Claim No: CA-010-2016

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 APPEAL

BEFORE THE CHIEF JUSTICE MICHAEL HWANG, JUSTICE TUN ZAKI AZMI, H.E JUSTICE ALI AL MADHANI

BETWEEN

KASSAB MEDIA FZ LLC

Defendant/Appellant

and

SKY NEWS ARABIA FZ-LLC

Claimant/Respondent

Hearing: **20 September 2016**

Counsel: Mohammed Ahmed (Abdelrahman Al Maazmi Advocates & Legal Consultants) for the Defendant/Appellant

Harris Bor (Wilberforce Chambers and Clyde & Co.) for the Claimant/Respondent

Judgment: **12 July 2017**

JUDGMENT

Summary of Judgment

This dispute arose out of an agreement entered on 1 July 2013 for the supply of advertising and sponsorship sales representation (the "Agreement") between the Appellant (the Defendant in the original proceedings), Kassab Media FZ LLC, and the Respondent (the Claimant in the original proceedings), Sky News Arabia FZ-LLC. The Respondent alleged that the Appellant failed to meet its contractual obligations and sought a declaration from the DIFC Courts that the Agreement was effectively terminated on 11 February 2016 (the "Claim"). In response, the Appellant filed an application on 20 March 2016 seeking a declaration from the DIFC Courts that it lacked competent jurisdiction to hear the dispute as the Claim is subject to the jurisdiction of the Federal Courts pursuant to Article 226 of the UAE Federal Law No. 18 of 1993 on Commercial Transactions, as amended ("Commercial Code"); the UAE Federal Law No. 6 of 1978 on Establishing the Federal Courts, and the UAE Constitution of 1971, as amended. Alternatively, the Respondent argued that if the DIFC Courts decide that they have jurisdiction to try the Claim, the DIFC Courts should not exercise its jurisdiction as the Claim is not capable of being litigated pursuant to Article 3 of the Federal Law No. 18 of 1987, as amended (the "Federal Commercial Agency Law").

On 20 June 2016, H.E. Justice Shamlan Al Sawalehi issued a judgment by the Court of First Instance dismissing the Appellant's application to contest the jurisdiction of the DIFC Courts. On appeal, the Appellant maintains its argument that the DIFC Courts do not have jurisdiction. It contends that the DIFC Courts have the duty to review the validity of the jurisdiction clause. The Appellant further submits that the applicable law of the Agreement is the law in Abu Dhabi as the execution of the agreement lies in the State of Abu Dhabi. In its alternative submission, the Appellant argues that the Claim is not capable of being litigated as it arose from an Agreement that was made unlawfully pursuant to the Federal Commercial Agency Law and Federal Law No. 5 of 1985, as amended (the "Civil Code"). Additionally, the Appellant made an application to exclude the costs arising from the Respondent's preparation of an excluded witness statement of Ms Susie Abdel-Nabi. In response, the Respondent contends that the DIFC Courts have competent jurisdiction to determine its claims in the proceedings as the parties expressly agreed to the exclusive jurisdiction of the DIFC Courts in Clause 38 of the Agreement. The Respondent reasons that jurisdiction is determined solely by Law No. 12 of 2004, as amended by Dubai Law No. 16 of 2011 (the "judicial authority law"). Accordingly, the Federal Commercial Agency Law and the Commercial Code do not apply in the DIFC Courts' determination of jurisdiction. As the jurisdiction clause was clearly an agreement between the parties to be subjected to the jurisdiction of the DIFC Courts, it fell within one of the jurisdiction gateways under Article 5(A)(2) of the Judicial Authority Law. In addition, the Respondent takes the position that the applicable law of the contract is UAE Law applicable within the DIFC.

The issues to be addressed on appeal are whether the DIFC Courts have competent jurisdiction to hear the Respondent's Claim and the applicable law of the Agreement. Separately, the Court of Appeal had to determine whether the Appellant's request for an adjustment of costs should be granted.

Chief Justice Michael Hwang, Justice Tun Zaki Azmi and H.E. Justice Ali Al Madhani unanimously upheld the CFI Judgment of H.E. Justice Shamlan Al Sawalehi and dismissed the Appellant's appeal. The judges held that the DIFC Courts' jurisdiction is determined solely by the Judicial Authority Law. Consequently, the Federal Commercial Agency Law, the Commercial Code and the Civil Code are not applicable in determining the issue of jurisdiction. Upon examination of the jurisdiction clause in the Agreement, the judges found that the words "*subject to the exclusive jurisdiction of the Dubai International Financial Centre Courts*" in the jurisdiction clause expressed the parties' choice of court in specific, clear and express terms. Accordingly, the Respondent's Claim fell under the "opt-in" jurisdiction in Article 5(A)(2) of the Judicial Authority Law. The judges remitted the issue of the applicable law of the Agreement to the Court of First Instance. In regard to the Appellant's application to adjust costs, the judges granted the Appellant's request to refuse to allow costs arising from the Respondent's preparation of the excluded witness statement of Ms Susie Abdel-Nabi to be awarded in the case.

This summary is not part of the Judgment and should not be cited as such

ORDER

UPON hearing Counsel for the Appellant and Counsel for the Respondent on 20 September 2016

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

IT IS HEREBY ORDERED THAT:

1. With regard to the Appellant's appeal:
   - The Appellant's appeal is dismissed.
   - The issue of the applicable law of the agreement for the supply of advertising and sponsorship sales representation dated 1 July 2013 is remitted to the Court of First Instance.
   - The Appellant's request to exclude the costs arising from the preparation of the witness statement of Ms Susie Abdel-Nabi is granted.
2. Costs arising from the appeal shall be paid by the Appellant to the Respondent within 14 days of the date of this order, the amount of which shall be assessed, if not agreed, by the Registrar.

Issued by:

Lema Hatim

Assistant Registrar

Date of Issue: 12 July 2017

At: 3pm

JUDGMENT

INTRODUCTION

1. This is an appeal by Kassab Media FZ LLC (the "**Appellant**" or "**Kassab**") against the Judgment of H.E. Justice Shamlan Al Sawalehi (the "**Trial Judge**") dated 20 June 2016 (the "**CFI Judgment**").
2. In the CFI Judgment, the Trial Judge found in favour of Sky News Arabia FZ-LLC (the "**Respondent**" or "**SNA**") and dismissed the Appellant's application to contest the jurisdiction of the DIFC Courts. The Trial Judge held that the DIFC Courts had jurisdiction over the underlying dispute and ordered that costs for the application to be awarded in the case.
3. The Appellant appealed against the Trial Judge's decision that the DIFC Courts had jurisdiction to hear the matter.
4. Additionally, the Appellant asked the Court of Appeal to vary the Trial Judge's order in relation to costs. In particular, the Appellant requested that the costs associated with the Respondent's preparation of an excluded witness statement be refused and borne by the Respondent.

THE FACTS

5. The Respondent is a television production company established under the law of the Media Free Zone in Abu Dhabi with its principal address also in Abu Dhabi. The Appellant is a media business and representation company established under the law of the Dubai Media Free Zone with its principal address in Dubai Media City. The parties entered into an agreement for the supply of advertising and sponsorship sales representation on 1 July 2013, which was effective until 31 December 2018 (the "**Agreement**").
6. It was pursuant to this Agreement that the Respondent filed Claim Form No. CFI-007-2016 on 16 February 2016 (the "**Claim**"), asserting that the Appellant failed to comply with its obligations under the terms of the Agreement, with such failure constituting a material breach of the Agreement entitling the Respondent to terminate the Agreement. The Respondent gave notice to terminate the Agreement on 11 February 2016, demanding all outstanding

payments be made within 14 days. The Respondent claimed that the Appellant did not remedy the breach and did not make final payment. On this basis, the Respondent sought a declaration from the DIFC Courts that the Agreement was effectively terminated on 11 February 2016.

7. On 20 March 2016, the Appellant contested the jurisdiction of the DIFC Courts over the Claim, seeking an Order that the DIFC Courts do not have jurisdiction, or, in the alternative, that the DIFC Courts shall not exercise jurisdiction (the "**Jurisdiction Application**").
8. In its response to the Appellant's Jurisdiction Application, the Respondent submitted the witness statements of Ms Susi Abdel-Nabi and Mr Kelvin Barker. The Appellant subsequently applied to exclude these two witness statements (the "**Evidence Application**").
9. On 13 June 2016, a hearing was held before the Trial Judge in the Court of First Instance regarding the Evidence Application and the Jurisdiction Application.
10. On 20 June 2016, the Trial Judge released the CFI Judgment granting to the exclusion of Ms Susi Abdel-Nabi's witness statement and denying the exclusion of Mr Kelvin Barker's witness statement. The Trial Judge also denied the Appellant's Jurisdiction Application, finding that the DIFC Courts had jurisdiction over the Claim.
11. On 10 July 2016, the Appellant applied for permission to appeal the CFI Judgment. The Appellant's Appeal Notice sought the following actions in relation to the Order enacting the CFI Judgment
    - An order to set aside paragraph 3, which denied the Appellant's Jurisdiction Application and paragraph 4, which ordered that costs be awarded in the case.
    - An order to vary paragraph 1 such that the costs arising out of preparation of the witness statement of Ms Susi Abdel-Nabi be borne by the Respondent.
12. The Appellant alleged that the Trial Judge misapplied the law, and failed to apply the law applicable to the case. The Appellant articulated its arguments on appeal in its Skeleton Argument dated 10 July 2016 ("**Appellant's Skeleton Argument**").
13. On 3 August 2016, the Appellant's Application for permission to appeal was granted "on the grounds that the appeal would have a real prospect of success and/or there is a compelling reason why the appeal should be heard", pursuant to an Order of H.E. Justice Ali Al Madhani.
14. On 14 September 2016, the Respondent provided its Skeleton Argument ("**Respondent's Skeleton Argument**").
15. On 20 September 2016, the hearing for the Appeal was held before Chief Justice Michael Hwang, H.E. Justice Ali Al Madhani and Justice Tun Zaki Azmi. At the hearing, the representatives for both parties were heard and the case was reserved for judgment.

THE STATUTORY PROVISIONS

16. The relevant provisions relied on by the Parties are as follows.
17. Article 5(A)(1)-(2) of Law No. 12 of 2004, as amended by Dubai Law No. 16 of 2011 ("**Judicial Authority Law**")

"**Article 5**

Jurisdiction

(A) The Court of First Instance:

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

(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;

(c) Civil or commercial claims and actions arising out of or relating to any incident or transaction which has been wholly or partly performed within DIFC and is related to DIFC activities;

(d) Appeals against decisions or procedures made by the DIFC Bodies where DIFC Laws and DIFC Regulations permit such appeals;

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

(2) The Court of First Instance may hear and determine any civil or commercial claims or actions where the parties agree in writing to file such claim or action with it whether before or after the dispute arises, provided that such agreement is made pursuant to specific, clear and express provisions."

18. Articles 217 and 226 of the UAE Federal Law No 18 of 1993, as amended (the "**Commercial Code**") state as follows.

"**Article 217**

A contracts proxy is a contract pursuant to which a person undertakes to carry on continuously against remuneration, in a specific area of activity, instigation and negotiation in order to enter into transactions for the benefit of the principal and in return of a fee. The agent's task may include the execution and implementation of transactions in the name of the principal and for his account.

Article 226

As an exception to the rules of jurisdiction provided for in the Civil Procedure Code, the Court within which jurisdiction lies the place of implementation of the contract, shall be competent to look into any conflicts arising from the contracts proxy contract."

19. Articles 2 and 3 of the Federal Law No. 18 of 1981, as amended (the "**Federal Commercial Agency Law**").

"Article 2

As amended by Federal Law no. 14 dated 26/12/1988:

Carrying out the activities of commercial agency in the State shall be restricted to nationals individuals or companies wholly owned by national physical persons.

Article 3

The activities of the commercial agency in the State shall only be performed by persons whose names are inscribed in the commercial agents' register provided for this purpose in the Minstry, and any commercial agency not registered in this register shall not be considered, nor lawsuit therefore shall be heard."

20. Articles 31, 126(d), 127, 210(1) and (2) of the Federal Law No. 5 of 1985, as amended ("**Civil Code**") states as follows.

"**Article 31**

A mandatory provision (of law) shall take precedence over a contractual stipulation.

Article 126(d)

The following may be the subject matter of a contract:

(d) any other thing which is not prohibited by a provision of the law and is not contrary to public order or morals.

Article 127

A contract to do an unlawful thing is unlawful.

Article 210

(1) A void contract is one which is unlawful in its essence and form, lacking the elements of a contract or defective in its subject matter or purpose or form as laid down by law for the making of a contract, and such contract shall be of no effect and shall not be capable of being rectified by consent.

(2) Any person having an interest may rely on the voidness of the contract and a judge may so rule of his own motion."

21. Article 3(2) of the UAE Federal Law No. 8 of 2004 states as follows.

"These Zones (Financial) and Financial Activities shall also be subject to all Federal laws, with the exception of Federal civil and commercial laws."

22. Articles 7 of the DIFC Law No. 3 of 2004 ("**Law on the Application of Civil and Commercial Laws in the DIFC**") states as follows.

"The objectives of this law are to:

- Provide certainty as to the rights, liabilities and obligations of persons in relation to civil and commercial matters arising in the DIFC; and
- Allow persons to adopt the laws of another jurisdiction in relation to civil and commercial matters arising within the DIFC."

THE DECISION BELOW

The Evidence Application

23. At the CFI Hearing, the Appellant presented the following arguments in support of its Evidence Application:
    - The two witness statements did not comply with mandatory formal requirements set out in the relevant evidence law, Rules of the DIFC Courts ("**RDC**") and Civil Procedure Rules of England and Wales, and were therefore inadmissible.
    - The witness statement of Ms Susie Abdel-Nabi lacked legitimacy as it was made by a lawyer in the matter and did not contain only formal and uncontroversial statements, as required by Practice Direction No. 1 of 2016, issued by the DIFC Courts ("**PD 1/2016**").
    - The witness statement of Mr Kelvin Barker contained inadmissible portions that must be struck out if the statement was not struck out in full.
24. On the other hand, the Respondent submitted that the witness statements were of common format and content, and thus not out of the ordinary.
25. The Trial Judge granted the Appellant's Evidence Application to exclude the witness statement of Ms Susie Abdel-Nabi, stating that it did not comply with PD 1/2016. The witness statement of Ms Susie Abdel-Nabi was therefore

considered as "part of Counsel's arguments" pursuant to Paragraph 4 of PD 1/2016, but was otherwise discounted.

26. The Trial Judge denied the Appellant's Evidence Application to exclude the witness statement of Mr Kelvin Barker, finding no legal grounds to exclude it. The Trial Judge determined that Mr Kelvin Barker's witness statement provided insight into "personal knowledge of events surrounding the Agreement" and was thus valid and admissible evidence.

The Jurisdiction Application

27. The Trial Judge denied the Appellant's Application to challenge the jurisdiction of the DIFC Courts, relying on Clause 38.1 of the Agreement, which states:

"This Agreement and any issues or disputes arising out of or in connection with it (whether contractual or non-contractual, such as claims in tort, breach of statute or regulation, or otherwise) will be governed by and construed in accordance with the laws of the United Arab Emirates as applicable in the Emirate of Abu Dhabi and subject to the exclusive jurisdiction of the Dubai International Financial Centre Courts."

28. The Appellant stated that the DIFC Courts do not have jurisdiction over the Claim pursuant to any of the gateways of Article 5(A)(1) of the Judicial Authority Law. There was only potential for optional jurisdiction.
29. The Appellant continued that, even if parties were to agree on the jurisdiction of a specific court, such agreement would still be subject to other mandatory rules and limitations on jurisdiction. The Appellant submitted that, as the Agreement created a "principal-agent relationship," Clause 38 was void pursuant to Article 226 of the Commercial Code, which states:

"As an exception to the rules of jurisdiction provided for in the Civil Procedure Code, the Court within which jurisdiction lies the place of implementation of the contract, shall be competent to look into any conflicts from the contracts proxy contract."

30. The Appellant contended that Article 226 applied in this case as the Appellant was appointed under the Agreement as an exclusive media representative and agent of the Respondent, carrying out its proxy and managing its commercial agency independently. The Appellant reasoned that, as the Agreement was implemented within the jurisdiction of the UAE Federal Court of First Instance, the Federal Court was the appropriate venue to try claims arising out of the Agreement.
31. The Appellant argued that Article 226 of the Commercial Code was a mandatory rule which superseded general jurisdiction rules of Article 31 of the Civil Code. Therefore, Clause 38 was void and the DIFC Courts had no jurisdiction over the Claim.
32. Finally, the Appellant suggested that, if the DIFC Courts had jurisdiction, they should not exercise that jurisdiction pursuant to Article 3 of the Federal Commercial Agency Law. The Appellant reasoned that the Agreement was not compliant with the requirements of Articles 2 and 3 of the Federal Commercial Agency Law which restricts the activity of commercial agents in the country to Emirati nationals. Given that the Appellant was not an Emirati national, the Appellant should not perform commercial agency activity in the State. The Appellant further argued that the Agreement was not registered, and was accordingly, it is null and void.
33. The Respondent rejected the Appellant's arguments in full, stating that the parties expressly agreed to the exclusive jurisdiction of the DIFC Courts in Clause 38 of the Agreement, which was sufficient to effect jurisdiction pursuant to Article 5(A)(2) of the Judicial Authority Law.
34. The Respondent cited *Investment Group Private Limited v Standard Chartered Bank* [2014] DIFC CA 004 ("***Investment Group Private Limited***"), in support of its submission that Federal Civil and Commercial Laws do not apply within the DIFC. The Respondent suggested applying the approach in *Gavin v Gaynor* [2016] DIFC CFI ("***Gavin v Gaynor***"), which stated that any reference to the governing law being UAE law should be deemed a reference to the UAE laws applicable in the DIFC. Furthermore, onshore law should not be applicable in an offshore jurisdiction like the DIFC, citing *National Bonds Corporation PJSC v (1) Taaleem PJSC (2) Deyaar Development PJSC* [2011] DIFC CA 001 ("***National Bonds Corporation PJSC***").
35. The Trial Judge accepted the Respondent's argument, stating that, although the DIFC Courts did not have jurisdiction in this matter, Clause 38 of the Agreement qualified as a "specific, clear and express" agreement to the exclusive jurisdiction of the DIFC Courts, pursuant to Article (5)(2) of the Judicial Authority Law.
36. While the Trial Judge acknowledged that this case differed from *Investment Group Private Limited* in that it involves an opt-in jurisdiction, he opted to take the same approach. The Trial Judge therefore came to the same conclusion that Federal Civil and Commercial Laws did not apply in free zones, pursuant to Article 3(2) of Federal Law No. 8 of 2004.
37. Additionally, the Trial Judge accepted the finding from *Gavin v Gaynor*, which stated that, as the contract in question had "crossed the line" and become subject to the jurisdiction of the DIFC Courts, any reference to UAE Law must be a reference to UAE Laws applicable within the DIFC. The Trial Judge stated that the Parties had accepted that Federal Laws applicable in Abu Dhabi would "appear to be the same" Federal Laws applicable across the whole of the UAE. Based on the successful "opt-in" clause present in the Agreement, the reference to "the laws of the United Arab Emirates as applicable in the Emirate of Abu Dhabi" must be a reference to UAE Laws applicable within the DIFC.
38. The Trial Judge also stated that the Appellant had failed to provide sufficient evidence that the Federal Commercial Agency Law should apply and, in any event, the Federal Supreme Court required that if an agency agreement was not registered with the commercial agents' registry, it would be invalid. The Claim was therefore not likely to proceed in the Federal Court.
39. Finally, the Trial Judge rejected the Appellant's argument that, even if the DIFC Courts were found to have jurisdiction over the dispute, the matter should nonetheless be referred to the Federal Court.

THE PARTIES' ARGUMENTS ON APPEAL

Kassab Media FZ LLC's (Appellant's) Arguments

40. The Appellant submits that the reasoning given by the Trial Judge in the CFI Judgment is erroneous and inconsistent with law. In summary, the Appellant makes the following claims.
    - The Trial Judge failed to apply the provisions of Article 6 of the Judicial Authority Law and Articles 8, 9 and 11.1 of the DIFC Law No. 10 of 2005 all of which allow parties to effect a choice of law to govern their dispute.
    - The Trial Judge misapplied and misinterpreted the provisions of Article 3(2) of Federal Law No. 8 of 2004 in relation to its challenge on jurisdiction.
    - The Trial Judge misinterpreted (and therefore changed) the meaning of Clause 38 of the Agreement, and thus failed to apply the relevant governing law to the dispute.
    - The Trial Judge failed to apply the following provisions.
        - (i) Articles 2 and 3 of the Federal Commercial Agency Law;
        - (ii) Article 226 of the Commercial Code;
        - (iii) Articles 31, 126(d), 127, 210(1) and (2) of the Civil Code.
    - The Trial Judge did not consider and respect the distribution of jurisdiction between federal and local courts as a matter of public order that may not be transgressed by the courts or by parties in their agreements, pursuant to the UAE Constitution and Federal Law No. 6 of 1978, as amended.
41. Based on the above, the Appellant invites the Court of Appeal to set aside the CFI Judgment on the Appellant's Jurisdiction Application and stay proceedings in the Claim. The Appellant further invites the Court to find Clause 38 of the Agreement void, and consequently to dismiss the case for lack of jurisdiction. Alternatively, the Appellant submits that the Court should dismiss the case because the matter is not capable of being litigated. Finally, the Appellant takes the position that the Respondent should bear all case associated costs and expenses.
42. The Appellant also requests that the Court of Appeal should vary the order in the CFI Judgment such that the costs associated with the preparation of the witness statement of Ms Susie Abdel-Nabi should be borne by the Respondent exclusively.
43. In support of its appeal, the Appellant submits the arguments below.

The Trial Judge should have assessed the validity of Clause 38 of the Agreement

44. The Appellant clarifies that it is not asking the DIFC Courts to directly apply the jurisdiction rules stated in the Federal Law, for example, Article 226 of the Commercial Code. In the Appellant's Skeleton Argument, the Appellant argues that it is asking the Trial Judge "to invoke the voidness" of Clause 38 by assessing its validity instead of applying jurisdiction rules. The Appellant takes the position that, when applying the gateways of the Judicial Authority Law, including adoptions of the jurisdiction via consent, the Court is still tasked to review if the adoption is correctly made and not contrary to "Public Order." The Court must address whether the jurisdiction clause is valid, either upon a party's request or *sua sponte* if no party requests such review. The Appellant cites Practice Direction No. 1 of 2015 of the DIFC Courts ("**PD 1/2015**") in support of this contention, which states:

"while compliance with Article 5(A)(2) of Dubai Law No. 12 (as amended) is ultimately a matter of interpretation by the Courts in the hearing, the Registry will accept Claim Forms filed by the Parties which rely on Article 5(A)(2) to invoke the jurisdiction of the DIFC Courts if accompanied by submission agreements in one of the forms set out below, without prejudice to any subsequent challenge that may be made to that jurisdiction on the ground that the submission relied on dues not satisfy the requirements of Article 5(A)(2)."

45. The Appellant argues that, by contracting out of the Federal Courts which have the original jurisdiction to try the case, the jurisdiction clause is not "made correctly" and is contrary to "Public Order". On this basis, the Appellant submits that, since Clause 38 does not exist and has no effect pursuant to Article 210 of the Civil Code, the jurisdictional gateway of Article 5(A)(2) has not been complied with. Article 210 of the Civil Code states as follows.

"(1) ****** A void contract is one which is unlawful in its essence and form, lacking the elements of a contract or defective in its subject matter or purpose or form as laid down by law for the making of a contract, and such contract shall be of no effect and shall not be capable of being rectified by consent.

(2) ******* Any person having an interest may rely on the voidness of the contract and a judge may so rule of his own motion.

(3) ******* No claim (for a declaration) that a contract is void shall be heard after the expiry of 15 years from the date the contract was made, but any person having an interest may raise the defence of the voidness of the contract at any time."

46. The Appellant argues that reliance on *Investment Group Private Limited* was inappropriate as that case is easily distinguished. As acknowledged by the Trial Judge, *Investment Group Private Limited* involved an assessment of jurisdiction under Article 5(A)(1) of the Judicial Authority Law, rather than an opt-in jurisdiction under Article 5(A)(2).

The Trial Judge misapplied Article 3(2) of Federal Law No. 8 of 2004

47. The Appellant disagrees with the Trial Judge's reliance on Article 3(2) of the Federal Law No. 8 of 2004, which states:

"These Zones (Financial) and Financial Activities shall also be subject to all Federal laws, with the exception of Federal civil and commercial laws."

48. According to the Appellant, Article 3(2) only excludes the application of Federal, civil and commercial laws inside financial free zones to provide more freedom on the choice of law for business entities within the borders of the financial free zones. Article 3(2) is therefore irrelevant to activities performed outside the financial free zones. The Appellant also highlights that Article 7 of the Law on the Application of Civil and Commercial Laws in the DIFC further clarifies the application of Article 3(2) of Federal Law No. 8 of 2004. Article 7 states as follows.

"The objectives of this law are to:

- Provide certainty as to the rights, liabilities and obligations of persons in relation to civil and commercial matters arising in the DIFC; and
- Allow persons to adopt the laws of another jurisdiction in relation to civil and commercial matters arising within the DIFC."

49. The Appellant contends that the key words of Article 7 are "arising within the DIFC." Accordingly, Article 3(2) of Federal Law No. 8 of 2004 and Article 7 of the Law on the Application of Civil and Commercial Laws in the DIFC relate only to commercial and civil matters arising within the DIFC. Given that the current appeal does not arise within the DIFC zone, Article 3(2) of Federal Law No. 8 of 2004 and Article 7 of the Law on the Application of Civil and Commercial Laws in the DIFC are therefore irrelevant.
50. Furthermore, the Appellant submits that Article 3(2) does not invalidate the parties' choice of law in Clause 38, which should be assessed based on Article 6[1] of the Judicial Authority Law and Articles 8, 9 and 11(1)[2] of DIFC Law No. 10 of 2005, all of which state that a contract's validity is determined by the law which governs the contract.

The Trial Judge changed the meaning and application of Clause 38

51. The Trial Judge found that Clause 38 referred to the laws of the UAE generally, as applicable within the DIFC. In relation to this finding, the Appellant contends that the Trial Judge "entirely changed" the meaning of Clause 38.

According to the Appellant, the laws applicable to the Agreement or any issues arising out of it or in connection with it will be governed by both the UAE Federal Laws as applicable in the Emirate of Abu Dhabi and the local laws issued by the Ruler of Abu Dhabi.

52. The Appellant disagrees with the Trial Judge's adoption of *Gavin v Gaynor* which found that any reference to UAE law as the governing law should be deemed a reference only to UAE laws applicable in the DIFC. The Appellant distinguished *Gavin v Gaynor*, arguing that the governing law in *Gavin v Gaynor* was a general provision while the governing law under Clause 38 was "specific and limiting" to the law "applicable only in Abu Dhabi."
53. According to the Appellant, Clause 38 expressly states that the laws applicable in the Emirate of Abu Dhabi. This means only two categories of law are applicable, namely (1) all Federal Laws; and (2) Laws of the Ruler of the Abu Dhabi Emirate. The Appellant further argues that it is logical that the governing law is limited to the law in Abu Dhabi as the execution of the Agreement lies within the "State Capital" (sic) of Abu Dhabi.
54. The laws of Dubai and the DIFC are therefore not applicable. Instead, the Civil Code, the Commercial Code, and the Federal Commercial Agency Law are applicable to the Claim.
55. The Appellant further argues that Clause 38 allows "a very broad" application of the governing law." It contends that the broad application should cover matters connected with the Agreement and non-contractual issues "including the breach of laws or regulations, jurisdictional and other issues without limitation."

The Trial Judge failed to apply the Federal Commercial Agency Law

56. The Appellant contends that the Federal Commercial Agency Law is applicable because the commercial agent's activity under the Agreement is performed within and contracted for the State territory. The Federal Commercial Agency Law restricts the activity of commercial agents in the UAE to Emirati nationals only and sets out formal requirements for contracts to be registered.
57. According to the Appellant, any commercial agent activity contracted by a foreign-owned entity is not permitted to register and is considered to be "illegal" and "void by force of law" under Article 2 of the Federal Commercial Agency Law. Referring to Article 3 of the Federal Commercial Agency Law, the Appellant submits that an agency which is not registered shall have no legal effect. In support of its position, the Appellant highlights the judgment by the Federal Supreme Court Case No. 357/15 which states as follows.

"Commercial Agency business may not be carried out unless by citizens or firms fully owned by UAE national individuals or companies wholly owned by UAE nationals upon registration within the register concerned.**no commercial agency shall be deemed valid unless registered in such register**. Furthermore, unless registered in such register, no claim concerning agency, which shall be deemed of no effect despite the agency agreement fulfils all terms and conditions required by civil transaction law." (emphasis added)

58. Based on the legal reasoning above, the Appellant argues that it was appointed as an exclusive agent or representative of the Respondent within the UAE territory under the Agreement.
59. Since the Appellant is a foreign-owned company and the Agreement between the parties was not registered, the Agreement was therefore "illegal" and "void by force of law." In the circumstances, as this dispute arises from a contract for the "forbidden performance of activity", the matter should not be heard by any competent court, whether federal or local, including the DIFC Courts. The Appellant considers this matter as an "exemption from the general constitutional right to submit to the court".

The DIFC Courts lack jurisdiction based on the Federal Commercial Code and the Federal Civil Code

60. The Appellant submits that the Trial Judge should have found that, pursuant to Clause 38 of the Agreement, the law applicable to the Agreement and to any dispute arising out of or in connection with the Agreement must be UAE Federal Law and Abu Dhabi Laws, i.e. only those laws applicable in the Emirate of Abu Dhabi. Abu Dhabi applies the Federal Civil Code, Federal Commercial Code, Federal Commercial Agencies Law and the UAE Constitution. The laws of the Emirate of Dubai or DIFC Laws are not applicable.
61. Pursuant to Article 8 of the DIFC Law No. 10 of 2005, the existence, validity and effect of a contract shall be determined by the governing law. The Appellant submits that the existence, validity and effect of the jurisdiction clause (i.e. Clause 38) should therefore be determined pursuant to the governing law i.e. the Federal Commercial Code and the Civil Code. The Appellant further supports its position with Article 31 of the Civil Code which stipulates that "a mandatory provision (of law) shall take precedence over a contractual stipulation."
62. The Appellant further refers to Article 226 of the Commercial Code which states as follows.

"As an exception to the rules of jurisdiction provided for in the Civil Procedure Code, the Court within which jurisdiction lies the place of implementation of the contract, shall be competent to look into any conflicts from the contracts proxy contract."

63. The Appellant contends that, given the Appellant's capacity as a contracts proxy, Article 226 should prevail any agreed stipulation between the parties.
64. As the provision is mandatory, the parties cannot contract out of it. Applying Article 226 of the Commercial Code, since the implementation of the Agreement lies within the State territory as stated in Clause 3.1 of the Agreement, it follows that the State Federal Courts of Abu Dhabi are the competent and mandatory courts to adjudicate this dispute.
65. Additionally, Article 126(d) of the Civil Code provides that the subject matter of a contract may not be something prohibited by a provision of law or contrary to "Public Order". The Appellant submits that Clause 38 is contrary to "Public Order" as it violates the rules relating to the distribution of the competence between the national and local courts. Clause 38 is therefore null and void by force of law.
66. Clause 38 is also defective under Article 210 of the Civil Code, which states that a void contract may not be rectified by the parties' consent. The Appellant further relies on Article 210(2) which states that any person having an interest may rely on the provision and submits that the Trial Judge should have, *sua sponte*, ruled that Clause 38 was void by virtue of Article 210.
67. The Appellant repeats its submission that the Trial Judge should have considered Articles 8 and 9 of DIFC Law No. 10 of 2005, which state that a contract's validity is determined by the law which governs the contract.

The Trial Judge should have found that the Claim is not capable of being litigated

68. The Appellant argues that the Claim is not capable of being litigated; it is an exception to the constitutional right to submit to the courts. Any competent court "will not hear" this Claim because it arises from an Agreement which was made unlawfully and is therefore null, void, and incapable of rectification by consent.
69. Referring to the Federal Commercial Agency Law, the Appellant repeats its argument that the Agreement is not registered and therefore has "no effect by force of law i.e. null and void". As the Agreement is a contract for commercial agency performed by a non-Emirati, the Agreement is unlawful. Pursuant to Article 127 of the Civil Code, a contract to do an unlawful thing is unlawful. The Agreement is therefore null and void pursuant to Article 210 of the Civil Code. Any court that would be competent to hear this case should not exercise jurisdiction as the Claim arises out of an unlawful contract.



The Trial Judge should have adjusted costs

70. The Trial Judge granted the Appellant's application to exclude the witness statement of Ms Susie Abdel-Nabi. However, in his order on costs, the Trial Judge ordered that "costs shall be awarded in the case".
71. The Appellant submits that the Trial Judge had made a general decision that costs be awarded in the case without addressing the costs related to the preparation of the excluded witness statement of Ms Susie Abdel-Nabi. Under RDC 29.15, the Trial Judge should have refused to allow the costs arising from preparation of this witness statements to be awarded.

Sky News Arabia FZ-LLC's (Respondent's) Arguments

72. The Respondent submits that it opposes the appeal in its entirety. The CFI Judgment was correct and the DIFC Courts have jurisdiction over the Claim. Clause 38 falls squarely within the remit of Article 5(A)(2) of the Judicial Authority Law. The Court of Appeal should not depart from the CFI Judgment and the reasoning of the Trial Judge.
73. The Respondent submits that there is no merit to any of the Appellant's arguments and thus invites the Court of Appeal to dismiss the Appeal in full. In responding to the Appellant, the Respondent addresses the Appellant's main arguments in three parts.

Jurisdiction is based solely on the Judicial Authority Law

74. The Respondent argues that the Trial Judge was correct in finding that the DIFC Courts's jurisdiction is solely determined by the Judicial Authority Law as established in *Investment Group Private Limited*. While Clause 38 makes reference to UAE and Abu Dhabi Law, it states expressly that the Agreement is "subject to the exclusive jurisdiction of the Dubai International Financial Centre Courts." This is a clear and express opt-in clause pursuant to Article 5(A)(2) of the Judicial Authority Law.
75. The Trial Judge was correct in applying the findings in *Investment Group Private Limited* as these findings by the Court of Appeal are binding. The Respondent argues that the findings in *Investment Group Private Limited* should also apply to cases of opt-in jurisdiction.

76. In support of its argument, the Respondent cites Article 121 of the UAE Constitution which provides an exemption from the application of Federal legislative provisions in free zones such as the DIFC. The jurisdiction of the DIFC Courts is therefore solely determined by the Judicial Authority Law.
77. With regard to the governing law, the Respondent contends that the Trial Judge was correct in finding that the parties had agreed on the applicable law to be "*the laws of the United Arab Emirates, as applicable in the Emirate of Abu Dhabi*" which refer to UAE Law applicable in the DIFC. The reference to UAE laws applicable in Abu Dhabi does not undermine the Trial Judge's finding because the very laws which bind Abu Dhabi provide that Federal civil and commercial laws do not apply in the DIFC. Furthermore, the Agreement gives the DIFC Courts exclusive jurisdiction.
78. In summary, the Respondent argued that the Trial Judge was right in relying on *Gavin v Gaynor* when he found that Clause 38 "crossed the line" into the jurisdiction of the DIFC Courts.
79. The Respondent further referred to *National Bonds Corporation PJSC* where the Court of Appeal found it to be "distinctly implausible" that parties would have chosen one law to apply to the contract and another to the jurisdiction. The Respondent argues that it is even more improbable that the Appellant's argument is correct; it is unlikely that the chosen governing law will contain mandatory provisions negating the parties' express agreement to the exclusive jurisdiction of the DIFC Courts.
80. It therefore follows that, although the parties are free to agree on application of Federal civil and commercial law over all matters, including assessments of jurisdiction, such intention must be indicated "in the clearest possible terms", especially when there is an express agreement to DIFC Courts' exclusive jurisdiction. The Respondent asserts that there was no clear intention in this case.

The Commercial Code does not apply to the assessment of jurisdiction

81. In response to the Appellant's contention that the Trial Judge failed to properly apply Articles 217 to 228 of the Commercial Code, the Respondent argues that the assessment of jurisdiction must be based solely on the Judicial Authority Law, not the Commercial Code.
82. Furthermore, the Respondent contends that the Agreement and the relationship between the parties do not fall within the remit of Articles 217 to 228 of the Commercial Code. The Respondent refers to Article 217 of the Commercial Code which defines "Contracts Agency" as a situation where "*a person is bound in a continuing manner and in a particular field of activity to initiate negotiation for the conclusion of transactions in the principal's interest for a fee. His task may include the conclusion and implementation of such contracts in the name and on account of the principal.*"
83. Relying on Article 217, the Respondent contends that the Appellant does not act as an agent for the Respondent under the Agreement.
    - The Agreement does not allow the Appellant to conclude and implement contracts in the name or on the account of the Respondent. Instead, the Agreement authorises the Appellant to sell advertising in the Territory, as defined, on its own account, and under Clauses 9.1 to 9.3, the Appellant will receive a percentage of net revenue for doing so.
    - Clause 30.1 of the Agreement expressly states that the Appellant "acts in all its contracts as a principal at law" without creating any "partnership, association, joint venture or other co-operative entity" between the parties.
84. The Respondent claims that, even if the relationship between the parties did constitute an agency relationship under Articles 217 to 228 of the Commercial Code, the DIFC Courts would be entitled to take jurisdiction. Article 226 assigns jurisdiction to the Court of the "circuit of the place where the contract is executed." This place is the UAE, as accepted by the Appellant, and the DIFC Courts are part of the UAE Court system.
85. Finally, the Appellant contends that, because the implementation of the Agreement lies within the State territory as one area, the jurisdiction therefore lies with the State Federal Courts in the State capital pursuant to Article 226 of the Commercial Code. In response to this contention, the Respondent points out that Article 226 does not specifically identify the State Federal Courts. Furthermore, Clause 3.1 of the Agreement refers to more than just one Territory. In fact, Clause 3.1 refers to a number of countries, as seen in the definition of "Territory" under Schedule 1 to the Agreement. "Territory" is defined as follows.

"Territory" means the land-mass occupied by the countries known, as at the Effective Date, as Algeria, Bahrain, Egypt, Iran, Iraq, Jordon, Kuwait, Lebanon, Libya, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, Turkey, the United Arab Emirates and Yemen."

86. Accordingly, the Respondent contends that the Appellant was wrong in its application of Article 226. The DIFC Courts are permitted to take jurisdiction even if Article 226 applied to the Claim.

The Federal Commercial Agency Law does not apply in this case

87. With regard to the application of the Federal Commercial Agency Law, the Respondent again points to its own argument that the Trial Judge was correct to determine that the jurisdiction of the DIFC Courts based solely on the Judicial Authority Law. Furthermore, the Respondent contends that the Appellant failed to prove the application of the Federal Commercial Agency Law by failing to submit evidence on non-DIFC law pursuant to RDC 29.133. As the Trial Judge acknowledged, expert evidence would likely have been required. Moreover, the Appellant did not ask the Trial Judge to use his discretion to allow only submissions on foreign law (as opposed to the submission of affirmed expert evidence).
88. Additionally, the Respondent claims that, even if the Appellant had proved that the Federal Commercial Agency Law applied in this Claim, that law would not be relevant to this dispute as the Agreement does not fall within the remit of the Federal Commercial Agency Law. A "Commercial Agency" is defined under Article 1 of the Federal Commercial Agency Law as the representation of a principal by an agent for sale of products or services inside of the UAE. According to the Federal Supreme Court of Cassation Judgment No. 375/15, this requires the agency to have authority to contract in the name of and for the account of the principal. As detailed above, this Agreement does not create this type of relationship.
89. Furthermore, the Appellant is not wholly owned by UAE nationals as required under Article 2 of the Federal Commercial Agency Law and the Agreement is not registered at the UAE Ministry of Economy as required under Article 3 of the Federal Commercial Agency Law. Accordingly, there is no Commercial Agency agreement as opposed to a Commercial Agency agreement being null and void as argued by the Appellant.
90. Even if the Federal Commercial Agency Law is found to be applicable, the Respondent argues that non-registration does not render the Agreement null and void. Relying on the Federal Supreme Court of Cassation Judgment No. 375/15, the Respondent argues that the effect of non-registration does not void the contract but instead terminates the "commercial agency" on the last available date for registration. Thus, only the "commercial agency" comes to an end, rather than all the private rights contracted for. If failure to register were to void the entire contract, the result would be "draconian."
91. Finally, Clause 26.1 of the Agreement expressly requires any illegal, invalid or unenforceable terms to be "severed" from the Agreement with the remaining provisions in force. Clause 26.1 states as follows.

"26 SEVERABILITY

26.1 If any term of this Agreement is or becomes illegal, invalid or unenforceable in any jurisdiction, it will not affect:

(a) the legality, validity or enforceability in that jurisdiction of the rest of this Agreement; or

(b) the legality, validity or enforceability in other jurisdictions of that or any other provision of this Agreement."

92. Accordingly, even if the Commercial Agency Law applied, the Respondent takes the position that, although the provisions dealing with UAE sales in the Agreement may be null and void, the remaining provisions of the Agreement remain valid and binding. This includes the following provisions in the Agreement.
    - Clause 16.2(b) which contains a "representation, warranty and undertaking" by the Appellant that it has the right, power and authority to enter into the Agreement to carry out its obligations. The Respondent contends that it is entitled to claim damages as it is the Appellant's own position, and therefore its admission, that it has no such "right, power and authority" to carry out its obligations.
    - All clauses in the Agreement insofar as they relate to sales outside of the UAE.
    - The exclusive jurisdiction provision at Clause 38.1.
93. The Respondent emphasises that, even if Articles 127 and 210 of the Civil Code applied, there was nothing unlawful about the Agreement. Furthermore, Article 6 of the Federal Commercial Agency Law explicitly states that UAE Courts are competent to consider disputes arising between principal and agent and the DIFC Courts are UAE Courts. The Trial Judge was therefore correct to find that the DIFC Courts are therefore the only competent courts to hear this Claim.

DISCUSSION

Issues before the Court

94. In this Judgment, the Court of Appeal will address the following issues:
    - Issue 1: Should the Trial Judge have found Clause 38 void;
    - Issue 2: Whether Clause 38 falls within Article 5(A)(2) of the Judicial Authority Law and confers jurisdiction to the DIFC Courts;
    - Issue 3: The applicable law of the Agreement as stated in Clause 38;
    - Issue 4: Whether the Federal Commercial Agency Law and Commercial Code are applicable to the Claim;
    - Issue 5: Whether the Trial Judge should have adjusted his order on costs to exclude the costs arising from the preparation of the witness statement of Ms Susie Abdel Nabi.

Issue 1: Should the Trial Judge have found Clause 38 void

95. First, the Appellant asked the Trial Judge to find that Clause 38 was void, instead of directly applying the jurisdiction rules. It contends that this Court is still first tasked to review if the "opt in" was correctly made and not contrary to "Public Order."
96. This argument is made on the ground that, if the contract and all its clauses, including the jurisdiction clause at Clause 38, are void, there is no valid "opt in". Accordingly, the requirements of Article 5(A)(2) of the Judicial Authority Law are not met. There is therefore no connection between the Claim and the DIFC Courts.
97. It was repeatedly asserted by the Appellant that the Agreement and Clause 38 are void due to the conflict with Articles 2 and 3 of the Federal Commercial Agency Law as the Agreement is not in compliance with: (1) Commercial Agency registration mandates, (2) the mandate for local Emirati ownership of the agent, and (3) Article 210 of the Civil Procedure Code, which provides that "A void contract is one which is unlawful in its essence and form, lacking the elements of a contract or defective in its subject matter or purpose or form as laid down by law for the making of a contract, and such contract shall be of no effect and shall not be capable of being rectified by consent."
98. Even before this Court addresses the issue of whether Clause 38 is void, it should be highlighted that it is very common for parties, lawyers, judges or even arbitrators to misunderstand the relationship between the validity of an agreement as a whole and the validity of a jurisdiction clause. This is especially true in national courts as most of the jurisdiction rules are defined by law rather than by contract, unlike arbitration agreements.
99. The common misconception is that parties may seek to invalidate the entire agreement at the jurisdiction stage rather than assess the severability of the jurisdiction clause from the agreement as a whole. This often confuses the merits of the dispute with the appropriate considerations at the jurisdiction stage of the hearing.
100. On one hand, the Appellant is contesting the jurisdiction of the DIFC Courts to hear the case. On the other hand, the Appellant is requesting that the Court declare the whole contract void based on the governing law of the Agreement.
101. The Appellant's request to declare the Agreement void necessitates this Court to decide upon the applicable governing rules or laws and then examine the Agreement against the applicable rules. Before this Court is able to embark on an assessment of the Agreement's validity, this Court has to ensure that it has the jurisdiction to assess the contract as a whole. Making a declaration that the Agreement is void would require deciding a substantial part of the Claim between the parties. A court without jurisdiction to determine a dispute regarding a contract should hesitate before declaring that same contract void.
102. Accordingly, the need to separate the examination of the jurisdiction clause and the rest of the contract becomes obvious. This must occur to enable one venue or another to accept jurisdiction over the case between the parties and then determine the merits of the underlying contractual dispute.
103. It was held in the English Court of Appeal in *Deutsche Bank v Asia Pacific* [2008] EWCA Civ 1091 that a jurisdiction clause, like an arbitration clause, is a separable agreement from the underlying contract. This is an uncontroversial finding both as a matter of domestic law (see *Fiona Trust v Privalov* [2008] 1 Lloyd's Rep 254; [2007] Bus LR 1719) and as a matter of European Law (see *Benincasa v Dentalkit SRL* [1997] ECR 1-3767). Longmore LJ stated that it followed that disputes about the validity of the contract at issue in a present case had to be resolved pursuant to the terms of the exclusive jurisdiction clause contained therein.
104. It was only if the jurisdiction clause itself was under some specific attack that a question could arise as to whether it was correct to honour the terms of the jurisdiction clause. Examples of these types of attacks may be claims on invalidity due to fraud or duress alleged specifically in relation to the jurisdiction clause.[illegible] However, it is unlikely that mere and unsupported allegations to that effect would render a jurisdiction clause inapplicable.
105. The English authorities were clear that the jurisdiction clause is not nullified whenever there is a reasonable allegation that the contract in which such jurisdiction clause was contained was invalid due to mistake, misrepresentation, illegality, lack of authority or lack of capacity. Accordingly, all of the Appellant's grounds of appeal based on the argument that the underlying contract is void must fail when it comes to the examination of the jurisdiction clause.
106. The question that remains is whether the Appellant made any specific attack on the jurisdiction clause itself. This Court has not seen any argument by the Appellant that relates specifically to the jurisdiction clause, as opposed to arguments directed against the Agreement as a whole. The Appellant therefore cannot succeed in this regard.
107. However, the Court notes that the Appellant made arguments about conflicts of laws and "Public Order" that it claims would prevent this Court from adjudicating the claim. The Court shall address these arguments under issues 3 and 4 of this judgment.

Issue 2: Whether Clause 38 falls within Article 5(A)(2) of the Judicial Authority Law and confers jurisdiction on the DIFC Courts

108. As mentioned in paragraphs 102 and 103, it is well-established that the choice-of-forum clause is an independent contract from the underlying contract. It bears mentioning that it is not necessary for the opt-in jurisdiction under Article 5(A)(2) of the Judicial Authority Law to be a contract. Even a simple agreement between the parties through correspondence would suffice for Article 5(A)(2) to apply.

109. Having reviewed that there is no issue regarding the validity of the jurisdiction clause, we now move on to discuss the jurisdiction agreed between the parties. The words "subject to the exclusive jurisdiction of the Dubai International Financial Centre Courts" in Clause 38 expresses the Parties' choice of court in specific, clear and express terms.

"This Agreement and any issues or disputes arising out of or in connection with it (whether contractual or non-contractual, such as claims in tort, breach of statute or regulation, or otherwise) will be governed by and construed in accordance with the laws of the United Arab Emirates as applicable in the Emirate of Abu Dhabi and subject to the **exclusive jurisdiction of the Dubai International Financial Centre Courts.**" (emphasis added)

110. The Trial Judge was correct in pointing out that the DIFC Courts have no jurisdiction under Article 5(A)(1) in this Claim, and accordingly this Claim falls under the "opt-in" jurisdiction in Article 5(A)(2) of the Judicial Authority Law.
111. In its Skeleton Argument, the Appellant claims that the consensual "opt-in" jurisdiction does not apply because the jurisdiction of the Claim continues to lie with the State Federal Courts due to laws applicable to the Agreement and the parties' relationship. In particular, the Appellant claims that the Court should consider the Appellant's capacity as an agent or representative of the Respondent as a contract proxy or contracts agent under the Commercial Code. Article 226 of the Commercial Code provides that jurisdiction lies in the place of implementation of a contract. The Appellant further highlights that, under Article 31 of the Civil Code, the mandatory provision shall prevail any contractual stipulation.
112. The Appellant further submits that the Agreement is subject to compliance with the requirements under the Federal Commercial Agency Law. Highlighting Article 126 of the Civil Code, the Appellant argues that the Agreement did not meet the statutory requirements under the Federal Commercial Agency Law and accordingly, the subject matter of the Agreement is prohibited by a provision of the law and therefore contrary to "Public Order".
113. On the other hand, the Respondent, relying on the Court of Appeal's finding in *Investment Group Private Limited*, agreed with the Trial Judge's conclusion that the DIFC Courts' jurisdiction was solely determined by the Judicial Authority Law.
114. The Appellant had attempted to distinguish this Claim with that in *Investment Group Private Limited* by arguing that the findings in *Investment Group* only applied to matters where the DIFC Courts had jurisdiction under Article 5(A)(1) of the Judicial Authority Law. Although *Investment Group Private Limited* examined Article 5(A)(1) of the Judicial Authority Law, the legal principles expounded by the Court of Appeal in the case could not be more similar and applicable to the present Claim.
115. In *Investment Group Private Limited*, the Court of Appeal had to determine whether the DIFC Courts had competent jurisdiction to hear the claims commenced by Standard Chartered Bank against Investment Group Private Limited. Investment Group Private Limited argued that the DIFC Courts could not enforce any law which contradicted or subverted the UAE Constitution. It submitted that Articles 20 to 24 of the Civil Code prescribed mandatory limits on jurisdiction and that under these provisions, the DIFC Courts did not have competent jurisdiction to hear the dispute. The Court of Appeal unanimously determined that the DIFC Courts had jurisdiction. It reasoned that the jurisdiction of the Courts was determined solely by the Judicial Authority Law and that the Civil Code did not apply.
116. The Court of Appeal, at paragraph 94 in *Investment Group Private Limited,* examined the legislative history underpinning the establishment of the UAE free zones and concluded that the exemption of UAE free zones from the Civil Code is "consistent and sanctioned" by UAE legislation. Such exemption is an essential aspect of the state's economic policy as implemented by statute and is "far from subverting public goals pursued by the state."

"We understand the USC to be establishing in these two decisions an uncontroversial proposition, namely that where a UAE court is bound by the CPC, it must adhere to the jurisdictional allocation prescribed by the CPC and disputants cannot contract out of it This proposition, we unreservedly accept. We also accept that the CPC provisions on jurisdiction concern a matter of public order. **But these do not go far enough to support the wider proposition that IGPL now advances, namely that the financial free zones such as the DIFC Courts must take into account the limits imposed by the CPC when determining questions of jurisdiction.** The fact that the CPC provisions on jurisdiction are driven by considerations of public order is insufficient; IGPL must also demonstrate that a failure to apply the CPC to free zones would offend public order. Having regard to the legislative history underpinning the establishment of UAE free zones set out above, such a conclusion is not sustainable. It is critical that **the exemption of UAE free zones from the CPC is effected both at the constitutional level (Article 121 of the Constitution) and the federal level (Article 3(2) of Federal Law 8)**. Two conclusions flow from this. **First, the UAE free zones' exemption from the CPC (in its entirety) is consistent with and sanctioned by the UAE's legislation.**

Second, far from subverting public goals pursued by the state, the exemption is an essential aspect of the state's economic policy, as implemented by statute. Accordingly, **even on the widest understanding of "public order", it cannot be said that the DIFC's exemption from the CPC is contrary to public order."** (emphasis added)

117. Consistent with the decision in *Investment Group Private Limited*, the Respondent rightfully points out that DIFC Courts are excluded from the implementation of Federal legislative provisions under Article 121 of the UAE Constitution and Article 3(2) of the UAE Federal Law No. 8 of 2004. The relevant provisions are as follows.

"Article 121 of the UAE Constitution

Without prejudice to the provisions of the preceding Article, the Federation shall have exclusive legislative jurisdiction in the following matters:

- labor relations and social security;

.

- organizing the free zone areas, determining the method of creation of such zones and the scope of its exception from the implementation of the Federal laws.

Article 3(2) of the UAE Federal Law No. 8 of 2004

These Zones and Financial Activities are subject to all provisions of Federal Laws with the exception of Federal civil and commercial laws."

118. We also disagree with the Appellant that *Investment Group Private Limited* can be distinguished. Although the Court of Appeal in *Investment Group Private Limited* determined that the DIFC Courts had jurisdiction under Article 5(A)(1) of the Judicial Authority Law, it also construed the jurisdiction agreements and found at paragraph 154 of its judgment that, not only had the parties **not** opted out of the DIFC Courts' jurisdiction, the parties' jurisdiction agreements covered the DIFC Courts and also conferred jurisdiction under Article 5(A)(2) of the Judicial Authority Law. The Appellant is therefore incorrect to say that *Investment Group Private Limited* can be distinguished and is inapplicable to this Claim.
119. Having considered the Parties' position, we agree with the decision in *Investment Group Private Limited* and find that the Respondent is correct in its position that UAE's civil and commercial laws do not apply to the DIFC. The Appellant's contention that the Civil Code is applicable is inconsistent with Article 3(2) of the UAE Federal Law No. 8 of 2004. Accordingly, the DIFC Courts's jurisdiction is solely governed by the Judicial Authority Law.
120. It cannot be more obvious in this Claim that the parties had used clear language specifically conferring "exclusive jurisdiction" to the DIFC Courts. We take the view that the parties must surely have contemplated the possibility that either party would commence a claim in the DIFC Courts.

Issue 3: The applicable law of the Agreement as stated in Clause 38

121. The Parties disagree on the construction and interpretation of the governing law stated in Clause 38.1.

"This Agreement and any issues or disputes arising out of or in connection with it (whether contractual or non-contractual, such as claims in tort, breach of statute or regulation, or otherwise) will be governed by and construed in accordance with **the laws of the United Arab Emirates as applicable in the Emirate of Abu Dhabi** and subject to the exclusive jurisdiction of the Dubai International Financial Centre Courts." (emphasis added)

122. The Appellant contends that the applicable laws to the Agreement are UAE Federal Laws as applicable in the Emirate of Abu Dhabi and the local laws issued by the Ruler of Abu Dhabi. Disputing the Trial Judge's finding that any reference to UAE law as the governing law should be deemed a reference only to UAE Laws applicable in the DIFC, the Appellant instead contends that the laws of Dubai and the DIFC are not applicable at all.
123. The Respondent supports the Trial Judge's reference to the decision of H.E. Justice Ali Al Madhani in *Gavin v Gaynor*. It also argues that the reference to UAE Laws applicable in Abu Dhabi does not undermine the finding that the governing law relates to UAE Laws applicable in the DIFC because, as a matter of UAE Laws, Abu Dhabi has to recognise UAE laws applicable in the DIFC.
124. In *Gavin v Gaynor*, the relevant jurisdiction clause provided that "*any controversy arising out of, or relating to this Agreement, or the breach thereof, which cannot be resolved pursuant to Section 13.4 above, shall be submitted to arbitration* ***per the law of the United Arab Emirates***". After H.E. Justice Ali Al Madhani in the Court of First Instance determined that the DIFC Courts had jurisdiction, the next step was to determine the applicable law. H.E. Justice Ali Al Madhani found that, since the contract had become subject to the jurisdiction of the DIFC Courts, any reference to UAE Law must be a reference to UAE Laws applicable within the DIFC. It should be clarified that, at paragraph 67 of the judgment, H.E. Justice Ali Al Madhani stated that the reference to "UAE Laws applicable within the DIFC" referred to DIFC Arbitration Law and procedure and "not the applicable law as to the merits or substance of the claim". This was because the applicable law was already expressly stated in a separate provision in the agreement.

"[67] Since this Court has found that the contract or the transaction has crossed the line and become subject to the jurisdiction of the DIFC Courts, any reference to UAE Law must be a reference to UAE Laws applicable within the DIFC. Accordingly the reference to UAE Laws in the Arbitration Clause (13.5) of the SVC Agreement must be the DIFC Arbitration Law and procedure and not the applicable law as to the merits or substance of the claim, considering that the applicable law was referred to in Clause (13.2) and would not likely be referred to twice."

125. Since the decision in *Gavin v Gaynor* only examined the applicable law to be used when determining the DIFC arbitration law and procedure, we take the view that this decision cannot be used to determine issues relating to the applicable law of the Agreement.
126. We find that it is not necessary at this stage to address the issue of the applicable law of the Agreement. It is crucial to clarify that the issue of jurisdiction is separate from the issue of the applicable law of the Agreement. The Court first decides if it has jurisdiction under Article 5(A) of the Judicial Authority Law. After the issue of jurisdiction is decided, the Court with jurisdiction to hear the Claim can then go on to assess the applicable law of the Agreement as stated in the jurisdiction clause. To this end, we also find that the Parties have not submitted any expert evidence or pointed to any material facts relating to the execution of the Agreement within the UAE to allow the Court to ascertain the applicable law of the Agreement. Accordingly, notwithstanding our finding that the DIFC Courts have jurisdiction, we remit the issue of the applicable law of the Agreement to the Court of First Instance.

Issue 4: Whether the Federal Commercial Agency Law and Commercial Code are applicable to the Claim

127. As mentioned in [126] of this Judgment, we will not decide on the issue of the applicable law of the Agreement. Nevertheless, while it is not strictly necessary, we set out below a brief discussion on the applicability of the Federal Commercial Agency Law.
128. According to the Federal Commercial Agency Law, a valid agency agreement must be in compliance with mandates of that law which restrict the activity of commercial agents in the UAE to Emirati nationals only. Valid agency agreements also need to be registered between an agent and a principal.
129. There is no room for the Appellant to argue that the whole Agreement is illegal and will be void by force of law, considering the decision of the Federal Supreme Court in Case No. 357/15, which provides that "*no commercial agency shall be deemed valid unless registered in such register.".* This judgment did not purport to invalidate the contract itself, but instead found that the relevant contract did not qualify as a "commercial agency." Thus, only the "commercial agency" is invalid, as opposed to all the private rights the parties had contracted for.
130. We further disagree with the Appellant for two reasons.
131. First, we repeat our position in paragraphs 95 to 106 that the illegality of the main contract does not affect the validity of the jurisdiction clause.
132. Second, and in any event, we do not find that the Agreement makes the Appellant an agent of the Respondent. In the Appellant's Skeleton Argument on its Jurisdiction Application at the Court of First Instance, the Appellant relied on Clause 3.1 and the definitions in Schedule 1 of the Agreement to argue that it is the "exclusive agent" to sell advertising and broadcasting service within the Territory. Clause 3.1 merely states that "*KASSAB is appointed for the Term as the exclusive media representative for SNA in the Territory responsible for selling all Advertising and Sponsorship on the Channel, on the Website, and mobile services.*"
133. The definitions in Schedule 1 of the Agreement also do not lend much assistance to the Appellant's argument that it is an agent of the Respondent. In fact, any reference to agency in the definitions section of Schedule 1 refers to Kassab's agents and not Kassab as an agent of SNA. We set out a few examples from Schedule 1 below.

"'Agency Fees" means (i) Agency Commission and (ii) Agency Value Incentive, provided that the maximum amount of Agency Fees payable to any agent shall not without SNA's prior written approval exceed X's of the total revenues received from KASSAB Sales attributable to such agent, with the value of X to be agreed between the Parties during each annual Commercial Policy Process.

"Agency Commission" means discounts and commissions payable by KASSAB to any agent for facilitation of KASSAB Sales, calculated as a percentage of the total revenues received from KASSAB Sales attributable to such agent (excluding the commission payable to KASSAB pursuant to Clause 9.1).

"Agency Value Incentive" means additional fees or other items of service or value (on top of the Agency Commission) payable by KASSAB to any agent for the achievement of enhanced targets resulting in higher KASSAB Sales revenue."

134. On the other hand, the Respondent highlights that the Agreement does not allow the Appellant to conclude and implement contracts in the name of or on the account of the Respondent. Instead, the Agreement authorises the Appellant to sell advertising in the Territory, as defined, on its own account, and to receive a percentage of net revenue for doing so. Additionally, Clause 30.1 of the Agreement expressly states that the Appellant "acts in all its contracts as a principal at law" without creating any association between the parties.
135. Based on the facts raised by the Respondent to the Court's attention, we agree that the Appellant does not fall within the definition of a "Commercial Agency" under Article 1 of the Federal Commercial Agency Law.
136. It should be noted that the term "agent" is often misused in commercial practice, even in legal documents. Sundry commercial relationships which do not amount to a legal relationship of principal and agent are frequently described in these terms. Examples include distributors, franchisees, and licensees. Accordingly, merely because a party is described as an "agent" does not of itself make him one. The same concept applies to the term "agency" where some parties mistakenly assume that there is an agency and principal relationship with advertising agencies, public relations agencies and government agencies. It is therefore crucial to embark on a factual and legal analysis in each case to determine if there is indeed an agency relationship.
137. In the present Claim, the Agreement describes the Appellant as a "representative" as opposed to an "agent". We therefore do not even need to consider any possibility of misuse of the term "agent" or "agency" in this Claim.
138. Accordingly, even if UAE Federal civil and commercial laws apply, there is no valid commercial agency agreement existing between the parties. The Agreement between the parties is therefore not subject to the Federal Commercial Agency Law.
139. As regards the Commercial Code, we remit consideration of the issue to the Court of First Instance since this issue is dependent on the applicable law of the Agreement.
140. The Appellant has also made arguments that the Agreement is void owing to the "forbidden performance of activity" under the Commercial Code. For the avoidance of doubt, it still remains open for the Court of First Instance to decide whether the Agreement is void.

Issue 5: Whether the Trial Judge should have adjusted his order on costs to exclude the costs arising from the preparation of the witness statement of Ms Susie Abdel-Nabi.

141. The Appellant argues that the Trial Judge made a general decision that costs shall be awarded in the case without adjusting the cost after granting the Appellant's application to exclude the witness statement of Ms Susie Abdel-Nabi, a lawyer from the law firm representing the Respondent. The Appellant submits that the Trial Judge should have refused to allow the costs arising from the preparation of this witness statements to be awarded in the case.
142. The Respondent did not make any submission in regard to this issue.
143. Under RDC 38.12, the effect of "costs in the case" is such that the party in whose favour the Court makes an order for costs at the end of the proceedings is entitled to his costs of the part of the proceedings to which the order relates.
144. The general rules governing the award of costs in the RDC are, in relevant part, as follows.

"**Court's discretion and circumstances to be taken into account when exercising its discretion as to costs**

38.6

Subject to Rules 38.15 to 38.16 the Court has discretion as to:

(1) whether costs are payable by one party to another;

(2) the amount of those costs; and

(3) when they are to be paid.

38.7

If the Court decides to make an order about costs:

(1) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(2) the Court may make a different order.

38.8

In deciding what order (if any) to make about costs, the Court must have regard to all the circumstances, including:

(1) the conduct of all the parties;

(2) whether a party has succeeded on part of his case, even if he has not been wholly successful; and

(3) any payment into Court or admissible offer to settle made by a party which is drawn to the Court's attention and which is not a Part 32 offer.

38.9

The conduct of the parties includes:

(1) conduct before, as well as during, the proceedings;

(2) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(3) the manner in which a party has pursued or defended his case or a particular allegation or issue; and

(4) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim."

145. According to the above rules that govern the assessment and award of costs in the DIFC Courts, the court has the discretion to award costs with consideration of the entirety of the surrounding circumstances. The court is not bound by the general rule that the party that has been successful overall is usually awarded its costs.
146. Given the fact that the Trial Judge has granted the Appellant's application to exclude the witness statement of Ms Susie Abdel-Nabi, the Trial Judge is further allowed to prevent the Respondent from receiving any benefit of costs from the exclusion of its evidence.
147. Accordingly, we grant the Appellant's request to exclude the award of costs arising from preparation of the excluded witness statement of Ms Susie Abdel-Nabi. Such costs should be borne solely by the Respondent.

Conclusion and Costs

148. For the reasons set out above, we dismiss the Appellant's appeal on jurisdiction.
149. The issue of the application law of the Agreement is remitted to the Court of First Instance.
150. The Appellant's request to exclude the costs arising from the preparation of the witness statement of Ms Susie Abdel-Nabi is granted.
151. Costs arising from the appeal shall be paid by the Appellant to the Respondent within 14 days of the date of this order, the amount of which shall be assessed, if not agreed, by the Registrar.

[illegible] Issued by:

Lena Hatim

Assistant Registrar

Date of Issue: 12 July 2017

At: 3pm

[1] Article 6 of the Judicial Authority Law states "the Courts shall apply the Centre's Laws and regulations, except where parties to the dispute have explicitly agreed that another law shall govern such dispute, provided that such law does not conflict with the public policy and public morals."

[2] Article 8 of DIFC Law No. 10 of 2005 regulating the application of DIFC Laws reads "the Existence, validity, effect and performance of a contract, or any term thereof, including any requirements as to formality, shall be determined by the law which governs it." Furthermore, Article 9 of the same law states "an express choice of a governing law in a contract shall be effective against all persons effected thereby." Article 11(1) reads "where an agent is appointed under the contract, the capacity and authority of the agent shall be determined by the law which governs the contract."