IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

UNION INSURANCE COMPANY PJSC

Claimant

and

INTERNATIONAL PRECIOUS METALS REFINERS LLC

Defendant

AMENDED ORDER WITH REASONS OF JUSTICE WAYNE MARTIN

UPON the Defendant's Application No. CFI-064-2022/1 dated 31 October 2022 contesting the jurisdiction of the DIFC Courts to hear the Claim; or alternatively the Claim be struck out as an abuse of process; or alternatively that the Court decline to exercise any jurisdiction it has and/or stays the proceedings in favour of the proceedings before the Sharjah Federal Court of First Instance (the "Defendant's Application")

AND UPON the Defendant's Application No. CFI-064-2022/3 dated 12 January 2023 seeking an order to stay the proceedings pending the Court of Appeal's judgment in CA-015-2022 (the "Stay Application")

AND UPON the Order of Justice Wayne Martin dated 3 February 2023 ordering the parties to make submissions or agree on directions within 21 days following the publication of the decision of the Court of Appeal in CA-015-2022

AND UPON the Court of Appeal's judgment in CA-015-2022 dated 19 April 2023, and amended on 4 May 2023 (the "CA-015-2022 Judgment")

AND UPON reading the case file

IT IS HEREBY ORDERED THAT:

1. The Defendant's Application is dismissed.

2. The Defendant shall pay the Claimant's costs of the Defendant's Application, on the standard basis, to be assessed by a Registrar if not agreed.

Issued by:
Hayley Norton
Assistant Registrar
Date of issue: 15 September 2023
Date of re-issue: 18 March 2024
At: 11am

SCHEDULE OF REASONS

Summary

1. The Defendant, International Precious Metals Refiners LLC ("IPMR"), has applied for:

(a) A declaration that the Court does not have jurisdiction to hear the claim by Union Insurance Company PJSC ("UIC"), and/or

(b) An order that the claim be struck out as an abuse of the Court's process, and/or

(c) An order that the Court decline to exercise any jurisdiction it has and/or stays the proceedings in favour of proceedings pending before the Sharjah Federal Court of First Instance.

(the "Defendant's Application")

2. For the reasons which follow, the Defendant's Application must be dismissed.

Factual background

3. The following summary of the factual background to the current Defendant's Application is taken largely from the evidence adduced by IPMR in support of the Defendant's Application. The summary should not be taken as findings of fact, but rather provides an overview of the allegations made by each party for the purposes of identifying the nature of their dispute, which in turn provides context for the issues to be resolved.

4. IPMR carries on business as a refiner of gold and silver. It is incorporated in Abu Dhabi. Its production facility is based in the Sharjah Airport

International Airport Free Zone in the Emirate of Sharjah, where it occupies two substantial warehouses which are used for the purposes of refining operations.[1]

5. The Claimant, UIC, is an insurance company incorporated in the Emirate of Ajman, although its headquarters are in Dubai (outside the DIFC). It is registered as an insurer with the UAE Central Bank.[2]

6. In 2020, IPMR took out a policy of insurance with UIC, described as the "Gold Refinery Policy" (the "GR Policy") in order to distinguish it from another policy which IPMR took out with UIC. The period of insurance of the GR Policy was from 24 November 2020 to 24 November 2021. The GR Policy was expressed to cover *"all risks of physical loss or damage to gold and/or precious and/or semi-precious metals in any form whilst at the named location"*. The named locations in the GR Policy extended to all warehouses in the Sharjah Airport International Free Zone in Sharjah, including the warehouses occupied by IPMR for the purposes of their refining activities.

7. The cover was provided in respect of "any natural mineral" with a limit of USD 60 million for each and every loss at a named location, including the Refinery.[3]

8. The schedule to the GR Policy provides that:

> "This insurance shall be governed by and construed in accordance with the law of UAE. Each party agrees to submit to the exclusive jurisdiction of the Courts of UAE."

9. IPMR refines scrap gold supplied by wholesale bullion traders. The scrap gold is usually made up of unwanted jewellery and similar items.[4] The refining process involves transforming the gold into particles which dissolve into a liquid in solution which is placed into a gold storage recovery tank, from which gold powder is precipitated.[5]

10. On 19 September 2021, during the term of the GR Policy an accident occurred at IPMR's refining facility in the Sharjah Airport International Free Zone. The accident occurred when a forklift driven by a qualified and licensed driver was being used to move a water tank containing just under 3000 litres of waste solution. The water tank fell off the arms of the forklift and on to the gold recovery storage tank, splitting the fiberglass bottom to that tank, which caused the gold solution to run out and mix with the water/sludge from the waste tank on the floor of the Refinery. The problem was exacerbated by the fact that the collision had knocked a water pipe from the wall which resulted in additional water mixing with the gold solution.[6]

11. The mixing of the solutions caused the production of nitrogen dioxide fumes which meant that the Refinery had to be evacuated. Once those fumes had subsided to a safe level, attempts were made to recover as much of the gold in solution as possible. However, the vast majority could not be recovered and appears to have escaped through a drain below the gold recovery storage tank. Attempts to recover the solution from drainage pipes outside the Refinery were unsuccessful.[7]

12. Over 5,000 litres of liquid were successfully recovered from the Refinery floor which resulted in the recovery of 94.479 kg of gold.

13. IPMR asserts that the value of the gold in solution in the recovery storage tank at the time of the accident was USD 43,216,665, of which gold to the value of USD 5,337,342 has been recovered, and gold to the value of USD 166,447 (contained within the sludge) is likely to be recovered, resulting in a loss of USD 37,709,846. However, a slightly larger amount is claimed by IPMR in the proceedings which have been commenced in Sharjah, based upon a more recent calculation of IPMR's alleged loss.[8]

The Claim and the various proceedings

14. IPMR notified UIC of the accident and of the likelihood of a potential claim on 19 September 2021.[9]

15. UIC appointed experts in a number of disciplines to assist in its consideration of IPMR's claim although over a period IPMR came to the view that UIC was not progressing its claim expeditiously.[10] However, IPMR asserts that it has cooperated with UIC and its advisers at all times.[11]

16. Insurance law in the UAE is regulated by Federal Law No. 6 of 2007 (the "Insurance Law"). Article 110 of the Insurance Law provides a regime for the resolution of disputes with respect to claims made under regulated insurance policies such as the GR Policy. In broad terms, under that Article, an insured who is aggrieved by the refusal of an insurer to pay a claim may submit a written complaint to the UAE Central Bank (the "Bank"). The Bank may then refer the complaint to an Insurance Dispute Resolution Committee (the "IDRC") for a determination. The IDRC has power to require the production of documents, expert evidence and to hear witnesses.

17. Any decision of the IDRC can be challenged before the "competent court of first instance" within 30 days of the decision of the IDRC. The challenge takes the form of a rehearing of the original complaint. If no challenge is made to the IDRC's decision, that decision is final and enforceable as if a judgment of a Court. Proceedings cannot be commenced in a Court by an insured claiming under a policy of insurance unless and until a complaint has been made to and decided by the IDRC.[12] An insurer has no capacity to invoke the dispute resolution regime provided by Article 110 of the Insurance Law.

18. On 13 April 2022, IPMR invoked the procedure available under Article 110 of the Insurance Law by filing a complaint against UIC at the Bank. On 15 April 2022 UIC submitted a reply to the complaint, and on 6 June 2022 IPMR requested that the complaint be escalated to the IDRC.

19. On 6 July 2022, the complaint was allocated to the IDRC, which sat in Abu Dhabi. On 25 July 2022, the IDRC ordered IPMR to submit an expert report in support of its complaint within 12 days, which meant that the deadline fell on Sunday, 7 August 2022. On 8 August 2022 IPMR submitted a further submission in support of its complaint, together with an expert report. However, the IDRC dismissed the complaint on the basis that IPMR had failed to file the required expert report in time. IPMR submits that it was not possible to upload the expert report in time because of

the difficulty of uploading any document on a non-working day

20. Following the dismissal of IPMR's complaint by the IDRC, IPMR commenced proceedings in the Sharjah Court of First Instance on 16 August 2022. In those proceedings IPMR claims USD 37,833,828.14 with respect to the gold lost, an additional AED 10 million by way of compensation for loss of profit as a result of UIC's delay in providing indemnity, together with interest at the rate of 12% per annum on all monies due.

21. On 29 August 2022, the Sharjah Court confirmed that UIC had been served with the claim and the first case management hearing was listed for 5 September 2022. At that hearing, UIC asked for a period of time within which to submit its power of attorney, and an adjournment was granted until 20 September 2022 for that purpose. At that hearing, UIC presented the power of attorney granted to its lawyers and requested a further adjournment of the Sharjah proceedings in order to file its Reply.

22. UIC commenced proceedings in this Court on 29 September 2022. In its Claim Form UIC asserts that IPMR *"deliberately misrepresented and/or failed to disclose . the correct volume of gold under process at any one time in statements made prior to and/or at the time of inception of the Policy [and] as such the Policy is void ab initio" and further asserts that "IPMR has deliberately and/or fraudulently concealed and/or misrepresented substantial aspects of the incident [and] as such, [UIC] is entitled to avoid, and does so elect to avoid, the Policy"*. UIC further asserts that in the alternative IPMR has failed to establish that any loss arising from the incident is within the scope of the insuring clause of the GR Policy as a result of which IPMR is not entitled to indemnity under the GR Policy. In the further alternative UIC asserts that IPMR has breached a condition of the GR Policy by failing to take all reasonable care and measures to protect the insured property and/or to maintain it in good and proper condition and, in the alternative, has failed to co-operate with UIC and its representatives in its investigation of the claim. In the further alternative, UIC asserts that any loss relating to the incident is excluded by various provisions of exclusion within the terms of the GR Policy. UIC seeks declaratory relief corresponding to its various alternative assertions.

23. On 31 October 2022, IPMR brought an application contesting the jurisdiction of the Court to entertain the claim and various forms of alternative relief referred to above. The application was supported by witness statements provided by Mr Sherif Marey, the Managing Director of IPMR, and Dr Asma Ahmed Al Rasheed, who is a partner in the law firm representing IPMR.

24. On 7 December 2022, UIC served witness statements of Mr Balaguru Swaminathan, the Head of Non-Motor Claims at UIC and Mr Mark Beswetherick, a partner in the law firm representing UIC.

25. On 23 December 2022, IPMR served witness statements in reply from each of Mr Marey and Dr Al Rasheed.

26. On 12 January 2023, IPMR applied for a direction staying the proceedings until the publication of the decision of the Court of Appeal in *Al Buhaira National Insurance Company v Horizon Energy LLC* (the "Horizon Energy case") on the ground that the decision in that case would determine a number of the issues which arose in its application. As that application was opposed, it was listed for hearing before me at the same time as IPMR's substantive challenge to the jurisdiction of the Court.

27. Both applications came on for hearing before me three days after the appeal in the *Horizon Energy* case had been heard. After hearing argument, I concluded that there was a likelihood of overlap between at least some of the issues to be determined in that case and some of the issues to be determined on IPMR's application in this case. I also concluded that there was a risk that if I determined any of the common issues inconsistently with the decision of the Court of Appeal, the parties to these proceedings would be put to the expense and delay involved in appealing from my decision. However, the parties had exchanged detailed skeleton arguments and had engaged senior counsel who were fully prepared to argue the substantive application before me. In these circumstances, I suggested that the most pragmatic course was to allow the argument to proceed, on the basis that I would reserve my decision until after publication of the decision of the Court of Appeal in the *Horizon Energy* case, after which the parties would be provided with the opportunity to exchange written submissions in relation to the effect which the decision in *Horizon Energy* had upon the issues ventilated in these proceedings. Neither party substantively opposed that course, and the matter proceeded accordingly.

28. The Court of Appeal delivered its decision in the Horizon Energy case on 19 April 2023. Thereafter the parties conferred in relation to the impact of that decision, and eventually agreed upon a timetable for the exchange of written submissions as to the effect of that decision on the issues raised in these proceedings. Those submissions will be referred to in due course.

The Horizon Energy Case

29. The relevant facts in *Horizon Energy* were as follows. Horizon held policies of marine insurance issued by Al Buhaira National Insurance Company ("ABNIC") covering a number of vessels including a tanker known as the "BETA". ABNIC is based in Sharjah. The vessels covered by the policies, including the BETA, were peripatetic.

30. The policies contained provisions in the following terms:

> "This contract shall be governed by and construed in accordance with the English law and each party agrees to submit to the exclusive jurisdiction of the Courts of the United Arab Emirates."

31. Horizon lodged a claim under the policies asserting that the vessel had disappeared. Negotiations took place between Horizon and ABNIC in relation to the claim. During the course of those negotiations, it seems that ABNIC neither admitted nor denied coverage under the policies. Horizon then made a complaint to the Insurance Authority seeking an order that ABNIC provide indemnity under the policies in respect of the loss of the vessel.

32. A few weeks thereafter, ABNIC gave notice to Horizon to the effect that it had decided to avoid the policies. The following day, ABNIC commenced proceedings in this Court claiming declarations that the policies had been avoided on the grounds of misrepresentation, and that it was not liable to Horizon under the policies or in the alternative, declarations to the effect that the claim did not fall within the ambit of cover provided by the policies.

33. Horizon applied to have ABNIC's claim set aside on the grounds that the Court lacked jurisdiction, or alternatively, for an order that the claim be struck out as an abuse of process. Justice Giles dismissed that application.[13]

34. Following that decision, the Insurance Authority held that it had no jurisdiction over Horizon's complaint because there was an arbitration clause in the policies. However, it was common ground in the DIFC Court proceedings that there was in fact no such arbitration clause.

35. Horizon then commenced proceedings in the courts of Sharjah as "the competent court of first instance" under Article 110 of the Insurance Law, challenging the decision of the authority to the effect that it had no jurisdiction. It was in that context that Horizon was granted limited permission to appeal from the decision of Justice Giles.

The decision of Justice Giles

36. The first issue addressed by Justice Giles was the question of whether the parties to the policies had agreed in writing to confer jurisdiction upon this Court in accordance with the provisions of Article 5A (2) of the Judicial Authority Law (the "JAL")[14] which provides:

> "(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."

37. Justice Giles observed that this Court had considered whether jurisdictional choices expressed in terms such as *"the Courts of Dubai"* or *"the Courts of the UAE"* constituted agreements to confer jurisdiction upon the Court on a number of occasions. He referred in particular to *Goel v Credit Suisse (Switzerland) Ltd,*[15] ("Goel") Laabika v Ladu[16] ("Laabika") and IGPL v Standard Chartered Bank[17] ("IGPL").

38. After considering those cases Justice Giles observed:

> ".the agreements in the Policies on the jurisdiction of the Courts of the United Arab Emirates (UAE) in their ordinary meaning confer jurisdiction on the DIFC Courts, as courts of the UAE, and are specific, clear and express provisions in that respect, unless there is reason from their text or the surrounding circumstances to give them a different construction."[18]

39. His Honour went on to consider Horizon's submission that there was reason to give the provisions a different construction, and that they should be understood as agreements to submit any disputes under the policies to the Courts of Sharjah, or alternatively to the onshore Courts of the UAE, excluding both the DIFC Courts and the Courts of the ADGM. That submission had two limbs.

40. First, Horizon submitted that in all cases in which an agreement to confer jurisdiction upon *"the Courts of Dubai"* had been held sufficient to confer jurisdiction upon this Court there had been *"a material and sufficient link between the parties/facts of the case and the DIFC"*. Horizon submitted that there was no connection between the DIFC and either the insurer, the insured, or the vessel.

41. Justice Giles rejected this submission. He observed:

> "A link to the DIFC is not necessary for an agreement as referred to in Article 5A(2). That is the point of an opt-in agreement, and it is common for parties to agree to submit their disputes to, for example, the Commercial Court in England even if there be no connection with the country. That does not exclude regard to presence or absence of a link in the task of construction, but the absence of a link is of itself of little significance. In *IGPL* at [137] it was said that where there is an agreement within Article 5A(2) *the DIFC Courts are not deprived of jurisdiction even if the claims and underlying facts do not have any connection [to] the DIFC.*"[19]

42. Justice Giles also relied upon an observation of mine at first instance in Goel in the following terms:

> "While the adoption of the laws of the DIFC as the substantive law of the agreement provides a strong indication that the parties would have intended the DIFC Courts have jurisdiction, the converse proposition does not carry nearly so much weight. That is because it is commonplace for the opt in jurisdiction of this Court to involve the resolution of disputes governed by substantive laws other than the laws of the DIFC. The fact that Article 5A(2) contains no requirement for any connection between the DIFC and the parties agreeing to confer jurisdiction upon the DIFC Courts, necessarily connotes that prospect."[20]

43. Justice Giles went on to observe that there was no material link with the DIFC in *Laabika.* Justice Giles observed:

> "Given the width of the choice of `the Courts of the United Arab Emirates', the connection with Sharjah is not a strong argument for confining the phrase to the Sharjah Courts or the on-shore Courts of the UAE: it does not provide a sensible reason for limiting the agreement on jurisdiction to the Sharjah Courts alone out of all the courts of the UAE."[21]

44. The second limb of the argument advanced by Horizon relied upon the provisions of the Insurance Law and the dispute resolution procedure provided by Article 110. It was submitted that any challenge to a decision by the Insurance Authority under that Law could only go to the on-shore Courts, and therefore the jurisdiction clause in the policies should be construed as excluding courts other than the on-shore Courts.

45. Justice Giles rejected the contention that challenges to a decision of the Insurance Authority could only be brought in the on-shore Courts, and held that it would be open to the parties to choose their court or courts of competent jurisdiction, including the DIFC Courts.

46. Returning to the issue of the proper construction of the jurisdiction provisions in the policies, Justice Giles drew attention to the fact that the polices were written in English, and the parties had agreed that the governing law would be English law.[22] Justice Giles considered that ABNIC's submission that these were strong indications of an intention to confer jurisdiction upon the DIFC Courts should not be taken too far because, if jurisdiction is conferred on the DIFC Courts, it is shared also with the other Courts of the UAE which operate under a civil system and in Arabic. Nevertheless, Justice Giles considered that it was:

"A sound consideration that it was intended that the parties should be able if they wished to submit their disputes to the DIFC Courts, as a Court operating in English and likely to have greater familiarity with validity, interpretation and application of the Policies."[23]

47. On the issue of construction his Honour concluded:

"In my view, reason has not been shown to depart from the ordinary and natural meaning of the conferring of jurisdiction on the `Courts of the United Arab Emirates' as including the DIFC Courts."[24]

48. Horizon also contended that the proceedings should be struck out as an abuse of process. Horizon based that submission upon the process pending (at that time) before the Insurance Authority under Article 110 of the Insurance Law. Justice Giles rejected the proposition that Article 110 "covered the field" of mechanisms for the resolution of disputes with respect to insurance policies, and therefore concluded that the currency of a process under that Article did not preclude the commencement of legal proceedings. He also rejected an alternative contention, based upon *lis alibi pendens.*

The decision of the Court of Appeal

49. Horizon sought permission to appeal on five grounds. The application for permission was initially rejected. However, in a subsequent application to the Court of Appeal, permission to appeal was granted on two grounds. One of those grounds, based upon *lis alibi pendens,* was not pursued. The only ground which was pursued was an assertion that Justice Giles erred by holding that parties to insurance contracts governed by the Insurance Law can make a choice of the "competent court" to review decisions of the IDRC under Article 110 of that Law. The appellant contended that this error caused the Judge to erroneously construe the jurisdiction clause as conferring jurisdiction upon this Court."[25]

50. The Court of Appeal held that Article 110 of the Insurance Law creates a mechanism for the resolution of disputes between insurers and insureds in a particular set of circumstances, with a limited application.[26] It noted that the only party to an insurance contract who can invoke that mechanism is the insured. In that context the Court observed:

The reference to `competent court of first instance' in Article 110(4) is specifically directed to challenges on the merits of a committee decision.Even if it be the case that the "competent Court" is, properly construed, a non-DIFC Court, it has no preclusive operation affecting the jurisdiction of DIFC Courts, a fortiori, where the parties to an insurance contract have agreed that those Courts are included in the class of courts having jurisdiction over their disputes. The better view is that the term `competent Court' embraces a court having relevant jurisdiction to which the parties have agreed to submit their disputes.

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There is nothing in the provisions of the Insurance Law which prevents the parties to an insurance contract from agreeing to subject themselves, when in dispute, to the jurisdiction of the Courts of the UAE inclusive of the DIFC Courts and without the requirements to pass through a committee process.

That said, there may be cases where the institution of proceedings by an insurer in one court while earlier proceedings are pending may, if not an abuse of process, warrant a stay of proceedings in the latter jurisdiction in the interests of comity and efficiency. That is not this case. It is not an abuse for an insurer party to seek declaratory relief in a DIFC Court which would not be available through an administrative committee process nor on a challenge to a decision emanating from such a process.[27]

51. Accordingly, for these reasons, the appeal was dismissed.

The grounds of this application

52. When this application was commenced it was based on four propositions:

(a) In the circumstances and context in which the GR Policy was written, on its proper construction the provision in the policy conferring jurisdiction upon "the Courts of UAE" does not confer jurisdiction upon this Court;

(b) That construction of the jurisdiction clause is compelled by the fact that the Courts of Sharjah are the "competent court of first instance" for the review of decisions of the IDRC pursuant to Article 110 of the Insurance Law; alternatively

(c) These proceedings should be stayed by the reason of the doctrine of *lis alibi pendens;* alternatively

(d) These proceedings should be struck out as an abuse of process.

53. IPMR correctly accepts that the decision of the Court of Appeal in the *Horizon Energy* Case precludes the acceptance of the proposition in (b) above, which is no longer pursued. However, each of the remaining propositions are advanced in support of the application.

The proper construction of the jurisdiction clause

54. In its first skeleton IPMR expressly accepted *"that the words `Courts of the UAE' can amount to a choice of parties to submit their disputes to the DIFC Courts".*[28] Further, IPMR expressly accepted that in IGPL *"the Court of Appeal found that references to the UAE Courts should ordinarily and without more be broadly construed to include both the DIFC and non-DIFC Courts, so that the Claimant had been entitled to elect to bring its claims in the DIFC Courts".*[29]

55. However, IPMR contended that whether or not a particular jurisdiction clause would be construed in this way depended upon the context and circumstances of the particular case. IPMR contended that in this case the identity of the parties to the policy, the nature of the risk and the on-shore regime for the regulation of insurance disputes meant that the proper construction of the jurisdiction clause was that the parties had chosen

"the competent court" having jurisdiction under the Insurance Law.[30] However, as noted, IPMR accepts that it can no longer contend that only the on-shore Courts are "competent" for the purposes of the Insurance Law.[31] IPMR presses its construction argument on the basis that "the entire factual matrix" in which the GR Policy was written demonstrates a choice by the parties to submit their disputes to only the on-shore Civil Law Courts of the UAE.[32] IPMR supports this submission with the following propositions:

(a) The parties and the underlying subject matter of the dispute have no connection whatsoever to the DIFC,[33] and

(b) Until UIC commenced proceedings in this Court the parties had at all time operated on the basis that they and the GR Policy itself were subject to the Insurance Law, its regulatory regime and its dispute resolution process - their conduct is said to be "very strong evidence" that the parties always understood and intended "Courts of the UAE" to mean the on-shore Civil Courts of the UAE.[34]

56. These submissions must be considered in the following context:

(a) As IPMR expressly concedes, in *IGPL* the Court of Appeal held that the natural and ordinary meaning of the expression "Courts of the UAE" in a jurisdiction clause includes the DIFC Courts, for the simple reason that they are Courts of the UAE;

(b) More recently, in *Laabika* the Court of Appeal held:

> "When the term "the Courts of Dubai" is used in a contract the ordinary meaning, absent content and purposes pointing in a different direction, refers to all of the Courts of Dubai."

(c) In *Laabika,* the Court of Appeal also held that:

> "The construction of terms such as "Courts of Dubai" and "the Courts of the Emirate" will depend upon their particular context."

57. I respectfully agree with Justice Giles' observations at first instance in *Horizon Energy* to the effect that it is not necessary for a party seeking to invoke the jurisdiction of this Court under a jurisdiction clause conferring jurisdiction upon "the Courts of the UAE" to point to a link or connection between the parties or the transaction and the DIFC. That is because the DIFC Courts are Courts of the UAE and therefore fall within the ordinary meaning of the jurisdiction clause. Rather, the question is whether the party disputing the Court's jurisdiction has established, by reference to other contextual provisions in the agreement containing the jurisdiction clause, or by the context and circumstances of the agreement, that the jurisdiction clause should not be given its natural and ordinary meaning.

58. It follows that I agree with Justice Giles that the lack of any connection between the parties and the transaction to the DIFC is insufficient to sustain the conclusion that the jurisdiction clause should not be given its natural and ordinary meaning. As Justice Giles pointed out, consistently with my observations at first instance in *Goel,* as the jurisdiction conferred upon this Court by Article 5A (2) of the JAL is unconstrained by any requirement of connection with the DIFC, its' evident purpose is to enable parties to agree to confer jurisdiction upon this Court irrespective of whether or not they or their dispute have any connection with the DIFC.

59. It follows that the first ground advanced in support of IPMR's construction of the jurisdiction clause provides no support for its contention.

60. The second contextual matter relied upon is the assertion that, until these proceedings were issued, the parties had proceeded upon the assumption that their dispute was to be regulated by the Insurance Law, and the dispute mechanisms provided under that Law, from which it can be inferred that they understood and intended "Courts of the UAE" to mean only the on-shore Civil Courts of the UAE.

61. There are a number of flaws in this submission. First, the question which must be determined is the proper construction of the jurisdiction clause at the time the parties entered into their agreement - that is, at the time the GR Policy was issued. It is doubtful that their conduct and attitudes years after the policy was issued could shed any light on the proper construction of the jurisdiction clause.

62. Second, as the Court of Appeal held in the *Horizon Energy* case, the dispute resolution mechanism provided by Article 110 of the Insurance Law is an administrative process of limited application. Significantly, it does not extend to any grievance which an insurer may have against its insured. As Justice Giles observed, it does not "cover the field", and consequently sheds no light upon the proper construction of the jurisdiction clause, which extends to matters which fall outside the limited ambit of Article 110.

63. Third, because of the limited application of Article 110, the conduct of the parties by engaging in a process pursuant to its terms only provides evidence of their awareness of that mechanism, which is of limited application, and of no application to any grievance by the insurer of the kind which founds UIC's claim in these proceedings. Put another way, participation in the complaint made by UIC to the Bank sheds no light on the intention of the parties with respect to proceedings of the kind which have been commenced by UIC seeking, *inter alia,* to avoid the Policy, as those proceedings could not have been initiated pursuant to Article 110.

64. In the result, IPMR's attempt to resurrect arguments based upon the Insurance Law notwithstanding the decision of the Court of Appeal in the *Horizon Energy* case must be rejected.

Lis alibi pendens

65. IPMR contends that this Court should stay these proceedings pursuant to the doctrine of *lis alibi pendens.* In support of that contention it asserts that there is evidence that the same remedies and procedural advantages are available in the on-shore Civil Courts of the UAE as are available in this Court. It also submits that the *Horizon Energy* case must be distinguished on the basis that, at the time of Justice Giles' decision, the only other proceedings on foot were the administrative process before the Insurance Authority, whereas in this case the court proceedings in Sharjah were issued before the proceedings were issued in this Court. As those proceedings are judicial proceedings, it is submitted that they engage the doctrine of *lis alibi pendens.*

66. In its first skeleton, IPMR accepted that *lis alibi pendens* was an aspect of the doctrine of *forum non conveniens.* A fundamental obstacle in

the path of acceptance of IPMR's submissions on this subject is the decision of the Court of Appeal in *IGPL,* which obviously binds me, to the effect that the doctrine of *forum non conveniens* has no application to parallel proceedings in different courts within the UAE. That decision is based upon Article 99 of the Constitution of the UAE which confers jurisdiction upon the Union Supreme Court (USC) to resolve conflicts of jurisdiction between the judicial authority in one Emirate and the judicial authority in another Emirate. In IGPL the Court concluded that this jurisdiction was exclusive, with the result that no Court other than the USC had power to determine which of two alternative Courts should resolve a particular dispute by application of the doctrine of *forum non conveniens.*

67. Even if the principles were applicable to this case, they would not sustain the conclusion that these proceedings should be stayed. Having agreed to confer jurisdiction upon all the Courts of the UAE, the parties must be taken to have agreed to take the risk that proceedings would be commenced within different Courts within the UAE.[35]

68. Further, it is not clear from the evidence that the proceedings in the Sharjah Court cover the same ground as the proceedings in this Court. There is no independent expert evidence with respect to the nature of the proceedings or the relief available in that court. It may be that the proceedings in the Sharjah Court are, in effect, proceedings by way of judicial review of the decision of the IDRC, and in particular, the decision of the IDRC to dismiss IPMR's complaint because of its failure to submit an expert report in time. It is however clear that the proceedings in this Court put in issue UIC's contention that the GR Policy was void *ab initio* or alternatively has been avoided by reason of fraudulent concealment and/or misrepresentation. The evidence does not establish that relief of that kind would necessarily be available in the proceedings pending in Sharjah.

69. Accordingly, had I concluded that this Court has jurisdiction to stay proceedings on the basis of *forum non conveniens,* having regard to the proceedings in the Sharjah Court, I would not have exercised that jurisdiction.

Abuse of process

70. IPMR maintains its assertion that the proceedings should be struck out as an abuse of process because:

(a) Even if the dispute resolution process under Article 110 is not exclusive, it was an abuse for UIC to have fully participated in the IDRC process, and the Sharjah proceedings, and to then seek to "derail" those proceedings by issuing a claim in this Court;

(b) UIC has commenced these proceedings, second in time and without warning, knowing that IPMR would be compelled to prosecute the proceedings in the Sharjah Court and simultaneously defend and counterclaim in these proceedings;

and

(c) There is evidence that UIC can obtain the same relief from the on-shore Civil Law Courts as in this Court.

71. These contentions must be rejected for the following reasons.

72. First, I agree with the view expressed by Justice Giles in *Horizon Energy* to the effect that where the parties have agreed to confer jurisdiction on this Court, it should not readily be found that invocation of that jurisdiction is an abuse of process.[36]

73. Second, IPMR's participation in the IDRC process and the proceedings which IPMR commenced challenging the outcome of that process does not result in the characterisation of these proceedings as abusive. Only IPMR was able to initiate the dispute resolution mechanism under the Insurance Law, and when it invoked that mechanism, UIC was obliged to respond and participate in that process. In those circumstances it cannot be said that its participation involved any implicit representation to the effect that it would not exercise the jurisdiction which the parties agreed to confer upon this Court. Similar considerations apply to UIC's participation in the review proceedings which IPMR commenced in the Courts of Sharjah.

74. Third, UIC was under no obligation to warn IPMR of its intention to commence proceedings in this Court. IPMR's contention that UIC is motivated by the objective of placing undue pressure upon IPMR is not sustained by any evidence. In particular, IPMR's assertion that UIC dragged out the preliminary procedures in the Sharjah court while it was preparing to commence these proceedings is mere supposition and conjecture. The sequence of events is more likely explicable by reference to the limited and unilateral nature of the dispute resolution mechanism provided under the Insurance Law.

75. Fourth, as already observed, the evidence doesn't establish that the ambit of the issues to be resolved in the Sharjah proceedings is identical to the ambit of the issues to be resolved in these proceedings. Accordingly, it cannot be concluded that these proceedings are of no utility, or that they will inevitably duplicate the issues which are to be resolved in the proceedings in the Courts of Sharjah.

Summary and conclusion

76. For the reasons given I have concluded that:

(a) The parties have agreed to confer jurisdiction upon this Court in accordance with Article 5A (2) of the JAL; and

(b) This Court has no jurisdiction to stay the proceedings on the grounds of *lis alibi pendens,* and even if it did have such jurisdiction, it would not be appropriate to exercise it in the circumstances of this case; and

(c) These proceedings are not an abuse of process.

77. It follows that the Defendant's Application must be dismissed.

Costs

78. There is no reason why costs should not follow the event, and it follows that IPMR should be ordered to pay UIC's costs of the Defendant's Application.

79. UIC has filed four separate statements of costs incurred in relation to the Defendant's Application, which total almost USD260,000. I express no view as to the reasonableness of the amounts claimed, as I have not received any submissions or argument on the subject. However, the amount claimed is very significant, and IPMR has had no opportunity to make submissions in relation to the costs claimed. I will therefore direct that UIC's costs are to be assessed on the standard basis by a Registrar of the Court unless agreed.