fadl. He did not expressly address whether the jurisdiction was exclusive to the Lebanese courts.

47. In Dr Boustany's opinion, the Article was "not valid" because the Arabic version was unclear and was wrongly translated. Wrong translation could not invalidate because the Arabic version prevails, and he did not explain the unclarity. From the Article as translated by Dr Boustany there may be a question of interpretation, but I am unable to see invalidating uncertainty. I do not accept Dr Boustany's opinion on this point.

48. Dr Boustany considered that the Article did not apply because the dispute was not "regarding the activities of the company or their direct or indirect consequences". He said that a company's activities should be legal; that the Article covered only "legal activities and disputes arising out [of] the loyal and faithful execution of LCB's AoA [Articles of Association]"; and that since the claim in the proceedings "arises out of illegal activities / money laundering", the Article did not apply.

49. It is sufficient that I do not agree that the Claimants' claim relevantly arises out of illegal activities. It is concerned with the audit of LCB's financial statements, which was part of its activities, and the dispute over the auditor's performance of its engagement is a dispute regarding the activities of LCB or their consequences. I do not accept Dr Boustany's opinion in this respect.

50. The central issue was whether the jurisdiction agreement in Article 87 could be enforced by Mr Fadl, when the auditor was not party to the agreement between LCB and its shareholders and between the shareholders constituted by their association on the terms of the Articles of Association. Mr Cortbaoui and Dr Boustany were agreed that the principle of privity of contract was part of Lebanese law. They also agreed that an exception was recognised for a "stipulation for the benefit of third parties". Thereafter they parted.

51. Mr Cortbaoui was unaware of rulings or scholarly works specifically regarding the effect of jurisdiction clauses in Lebanon vis-a-vis third parties. He based his opinion on analogy with arbitration clauses. Mr Cortbaoui said that a person named in a contract containing a jurisdiction clause was not "bound" simply because named, but that the clause can be "enforceable vis-a-vis" the person if the person's consent to the clause could be established. In his opinion, the jurisdiction provision in the engagement letters "should be construed as formal acceptance by the auditors (including Mr El Fadl)" of a stipulation for their benefit, and therefore Article 87 "bound" them; alternatively, there was tacit acceptance because the auditor would have been aware of the Articles of Association and "could not have ignored the existence of the clause or its scope". He considered, albeit in less than forthright words, that it is "likely" that Mr Fadl can "invoke" the provision.

52. Dr Boustany, on the other hand, identified the Article of the Lebanese Code of Commerce providing for stipulations for the benefit of third parties, and considered that it was not satisfied for a number of reasons, They included that the auditor did not accept or consent to Article 87, but rather put a different jurisdiction provision in the letters of engagement.

53. It is not necessary to go into all Dr Boustany's reasons. I have some difficulty in seeing Article 87 as a stipulation for the benefit of the auditor, although Dr Boustany said that it might be; and my difficulty remains despite Mr Cortbaoui's explanation that the expression is not to be used literally. Mr Cortbaoui's reasoning merged being bound and ability to enforce a benefit, but they are not the same; the Article purported also to impose an obligation on the auditor to accept the jurisdiction of the Lebanese courts, the reciprocal benefit and obligation being inseparable. But I cannot agree that the auditor accepted the provision as a stipulation for its benefit or extending to it, whether expressly or tacitly. There could not have been express acceptance by virtue of a different provision, in different terms, in the engagement letter; agreement on the different provision was negation of any acceptance. Nor could there have been tacit acceptance when there was agreement on the different provision.

54. In my opinion, therefore, Mr Fadl can not "invoke" Article 87 as an agreement with the shareholders upon the jurisdiction of the Lebanese courts, exclusive or otherwise. It is not necessary to decide whether, if he could do so, there would be agreement upon exclusive jurisdiction. That is not evident from the terms of the Article in its English version. It should be recorded, however, that Mr Cortbaoui said without further explanation that "when a jurisdiction clause appoints Lebanese courts, the competence of the Lebanese courts should be considered as exclusive"; and that Dr Boustany's translation of the Arabic text was that the dispute "shall solely fall within" the jurisdiction of the court.

Exclusive jurisdiction under the engagement letters

55. The central issue was similar to that in relation to Article 87: can Mr Fadl enforce the jurisdiction provision as against the shareholders when they are not parties to the agreement between LCB and the auditor.

56. Mr Cortbaoui recognised the principle of privity of contract, and said that while contracts entered into by a company are binding only on the company and the shareholders cannot be "request to execute" the contracts -

> ".contracts validly entered into by the company are opposable to the shareholders[12] and are therefore applicable as against the Claimants (in French, *opposable*). The Engagement Letters, including the relevant jurisdiction clauses, can therefore be relied on by Mr El Fadl as against the Claimants."

57. The footnoted reference was to a work in French; no translation was provided.

58. At a later point Mr Cortbaoui said that.

> ".contracts entered into by the company are binding on the company only, in accordance with the principle of privity of contracts. As such, the Engagement Letters cannot create obligations on the shareholders which are third parties to them. But this does not mean that the Engagement Letters are not applicable (in French: *opposable*) to the shareholders, including the Claimants."

59. Dr Boustany noted Mr Cortbaoui's opinion in this respect. He did not contest it. Rather, he said that Mr Fadl could not rely on the jurisdiction provision in the engagement letters because (a) it applied only to disputes arising from auditing LCB's financial statements and not to disputes "relating to the auditor's auditing for anti-money laundering"; and (b) even if it did apply to auditing for anti-money laundering, the provision was different from the jurisdiction provision in Article 87.

60. Neither of these responses can be accepted. The Claimants' case went beyond reporting money laundering, and the extent of the auditor's responsibility including as to discovery and reporting of such a matter is for the trial. The jurisdiction provision in the engagement letters stand separately from Article 87, and is not affected by its presence.

61. I return to Mr Cortbaoui's opinion. The concept *opposable* was not explained by Mr Cortbaoui, and as I have said no translation of the work to which he referred was provided. He described the concept by "applicable as against" and "applicable to". He did not answer the question asked of him, whether shareholders could be bound by a contract entered into by the company, and gave his conclusion in the terms that Mr Fadl could rely on the contract as against the shareholders.

62. What does this mean? It is not that the shareholders are bound as obligees: Mr Cortbaoui is clear on that, and that the principle of privity of contract is the reason. It follows that the auditor can not oblige the shareholders to submit to the jurisdiction of the Lebanese courts. *Opposable* appears to mean that the contract entered into by the company has an effect on the shareholders; whatever the effect, it is not that it can be enforced against them.

63. In this application Lebanese law is a question of fact: as with all findings of fact, I must have affirmative satisfaction. Although Dr Boustany did not contest Mr Cortbaoui's opinion in this respect, I am not satisfied that under the laws of Lebanon Mr Fadl can enforce the jurisdiction provision in the engagement letters as against the Claimant shareholders.

64. There may be a shorter answer to the question. By the provision in the engagement letters, LCB and the auditor submit to the exclusive jurisdiction of the Lebanese courts to settle disputes arising out of or in connection with the agreement. As a matter of construction, it may be that the submission is of disputes between LCB and the auditor: not of a dispute between a third party and LCB, or a third party and the auditor, in

some manner having a connection with the audit engagement. This was not argued, and I say no more of it.

65. Mr Fadl relied further on the resolution at the Annual General Assembly meeting.

66. Mr Cortbaoui cited Article 192 of the Code of Commerce, to the effect that decisions of a meeting properly arrived at "are binding on all shareholders even absentees and dissidents". He said that all shareholders were therefore bound by resolutions of the general assembly of shareholders unless the resolutions were annulled for cause (which was not suggested here), and so that the appointment of DTL as LCB's auditor was binding on all shareholders. He noted, however, that the engagement letters were not approved by the Annual General Assembly, which only appointed the auditor and fixed remuneration, and that it was for management to negotiate and enter into the engagement letters. He did not directly answer the question asked of him, namely, whether under Lebanese law approval of the resolution meant that the shareholders of LCB were individually bound by the engagement letters.

67. Dr Boustany agreed that the resolution was binding on all shareholders. His opinion that the Claimants were nonetheless not bound by the jurisdiction provision in the engagement letters covered a number of matters, the principal reasoning being to the effect (again) that the provision did not apply to auditing in relation to money laundering and the shareholders had agreed to the different provision in Article 87. Dr Boustany rather obliquely observed as a further reason that the resolution did not address the terms of the auditor's engagement, but explicitly left those terms to be arrived at by management.

68. In my view, that is a sufficient answer to Mr Fadl's reliance on the resolution. The shareholders may have become bound to the appointment and remuneration of the auditor, but it can not be said that they became bound as obligees by the specific terms of the engagement letters which management thereafter brought about. In not directly answering the question asked of him, but noting that it was left for management to negotiate and enter into the engagement letters, Mr Cortbaoui appears to have recognised this.

69. In my view, therefore, the resolution does not assist Mr Fadl in establishing that he can enforce the jurisdiction provision in the engagement letters against the Claimant shareholders.

Conclusion as to exercise of jurisdiction

70. The Claimants not being bound to Mr Fadl by either of the exclusive jurisdiction provisions, and no other reason being suggested, I would not decline to exercise jurisdiction if there be jurisdiction to hear and determine the claim against Mr Fadl.

71. There remains the Claimants' contention that in any event the exercise of jurisdiction should not be declined. A foreign jurisdiction clause will be given effect unless strong cause be shown, the burden of which is on the plaintiff (see Al Khorafi v Bank Sarasin-Alpen (ME) Ltd at [114] - [115], citing from The Eleftheria [1969] 1 Lloyds Rep. 237 at 241). Cause may be shown if the plaintiff would be unlikely to get a fair trial in the foreign court, and that was the ground for the Claimants' contention. However, I do not think that I should go into that contention.

72. The discretion to grant a stay or not grant a stay should be exercised having regard to all relevant circumstances. In the present case they include the conjoint claim against DTME and the economic and procedural consequences and risk of inconsistent finding if there were trials in two jurisdictions (which were determinative circumstances in Al Khorafi v Bank Sarasin-Alpen (ME) Ltd). Depending on the evidence and its evaluation, any unlikelihood of a fair trial in the Lebanese courts could dominate, but that does not exclude regard to these other circumstances.

73. But the claim against DTME is subject to the pending strike-out application. It is not necessary to consider the Claimants' contention. It is not appropriate to do so, not only because that would be upon a still further assumption that I am wrong in what I have said, but also because the discretion could not properly be exercised until the outcome is known of DTME's application to strike out the claim against it.

Costs

74. While Mr Fadl succeeds in the application, he has not succeeded as to exclusive jurisdiction and the disposition of costs may not be straight forward. Further, in the event of an application for an order under RDC 20.7, some of the costs of this application may come to be within its costs. Subject to what the parties may wish to say, it seems to me appropriate that I deal with costs when it is known whether an RDC 20.7 application is made and, if it is made, when it has been heard so that costs may be considered holistically.

75. I will therefore reserve costs. If either party (or both parties) wish an immediate disposition of costs, they should notify the Registry within 14 days and directions will be given for deciding whether that should be done and/or with a view to deciding the disposition, as the case may be. Otherwise, the matter can be re-listed for directions according to the making and hearing of any RDC 20.7 application.

Orders

76. I make the following orders -

(a) Declare that the Court has no jurisdiction to hear and determine the claim against the Second Defendant.

(b) Set aside the Claim Form and Particulars of Claim so far as they make, detail and/or particularise the claim against the Second Defendant, but without prejudice to any application the Claimants may make pursuant to RDC 20.7 for an order that the Second Defendant be added as a party.

(c) Costs reserved.

Issued by:

Natasha Bakirci

Assistant Registrar

Date of Issue: 24 August 2017

At: 4pm

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